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Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union

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Solidarity has always been an important element of European integration law and with the Treaty of Lisbon this principle has received even more prominence. But what does this concept mean and how should it be implemented? Within several areas of European integration law, for example regional policy, asylum, development cooperation, and economic and monetary Union, the principle of solidarity is regularly invoked when the existing law has to be interpreted or further developed. In this context it is striking to see how talk about solidarity is suited to stir up emotions, often associated with the fact that each party understands something different by this expression. In this contribution an effort will be made to unearth the very foundations of solidarity as it applies in the law of the European Union. It will be shown that solidarity within EU law has a strong reciprocal (or mutualistic) nature. This means that contributions are given with the hope to receive some day counter-contributions or with the intent to pursue a common goal. Understood in this sense, solidarity can be a useful instrument to further strengthen the European order. On the contrary, if this reciprocal context is left and solidarity is interpreted as an obligation for altruistic redistribution of resources on a regional or a global level (for example by creating a transfer union healing all budgetary sins by single Member States on a central level) the functionability and the basic consensus of European integration could be undermined.

I. Introduction

The economic and fiscal crisis starting in the year 2008 has posed an extraordinary challenge to the national economic systems of the Member States as well as for EU Economic Governance. Within a few years the Economic and Monetary Union (EMU) had to undergo fundamental reforms in order to withstand the disruptive waves that started from the United States and that finally affected the whole international economic and financial order. EMU—and probably the whole European Union—could only be saved by a strong commitment to

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solidarity. This solidarity avoided the worst but was at the same conducive to new threats. In particular, the fear was that the EU would become not only a 'solidary union' but a 'transfer union', a concept prevailingly interpreted in a negative connotation. As a consequence, the need arises to find a proper understanding for solidarity as it finds application in this specific context of EU law. This seems to be all the more important as the profound dissent about the meaning and the consequences of 'solidarity' seriously compromised the attempts to counter the crisis at its very height and there are justified fears that such a situation could repeat. In this contribution other areas of EU law, where solidarity is of particular importance, will be investigated. Notwithstanding a series of different connotations the concept of solidarity takes in these diverse fields, it is argued here that there are also important common traits, in particular as to the reciprocal or mutualistic nature of solidarity that here applies.

II. The Principle of Solidarity in EU Law

As will be seen, the whole system of EU law has been inspired, from its very beginnings, by the principle of solidarity. It can be argued that the idea of solidarity has been one of the main inspirational ideas standing behind the European integration movement since its inception in the immediate post-war period.[1] Some provisions of EU primary law, however, refer directly to this principle. According to the sixth preambular provision of the Treaty of the European Treaty (TEU) the Member States express their desire 'to deepen the solidarity between their peoples while respecting their history, their culture and their traditions'. On the basis of Article 2 TEU, solidarity is a foundational value of the European Union.[2] According to Article 3 (3) TEU, the EU aims at promoting 'economic, social and and territorial cohesion, and solidarity among Member States'. Eight further provisions in the TEU and in the Treaty on the Functioning of the European Union (TFEU) refer expressly to this principle while many others indirectly give expression to it.[3]

[1] See the famous statement by Robert Schuman of 9 May 1950: 'Europe ne se fera pas d'un coup ni dans une construction d'ensemble: elle se fera pour des réalisations concrètes, créant d'aboard une solidarité de fait.' In the jurisprudence of the ECJ a first bold statement as to the paramount importance of solidarity within EEC law can be found in C-6 and 11/69, *Commission v France*, 10 December 1969, para. 16: 'The solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty. . .'.

[2] See Ch Boutayeb, 'La solidarité, un principe immanent au droit de l'Union européenne', in Ch Boutayeb (ed.), *La solidarité dans l'Union Européenne* (Paris: Dalloz, 2011) 5–37: 'La solidarité, pierre angulaire du système juridique de l'Union européenne' (ibid 5).

[3] For expressive references to the principle of solidarity see Articles 21, 24 para. 2 and 3 of the TEU and Articles 67, 80, 122, 194, and 222 of the TFEU. See R Bieber and F Maiani, 'Ohne Solidarität keine Europäische Union: Über Krisenerscheinungen in der Wirtschafts- und Währungsunion und im Europäischen Asylsystem', in *Schweizerisches Jahrbuch für Europarecht 2011/2012*

A closer look at these norms reveals that the expression of 'solidarity' is used with widely diverging meanings. The common ground between these provisions at a first look appears to be rather feeble, if not completely absent. There can be no doubt that the multiplicity of meanings and contents attributable to this principle considerably burdens any discussion about the question whether solidarity helps or hinders the stabilization of European Monetary Union.

The easiest way to deal with this issue would be to dismiss 'solidarity' as pure political rhetoric, introduced as an attempt to provide glue and to boost an integration project encountering uncountable obstacles and repetitive backlashes. Such an attitude would, however, be untenable as it stands in contrast to the broad usage of this principle in the treaties, its apparent pivotal role in various stages of the history of European integration when difficulties had to be overcome, and, in addition, the interpretation rule of 'effet utile' or '*ut res magis valeat quam pereat*' requires that this concept is taken seriously.

The most effective way to overcome this interpretative conundrum seems to be to structure the various provisions on solidarity in different groups so as to build masses of norms that display some sort of stricter coherence. These groups of provisions can then be brought in reciprocal relationship so as to identify a more abstract or second order meaning that unites all provisions on solidarity.

To this avail three different dimensions of solidarity have been identified:[4] solidarity between Member States, between Member States and individuals, and between generations. This last expression of solidarity, that between generations, was introduced by the Treaty of Lisbon (Art. 3 (3) TEU). Solidarity between Member States and individuals has become of particular relevance in more recent years. Originally, it was hardly imaginable that within EU law (or EEC as it was at the time) such a dimension of solidarity should develop as the social element was purportedly excluded from Community Law and left in the sovereign domain of Member States.[5] It was, in particular, the freedom of movement that brought social rights within the realm of EU law. As long as this freedom was exercised by workers, it could be argued that associated social rights were nothing else than rights flowing from an actual working status. Eventually, the social rights of migrant workers became part and parcel of a fairly balanced economic package of rights and duties between the migrant worker at the one hand and his employers and the guest state at the other. If there was an element of solidarity in this relationship, it was strictly one of a actuarial mathematics and referred—if the situation of all migrant workers was considered

(Zürich/Bern: Staempfli, 2012) 297–327 (298) and R Bieber, 'Gegenseitige Verantwortung—Grundlage des Verfassungsprinzips der Solidarität in der Europäischen Union', in Ch Calliess (ed.), *Europäische Solidarität und nationale Identität* (Tübingen: Mohr/Siebeck, 2013) 67–97 (69).

[4] See I Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach', in 35 (2013) *European Integration*, 459–75.

[5] Still today, the social dimension of EU law is strictly limited and the Member States have taken great care to defend their sovereign prerogatives in this field.

comprehensively—to the *do ut des* principle. This situation changed, initially almost inadvertently, in a radical way when Union citizenship was introduced by the Treaty of Maastricht. In fact, Union citizenship, a concept that was 'destined to be the fundamental status of the nationals of Member States'[6] provided for additional rights to migrants even if they did not exercise economic rights in the proper sense. This development could be seen as a creation of jurisprudence[7] but on a whole it laid bare the potential that resided in the concept as introduced in 1993.[8]

Why did the EU become encumbered with solidarity between Member States and individuals? Because it had discovered the individual as the main protagonist in the European integration process and it was for this reason that it could pretend a certain degree of solidarity of Member States with Union citizens which translated in the end into solidarity between Member States. Of course, these judge-made rules on solidarity should not be a gateway to open-ended financial solidarity. In fact, since Grzelczyk, the ECJ has been consistent in repeating that only a 'certain degree' of solidarity was owed.[9] Here, again the principle of reciprocity appears, although it is not as strict as in the case of the social rights owed to migrant workers. Social rights are attributed to Union citizens in order to make a further development of EU law possible, to enhance intra-EU migration, and to give further strength to the EU order. There is no strict *do ut des* but nonetheless these rights buttress the EU legal order as a whole. Such rights are not aiming at broader social redistribution or at achieving full equality within the EU but they are circumscribed to the more limited ends mentioned above. Further limits arise from the budgetary restraints of Member States. While it is difficult to quantify exactly the degree of solidarity owed by the Member States to Union citizens, it becomes apparent that the limits are manifold. Although fears among Member States about the excessive reliance of Union citizens on the solidarity principle have been very present in the past, the ECJ has demonstrated its awareness of these fears and needs and has therefore avoided overburdening the Member States.[10]

[6] So the famous statement by the Court in case C-184/99, Grzelczyk, 2001, ECR I-6193.

[7] See P Hilpold, ‚Unionsbürgerschaft und Bildungsrechte oder: Der EuGH als "Künstler", in G Roth and P Hilpold (ed.), *Der EuGH und die Souveränität der Mitgliedstaaten—Eine kritische Analyse richterlicher Rechtsschöpfung auf ausgewählten Rechtsgebieten* (Vienna: Linde, 2008) 11–53.

[8] As is known, this process was a gradual one. In Martinez Sala a Spanish migrant requested family allowance in Germany without qualifying as a migrant worker. The ECJ sided with the claimant although this Court was not fully clear about the actual status of Miss Martinez Sala. In subsequent judgments the ECJ took a more pronounced stance on the social rights associated with Union citizenship, as in the 'minimex cases' Grzelczyk and Martinez Sala and Trojani. In 'Collins' Union citizenship was the basis for granting a job seeker allowance in another Member State.

[9] S Giubboni, 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice', in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford: Oxford University Press, 2010) 166ss.

[10] See P Hilpold, 'Nichtdiskriminierung und Unionsbürgerschaft', in M Niedobitek (ed.), *Europarecht—Politiken der Union* (Berlin/Boston: Walter de Gruyter, 2014)1–96.

Further provisions on solidarity are to be found in the Charter of Fundamental Rights. There, a whole chapter (ch. IV) refers to this principle.[11]

For our purposes, when dealing with the financial crisis and the attempts to overcome this extraordinary challenge, solidarity between Member Statse is the dimension of solidarity of most interest, even though all dimensions of solidarity are, in the end, closely interrelated.

III. What Does Solidarity Mean?

The preceding discussion has demonstrated that the solidarity principle as applied by EU law has a particular meaning that stands in clear contrast to some traditional interpretations of this concept. These traditional or common knowledge interpretations appear, however, to not be set out in great detail, as they are mainly based on general philanthropic aspirations. A closer look at solidarity both as it is applied in EU law and as it results from a more sophisticated legal discussion reveals instead that there is a broad overlap between these two approaches. In the end, this situation would be little different in a legal order based on theconsent of Member States to the European one. As is the case with most international agreements and in particular with those of a prevailingly economic nature, the consent between the Member States on which the EU treaties are based is informed by the principle of reciprocity or mutuality.[12] Any principle of solidarity inserted in this system as a written or unwritten founding value could fit in this order only if it were closely connected with the reciprocity principle rather than in to contrast it. And this is exactly the case with solidarity within EU law. This leads us squarely to a general legal doctrine on solidarity. As has been said by legal philosophers, solidarity is not the same as altruism.[13]

[11] The solidarity rights in chapter IV of the Charter are, however, rather heterogeneous and it is not easy to find for them a common denominator. While social rights stay in the forefront this category surely does not cover all rights mentioned in this chapter. See C Picheral, 'La solidarité dans la Charte des droits fondamentaux de l'Union', in Ch Boutayeb (ed.), *La solidarité dans l'Union européenne* (Paris: Dalloz, 2011) 93–105 (95).

[12] On this reciprocity principle see the pivotal contributions by B Simma, in particular B Simma, *Das Reziprozitätsprinzip beim Zustandekommen völkerrechtlicher Verträge* (Berlin: Duncker & Humblot, 1972). As is well known, the principle of reciprocity does not apply to human rights treaties. See P Hilpold, 'Das Vorbehaltsregime der Wiener Vertragskonvention—Notwendigkeit und Ansatzpunkt möglicher Reformen unter besonderer Berücksichtigung der Vorbehaltsproblematik bei menschenrechtlichen Verträgen', 4 (1996) *Archiv des Völkerrechts*, 376–425. Some authors distinguish between reciprocity and mutuality. For them, reciprocity requires strict correspondence of contribution while mutuality is less demanding, requiring only a struggle for a common objective while excluding one-sided efforts. See Ph Dann, 'Solidarity and the Law of Development Cooperation', in R Wolfrum and Ch Koijma (eds), *Solidarity: A Structural Principle of International Law* (Berlin/Heidelberg: Springer, 2010) 55–77, 61. This distinction will not be followed here as reciprocity in general international law is based on a broader correspondence of contributions. While reciprocity and mutuality could therefore be used interchangeably, preference is given here to the first term which is more commonly used.

[13] See J Isensee, 'Solidarität—sozialethische Substanz eines Blankettbegriffs', in J Isensee (Hrsg.), *Solidarität in Knappheit: zum Problem der Priorität* (Berlin: Duncker & Humblot, 1998) 97–141, 103.

Solidarity refers to the common exercise of interests, for example in risk prevention or in a political struggle, while altruism finds its roots in an individual attitude which is totally unselfish.[14] Solidarity, rightly understood, has many egoistic traits while altruism, on the other hand, is characterized by a total lack of egoism. Altruism can lead to complete self-abandonment. The Lord's command that 'thou shall love your neighbour as thyself'[15] has only recently been interpreted by psychoanalytic studies as an invitation to develop, first, self-love as otherwise no love for the neighbour is possible.[16]

Solidarity, on the other hand, is in many respects a cold and calculating instrument: 'Solidarity expects solidarity'.[17] This kind of solidarity also forms the basis of the social contract that unites individuals to a political community.[18]

In modern political philosophy John Rawls' concept of the 'veil of ignorance',[19] on which the social state is premised, gives best expression to such a perception of solidarity: in the last instance, mechanisms of solidarity operate as an insurance device against risks that are incalculable for the individual while exact statistics exist for a community as a whole. The individual in need might perceive assistance by the community as an act of generosity; while for the community this help is nothing other than a well-calculated measure of self-preservation.

Models of altruistic and solidarity help can coexist at both the national and the international level. Often, at a practical level, these two models are not strictly separated. As will be shown below, some instruments, such as international humanitarian aid, are prevailingly altruistic and it is only on closer inspection that they reveal some traits that hint at a broader reciprocity. In other

[14] As Erich Fromm has demonstrated, the notion that self-love is wrong has a long tradition in Western thought.

[15] Mark 12:31. See also Erich Fromm, *The Art of Loving*: 'The most fundamental kind of love, which underlies all types of love, is brotherly love. By this I mean the sense of responsibility, care, respect, knowledge of any other human being, the wish to further his life. This is the kind of love the Bible speaks about when it says: Love your neighbour as yourself. Brotherly love is love for all human beings; it is characterized by its very lack of exlusiveness. If I have developed the capacity for love, then I cannot help loving my brothers. In brotherly love there is the experience of union with the whole of mankind, of human solidarity. Brotherly love is based on the experience that we're all one.' See E Fromm, *The Art of Loving* (New York: Harper & Row, 1956) 47.

[16] The path for this approach was prepared by Fromm (15) who demonstrated that the rejection of self-love has a long tradition in Western thought, Calvin even calling it a 'pest'. Ibid 57.See fundamentally Fromm (n 15) As early as the seventeenth century the French poet Pierre Corneille said, 'Self-love is the source of all our other loves'.

[17] Isensee (n 13) 103.

[18] In present day political philosophy it is communitarists that most intensively hint at solidarity as the decisive element for a society's cohesiveness. See, for example, M Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: A. Belknap Press, 1996). In the political discourse about the legitimacy of European integration the element of solidarity can be of decisive importance for the formation of a European identity as a prelude to a European *demos*. See also I Ward, 'International Order, Political Community, and the Search for a European Public Philosophy', in (1998) 22.3 *Fordham International Law Journal*, 930–60.

[19] See J Rawls, *A Theory of Justice* (Cambridge, Mass.: A. Belknap Press, 1971).

cases, the opposite situation is the case: mechanisms that have been created to implement an ample design of solidarity, such as the social insurance system, have, over time, lost more and more of their original characteristics as they are no longer exclusively financed by the contributions of their members but have become increasingly reliant on external financing via general state subsidies. In this way they have (also) become instruments of redistribution,[20] integrating more and more elements of altruism. Experience has also shown, however, that this trend towards unconditional altruism is at best a partial one and is mostly retreating. In fact, instruments of such a kind are prone to fall victim to moral hazard. Thus, all over the industrialized world there is a clear tendency to revamp social security systems in order to strengthen the solidarityy element and to reduce their redistributional dimension which has mostly become unaffordable.

In sum, it can be said that instruments to implement solidarity are needed at both the national and the international level and they exist in considerable number. The closer the bonds between the various subjects are, the likelier it becomes that altruistic elements show up in this relationship.[21] This consideration suggests that solidarity is higher developed at the national level than the international: in the national arena such solidarity is easier to organize and emotional bonds are usually far closer there than at the international level. On the other hand, at the international level it might be easier to strictly limit the volume of resources earmarked for measures of solidarity and this again will strengthen the preparedness to actually take recourse to such instruments.

If we apply these considerations to the European Union, a mixed picture will emerge. European integration itself can be seen as an expression of insights into the merits of solidarity. After the Second World War peoples in Europe realized that a solidarity integration project might greatly reduce the risk of falling back into conflict and war and creating a new sense of cohesion. When Robert Schuman referred to 'solidarity of fact' he made a plea for solidarity as a main construction element for European integration, one that should not be pathetically pronounced but rather shoulld be applied with both modesty and determination.[22]

[20] Ibid 107.

[21] In political philosophy this aspect has been discussed with reference to the term of 'vicinity'. This term was introduced by the Anglo-Irish politician and philosopher Edmund Burke (1729–97) who thereby wanted to describe the fact that geographic or cultural proximity between two people increases the interest for each other's lot. See E Burke, 'Letters on a Regicide Peace' (Third Letter on a Regicide Peace, 1796) reprinted in *The Works of the Right Hon. Edmund Burke, Bd. II* (London: Holdsworth and Ball, 1834). On this subject see also P Hilpold, 'R2P and Humanitarian Intervention in a Historical Perspective', in P Hilpold (ed.), *The Responsibility to Protect* (Leiden/The Hague: Brill, 2015) 60–122.

[22] See note 1.

It becomes immediately evident that such a concept of solidarity is of an eminently reciprocal nature. It has to be realized step by step, in order to make sure that a general confidence-building procedure sets in[23] and to guarantee that no party suffers major losses due to the unruly behaviour of others. As a consequence, 'islands of solidarity'[24] within EU law have been created over time. These 'islands', such as provisions on development assistance, on asylum policy, on cohesion policy, and also with regard to the EMU, might today convey the image of sub-systems of EU law prevailingly ruled by altruistic considerations. Such a perspective is, however, misguided as it overlooks the broader synallagma into which all parts of EU law are embedded. While it cannot be denied that strong altruistic elements have been integrated in these areas of EU law, the overall reciprocal nature of EU law as a whole is thereby not put into question, as will be shown in this paper.

And there is a further reason why solidarity within EU law is still prevailingly premised upon the reciprocity principle: elements of a common European identity are still rather sparse while thinking in terms of national identity prevails.[25] This explains why in some cases it might appear that the European Union and its Member States are more willing to show altruism towards third country nationals than to EU citizens: the cases in which such help is granted are usually characterized by extraordinary humanitarian challenges that create specific feelings of 'vicinity' that transcend those qualifying the relations in the everyday life of Union citizens. A humanitarian catastrophe, caused by natural forces or by war, may beget a feeling of belonging between people of different regions and cultures. This feeling is usually short-lived but it may nevertheless be sufficiently strong to engender elements of a common identity, the identity of individuals belonging to one human mankind.

When we look in detail at economic and monetary integration, we will see that all the elements outlined in the previous paragraphs come fully to bear. In this area, where Member States have tried very hard to preserve their sovereign rights, solidarity is given, if at all, in its reciprocal form. There may be cases in which altruistic elements also become stronger in this field, such as when a financial and economic crisis threatens to totally disrupt a society, as has been

[23] As to the confidence-building force of the reciprocity principle see also P Hilpold, 'Der Südtiroler Weg völkerrechtlicher Stufenlösung im europäischen Vergleich', in S Clementi and J. Woelk (eds), *1992: Ende eines Streits* (Baden-Baden: Nomos, 2003) 109–117.

[24] This concept refers to the wonderful statement by Karel Wellens that in international law there are islands of cooperation in the sea of coexistence and that there are islands of solidarity in the sea of cooperation. See K Wellens, 'Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations', in R St J Macdonald and D M Johnston (eds), *Towards World Constitutionalism* (The Hague: Martinus Nijhoff, 2005) 775–807, 804.

[25] As Christian Tomuschat stated in 1987, within the EEC there is only limited space for solidarity, exactly because of the lack of cohesion and the basic divergences in the political culture of the Member States, having extensive consequences exactly on economic, financial, and fiscal questions. See Ch Tomuschat, 'Solidarität in Europa', in F Capotorti et al. (eds), *Du droit international au droit de l'integration—Liber amicorum Pierre Pescatore* (Baden-Baden: Nomos, 1987) 729–57, 756.

the case in Greece. Even with regard to Greece, however, altruism was limited and did not last very long. EU crisis management tried hard to convey the impression that help was provided at market conditions, even though at that very moment a market for financing Greece did no longer exist.[26] To this avail, all aid initiatives were taken within a reciprocal framework where the flow of resources should not be unidirectional but possibly balanced over a longer period of time. Interestingly, the whole discussion about aid for Greece was dominated by the question of who was to blame for the crisis, as if solidarity was warranted only in cases of need caused by third parties.[27] While such a positions stands in contrast to EU law,[28] politically it again gives expression to the fact that solidarity in EU law is closely associated with the reciprocity principle. Help was provided to the Greek government primarily because it was so important for the preservation of the euro system, which was deemed to be mutually advantageous.

Before examining in detail the solidarity elements of EMU, several other branches of EU law with pronounced solidarity characteristics will be analysed in order to provide an overall picture of the role of solidarity in EU law.

IV. The 'Islands of Solidarity' in EU Law

As has been demonstrated, the whole EU legal order, from its very beginnings, has been based on the solidarity principle. Although this principle has been interpreted restrictively in the sense that it was closely connected to the reciprocity principle, it has accompanied the entire material expansion of the EU legal order. With the growth of EU competencies and their enrichment in content and depth 'islands of solidarity' have formed in EU law that seem to express an unrestricted commitment to altruistic solidarity. In reality, however, these 'islands' are again closely connected with the reciprocity principle, both internally via the principle of conditionality and externally as these islands are important elements in an overall balancing system.

[26] The first Greek bailout packages by the Eurozone countries and the IMF was agreed in May 2010 at interests rates of 5.5%. These rates seem high if compared with orderly market rates in Europe but they were to be considered as extremely low if the risks associated with the Greek's disastrous budgetary situation was taken into consideration. By the second bailout package of July 2011 interest rates were cut to 3.5%.

[27] For some, emergency measures on the basis of Art. 122 (2) TFEU in favour of countries hit by the financial crisis was problematic insofar as the respective countries were themselves responsible for their woes, for example if they neglected their budgetary control obligations. As will be shown below, however, Art. 122 (2) does not aim at identifying past responsibilities, allowing help only for those states whose governments bear no responsibility for the financial crisis. The scope of this norm is clearly future-oriented: A crisis shall be fended-off that is presently beyond the control of a Member State whatever the original cause might have been. See P Hilpold, 'Neue europäische Finanzarchitektur', in W Hilpold and W Steinmair (eds), *Neue Europäische Finanzarchitektur* (Berlin/Heidelberg: Springer, 2014) 34s.

[28] See note 27.

A. Development Aid and Development Cooperation[29]

The European Union is—together with its Member States—the world's greatest provider of development aid totalling, at the time of writing, over €50 billion annually. Development aid is an important, but by no means the only, part of development cooperation which consists of many other economic, political, social, and cultural elements. It can be said that it comprises all forms of co-operation with developing countries aiming to improve their economic, social, and ecological development.[30]

It may seem surprising to see that a solidary policy which appears to be strictly non-reciprocal in nature, has found broad commitment by and within the EU. In reality, however, a closer look at this policy over the years reveals a broad range of reciprocal elements. This was the case for the first forms of development cooperation as provided for in the EEC Treaty of 1957 for the association of the Overseas Countries and Territories: colonies of EU Member States (initially mainly France and the Netherlands, afterwards involving countries such as Denmark and the UK). These rules permitted these countries to preserve their (already strongly restricted) preference system with their colonies as Member States of the Union. When the EEC countries allowed for the introduction of this system, they made a concession to the colonial countries within the EEC and thereby contributed to the overall consensus with this order. Similar considerations can be made with regard to the association regime of Jaunde, Arusha, and Lomé that developed later and which aimed to tie former colonies and now independent countries closer to the EEC. It was, in particular, the Lomé regime that became of an exemplar for development cooperation, even though, as is well known, the factual achievements brought about by this regime were mixed.[31] At the economic level, the Lomé regime mainly provided for privileged market access for agricultural products originating in former European colonies in ACP countries (African, Caribbean, and Pacific groups of states).[32] Formally, the Lomé agreements were based on a renouncement of reciprocity in international trade relations in favour of the associated ACP countries. The concessions made were not extended to all GATT parties (WTO members) as required by the most-favoured nation clause in article I, GATT. Both within the EEC (EU)

[29] On the EU development cooperation policy see extensively P Hilpold, 'TEC, Article 177 on Development Cooperation Policy', in *Smit & Herzog on the Law of the European Union* (Dayton: LexisNexis, 2007).

[30] See R. Streinz and T. Kruis, 'Art. 208 AEUV', in R Streinz (ed), *EUV/AEUV* (Munich: C.H. Beck, 2012) para. 5, p. 1986.

[31] O Babarinde and G Faber, 'From Lomé to Cotonou: ACP–EU Partnership in Transition', in O Babarinde and G Faber (eds), *The European Union and the Developing Countries* (Leiden/The Hague: Martinus Nijhoff, 2005) 1–15 and P Hilpold, 'TEC, Article 177 on Development Cooperation Policy', in Smit and Herzog, *The Law of the European Union* (Dayton: LexisNexis, 2007), pp. 273–5ss.

[32] The Lomé regime lasted from 1975 to 2000, associating at the end, 46 ACP countries with the EU.

and the cooperation regime, however, a broad balancing of interests had to be achieved. Concessions obtained by Member States particularly engaged within the Lomé system had usually to be traded in for other concessions the remaining Member States obtained in other fields. Within the Lomé agreements the preferences in favour of the ACP countries were given for the maintenance of spheres of influence. Later on, an outright conditionality policy was worked out: The associated ACP countries had to make specific concessions, guaranteeing, in particular, respect for human rights, good governance, and the adoption of specific social and environmental standards.[33] Respect for these norms and standards was not only in the immediate interest of the ACP countries but also, to a no lesser extent, in that of the EEC/EU which developed a steadily growing interest in an international order governed by the rule of law and respect for human rights.[34]

The Lomé regime had to be abandoned in 2000 because its inconsistency in economic terms with WTO law had become too evident.[35] According to the Agreement of Cotonou of 23 September 2000 the non-reciprocal association system had to be replaced by Economic Partnership Agreements based on article XXIV GATT. On the whole, the material resource-flow in a development cooperation system will always be unbalanced. It is in this way that developed countries demonstrate their solidarity with their former colonies and other third world countries. Nonetheless, the overall relationship between costs and benefits within EU development cooperation remains reciprocal as the developing countries do not get aid and assistance for free. All this cooperation is governed, instead, by the principle of conditionality. According to Article 208 TFEU, as it was newly drafted by the Treaty of Lisbon, '[u]nion policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action'. In this context, Article 21 TEU mentions, 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. Solidarity is mentioned here as an independent goal but at the same time all these goals can be interpreted as an expression of a reciprocal solidarity. Developing countries are beneficiaries of extensive aid and assistance by the EU and its Member States but in return they

[33] This was in particular the case within the Lomé IV regime.

[34] See B Simma, J B Aschenbrenner, and C Schulte, 'Human Rights Considerations in the Development Co-operation Activities of the EC', in P Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999) 571–626 and P Hilpold, 'EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance', in (2002) 7.1 *European Foreign Affairs Review*, 53–72.

[35] Although Part IV of GATT as well as a waiver of 1971 allowed for non-reciprocal trade preferences for developing countries, these exemptions, should they be in conformity with GATT law, had to be applied on a generalized and not on a selective basis (i.e. to all developing countries in the same or a comparable condition).

have to contribute to a world order that is premised on goals of pivotal importance to the EU. Again we see that one of the most important manifestations of solidarity within EU law is not based on altruism, at least not prevailingly, but on a quid pro quo that is in the reciprocal interest of all parties. As a corollary, solidarity in this field is not limitless but finds its boundaries in a return service that may, however, also be delivered in a different sector of interest.

B. Cohesion Policy

One of the first fields where intra-EU solidarity came to bear was regional or cohesion policy. It was at the same time a formidable area where the meaning, the potential, and the limits of solidarity could be tested. A closer look at the regional policy also reveals the particularities of the reciprocal nature of solidarity within EU law. The need 'to eliminate the barriers which divide Europe' and 'to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions' had already been averted in 1957.[36] A cohesion policy as such was started, however, only much later, in 1975 with the creation of the European Regional Development Fund (ERDF)[37] when regional disparities had become more pronounced as a consequence of the ongoing enlargement process. From the very beginnings it became evident that this initiative was designed to implement solidarity objectives based on the principle of reciprocity. First of all, the resources administered by this fund were assigned according to a strictly regulated quota system from which any Member State benefited, although to a varying degree which also permitted taking into consideration the different development needs. In any case, each Member State could perceive that it had taken part in a mutually advantageous regime. Secondly, and perhaps even more importantly, the ERDF was established due to pressure from Great Britain, newly joining the EEC in 1973. Due to the particular structure of the UK, economy it could profit from the resources of the Common Agricultural Policy (by then the most important instrument of resource re-distribution within the EEC) only to a rather limited extent. By the introduction of the ERDF, reciprocity was re-established, at least to a certain degree. In the aftermath, this national quota system was abandoned incrementally and the needs of the single regions became the primary focus. Nonetheless, each country continued to profit from this system. With the Single European Act of 1986 a specific section on 'Economic and Social Cohesion' was inserted into the EEC treaty, thereby giving the structural policy an explicit basis in primary law. Now, a better coordination between the various structural funds (ERDF,

[36] See the preamble of the EEC Treaty of 1957, paras 2 and 5 (now paras 2 and 5 of the preamble of the TFEU).

[37] Council Regulation (EEC) No. 724/75 of 18.3.1975 establishing a European Regional Development Fund.

the Social Fund created in 1957,[38] and the European Agricultural Fund for Rural Development) could be sought. The Treaty of Maastricht created a Cohesion Fund was whichbecame operative in 1994 and which should provide a financial contribution to projects in the fields of environment and to trans-European networks in the area of transport infrastructure. The re-distributional element was emphasized more in this treaty, as its scope of application was restricted to regions whose per capita GDP was less than 90 per cent of the EU average. Article 174 (1) TFEU bears out the solidary function of the cohesion policy as a whole:

> In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

It is not the primary goal of the EU to maximize average growth—an aim which could best be achieved by investing in the leading growth regions—but to promote the 'overall harmonious development' of the Union. Since the Treaty of Lisbon, the goal is not only economic and social cohesion, but also territorial cohesion. While the exact meaning of this addition is still disputed and many commentators doubt it can add value, it can be argued that the territorial element suggests an objective of higher-level integration according to which cohesion should transcend the traditional economic and social area and comprise the political and administrative area. It is apparent that behind such an extension of the cohesion policy there is the concept of strengthened solidarity. This finding is consistent with the fact that the volume of resources beng put into cohesion policies has steadily grown so that it is now second only to the agricultural budget. In addition, the internal structure of the cohesion policy indicates that it is continuously evolving, the primary goal being to increase efficiency. There is controversy about how to assess the outcome of these attempts. For many, the results are ambiguous at best, hinting at development gaps within the EU, the fact that ever more resources were needed—which could be seen in itself as a demonstration of inefficacy of this approach—and the inability of many Member States to benefit from these EU resources due to unsurmountable bureaucratic obstacles or insufficient domestic resources to co-finance single projects.[39]

There can be no doubt that a considerable amount of the criticism against the cohesion policy is justified, particularly regarding the bureaucratic burdens and costs, the length of the procedure, and incapacities at the national level to

[38] See M Rossi, 'Die Kohäsionspolitik der Union', in M Niedobitek (ed.), *Europarecht—Politiken der Union* (2014) 688ss.

[39] As to these arguments see, among others, A Putler, 'Solidarität als Finanzausgleich? Die europäische Kohäsionspolitik', in S. Kadelbach (ed.), *Solidarität als Europäisches Rechtsprinzip?* (Baden-Baden: Nomos, 2014), S. 43–57 and D Adamski, 'Europe's (misguided) constitution of economic prosperity', (2013) 50 *CMLR*, 47–85.

effectively apply for these resources. However, this criticism cannot detract from the fact that many of the regions of the EU that in the past have suffered the most from economic backwardness have profited enormously from the cohesion policy. The fact that it is some of the regions were those that were hardest hit by the recent crisis[40] cannot change the overall assessment, as it is only to be expected that the regions that have demonstrated the most recent growth should suffer most in the crisis because some of this growth had come from overheated sectors such as housing. Nor can it be denied that the EU has worked hard to overcome the administrative deficits that in the past had thwarted the implementation of this policy. The domestic deficiencies that stand in the way of more efficient regional policy are serious but they have to be tackled where they occur, that is, at the level of the Member State.

Much criticism has also been provoked by the fact that in order to be eligible for finance from the structural fund, the criteria of additionality and co-financing apply, where additionality means that contributions from the structural fund shall not replace public or equivalent structural expenditure by a Member State,[41] while co-financing refers to the principle that the EU, as a rule, can finance projects only in part.[42] These restrictions can be seen as an expression of the principle of conditionality that once again is related to the principles of solidarity and reciprocity. Member States have to make an active contribution to their own development. It is a reciprocal effort to achieve the fixed development tasks. The EU demonstrates solidarity but this solidarity is not unlimited. Member States bear co-responsibility and thereby they must be actively involved in the attempt to make projects succeed. Economic growth and social progress in all regions of the EU is in the interests of both the Member State as well as the EU as a whole and these are ideal preconditions for projects to be implemented in the spirit of reciprocity and solidarity. The fixing of numerical ceilings should not suggest that the solidarity principle that applies here is an aseptic, mechanical one. In fact, the ceilings are different for the different regions and the drafters of these instruments have taken care to insert a series of provisions into the regulations that leave broad scope for altruism. Bureaucratic rules for the application for funds are intended to make conditionality work. The main challenge for the Member States and the EU is to keep these rules reasonable and to avoid excessive red tape. Critics may still argue that the administrative costs of the cohesion policy are too high, but there can be no doubt that solidarity and cohesion come at a price, a price that might be worth paying when the overall benefits of European integration are kept in mind. Many of the shortcomings of the cohesion policy might be directly related to the fact that they represent a difficult compromise: they

[40] See European Commission, Cohesion policy: Strategic report 2013, COM(2013) 210 final.
[41] See Art. 15 Regulation (EU) 1083/2006.
[42] For the different ceilings see Regulation 1303/2013 of 17 December 2013 containing the basic provisions for structural funds presently in force.

have to be reciprocal in nature (at least in the overall context), they have to evidence an altruistic element, and they have to allow for the limitations of the resources and the need to avoid abuse.

Governments and the responsible EU institutions have continued to advocate the cohesion policy and improve its effectiveness. To this avail, the cohesion policy has now been directly connected to the 'Europa 2020' goals. The European Structural and Investment Funds (ERDF, Cohesion Fund, ESF, the Rural Development and Fisheries funds) are now coordinated on the basis of a Common Strategic Framework.[43] For the financial planning period 2014–20 €325 billion of European funds are earmarked for this purpose. Together with national contributions, the total financial volume will reach €500 billion.[44] This whole approach may lend itself to further criticism as the goals set by the Europe 2020 programme are themselves not uncontested.[45] The programme aims for 'smart, sustainable, inclusive growth' and sets a series of targets, in particular in the fields of employment, education, and environmental protection, areas where solidarity between EU Member States has been rather underdeveloped in the past.[46] Great emphasis is laid on better coordination of pertinent national and European policies. Whether goals, target, and priorities are appropriately chosen is open to debate but they give some direction to a European Union that is sorely in need of finding its position in a globalized word. However, all these aims can be seen as expressions of the principle of solidarity. They represent individual interests, interests of the Member States, and goals of the European Union as a whole evidence of how closely interrelated these interests are. At the same time it is clear that solidarity within the EU does not mean free-riding but requires strict reciprocal commitment.

C. EU Law and Asylum Policy

In the field of asylum law and policy, elements of both external and internal solidarity combine in an exceptional way. Externally the EU tries to demonstrate solidarity with refugees who, according to the Geneva Refugee Convention of 1951 are defined as individuals who are unwilling to return to their home country 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[47]

[43] This Common Strategic Framework was presented by the Commission on 14 March 2012 and covers the financial planning period from 2014 to 2020.

[44] European Commission, Memo, 19 November 2013.

[45] As is well known, this strategy was adopted by the European Council on 17 June 2010 as a follow-up to the Lisbon Strategy for Europe 2010 which remained widely unfulfilled. It aims at 'smart, sustainable, inclusive growth' and sets a series of targets, in particular in the fields of employment, education, and environmental protection. Great emphasis is laid on a better coordination of national and European policy.

[46] So, with regard to environmental issue, Domurath (n 4), 464.

[47] See Art. 1 (A) 2.

Within the EU, the asylum question creates problems of solidarity as some countries, and particularly those at the outer borders in the Mediterranean region, are more exposed to requests for asylum by refugees than is the case further north. This challenge is accentuated by the special nature of the European Asylum system which is based on the principle that asylum applications have to be treated in the state where the asylum seeker first enters the EU.[48] If asylum seekers apply in a different Member State, as a rule they can be transferred back to the Member State primarily designated as responsible.[49]

The EU and its Member States have become aware of this multi-faceted solidarity issue, they have made repeated pledges to live up to this solidarity challenge, but at a practical level they have grossly failed in this task. The large discrepancy between formal proclamations and real life attitudes prompts the question of what were the specific reasons why solidarity could not be attained in this area.

Formally, the commitment to solidarity by the EU is also impeccable in this field. Officially, since the Treaty of Amsterdam of 1999a Common European Asylum System (CEAS) has been in the making. The Treaty of Lisbon has enabled to be taken a bold stance in this regard. According to the newly drafted Article 80 TFEU, the policies set out in the chapter on border checks, asylum, and immigration (Articles 77 to 79) shall be governed by 'the principle of solidarity and fair sharing of responsibility, including its financial implications'. And there are further provisions in the TFEU requiring the solidarity principle to be taken into account—at least indirectly—when asylum questions are at issue: Thus, according to Article 74 TFEU the Council shall adopt measures to ensure administrative cooperation between the Member States and the Commission in all areas covered by Title V TFEU. Article 67 para. 2 which makes up part of Title V provides that the Union 'shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.[50]

Article 78 TFEU sets out a series of material standards that should qualify the evolving CEAS comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

[48] Art. 13 Reg. (EU) No 604/2013.
[49] Ibid Art. 3.
[50] See also P McDonough and E Tsourdi, 'Putting solidarity to the test: assessing Europe's response to the asylum crisi in Greece', UNHCR, Research Paper No. 231, January 2012, p. 8ss.

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

This system is essentially based on three pillars:

- the creation of an uniform standard of asylum throughout the Union;
- the principle that one state alone should be responsible for considering an application for asylum ('single application rule') in order to avoid 'asylum shopping'[51] and the creation of additional costs to the Union as a whole;
- a sharing of costs and burdens according to the solidarity principle.

For the implementation of the most critical provision in Article 78 Reg. No. 604/2013 (the so-called 'Dublin III regulation') was issued setting the 'single application rule'. As is well known, this rule can work only with the two other pillars (uniform asylum standard in all Member States and unified sharing of costs and burdens) in place. This is, however, not the case as the Greek asylum crisis has revealed most dramatically. Greece, one of the EU's weakest economies with poorly developed institutions to administrate asylum procedures has had to handle the vast majority of cases. The consequence was that no fair procedure could be guaranteed, that nearly all applications were dismissed even when the applicants were in serious danger if returned to their home country and that many asylum seekers were held in inhuman and degrading conditions. The financial and economic crisis—which hit Greece hardest of all EU Member States—further compounded the problem. The other Member States failed to demonstrate the solidarity required and continued, on the contrary, to return great numbers of asylum seekers to Greece on the basis of the first application rule.[52] Only when the ECJ ruled in 2011, in 'N.S.',[53] that fundamental rights had to be respected in asylum proceedings did it became clear that returning an asylum seeker to the first entrance country could no longer be the absolute rule if that country did not provide sufficient guarantee of a fair procedure and

[51] So Bieber and Maiani (n 3), 313.

[52] In the 'Dublin II' regulation, the predecessor of the Dublin III regulation, this rule was formulated in a rather strict way.

[53] ECJ, N.S., C-411/10, Judgment of 21 December 2011.

adequate treatment.[54] These standards were taken into consideration in the drafting process of the Dublin III regulation. In fact, according to Article 3, para. 2 of Reg. 604/2013, '[w]here it is impossible to transfer an applicant to the Member state primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.'

While the situation in Greece has now somewhat improved through the intervention of Frontex[55] and some financial help, the overall situation remains highly critical. The migration flows have been re-directed towards other countries, in particular Italy, a country which seems to be barely able to control the influx of refugees over the Mediterranean Sea without adequate help from the EU. This help is, however, widely absent. So it can be said that in this crucial field solidarity does not work. If we look for the reasons for this situation, they are manifold. First of all, one of the main pre-conditions for solidarity to work, reciprocity, seems to be absent here. At least in the short term—and that is the term governments interested in re-election usually refer to as the planning horizon—controlling the migratory flows is not a priority for many countries north of the 'frontier states'. While Member States not immediately affected do not totally ignore these problems, they seem to be of the opinion that traditional instruments (in particular border controls, return of illegal immigrants) are more cost-efficient than the establishment of a broader system of solidarity which could perhaps attract further immigration. The obligation to show solidarity flowing from the Treaties is simply ignored and in this Member States can rely on the fact that their obligation to solidarity remains to a large extent a dead letter.[56] With regard to the immigration problem, the situation of the Member

[54] '. . .the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'. Ibid para. 94.

[55] As is well known, the 'European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (Frontex) is a EU agency created in 2004 'to reinforce and streamline cooperation between national border authorities'.

[56] Italy has also experienced this fact when it had to bear the costs of the 'Mare Nostrum' operation designed not only to control the outer borders of the EU in the Mediterranean but also to rescue African refugees who tried to cross the Mediterranean in makeshift boats or had been abandoned by human traffickers. By the end of August 2014 the EU signalled that it would assume this task from Italy. The EU thereby showed solidarity towards Italy, although Frontex Plus, the programme replacing 'Mare Nostrum' will most probably have a heavily reduced character and concentrate

States varies considerably and this bodes ill for any hope of finding a consensus to proceed on the basis of the reciprocity principle. The most important obstacle, however, for solidarity to unfold, lies in the fact that there seems to be no obvious or immediate solution at hand to solve this problem. The immigration challenge is simply too great and so Member States prefer to pursue their short-term interests in this field and to disregard their duty towards solidarity.[57]

V. Solidarity within EMU

A. Prologue

As we have seen, the whole of EU law is governed by the principle of solidarity, although this principle reveals different strengths in the various sectors of this legal order. There are some specific 'islands' where solidarityy becomes most visible. As shown in Section IV, when considering the most famous 'islands of solidarity' in EU law, the application of this principle is governed by the principle of reciprocity, which is not always immediately recognizable but which is nonetheless a necessary, structural element of solidarity throughout the EU treaties. Altruistic elements may also show up here and there but they never dominate, as the resources the EU and their Member States have at their disposal are limited and consent for solidarity may never be overstrained. In this, the principle of solidarity as it finds application in EU law widely corresponds to the principle of solidarity as it has been developed by general theory of international law.

If we look at the provisions on EMU, all the considerations made in Section IV find additional confirmation and reinforcement. Solidarity stands here in the direct service of the common, reciprocal interest to keep a system running that, if rightly understood, has proved to be so beneficial for the EU and the Member States. Like nowhere else, however, within EMU it is important to clearly fix the limits of solidarity. These limits should be neither too restrictive nor too loose. In the first case the functioning of EMU could be undermined, especially in times of crisis. In the second case, on the one hand, an incentive for moral hazard could be given, on the other hand, Member States which feel overburdened might consider withdrawal from this system. The financial and economic crisis starting in the year 2008 tested solidarity within the EMU as it has never been tested before. Important new insights on the meaning of solidarity could thereby be gained.

on border control while assistance and rescue activities would be limited. As a consequence, solidarity towards refugees would be all but terminated.

[57] See also for a profound analysis of this problem Bieber and Maiani (n 3) 311ss. On solidarity as a 'duty of loyalty' see also A Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union* (Baden-Baden: Nomos, 2001).

B. Building EMU as both a Solidarity and an Anti-solidarity Construction

What at first sight seems to be a unitary construction, at a closer look reveals a Janus-face: a loosely integrated economic union should be paired with a highly cohesive monetary union. The interrelation between economic and monetary integration was not ignored from the very beginning. It was always clear that these two limbs of EMU, representing two sides of the same coin, had to be kept in sync. In the background, again, stood the question of what role should be attributed to solidarity. Finding a technical solution to the task of developing an economic union that should safeguard, to the utmost extent, the economic sovereignty of its Member States[58] and create a monetary union that should fully live up to its name represented a challenge to further define solidarity.[59]

In fact, both parts of EMU should contribute to solidarity in the Union in the sense that they should pave the way for an ever-closer union from which the economies of all Member States should profit. At the same time, the overall balance and reciprocity between rights and obligations should be maintained. With regard to economic union, this meant that interference in the core areas of economic sovereignty should be avoided while, with regard to monetary union, care had to be taken that no free-riding should take place, thereby endangering the stability of the monetary union altogether. The EMU system as a whole was surely, therefore, a solidarity project. monetary union contains, however, a series of anti-solidarity elements, first of all the so-called 'no bail-out clause' in Article 125 TFEU, the prohibition of financial solidarity among Member States. Also the prohibition of monetary financial assistance by the European Central Bank and national central banks (Article 123 TFEU) shall be mentioned in this context. These prohibitions on solidarity were the direct consequence of an Economic Union with far-reaching imperfections. According to Article 121 TFEU Member States should coordinate their economic policies according to a complex but rather vague set of rules and guidelines that, as a whole, could be characterized as expressions of the Open Method of Coordination, an instrument of governance situated between law and politics enjoying ever greater application in a union trying hard to cope with an enormous rise of complexity in the relations between Union and Member States. Substantive norms to be respected by Member States and serving as a basis for surveillance by the EU Council and the EU Commission were contained in the Stability and Growth Pact, but this instrument was considerably weakened in 2005.[60] Thereby, the

[58] See J-V Louis, 'Solidarité budgétaire et financière dans l'Union européenne', in Ch Boutayeb (ed.), *La solidarité dans l'Uniion européenne* (Paris: Dalloz, 2011) 107–124, 111.

[59] For an extensive examination of this subject see also H-J Blanke and St Pilz (eds), Die 'Fiskalunion' (Tübingen: Mohr/Siebeck, 2014).

[60] See P Hilpold, 'Eine neue europäische Finanzarchitektur—Der Umbau der Wirtschafts- und Währungsunion als Reaktion auf die Finanzkrise', in P Hilpold and W Steinmair (eds), *Neue europäische Finanzarchitektur* (Berlin/Heidelberg: Springer, 2014) 3–82.

sovereign prerogatives were extended and EU surveillance of national economic policies lost ground. In fact, in 2005 the discretionary powers of the Council for the determination that a Member State was in excessive debit were considerably enhanced. Debt rule offenders could now fall back on a whole array of justifications. In particular, due regard was to be paid to the economic cycle and to special circumstances so that punitive sanctions became practically inapplicable.[61]

Interestingly enough, while the stability of the EMU construct was thereby considerably shuttered, the confidence of the market in its resilience grew further, paving the way for enormous speculative bubbles and concomitant budget deficits, especially in southern EU countries. The key to understanding this perverse market reaction was once again to be found in the principle of solidarity. An EMU with such a highly developed monetary union and with a common currency whose abandonment subsequent to its definite establishment was simply not a realistic option[62] gave rise to enormous expectations as to the degree of solidarity Member States were prepared to demonstrate, notwithstanding the strict limitations to be found in this regard in the TFEU. In other words: the limitations described above had all but lost credibility.[63] Markets relied on the Member State's preparedness to do everything necessary to fend off a disruption of this system in the event of budget imbalances in a single Member State. While the magnitude of the sovereign debt crisis of the years 2010—2012 was not anticipated, these market expectations were confirmed to a considerable extent by bold remarks from ECB President Mario Draghi.[64]

Subsequently, on 2 August 2012, the Governing Council of the European Central Bank (ECB) announced the launch of the so-called Outright Monetary Transactions Programme according to which the ECB would consider the purchase of Eurozone Member State bonds on the secondary market under certain, rather restrictive conditions. This programme is available for bonds from Eurozone Member States under an EFSF/ESM macroeconomic adjustment programme or a precautionary programme. There are no *ex ante* quantitative limits for the size of these programmes.[65] The announcement of Outright Monetary Transactions programme sufficed to provide an unexpected degree of stability to the financial markets throughout the Eurozone. Strict

[61] Ibid 29ss.

[62] See H Enderlein, 'Solidarität in der Europäischen Union—die ökonomische Perspektive', in Ch Calliess (ed.), *Europäische Solidarität und nationale Identität* (Tübingen: Mohr/Siebeck, 2013) 83–97, 93.

[63] See A de Streel, 'The evolution of the EU Economic Governance since the Treaty of Maastricht: An Unfinished Task', in (2013) 20.3 *Maastricht Journal*, 336–62, 337.

[64] See the Verbatim of the remarks made by Mario Draghi at the Global Investment Conference in London on 26 October 2012 <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> accessed 15 August 2014. The following statement became famous as it was taken as exemplifying the basic attitude of the ECB President: 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.'

[65] See ECB, Press release, 6 September 2012—Technical features of Outright Monetary Transactions (18 August 2014).

conditionality—with the involvement of the IMF, an institution with the longest experience in running conditionality programmes—ensures that beneficiaries of such assistance have to make appropriate (usually very demanding) contributions for the success of these programmes.

These events shed a telling light on the meaning to be attributed to solidarity within the EMU system. The Economic Union and Economic Monetary Union are like communicating vessels. The meaning of solidarity that this system is purported to achieve can be comprehended only in a cumulative view of the interaction of its two branches. The EMU's first objective was to provide the monetary basis for the EU's ever-evolving economic integration project. Within EMU there can be no doubt that monetary integration was centre stage; the coordination of the Member State's economic policies was more or less an appendix to it. This coordination was not an end in itself but was designed to provide stability and coherence to monetary union. The economic policies, however, touch upon sensitive aspects of national sovereignty. It is simply not possible to coordinate or even harmonize economic policies simply to provide stability for the euro. Such coordination, should it be full and effective, was tantamount to an integration project the Member States were clearly not prepared to adhere to. A fully coordinated economic policy would transfer budget policy and tax policy to the European level. Following that, strongholds of national sovereignty such as social policy, education, and cultural policy would also have to be widely abandoned in favour of the EU. With all these implications in mind, Member States were wary of accepting EU Economic Governance except to the most limited extent possible. As it came later transpired, this limit, defined as it was against the backdrop of a relatively calm international financial scene, was set far below the danger zone. Even though mainstream EU integration economics did not foresee in full the inherent instability of EMU, the incompleteness of the project was a fact that analysts were generally aware of. As a consequence, the limits to Economic Union meant that neither of the intended aspects of monetary union could be all-encompassing. In particular, disrespect of common economic goals should not engender any rescue assistance in case of escalating budget problems. Thereby, on a whole, the balance of rights and obligations within EMU remained preserved. Solidarity within EMU was strictly based on reciprocity. It had less to do with altruism and idealism than with actuarial mathematics.

As evidenced, EMU all but failed for a series of series of reasons. First of all, the basic risk assumption proved to be wrong. Even taking into account the strong resistance by Member States against further encroachments upon their sovereignty, far less was done in the field of economic policy coordination than would have been necessary to stabilize EMU. Second, several Member States somewhat recklessly put the stability of EMU to the test by forgoing any budgetary discipline, thereby demonstrating anti-solidarityy behaviour. Finally, markets made a different assessment about the degree of evolution of EMU:

assuming that the euro could not be abandoned in any case, they anticipated far more extended solidarityy action than the Member States had been prepared to make in their explicit commitments.

C. The Financial Crisis: The End of Reciprocal Solidarity or its Confirmation?

The financial crisis made all the construction deficits of the EMU apparent. Starting in 2008, markets began to speculate against the weakest economies of the Eurozone. Refinancing costs for the most indebted countries rose to unbearable highs so that the debt load was no longer sustainable without external help. As is well known, Greece had to be bailed out by two rescue packages in 2010 (worth €110 billion) and in 2011–2012 (worth another €100 billion).[66] Further bailout programmes had to be prepared for Ireland, Spain, Portugal, and Cyprus and the Eurozone Member States bore the brunt of the costs, first via bilateral loans and afterwards through the European Financial Stabilisation Mechanism (EFSM), based on a EU Regulation,[67] and the European Financial Stability Facility (EFSF), a Special Purpose Vehicle,[68] both of which were replaced in July 2010 by the European Stability Mechanism (ESM), an IMF-like international organization funded by the Member States of the Eurozone with €500 billion. There can be no doubt that these instruments were aimed at crisis prevention in the wake of an extraordinary challenge that the drafters of the treaties had by no means anticipated. It was therefore not easy to tell whether these measures were in conformity with EU law and the ensuing discussion soon touched upon the question of what meaning was to be given to solidarity in EU law.[69]

With regard to the urgent bilateral aid measures of 2010, granted in the face of an unprecedented financial crisis, doubts were voiced whether Article 122 (2) TFEU was really the appropriate legal basis for providing financial assistance as claimed by the Union. While it is true that this provision allows for financial assistance by the Union to Member States 'in difficulties' or 'seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control' it was proposed that the economic breakdown of a country like Greece was not an 'exceptional occurrence' beyond the country's control but that these events were foreseeable in view of irresponsible economic policy in the past.[70] This proposition overlooks, however, that Article 122 (2) TFEU does not

[66] See Editorial Comment, in (2011) 48 *CMLR*, 1769–76.
[67] EU Reg. No. 407/2010.
[68] The EFSM had a budget of €60 billion while the EFSF was far better funded with €440 billion.
[69] See also on this subject B Smulders and J-P Keppenne, 'Commentary to Article 222 TFEU', in von der Groeben, Schwarze, and Hatje, *Europäisches Unionsrecht* (Baden-Baden: Nomos, 2015) vol. 3, 943–52.
[70] See K. Faßbender, 'Der europäische "Stabilisierungsmechanismus" im Lichte von Unionsrecht und deutschem Verfassungsrecht', in (2010) *Neue Zeitschrift für Verwaltungsrecht*, 799ss. (800s.). In the same vein, as to the Irish financial crisis, M Ruffert, 'The European Debt Crisis and European

limit financial assistance to Member States that are in difficulties without past fault. It is rather the exceptional situation that has to be overcome, in the interests of both the Member State immediately affected andthe Union as a whole. To consider past governmental misdemeanours as an exclusion clause for financial assistance would not only pose unsurmountable evidentiary problems[71] but would also unduly restrict the scope of the application of Article 122 II. The solidarity principle, as enshrined in this provision, would lose its characteristic as an instrument to fend off imminent threats of a substantive nature and would be transformed into a mechanism that either punishes or rewards past governmental behaviour, a goal which international institutions such as the EU are ill-equipped to achieve in a satisfactory way.

As for the so-called bail-out prohibition in Article 125 TFEU, the discussion is somewhat more complicated as this provision seems to categorically rule out any assumption of the liabilities of single Member State by the Union or by another Member State. The true meaning of this provision becomes apparent, however, only through an interpretative process that balances different goals and values that are again closely connected with the principle of solidarity. As already mentioned, the primary goal of this provision is to hold each Member State responsible for its economic policy, particularly insofar as this state digresses from common goals defined via the Open Method of Coordination. The consequences of national economic policy potentially undermining Monetary Union should be borne; first of all, by the responsible Member State. Markets should not confide in overall EU solidarity but instead should discipline the budget sinner via higher interest spreads. But how strong can and should such a message by the treaties to the markets be? GA Juliane Kokott has explained very well in her view delivered in Case C-370/12, *Thomas Pringle*,[72] that absolute rigour in this field could come at an unsustainable price. In fact, solidarity would be fully excluded if Member States were prohibited from providing any financial support to other Member States, a prohibition that might even imply the need for a total ban on trade and commerce between Member States.[73] In other words: it is next to impossible to exclude any form of solidarity between Member States as long as the European Union exists. The challenge is to find the right measure of solidarity that should provide utmost resilience for

Union Law', in (2011)n48 *CMLR*, 1777–806, 1787 maintaining that this crisis was by no means unusual given the Irish Government's failure to adequately supervise and tax the financial sector. In defence for Ireland it can, however, be argued that what 'adequate supervision' implied had become evident only much later, when the financial crisis had fully unfolded.

[71] Thus, while Greece was often accused of deliberate cheating in terms of relevant economic data, it is also known that statistic data available to the government were widely unreliable due to a dysfunctional statistic system. With regard to Ireland, seen with hindsight, the government may be accused of supervisory neglect with regard to its banking system but it was surely not alone in this. See Hilpold (n 60) 30s.

[72] Delivered on 26 Ocotber 2012.

[73] Ibid para. 133.

the Union in view of the described, partially contradictory interests and forces here at play.

In *Pringle*[74] the ECJ found a solution that was able to reconcile financial assistance by Member States and/or the ESM to another Member State in financial distress: legally, by providing assistance to another Member State, neither the aiding Member State nor the ESM would assume its debts.[75] The same is true for the purchase of bonds issued by the ESM: in addition, in this case, the issuing Member States remain solely answerable to repay its debt.[76] Of course, in view of the unclear normative situation, the ECJ had to make hard choices and to undertake a difficult balancing of values which afterwards met with some criticism.[77] On a whole, however, it cannot be denied that the position taken by the ECJ fits well with spirit and structure of EMU. The ECJ takes a pragmatic stance: The bail-out prohibition is no end in itself but is instrumental to keeping the EMU workable even in the face of dysfunctional economic governance. When the financial crisis demontrated an unexpected threat to monetary union, it would have been counterintuitive to oblige Member States to conduct a policy further acerbating the crisis. While it was uncontested that Article 125 left no space for a compulsory bail-out, voluntary measures should be permissible. In order to resolve all doubt, the ECJ highlighted with conditionality a further element, unknown to the treaties but of central relevance in the context of all assistance measures, that had to be respected. The prospect of assistance might be said to soften the resolve for budgetary discipline but the conditionality criteria the ECJ read into Article 125[78] should be an effective deterrent against free-riding. Assistance in emergency situations becomes a mere possibility (and not a necessity) and it comes at a price. The readjustment measures proved to be extremely painful for the debtor countries so that no other Member State would find having to be rescued an enticing prospect.

All in all, the solution found by the EU and condoned by the ECJ in *Pringle* was very much down to earth even though EU purists might have screwed up their noses: EMU was salvaged while the mechanisms that should ensure budget discipline were not definitely set aside. The key to this solution was the imposition of 'strict conditionality', a requisite for financial assistance that by 2011 has also been anchored in primary law.[79]

[74] ECJ, C-370/12, Thomas Pringle, Judgment of 27 November 2012. See, among others, P Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology', in /2013 20.1 *Maastricht Journal*, 3–11 and F Martucci, La Cour de justice face à la politique éonomique et monétaire: du droit avant toute chose, du droit pour seule chose, Commentaire de l'arrét CJUE, 27 novembre 2012, *Pringle*, in Revue trimestrielle de droit européen 2013, 239–66.

[75] ECJ, C-370/12, *Pringle*, para. 137.

[76] Ibid para. 141.

[77] See very explicitly G Beck, 'The Court of Justice, Legal Reasoning, and the *Pringle* Case—Law as the Continuation of Politics by Other Means', in (2014) 2 *European Law Review*, 234–50.

[78] See B de Witte and Th Beukers, 'Case note to "Pringle"', in (2013) 50 *CMLR*, 805–48 (838ss.).

[79] Art. 136 (3) TFEU: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The

The Member States and the ECJ were keen not to convey the impression that altruistic solidarity could become an option in EU law, not even in such an extraordinary situation as the sovereign debt crisis starting in the year 2010. As the ECJ pointed out, the aid provided was not open-handed generosity but it was conditional upon the fulfilment of a series of obligations[80] and it made clear that no new form of solidarity had been introduced. It was rather the case that in *Pringle* the ECJ gave a very clear confirmation that in this highly delicate area solidarity should be strictly based on the principle of reciprocity.

D. Further Developments

At the time of writing (August 2014) a major case concerning the reach of solidarity in the area of EMU is pending before the ECJ: As is well known, in March 2014, Germany's Constitutional Court (Bundesverfassungsgericht—BVfG) has referred the ECB's OMT decision to the ECJ for a preliminary ruling. The BVfG voiced the opinion that the ECB had acted *ultra vires* and that a series of provisions of the TFEU, in particular Article 123 prohibiting monetary financing of the budget, had been violated. In an unusual gesture, called by some as 'a masterpiece of judicial arrogance'[81] the BVfG suggested a series of conditions to the ECJ that, if fulfilled, would make the OMT programme acceptable for the BVfG. In particular, according to the BVfG, this 'would probably require that the acceptance of a debt cut must be excluded, that government bonds of selected Member States are not purchased up to unlimited amounts and that interference with price formation on the market are to be avoided where possible'. The first and the last of these conditions may probably be acceptable but this is less the case for the second one. In fact, it was precisely the announcement to purchase sovereign bonds, if necessary, to an unlimited amount that gave stability to the financial markets.[82]

At a first reading the BVfG decision might indeed leave a rather awkward impression. It seems that the BVfG was attempting to define the ECB's stability obligations according to a strictly legalistic perspective, formed in a historic and national perspective, that of post-war Germany, and to impose it unilaterally on the Eurozone countries as a whole.[83] Nonetheless, while it is true that the lecturing undertone, a rather unusual attitude in relations between reciprocally

granting of any required financial assistance under the mechanism will be made subject to strict conditionality'" See also M Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"', in (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 61–104.

[80] ECJ, C-370/12, Thomas Pringle, Judgment of 27 November 2012, para. 142s.

[81] See Ch Secondat, and PJ Goossens, and D Roterod, 'The German Constitutional Court's decision about the European Central Bank's OMT mechanism: A masterpiece of judicial arrogance', European Policy Brief no. 30, 2014.

[82] Ibid. 2: '[I]of one wants to stabilise markets, the volume of salvation measures cannot be limited in adavance.'

[83] In a similar vein but with far harsher words Secondat et al. (n 79) who, among others, state that the BVfG held an 'amateuristic course in monetary economics'.

independent courts, might cause some irritations, it is nonetheless to be hoped that the solution developed by the BVfG might open the way for a face-saving compromise for all sides. While it is true that the BVfG largely misread the economic rationale of the OMT programme and also failed therefore to grasp the very nature of the EMU stability task (that it is not a purely nominal or formal one but also has to consider economic reality as a whole) the German Constitutional Court had a point when it fought relentlessly against any encroachment upon the reciprocal nature of solidarity trying at the same time to stem certain tendencies within the Union to create a transfer Union based on an pre-eminently altruistic concept of solidarity and thereby changing the very nature of EMU and jeopardizing its survival.

Notwithstanding the appearances, there is, therefore, considerable common ground between the positions taken by the ECB on the one hand and that exposed by the BVfG on the other and it is now up to the ECJ to find a formula making it clear that the comprehensive stability policy pursued through the OMT programme does not question the nature of the solidarity principle underpinning EU law.

The next place where the meaning of solidarity within EMU will be tested is the banking union. As is well known, the banking union comprises a set of norms put into effect—or at least envisaged after the break out of the financial crisis—that should stabilize the banking and the financial sector within the European Union. Stabilization implies, first of all, the creation of an unitary legal framework (the so-called single rulebook) that should govern capital requirements,[84] deposit insurance,[85] and provisions on the recovery and the resolution of credit institutions in case of insolvency.[86] The two main pillars of the banking union, as it stands today—the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM)—should prevent banks from getting into distress in the first place, while in case this could not be avoided a process of orderly bank restructuring or of bank resolution should be provided for. A first reading of these provisions would suggest that they are intended to implement a supervisory and intervention system for banking and finance institutions in the Eurozone (and, in case of voluntary adherence also for other EU Member States) which should be based on a solidarity model of a reciprocal nature. While these measures and provisions come at a considerable cost, they are surely prevailingly of a preventive nature. In fact, there can be no doubt that the banking and finance systems of the EU Member States are strongly interconnected and that all Member State are confronted here with a Rawlesian "veil of ignorance" as to the effective risks present in these sectors so that all Member States (and in particular the Eurozone Member States) are tied together to a

[84] See the Capital Requirement Directive IV, Directive 2013/36/EU of 26 June 2013 and Regulation (EU) No 575/2013 implementing the Basel III capital requirements for banks.
[85] See the Deposit Guarantee Scheme Directive, Directive 2014/49/EU of 16 April 2014.
[86] See the Deposit Guarantee Scheme Directive, Directive 2014/49/EU of 16 April 2014.

community of fate.[87] Nonetheless, criticism was been voiced that several elements of the banking union would trespass this traditional solidarity model and transmute the banking union into a transfer union.[88] Of particular delicacy are, in this regard, the provisions on the future Single Resolution Fund (SRF) that should finance bank restructuring as the mutualization of contributions to this fund could lead to a situation where Member States with high supervisory and regulatory discipline would be compelled to finance countries with poorer discipline in these fields. The overall assessment would have to be even more critical if the banking union were supplemented, as requested by various Member States, by the issuance of Eurobonds leading to an even more extensive mutualization of risks. In this case the reciprocal nature of EMU would be further weakened in favour of altruistic solidarity.

VI. Conclusions

As demonstrated in this article, the law of the European Union contains a vast array of elements of solidarity. What solidarity effectively means depends, to a large extent, on the specific circumstances of the sector in which it shall apply and from the period of time to which the examination refers. Thus it can be noted that the importance of solidarity is quite different in sectors such as, say, regional policy or international development policy. Some of the main traits are, however, common to all forms of solidarity that find application within EU law. In its very essence, in fact, solidarity within EU law evidences a strongly reciprocal nature, a *do ut des* character. In some areas altruistic elements show up in solidary initiatives but, as a norm, they do not dominate. If Member States are required to act prevailingly in an altruistic way and no reciprocity is in sight, the 'island of solidarity' is in danger of being washed way as is the case with refugee and asylum policy. The tragic events in the Mediterranean in 2015 evidence the unacceptable consequences of such a situation. At the same time a development can be noted according to which the solidarityy elements within EU law continuously increase and there is at least the appearance of solidarity tilting more strongly towards the altruistic side. This impression might be deceptive insofar as it neglects further tendencies whose consideration is indispensable if the analysis is to deliver a comprehensive picture. First of all, over the last decades the whole of EU law has been gaining a far higher degree of cohesion in which

[87] See on this subject also E-U Petersmann, De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreeement, in (2008/2009) 6 *Loyola University Chicago International Law Review*, 209–47.

[88] This is at least the opinion by a group of German plaintiffs headed by Prof. Markus Kerber who in July 2014 challenged the main provisions of the banking union, and in particular the SSM, the SRM and the SRF at the German Constitutional in view of their alleged contrariness to the German constitution and EU primary law.

the reciprocal nature of commitments has somewhat lost visibility. Furthermore, Union citizens have become important actors and subjects of rights so that the immediate interests of the Member State have faded into the background to some extent. Finally, EU law has been extended to further areas where, as is the case with EMU, pronounced forms of solidarity are essential for the survival of the respective branch as a whole. With regard to EMU, in particular, the extreme volatility of financial markets, their low degree of predictability, as well as the enormous impact of instabilities in this field on the real sector exact a rather extensive commitment to solidary action from Member States. It is therefore the particular nature of mutuality applying in this area that may require extensive commitments. Nonetheless, in the end, the reach of these commitments remains circumscribed. To attribute to them a predominantly altruistic character and to insinuate that the EU had become, at least in some areas, a transfer union, would undermine the very existence of the EU. In fields such as the asylum and refugee policy the limits of solidarity have become clearly visible as the essential prerequisites for solidarity to unfold in this area did not materialize at either the level of the European Union or internationally. In fact, it was not possible to find a sustainable compromise for burden-sharing within the EU and nor were there international partners available with which a long-term management of refugee flows could be arranged.[89]

No perspective of reciprocity, not even for a longer period, was given and so single Member States are left at their own devices even though, manifestly, they are not able to solve this problem on their own.

In sum, it can therefore be said that the relevance of solidarity in EU law has been augmenting continuously over the last years, whether this is because stronger cohesion came to be valued or because monetary integration implied a strong increase of the risk factor in respect to which solidarity provides insurance. This does not, however, equal the creation of a 'transfer union'. On the contrary, solidarity is still circumscribed by reciprocity and the elements of conditionality have even been reinforced. This might be seen as disillusioning or as Member State egoism but, from a more pragmatic viewpoint, this result indicates only that solidarity within European integration is dominated by similar characteristics that qualify this concept in general legal theory.

[89] One of the main reasons was the rising number of failing states in the region from which most of the refugees and asylum seekers come.