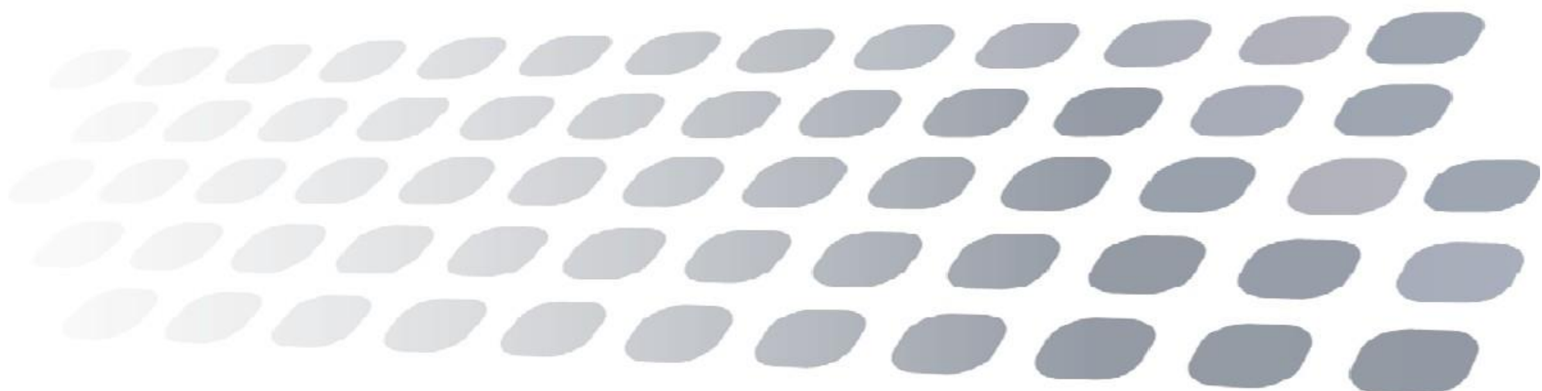
CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM

VOLUME 7

ISSUE 3

2015



CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 7, ISSUE 3, 2015

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PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Solidarity in the European Union in Times of Economic Crisis

by

Jerónimo Maillo* and Justo Corti*

Perspectives on Federalism, Vol. 7, issue 2, 2015

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Abstract

The present special issue of Perspectives on Federalism reflects on the nature and characteristics of solidarity within a supranational context, it explains what solidarity has meant so far in the EU, how much solidarity we had during the crisis, what type of solidarity is needed and how to build it. It focuses on the new economic governance and its solidarity mechanisms during and after the economic crisis but tackles other related fields such as its impact on services of general economic interest or the European budget, as well as other areas where solidarity is also discussed such as the free movement of persons.

This monographic issue has its origin in the International Conference "Solidarity in Hard Times. Solidarity and the European Social Model in times of economic crisis" organized by the University Institute for European Studies (IDEE) on 11-12 June 2015 in Madrid, within the Jean Monnet Network MoreEU ("More Europe to overcome the crisis").

Key-words

EU law, solidarity, supranational integration, new economic governance

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Solidarity has traditionally been at the core of the cohesion of modern European societies and of the legitimacy of our political systems. It is deeply rooted in the European identity, perceived by third parties as one of its distinctive features and often as one of its most worthwhile values. The so called 'European Social Model' is a crucial element to understand Europe's evolution since the second half of the XX century.

The European integration adventure has referred to solidarity since its very beginning when Robert Schuman stated that Europe would be built through concrete achievements which first create a 'de facto solidarity'. Mechanisms of solidarity (e.g. structural funds, cohesion funds, European Stability Mechanism, etc) had been key factors to accept new integration steps and maintain or increase the attractiveness of the European Union. The notion of solidarity is now contained in many provisions of the EU Treaties (e.g. article 3.5 TEU, for the external dimension, articles 2 and 42.7 TEU, and 122, 136 and 222, for the internal dimension) and includes solidarity among Member States, regions, citizens and generations. Both territorial and social cohesion are foreseen and pursued by many different policy tools.

However, the recent economic crisis has very harshly impacted in Europe, challenging and calling into question both solidarity between Members States and their citizens. The crisis has revealed serious weaknesses in the EU model of integration and, probably the worst, has put at risk the fragile European identity. Many had wrongly perceived that "Europe" was more part of the problem than part of the solution and this feeling led to increased support to Euroskeptic parties, both from the right and left, whose proposals for reducing the social impact of the crisis focused on "national" solutions.

Following an austerity-focused policy, underestimating the social impact of the crisis and the budget cuts of the periphery, Europe has given priority to win the battle of budget imbalances but risked to lose the war for European cohesion and citizens' legitimacy.

Beyond the economic crisis, political tensions between Member States have also arisen in other fields such as the refugees' crisis and free movement of persons within Europe. In all these fields, more solidarity has been claimed as a way forward to solve the crisis and to a certain extent it has been recognized as (at least) part of the solution. France has recently invoked by the very first time article 42.7 of the Treaty on the European Union concerning solidarity in defence in relation to the fight against jihadist terrorism after the Paris' attacks.

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However, what solidarity should mean, which intensity of increased solidarity, at which rhythm, and how the solidarity mechanisms should be built and worked, have generated disagreements and new tensions between Member States, political parties and public opinions.

We should nevertheless acknowledge that solidarity has existed in Europe in the latter years, that we have attained unprecedented levels of transfers and created new potential for solidarity within the European Union by very different and innovative means. We are every day more identifying common challenges, assuming common responsibilities to face these challenges and sharing the costs. For instance, regarding the economic crisis, aid in its different formats has amounted up to 500 billion euros and the European Central Bank's action has significantly supported national economies during the crisis; regarding free movement of persons, large numbers of EU citizens (particularly from the periphery) have found jobs in other European countries and most Member States have reached an agreement to fund and share the cost and the increasing number of refugees who are coming to Europe.

It is true that all these new solidary agreements have taken time, often too long time, and that they are not altruistic but often conditional and limited. We may discuss whether the solidarity level is sufficient, well designed and implemented and whether it should have been adopted more rapidly, we can even debate on the 'nature' of this solidarity tools, but it is undeniable that new solidarity mechanisms have been created and that solidarity has been part of the solution.

It is our personal belief that solidarity, more solidarity, is essential to maintain and further develop the process of European Integration. We need more Europe and more solidarity within the European Union. Solidarity is called to play a major role in the reconstruction and development of the European project. It could be crucial to reverse the current 'nationalistic' tensions and increase the sense of belonging of Europeans to Europe. Furthermore, it could open windows of opportunity to find European solutions to citizens' problems and therefore help Europe to face in common challenges and risks of the present and the future.

The difficulty lies in finding and consolidating a new architecture for this increased need of 'supranational or postnational solidarity'. We have to be innovative and find the right balance between the different interests at stake. We have to further develop solidarity

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between Member States, probably a different in nature solidarity, and explore new means of solidarity between citizens. We have to adjust solidarity to the supranational context, to the reinforced Union we need for the future.

The present monographic issue precisely discusses this topic though seven contributions that explains the nature of solidarity within a supranational context, what kind of solidarity we have had during the crisis and what we would need for the future, including the opportunities that offer solidarity mechanisms of the new economic governance, and other related areas where solidarity is discussed as services of general economic interest, the European budget or the free movement of persons.

Katerina Pantazatou examines the evolution of the EU 'redistributive' policies in the (post-) crisis EU era and inquires on whether the EU, faced with the recent unprecedented crisis has demonstrated a solidary spirit. She concludes that only "reciprocal solidarity" has been exhibited during the crisis. She argues that this type of solidarity is inherent in the EU by reason of the huge differences among the Member States and the lack of a common demos and ethos among the EU people and that the need of financial assistance programmes and the new economic governance were unfavorable environment for shifting to altruistic solidarity.

Francesco Nicoli's contribution challenges the view that any scheme of solidarity in the EU is self-defeating, inefficient and illegitimate. He explains the three main criticisms to European solidarity (the Myths of the Beggar, of the Efficient Markets and the Demos) and proposes a notion of "federative solidarity" providing a solution to the three "myths".

Mario Kölling searches for solidarity into the EU budget. He identifies a shift in the budget rationale, a trend from a national calculation of self-interests (richer EU countries helping poorer EU countries to compensate that the former obtain a larger return from market opening) towards an instrument to support policy programmes related to addressing common challenges. He argues that a reform of the own resources system and a stronger involvement of the European Parliament in the negotiation of the Multi-Annual Financial Framework would be essential to foster this trend. These reforms, together with an increase in the financial resources available, are necessary if the EU budget is to be reconciled with a solidarity role it should and has to play, in addition to giving the EU the means to properly address current and future challenges.

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Marta Legnaioli evaluates the impact of austerity measures on national social protection mechanisms, in particular in Italy and Portugal. Within the process of 'Europeanization' of public services, she perceives the sovereign debt crisis as a new phase in this process, one that has not only limited the role of national social protection, but has even an impact on the definition of Services of General Economic Interest (SGEIs).

Arianna Vettorel focuses on the impact of the actions of the European Stability Mechanism (ESM) from a human rights perspective. She analyses to what extent the granting of financial assistance on the basis of strict conditionality measures has affected social rights in Europe and whether possible violations of human rights could be subject to traditional human rights mechanisms. She concludes that de iure is difficult and de facto unrealistic so that possible violations of human rights depending on conditionality measures are not likely to be remedied through the traditional legal channels.

Matteo de Nes examines the ESM Treaty and other relevant documents approved by its bodies (in particular the Code of Conduct and the By-Laws) through the lens of the transparency principle. He concludes that, within the ESM governance, confidentiality and secrecy are the rule and transparency and disclosure the exception, and he claims for higher standards of transparency.

Finally, Stefano Giubboni analyses the case-law of the European Court of Justice on the scope and limits of cross-border access of economically inactive Union citizens to national systems of social assistance. He focuses on the most recent case-law which shows, in his own words, "a spectacular retreat from the rhetoric of transnational solidarity in tune with the neo-nationalistic and social-chauvinistic moods prevailing in Europe".

All these contributions were discussed during the International Conference "Solidarity in Hard Times. Solidarity and the European Social Model in times of economic crisis" organized by the University Institute for European Studies (IDEE), Jean Monnet Centre of Excellence at CEU San Pablo University, in the context of the network "More Europe to overcome the crisis" (Jean Monnet Network - 553614-EPP-1-2014-1-IT-EPPJMO-NETWORK) which was held on 11-12 June 2015 in Madrid, on the thirty anniversary of the signature of the EEC accession Treaty of Spain and Portugal. This enlargement is often considered to be the most successful from the perspective of solidarity. It is that spirit of solidarity that European leaders showed then that could become a source of inspiration to promote solidarity in the future.

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The conference was part of the Jean Monnet Network MoreEU ("More Europe to overcome the crisis") led by Scuola Superiore Sant'Anna (Pisa) and comprising think tanks and research institutions of five European countries (Notre Europe – Jacques Delors Institute, CEU San Pablo Madrid; University of Warsaw and Nova Law School of Lisbon).

After the conference, selected papers were re-elaborated and presented for publication to Perspectives on Federalism. Once the peer-review was passed, this issue is the final outcome of the process. We are grateful to all the authors, the journal and its co-editors Roberto Castaldi and Giuseppe Martinico, the support granted by the European Commission through the Jean Monnet programme, and all the attendants to the conference who enrich the debate with their participation and comments. We all expect this issue to be a useful contribution to the debate on the present and future of the European Union, in particular to the role and design of solidarity within the European Union.

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[*] Professor of EU Law and Senior Research Fellow at the Institute for European Studies of CEU San Pablo University, Madrid.

[*] Assistant Professor and Research Fellow at the Institute for European Studies of CEU San Pablo University, Madrid.

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ISSN: 2036-5438

Free Movement of Persons and European Solidarity Revisited

by

Stefano Giubboni*

Perspectives on Federalism, Vol. 7, issue 3, 2015

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Abstract

This paper analyses the case-law of the European Court of Justice on the scope and limits of cross-border access of economically inactive Union citizens to national systems of social assistance. The author de-constructs and challenges the weak rhetoric of transnational solidarity generously deployed by the Court of Justice at the beginning of the expansive cycle of its case-law on the transnational social protection rights of mobile EU citizens. The most recent case-law shows, in fact, a spectacular retreat from this rhetoric in tune with the neo-nationalistic and social-chauvinistic moods prevailing in Europe.

Key-words

European citizenship; free movement of persons; cross-border access to national welfare systems; transnational solidarity.

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But people loved darkness instead of light
(John, III, 19)

1. Prologue

For almost fifteen years, the saga of the constitutionalization of European citizenship has been based on the famous promise of 'a certain degree of financial solidarity'[I] between the nationals of different Member States. The idea that a Union citizen could have access to a new 'status of social integration' (Azoulai 2010: 1), directly defined at the supranational level, and derived from the fundamental freedom of movement, actually seemed to be able to open up a new constitutional dimension to European citizenship, finally destined to transcend the nation-States' particularistic allegiances in order to revive and expand the universal and 'omni-inclusive' (Margiotta 2010: 7) promise of a society of free and equal individuals built on the jus-naturalistic foundations of modern citizenship.

The process of constitutionalization of the weak provisions on citizenship introduced by the Maastricht Treaty[II] has been carried out by the European Court of Justice along two convergent trajectories, beginning with the path breaking case of Martínez *Sala*.[III]

On the first trajectory, a new universal status for transnational access to social rights on an equal footing with the nationals of the host country was progressively attached to the freedom of the European citizen to move and establish residence in another Member State, irrespectively of their status of economic activity. As a result of this, the main feature of this first jurisprudential movement can be identified in the fact that the Court of Justice has progressively extended those same powerful mechanisms of de-nationalization (and partly of de-territorialization) of social citizenship rights to every citizen of the Union *qua talis*.

These mechanisms had originally been reserved by the Treaty of Rome for economically active persons, and to workers in particular, as a fundamental means for the functional integration of the common market (Giubboni 2014). The fragility of this first ideational-pillar, in such a sophisticated endeavour of making European citizenship the fundamental status of the individual in the European Union's constitutional order, is probably due to the intrinsic contradiction pervading the conceptual categories used by the Court for such an ambitious purpose. The attempt to overcome the functionalistic logic

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and the mercantile *ratio*, historically underpinning the guarantee of social security rights to migrant workers (Mancini 2000: 123), actually took place through a sort of radicalization and generalization of those same conceptual premises under the new universalistic and unifying rhetoric of European citizenship. However, for this very same reason the pseudo-universal allure of transnational social solidarity, expected to stem from European citizenship, could not (and cannot) sever the original connection with the market citizen construct,[IV] which has overbearingly reemerged (and re-surfaces) during the hard times of EU crisis. The 'resilience' of such a model (Nic Shuibhne 2010: 1605) – and the reappearance of its intrinsic limits – is therefore actually due to the contradictions underlying the attempt to promote the status of social integration of European (economically inactive) citizens over and above an individual freedom of movement built in the image and likeness of the transnational economic actor (Somek 2007, Somek 2012, Menéndez 2010).

The other trajectory for constitutionalization is even more ambitious as, in *Zambrano*,[V] it brought the Court's influence to bear in the overcoming of the transnational perspective, in a view of 'disconnecting citizenship from mobility' (Margiotta 2010: 150). The integration-loop potentially envisioned by such a move would have actually brought the constitutional trajectory of European citizenship to a sort of federal completion, in so far as the Union would no longer be seen simply as 'the sum of the physical territories of the Member States' but as 'a new common space, a space of distribution of rights and common values' (Azoulai 2011: 34).

But this second trajectory, based on even more fragile assumptions, was soon interrupted, even before the new territories of the common space of distribution of rights and political values could be explored by their unknowing and disoriented holders. The great crisis has, rather, precipitated in the Union a new *terra incognita*, which is exactly the opposite of the land promised by the Maastricht Treaty. Instead of welcoming the 'magnificent and progressive destinies'[VI] of an ever closer union among the peoples of Europe, tightened by the political project of common citizenship and currency, the great crisis has created deep rifts of division and reciprocal distrust between the Member States, threatening the disintegration of the whole project, above all beginning with the recurring risk of the fracture of the Eurozone.

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This paper gives a critical overview of the rapid rise and equally sudden decline of the normative ideal of European citizenship as a status of transnational social integration. The tipping points can be quite easily identified with the great changes that have diverted the course of European integration since the mid-00s; the cumulative effect of the big-bang Eastern enlargement, and the great political-financial crisis of the Eurozone, have totally altered the political economy of European integration and irreversibly degraded the optimistic and neo-illuminist assumptions underpinning the normative ideal. The Court's case law – especially with the much discussed *Brey*[VII] and *Dano*[VIII] judgments – shows a clear retreat, or maybe a retrenchment, in the discourse on EU citizenship as a source for transnational social solidarity, with an indisputable step back to a strict functional interpretation of the Treaty provisions in their relationship with secondary law (Directive 2004/38/EC and Regulation No. 883/2004).

Nonetheless, it is always risky and probably premature at this stage to gamble with predictions on possible future directions (Nic Shuibhne 2015). In a hypothetical European reform agenda, alternative paths would still be available; moreover the effective meaning of *Brey* and *Dano* is sufficiently ambiguous to leave such alternative interpretative pathways open. However, optimism on the democratic and socially-inclusive future of European citizenship is hardly compatible with the political dynamics dominant within the Union nowadays. It is no coincidence that the proposals recently announced by the European Commission with the *Labour Mobility Package* seem broadly consistent with the overall regressive itinerary that the Union entered while undergoing a crisis, which calls into question, above all, its identity and *finalité*.

2. Transnational solidarity in its ascending phase

As already mentioned, 'during the golden era of the Welfare State a concrete freedom of movement was inconceivable without the guarantee of the right to social security' (Margiotta 2010: 55). This is the reason why free movement rights of workers and, even before, the social security coordination system, introduced in 1958, could be considered as an embryo of European citizenship.[IX]

The Court of Justice's case law played a decisive role during the founding phase of the constitutionalization of the Community legal order, especially in relation to the freedom of

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movement and social rights of migrant workers (Weiler 1991). During this heroic original phase of integration, when the constitutional bases of the common market were set, the freedom of movement of workers had been intended in a broader sense than suggested by the mere functional logic of market integration (Spaventa 2007: 2 ff.).

We should not forget that the Court has, on the one hand, accepted an extremely broad definition of worker, as far as it encompasses all the activities, having any effectiveness and a minimum of economic consistency, that are performed under the direction of a different person in return for remuneration. On the other hand, it allowed the holders of the fundamental freedom of movement, and their family members, to have access to the whole panoply of social rights guaranteed to the nationals of the host Member State under conditions of full equal treatment. As for the first aspect, the Court was able to extend the guarantee of equal treatment in the host Member State – according to the current Art. 45 of the TFEU –to workers holding employment contracts that differ from the standard model of the permanent full-time job, already undermined during the early Eighties by the gradual spread of atypical work-relations. As for the second, the Court assigned an important integrative function to the guarantee of equal treatment, generally extended to social advantages by Art. 7 of Regulation No. 1612/68 into the domain of social assistance and welfare rights, thus opening up the inner circles of national solidarity systems to migrant workers and their families (Ferrera 2005: 53 ff.).

In this case law, 'social integration into the host society is seen by the ECJ as an instrument for promoting participation within the EU internal market and within its economic objective of free movement of factors of production, even when their productivity may be rather low. The rationale behind this case law has more to do with the internal market than with combating of social exclusion, even if this actually contributes to the latter' (Verschueren 2012a: 217). The model of integration endorsed by the Court is certainly based on the idea that the migrant worker (and his/her family members) should be included, from the beginning and without exceptions, in the social protection system of the host Member State, in its entirety, as they contribute to the well-being of the society that is hosting them through their (albeit reduced) economic activity (Dougan and Spaventa 2005).

An outcome of social integration in the migrant's elected country of residence– extended to all persons whose contribution to the internal market is actually only potential

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or at the very best only indirect – had thus been already firmly secured by the Court's historical case law on the freedom of movement of workers and their families. If read in light of this *acquis*, it can be said that the judgments, through which the Court has extended the principle of equal treatment in the access to social and welfare rights acknowledged by the host country, also extended to economically inactive European citizens. These judgments, from the leading case *Martínez Sala* to *Zambrano*, have done nothing but generalize a status of social integration already widely acquired, although within a more limited perimeter.

This case law was supposed to have the merit of universalizing the logic of social integration originally anchored to the functioning of the internal market, as free movers not carrying out an activity of economic nature were included in the equal protection status based on European citizenship. The innovative feature of this case law was to be found in the universalistic projection of the model of transnational social solidarity, already pre-envisaged by the Treaty of Rome in favor of economic migrants. Some have thus recognized a change in the very normative paradigm of European social solidarity; where access to the social protection systems of Member States was previously functional to the internal market's full effectiveness, according to such case law, it has now become an autonomous constitutive element of Union citizenship, widely codified by Directive 2004/38, and is seen as a fundamental status of social integration totally unrelated to the mercantile *ratio* and the original idea of *homo oeconomicus*. In this view, a constitutional citizenship-status of transnational value was hence created (Azoulai 2010: 8), which – overcoming the old category-based model of market-justice and occupational-solidarity – underpins a general claim for social integration within the host Member State, which is not very different from the functioning of federal-type polities.

However, the fragility of this conceptual construction has been brutally exposed by the great EU crisis. Such an idea of compassionate transnational solidarity was built, in fact, on a huge misunderstanding (Barnard 2005), whose hypocrisy has been mercilessly revealed by the drama of the European crisis. The great crisis has quite inevitably dissolved any propensity of the northern-European core Member States to host EU foreigners in need in their (still relatively) generous welfare systems: as social chauvinism ineluctably resurfaced in face of the well-cultivated *spectre* of 'benefit tourism', the swift political reaction has been

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everywhere nothing but the closing of the porous borders of the so-called transnational solidarity.

Hypocrisy has indeed its shortcomings: in our case, such limits are all included in a post-modern model of abstract solidarity, which – in so far as it relies not on a common welfare and fiscal system but on the disposition of selected Member States towards the hosting migrants in social need – by definition cannot ensure for economically inactive European citizens either an unconditional freedom of residence, or equal access to the system of social protection of the host country, at least until the status of long-term resident has been acquired according to Art. 16 of Directive 2004/38/EC. In concrete terms, the right to take up residence in another Member State for a period exceeding three months remains conditional on the reverse-means test of having comprehensive health insurance coverage, as well as sufficient resources to prevent the economically inactive citizen from becoming a burden on that State's social assistance system (Art. 7 of Directive 2004/38/EC). And the unfortunate accident of becoming such an unreasonable burden on the host Welfare State system gives the national authorities the power of expelling the unwelcome parasitic EU citizen, although without making use of rude automatisms and in compliance with the principle of proportionality (Art. 14, par. 3). Moreover, transnational access to the social solidarity system of a Member State under conditions of equal treatment with its nationals is subject in any case to an incremental criterion, since the inactive Union citizen must show proof of a sufficient degree of integration into the society of the host country.

Such limitations to access have a specific *ratio*, which has reverted to showing all its selective duress and disciplining power following the great crisis.[X] The very roots, at least of the Eurozone crisis, lie indeed in the total lack of any real European solidarity, and it is not by accident that the most prominent structure of the new crisis-management-law of Europe is that authentic tribute to de-solidarization un-popularly known as *Fiscal Compact* (Supiot 2015: 8 ff.; Rodotà 2014: 126 ff.). As there is no form of Europeanization or sharing of national social protection systems, each Member State may legitimately require that access to its welfare system has to depend on a given substratum of social integration already legitimately acquired by the European citizen.

By necessity, the exclusively transnational dimension of social solidarity connected to European citizenship is confronted with this underlying tension (Giubboni 2007), which

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inevitably reemerges anytime a freedom of movement not functional to the needs of the market ends up impinging on the finances of the national Welfare State (De Witte 2012). And, if such a tension can easily be disguised behind a vaguely cosmopolitan and post-modern rhetoric of transnational solidarity in times of economic growth, more or less equally distributed among the Member States (Bellamy 2009), in times of crisis all of the illusory and dangerous fragility of the rhetoric is revealed. This is especially true when the new highly asymmetrical Eurozone economic-governance rules trace a non-negotiable line between the self-proclaimed financial virtues of the northern countries and the irresponsibility of the southern ones, dismantling any resemblance of isonomy within the Union.[XI]

In essence, this is the lesson learned from *Brey* and *Dano*.

3. Brey and Dano

It is worth remembering that thanks to one of the most acrobatic (and in fact most discussed)[XII] passages in the *Martínez Sala* ruling, the Court of Justice had already come to infer that economically inactive European citizens might enter the scope of the *ratione materiae* of Art. 18 of the TFEU, derived from the simple exercise of the freedom of movement, even outside the conditions defined by Art. 7, par. 1, letter b) of Directive 2004/38/EC. That very fact could indeed be capable of attracting the mobile EU citizen within the perimeters of the principle of equal treatment, not least for the sake of having full access to the non-contributory social benefits in the host Member State. In *Martínez Sala*, as well as in other later cases, the residence permit held by the economically inactive European citizen was actually granted not on the basis of EU law but according to national law (Verschueren 2012b: 47 ff., especially at 62). Nevertheless, the effective exercise of the freedom of movement and subsequent residency by Mrs. Martínez Sala was sufficient to include her situation in the scope of the principle of equal treatment irrespective of nationality (Van Der Mei 2005: 225-226).

However, whilst certainly daring, the passage appeared in line with the overall political meaning of the interpretative efforts conducted at the time by the Court of Justice, which openly acted – both with that groundbreaking judgment as well as with other paradigmatic rulings of the same period[XIII] – within a bold perspective of the constitutionalization of the

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freedom of movement attributed to the European citizen by the Maastricht Treaty (Lenaerts 2011). In such a perspective, the conditions or limits posed by secondary law to the freedom of movement of the EU (economically inactive) citizen must be – coherently – very restrictively considered, while the maximum *effet utile* must be accorded to the rules of the Treaty in guaranteeing equal treatment in all relevant situations in order to effectively exercise that right *magis ut valeat* (Giubboni 2012: 186 ff.).

Michael Dougan has observed that, at least since the *Förster*[XIV] judgment of 2008, the Court of Justice's constitutional narrative has gradually undergone some reshaping with an undeclared 'backtrack from the technique of indirect judicial review previously cultivated by its case law on Union citizenship' (Dougan 2013: 141). Nonetheless, in its essence such a constitutional path had not been systematically abandoned by the Court, at least until *Brey*. The *Brey* judgment marks in our opinion the first essential separation from the expansive logic of Union citizenship as a fundamental status of Member States nationals, since it marks a paradigmatic retreat to a sort of interpretative legalistic-minimalism, according to which secondary law rules – strictly – determine the applicative limits of the Treaty, and not conversely.

Whilst *Brey* has an irresistible ambiguity (Verschueren 2014), it seemingly does not as yet imply a significant retreat from the old judicial course in respect of the degree of social solidarity 'among strangers'. In the judgment, in fact, the Court confirms that EU law – requiring a certain degree of transnational solidarity – precludes the consideration of the mere fact of the application for social assistance by an economically inactive citizen of a Member State as sufficient to prove that the s/he has become an unreasonable burden for the welfare system of the host country, therefore depriving her/him of the right to reside in that country. The Court also states that the competent national authorities are entrusted with the task, and the duty, to carry out a careful assessment of the specific characteristics of each individual situation according to the principle of proportionality, without there being any automatic consequence attributable to the request of enjoyment of welfare benefits by the citizen of another Member State.

However, at the same time the *Brey* judgment prepared the ground which was soon after explored by *Dano* for the return to a tight functional interpretation – and a true de-constitutionalization – of the freedom of movement and residence of the Union (economically inactive) citizen, in two important aspects.

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Firstly, because the judgment anticipates the focus-point of the argumentative line carried out in *Dano* as being the relationship between Directive 2004/38/EC and Regulation No. 883/2004, it essentially attributes an improper hierarchical prevalence of the former over the latter. As stated in *Brey*, and then repeated in *Dano*, the main issue is whether the recourse to social assistance, and the request of a special non-contributory benefit according to Regulation No. 883/2004 by the economically inactive citizen who has exercised his/her freedom of movement, would imply that the same European citizen risked losing the right to reside in the host country, as provided for by Directive 2004/38/EC under the conditions defined by Art. 7. And the Court's response was exactly that, for, even seen through the filter of the proportionality test, such a request for social assistance might actually endanger the status of legal residence under the Directive, due to the loss of the condition of economic self-sufficiency imposed by the latter in order to safeguard the financial stability of the welfare systems of the host Member States.

Secondly, because, among the possible configurations of the assessment of the alleged existence of an unreasonable burden on the public finances of a Member State, *Brey* accepts the most rigorous version, effectively defined by Daniel Thym as a 'systemic' evaluation-type as opposed to an 'individual' one (Thym 2015: 28-29). As elusive as it can be, the systemic-type of assessment in fact tends to privilege the importance of the overall implications that may impact on national public finances by the effective or potential increasing mobility of economically inactive Union citizens in need, therefore strengthening the protection of Member States' purses against – the real or imaginary – mal-practices of 'benefit tourism'.

Following the pathway opened by *Brey*, in *Dano* the Court of Justice took the decisive step to overturn the constitutional dynamic which, from *Martínez Sala* onwards, has essentially promoted the access of economically inactive citizens to the welfare systems of the host countries based on conditions of equal treatment with their nationals.

For, firstly, only the fulfillment of the conditions of economic self-sufficiency (and of comprehensive health insurance coverage) imposed by Art. 7, par. 1, letter b) of Directive 2004/38/EC would grant the European economically inactive citizen the right to reside in the host Member State, and therefore to benefit from equal treatment in the access to social assistance benefits in the territory of the latter. And, secondly, only a prior condition of legal residence, under the requirements strictly set out by Art. 7 of the Directive, would

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allow the economically inactive citizen (who can prove also a sufficient degree of integration in the society of the host country) to access the welfare system of the latter, without putting in jeopardy the right of that citizen to reside in that State. Art. 24, par. 1, of Directive 2004/38, read in conjunction with Arts. 4 and 70 of Regulation No. 883/2004. This therefore does not prohibit Member States from excluding economically inactive European citizens from the enjoyment of a special non-contributory benefit which is acknowledged to their nationals, when those Union citizens do not enjoy the right to legally reside under Art. 7 of the Directive.

This is in fact a spectacular retreat from the 'magnificent and progressive destinies' of transnational solidarity towards the nationals of other Member States, that the Court has performed with sublime ease in name of a new European *Realpolitik*, which evidently urges for further reassurances to the hegemonic countries of the far North, both continental and insular.[XV] This new case law reintroduces a sharp line of demarcation in the European *status civitatis*, which goes back to obeying to a strict mercantile logic or, rather, to a new census model of citizenship.

Hence, 'Two citizenships' re-emerge (Belorgey 1998: 160 ff.), characterized by totally different protection statuses: first and second class (cf. Verschueren 2015a). First-class citizenship is reserved to persons that are active in the internal market (as workers or simply as providers or merely as individuals receiving services in return for remuneration) and to those who, while not being economically active, can nonetheless prove their economic self-sufficiency. Second-class citizenship, essentially devoid of any transnational protective status, is for the indigent. The latter, in fact, are trapped within a classic *Catch-22* situation,[XVI] since in order to claim for social assistance in the host Member State this would almost automatically require, for them, giving evidence of not satisfying the requirements provided for by Directive 2004/38/EC in order to legally reside for a period exceeding three months.

From a technical point of view, the keystone of what, in hindsight, appears as the restoration of the system prior to the Maastricht Treaty, needs to be identified once again in the re-construction of the relationship between Directive 2004/38/EC and Regulation No. 883/2004. And in relation to this, *Dano* falls firmly in the conceptual wake traced by *Brey*.

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As Rob Cornelissen and Herwig Vershueren have shown (Cornelissen 2013; Verschueren 2015b), the interpretation adopted by the Court in *Dano* in fact overturns the terms of the political compromise behind the contextual adoption of the Regulation and the Directive in 2004. This compromise reaffirmed the political balance already achieved in 1992,[XVII] with the introduction of a special system of coordination for non-contributory cash benefits, characterized by the express and exceptional provision of a derogation to the general principle of exportability, albeit offset by the attribution of the responsibility of the payment of such benefits to the Member State of actual residence of the beneficiary according to the *lex loci domicilii*.

Yet, the notion of residence to this end, also used by Regulation No. 883/2004 for this very reason, is based on parameters that are inherently and essentially factual, as opposed to Directive 2004/38/EC, which gives a much stricter legal-definition instead, anchored as it is to requirements of legal-substantial nature. Therefore, the original idea was precisely that, as often as the merely factual situation of habitual residence in the host country recurred,[XVIII] the EU economically inactive citizens covered by the Regulations on social security would certainly be entitled to non-contributory benefits provided for by the legislation of the host Member State, in which that citizen placed his/her center of interests. Thus, at least within the semi-universal scope of application *ratione personae* of Regulation No. 883/2004, the right to have access to non-contributory benefits in the country of actual/factual habitual residence would certainly allow, or at least legitimately help, the European economically inactive citizen to meet the requirement of economic self-sufficiency set forth by Art. 7 of Directive 2004/38/EC.

Evidently, that compromise was overwhelmed by the interpretation of the relationship between the social security Regulation and the citizenship Directive endorsed by the Court in *Brey* and even more boldly in *Dano*. Only the status of legal residence – in full compliance with the Directive[XIX] – would allow access to special non-contributory/social assistance benefits under the specific conditions of equal treatment with the nationals of the host Member State. However, this means reintroducing a decisive cleavage within the status of Union citizenship, with a return to the previous deeply held normative ideal that, in the name of solidarity 'among strangers', was aimed at making EU citizenship the main constitutional vehicle for transnational social integration.

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4. Epilogue

Even after *Dano*, there are still many uncertain and controversial aspects that need to receive a conclusive answer from the Court. The jurisprudential framework is still developing and the darkest scenarios, although clearly visible on the horizon, hopefully do not necessarily need to take place, as Leopardi's insuperable pessimism on the unhappiness of human condition would predict.

Different interpretations of *Dano*, perhaps more in line with the socially inclusive idea of European citizenship endorsed in the ascending phase of the discourse on transnational solidarity, may still be possible, as Herwig Verschueren has tried to argue with his usual tireless and passionate argumentative accuracy (cf. Verschueren 2015b: 370 ff.). Indeed, Advocate General Whatelet, in his recent conclusions in *Alimanovic*,[XX] suggested that the Court follow a path firmly anchored to the context-sensitive and moderately socially-embracing principle of proportionality.

However, our fear is that the most likely outcome, in line with the new neurotic and intolerant European *Zeitgeist*, is towards a creeping return to the grim logic of the *Poor Laws*, with a post-modern rediscovery of the classical remedy of the expulsion of the undeserving poor, by sending him back to the parish (or, in our case, to the country) of origin (Groenendijk 2013). It is no coincidence that, among the different hypotheses of reforms for providing a solution to the new transnational social question of mobile inactive union citizens, there are some that are impressively similar to the old 'non-resident relief', which under the *Law of Settlement* from the Elizabethan period exceptionally allowed for the prevention of the expulsion of the poor stranger if the parish of origin accepted to take on the burden of his assistance (Landau 1990; Hollen Lees 2007). The hypothesis according to which, at least partially or even temporarily, such a burden is to be transferred to the State of origin of the migrant European citizen,[XXI] perhaps unwittingly (but no less clearly) echoes back to that historic tradition. And if this were to be actualized in the new context of the Union, the deep asymmetries already created by the great crisis between core and periphery countries would be exacerbated, again to the detriment of the Member States at the outer (Mediterranean or eastern) borders of the EU and to the benefit of the northern block under the German track (as well as the motherland of the *Poor Laws*, of course).

Moreover, pessimism is justified by the increasingly explicit and disturbing signs of an

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even more broad and general, not to say 'systemic', questioning of the postulates of the freedom of movement of persons, i.e. of workers, within the Union (cf. Editorial Comments 2014). One of these is now well-discernible within the case law of the Court of Justice, which more and more frequently – in a sort of reverse cross-fertilization – demands that economic migrants, especially frontier workers, give proof of a certain degree of integration in the society of the host country in order to have access to social advantages and benefits on par with the nationals of that State.[XXII] If this trend were to be consolidated, such an interpretative reorientation, or detour, would evidently undermine one of the pillars of the free movement within the internal market and of the model of social integration it embodied: that is to say, the unconditional right for migrant workers to have access to all the social benefits guaranteed by the host country (Art. 7 of Regulation n. 1612/68 and Regulation n. 492/2011).[XXIII]

And even the recent *Labour Mobility Package*, although not yet fully defined in its operational details, seems to be going in that same wrong direction, as I mentioned in the introduction to this melancholic eulogy on free movement of persons and European solidarity in the EU. The package would entail a substantial restriction of social protection rights of migrant workers, supinely endorsing once again the requests sent forth by the stronger northern European countries, and especially by Germany and the United Kingdom, which carry forward – in this regard – substantially convergent political positions.

If these scenarios of counter-reformation of EU law were to take place, we would be witnessing, as lost and disoriented as ever, not only the final and inglorious sinking of any misplaced hope of transnational social solidarity, but the deletion of an entire history of achievements of civilization in the long march towards the freedom of movement of workers in the European Union. Not only would it be a return to a de-socialized idea of market citizen, but a stronger premonition of the forthcoming disintegration of the whole European project.

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[*] This article draws its inspiration from the author's participation in different conferences and seminars in 2015, all related to the crisis of European solidarity and respectively held in Antwerp on May 7 and 8 (*Where do I belong? EU law and the adjudication on the link between individuals and Member States*), Madrid on June 11 and 12 (*Solidarity in hard times. Solidarity and the European social model in times of economic crisis*), and York on September 4 and 5 (*The impact of the financial-economic crisis on the guarantee of social welfare rights*). An expanded and revised version of this article will be also published with Intersentia in an essay-collection edited by Herwig Verschueren. I take the opportunity to publicly express my gratitude to all participants in such events for

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their comments and suggestions; of course, the usual disclaimer applies.
I Case C-184/99, *Grzelczyk*, par. 44.
II 'Little more than a cynical exercise in public relations on the part of the High Contracting Parties', as was famously said by Weiler 1996: 1.
III Case C-85/96.
IV *Ex plurimis* Everson 1995.
V Case C-34/09.
VI To the benefit of the non-Italian reader, I would like to remind that this is the verse of one of Giacomo Leopardi's most famous poems, *La ginestra*, composed in 1836. The citation from John's Gospel, appearing in exergue, is also taken from Leopardi's poetry.
VII Case C-140/12.
VIII Case C-333/13.
IX Levi Sandri 1971: 941. See Giubboni 2008.
X Almost prophetic were the analysis dedicated to German Ordo-liberalism by Foucault 2005, especially at 113 ff.
XI On the importance of isonomy in the Aristotle's philosophy of justice classically see Perelman 1963: 9 ff., and Giuliani 1997: 3 ff.
XII See in particular the sharp criticism by Hailbronner 2005.
XIII See especially the judgment of 17 September 2002 in the case C-413799, *Baumbast*, in which, for the first time, the Court explicitly states the direct effect of the fundamental right to reside in the territory of another Member State granted to the European citizen by Art. 21 of the TFEU.
XIV Case C-158/07.
XV The influence of the bold political position expressed by the governments of Austria, Germany, The Netherlands and the United Kingdom in the conjunct letter addressed by the competent ministers of those countries to the presidency of the Union in April of 2013 is evidently perceivable. The main theme abruptly put on the political table was that limitations of the freedom of movement apply only to economically inactive citizens meeting the legal requirements set by Directive 2004/38/EC.
XVI Minderhoud 2015, at 15 of the mimeo. The reference is of course to the famous paradox/dilemma of Joseph Heller's 1961 novel *Catch-22*. Here, in order to avoid war service, a combatant can claim insanity, but such a claim, being the act of a rational person, would negate the effect of the claim and mean the combatant had to fight!
XVII Through Regulation No. 1247/92, that modified Regulation No. 1408/71 by introducing the new sub-system for the coordination of special non-contributory cash benefits. Cf. Giubboni 1997.
XVIII See case C-20/96, *Snares*; case C-297/96, *Partridge*; case C-90/97, *Swaddling*.
XIX Further, see the judgment delivered by the Court in the joined cases C-424/10 and C-425/10, *Ziolkowski and Szeja*.
XX Case C-67/14, *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and others*.
XXI For a review of the various hypothesis of reform see Verschueren 2015a, especially at par. 4.
XXII Cf. case C-213/05, *Geven*; case C-379/11, *Caves Krier*; case C-20/12, *Giersch*.
XXIII Verschueren 2015c, at par. 5.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Eurocrisis and the myths of European redistribution: illegitimate, unsustainable, inefficient?

by

Francesco Nicoli*

Perspectives on Federalism, Vol. 7, issue 3, 2015

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Abstract

Criticism of European solidarity relies on three cornerstone arguments with mythological features. First is the "Myth of the Beggar": it is believed that supranational solidarity is self-defeating, as it produces a moral-hazard scheme where endogenous incentives to reform (otherwise known as "market pressure") are artificially removed. Second stands the "Myth of the Efficient Markets": it is believed that solidarity, through its market-distortive effects, artificially allocates resources into less productive activities, thus decreasing the overall growth rate of the economy. Third is the "Myth of the Demos": it is believed that democracy- and thus redistribution- can endure only within a single Demos, and thus no solidarity can exist outside of a Demos. This paper aims to challenge the view that any scheme of solidarity is self-defeating, inefficient and illegitimate, developing a notion of "federative solidarity" providing a solution to the three "myths".

Key-words

Solidarity, Redistribution, moral-hazard, federation, Eurocrisis, European Union, trilemma, demos

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1. Redistribution and solidarity in the Eurocrisis

Since late 2010, the Euro Area is torn by an economic, financial, political and –most of all- existential crisis. The great divide between core and peripheral countries in the monetary union threatens the very existence of European integration as we know it; yet, despite the overreaching consensus among the majority of economists concerning, on the one hand, the policy overhaul needed in the peripheral countries, and on the other, the institutions needed at European level to fully address the crisis, the progresses have been painfully slow and associated with high social costs. A truly integrated fiscal and economic Union is deemed to permanently address the causes of the Eurocrisis; yet, its implantation is delayed because of political opposition to further integration. Solidarity and sovereignty are at stake. The reason is simple to understand, but challenging to address. As originally stated by Mundell (1960, 1961) and more recently, among many other scholars, by De Grauwe (2011; 2013) Enderlein (2012) and Pisani-Ferry, Vihriälä and Wolff (2013), a monetary union requires, implicitly or explicitly, a fiscal and economic union. In fact, this is known since the Werner Report (1970); since the Van Rumpuy "Four presidents' Report" (2012), the strengthening of the monetary union with an economic and fiscal pillar is formally a flagship policy of the EU , and has acquired a more detailed timeline in the "Five presidents' report" (2015).

More in detail, Merler and Pisani-Ferry (2012) show that, in order to permanently settle the Eurocrisis, a choice is to be made between a full-fledged banking union, a debt union, and a stabilization mandate for the ECB. However, the three options all imply, in fact, fiscal integration (Nicoli, 2015): a full-fledged banking union implies the construction of a credible guarantee on deposits, which, by definition, has fiscal implications because it ultimately relies on sovereign funding (Wolff and PisaniFerry, 2012); a fiscal union (either in the form of Eurobonds or as a form of transfer mechanisms among states) is by definition a form of fiscal union; and a properly stabilizing mandate of the ECB has redistributive implications both in "normal times", when member states pay back to the bondholders their rates (De Grauwe and Ji, 2013 A) and in crisis times, when eventually a member state defaults on its bonds held by the ECB (Sinn and Wollmershäuser, 2011). The fiscally non-neutral nature of monetary integration is also evident by the intra-EU payment

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system of the Eurozone, TARGET II, which regulates claims and liabilities of national systems vis à vis the remainder of the Eurosystem. While TARGET II balances are fiscally neutral as long as the Euro is in place for all the participating countries, they become justiciable claims if a country were to leave the Eurosystem; as a consequence, we can consider that the Euro has had fiscal implications since its inception, which have become apparent under the fist of the crisis. Fiscal integration, broadly speaking, is as much an implicit feature of the construction of the Eurozone as it is a requirement for its long term preservation. The actual form fiscal integration will acquire (a full-fledged banking union, a fiscal union, an "ECB-stabilized" union, or a combination of these features) is still unclear, but nevertheless fiscal and economic integration is by any account, in the making.

In the economy of this paper we thus define, as the operative condition for the Euro Area to be stabilized and thrive, the creation of a permanent system of transfers which disbursement is not to be subject, at each time, to unanimous approval. The creation of such permanent system does not imply that the transfers have to be, themselves, permanent, or that they shall be unconditional; but once the system is agreed upon and conditions are set, the factual disbursement of resources does no longer constitute a matter of political discretion among member states. Such evolution would constitute a "genetic change" for the EU, which so evolves from a regulatory polity (Majone, 1999) to a redistributive one (Majone, 2014). In fact, a fiscal union of any kind implies a degree of redistribution, which cannot be achieved without a pre-existing predisposition to *solidarity* among the participants. But the "old" understanding of *solidarity* in the European Union was referred to the idea of inter-national solidarity; the kind of solidarity required for a fiscal and economic union is, on the other hand, typical of communities or nation states.

Solidarity is a central feature of modern all European societies (the so-called "European Social Model"), and –in its most general definition- it can be intended as the transfers of resources to those in need without expecting a positive monetary return.[1] When these societies have convened together to establish a permanent, incremental process of integration (as in the case of the European Union) they have however decided to accompany the national vision of solidarity with a newly-minted notion of inter-national solidarity. International solidarity stems from the same conceptual definitions as national solidarity, but it is applied differently as it concerns different nations. While national solidarity is anchored in communitarian bonds, international solidarity has originated as a

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form of contractual relation, a juridical connection between state-subjects (Brukhost, 2005). During the crisis, nevertheless, calls for generic "solidarity" have multiplied. As it is defined by its promoters, the new "European" solidarity is neither national nor inter-national; it is instead best defined as supra-or post-national (Habermas, 2013).

Of course, this is no new trend: if we assume, along with Derpmann (2009), that social rights constitute a crystallized expression of solidarity, then —at least since Kant— there has been a tendency to develop a global theory of solidarity. Unfortunately, these efforts have reached three dead-ends: human-rights Cosmopolitanism, Redistributive Global Justice and Transnational Solidarity. The first approach(human rights cosmopolitanism), by far the most advanced and recognized application of global solidarity thinking, has succeeded to develop a legal doctrine of human rights but failed in approving global social rights with redistributive dimension. The second approach -Redistributive Global Justice- remains highly theoretical and has never been practically implemented. The third approach "transnational solidarity" (as suggested by Gould, 2007) in practice boils down to safety nets in case of natural disasters or other temporary critical junctures, thus falling into the notion of inter-national solidarity despite the fancy new label.

Against this background, this paper argues that for supranational solidarity to exist, it must in fact be constituted by a linear combination of national and international solidarity: it cannot be simply intended as national solidarity applied internationally. Indeed, simply applying the national concept of solidarity among different nations generates a set of problems which can be (theoretically) neglected at national level. The particular nature of the Eurocrisis and of the ensuing European solidarity does produce –within the public debate- the ideal conditions for the emergence of old –yet often discussed- issues regarding solidarity, in particular the Moral Hazard and the optimal resources allocation. These issues used to be "hidden", or largely neglected, when discussing the national and inter-national versions of solidarity, but become apparent again when discussing European solidarity.

To understand how European solidarity differs from national and international solidarity altogether and why "new" issues arise, it is first required to clarify the distinctions between these two classical concepts. When comparing fiscal integration schemes in the frame of the Eurocrisis, four conditions are to be met; the scheme must be (1) *effective* in solving the crisis; (2) *legitimate* in front of the constituencies; (3) *sustainable* to avoid free-riders and moral hazard issues; and (4) *efficient* in allocating resources. The paper is thus

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organized as follows: section 2 deals with clarifying the concepts of national and inter-national in respect to each other. Section 3 deals with the "myth of the demos", which constitutes the "shroud" behind which issues like moral hazard are hidden in the national context.[II] Section 4 deals with "the myth of the beggar", discussing the validity of Moral Hazard in supranational solidarity; Section 5 deals with the "myth of the efficient markets". The conclusions (section 5) collect the results of the previous sections and set the conditions required for European solidarity to be sustainable, effective and legitimate.

2. National and intern-national solidarity in the European legal framework

Solidarity has played a fundamental role in discourse framing since the beginning of the European crisis. In particular, it has been used both as a means to justify – in front of national parliaments and up to a certain extent- new institutions and policies (Closa and Maatsch, 2014) and as a catchword used by fringe groups on the extremes of the political spectrum to oppose ruling parties during elections. It is worth noting that, in the latter case, the frame has acquired both a negative and a positive meaning, depending on whether the ruling elites were accused of having shown "too little" or "too much" solidarity towards southern European countries most hit by the crisis. Kontochristou and Mascha (2014) provide a definition of solidarity based on Durkheim (1893), for whom solidarity is intended as a society's criterion for determining a social group's boundaries.

Modern national solidarity can be understood as having roots in both pillars of Durkheim's solidarity typology: it is "mechanic" (or national) because it applies within the limits of a national community and weakens when extended further; and it is "organic" because it is mediated by state institutions (Gould, 2007). Applying Durkheim's understanding of solidarity is however problematic when considering the nature of solidarity relations within the European polity. A strict adherence to the national-organic view of solidarity (and distributive democracy as a related concept) will eventually collapse into the *no demos* thesis discussed in detail in the next section of this paper. We define national solidarity as a non-conditional solidarity among members of the same national group; typical examples of national solidarity are represented by the building blocks of a national welfare system with redistributive features. Typically, national solidarity is

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(generally) individual, automatic and unconditional, meaning it is often activated when an individual reaches a certain disadvantaged status vis àvis the other members of the national community, and will maintain the benefits of solidarity as long as it remains in the disadvantaged status. Within national federal polities the individualistic solidarity is often accompanied by a community-level system, where the region/state, and not the individual, is the target subject; in this case we also observe a relaxation of the non-conditionality features of national solidarity, as it happened in the federal republic of Germany since the introduction of the two "federation reforms" in 2005 and 2009.

In contrast, the European legal and philosophical tradition is characterized by a major distinction between national and inter-national solidarity. While the former constitutes a pre-requisite for democracy (Weiler, 1996), the latter is an ad-hoc mechanism to deal with limited problems and shall arise in special occasions. An inter-national solidarity clause is enshrined in art.122 of the Treaty on the Functioning of the European Union and is to be activated in case of natural disasters and disruptive events beyond a member state responsibility and control. As such, anti-crisis measures are not directly concerned by the solidarity notion as developed within the Treaties: the amendment of article 136 TFEU carried out in 2011 (allowing for the creation of a permanent financial aid mechanism in the Euro Area) has no references to solidarity as a driver for its activation, but rather its creation is justified in term of ensuring the endurance and the stability of the Eurozone.

The exceptionality of inter-national solidarity (as opposed to national solidarity) is also evident from the recent Bundesverfassungsgericht judgement on the ESM (Bundesverfassungsgericht, 2012): para. 214 of the decision specifies that, even when large disbursements are required to preserve stability of the Eurozone under ESM or similar mechanisms, they constitute a form of inter-national solidarity and thus they must be approved, case by case, by the Bundestag. Inter-national solidarity is thus defined, in contrast with intra-national solidarity schemes, for its absence of automatism. National Parliaments maintain total discretion on the disbursements enjoying de facto a veto-power. Clearly, this kind of approach is of little help when dealing both with urgent crisis management decisions (which require quick decision making and "anchoring" of financial markets' expectations through appropriate communication) and with the common fiscal policies required to stabilize the Eurozone over the normal economic cycles. Moreover, this conceptual distinction is particularly important in light of the "moral hazard" paradox

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discussed in the fourth section of this paper, as well as for the *no demos* thesis discussed in the third. As we will show, the two are intimately linked, but the former does not constitute a problem in neither international nor national solidarity, while it arises in supranational schemes.

3. Solidarity and national identity: *"The Myth of the Demos"* and the boundaries of redistribution

3.1. The myth of the demos in the European context

One of the most diffused arguments against the creation of a European fiscal and economic union (which would permanently solve the crisis) is that such a solution entails redistribution of resources outside of the nation. The relationship between redistribution and collective identities has noble fathers in political philosophy (Nicoli, 2015:8): in the nineteenth century, it appeared as a corollary in David Hume's Treatise, whereby the "moral feelings" of a human being for the others increase in strength with proximity (Cohon, 2001; 2010, para. 7). It follows that, accordingly with Hume's approach, solidarity manifests itself as a function of proximity. In the German scholarship, this idea was originally developed by Tönnies' gemeinschaft concept, indicating the predominance of societies built on identities and shared beliefs rather than upon contractualism. In the Anglo-Saxon scholarship the debate concerning solidarity, identity and the limits of redistribution has been particularly rich in North America, being marked by contributions like Rawls' "A theory of Justice" (1971), MacIntyre's "After Virtue" (1981) and Walzer's "Spheres of Justice" (1983). The debate was then transferred back on the shores of the Old Continent thanks to the controversial 1993 Maastricht decision on the Bundesverfassungsgericht, and the overall argument –'there cannot be solidarity, and thus democracy, outside of a single D*emos'*- started to be known as the "*no-demos thesis"*. Among its original proponents were Bryde (1994), Kielmansegg (1994; 1996), and, in a lesser extent, Grimm (1995) and Zürn (2000).

The reasoning proceeds as follows: identity is required for solidarity/redistribution, which is required for democracy (Weiler, 1996; 2000). In the European context, the *no demos thesis* is particularly important to understand the opposition of several scholars (along with many political parties such as the French Front National or the Italian Lega Nord) to

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the creation of a full-fledged European Democracy: 'Majoritarian decision-making is hardly achievable beyond the national level since it requires some form of collective identity that includes trust and solidarity, (Zürn 2000:195). Although only few among the proponents of the thesis, like Bryde (1994) venture far enough to claim that the conditions for a *demos* to exist can be found only within coherent ethnical, linguistic and cultural communities, the majority of the scholars sharing the *no-demos thesis* acknowledge that these elements are indeed essential for creating a sentiment of solidarity among the *demos* members, thus legitimizing redistribution through majority voting.

It is worth noting that the *no-demos* thesis produces tangible effects in our institutions regardless whether we agree with the theoretical foundations on which the theoretical argument is built upon. The operational consequence of the Myth of the Demos is that redistributive policies must be agreed *democratically,* i.e. by majority voting: this is a substantial difference from the classical international doctrine, where redistributive decisions are taken *by consensus,* i.e. by unanimous approval of each of the participants. This distinction is essential, as it enables policies that can address the Eurocrisis effectively. As outlined above, however, the Bundesverfassungsgericht (2012) has clearly rejected the idea that redistributive policies can happen in the EU trough majority voting (of the states); for each transfer, the ad-hoc approval from the Bundestag is needed, and by mirroring, the other Courts retain the same rights for each national Parliament, thus creating a system where the *unanimous* consensus of the involved actors is needed.[III]

3.2. The no-demos thesis, democracy and redistribution

Clearly the "Myth of the Demos" appears unproblematic only when we look at national-organic solidarity. The *nation,* at least as a theoretical construct, fulfills the criteria for solidarity to exist, and its intensity is reflected into States' organization and Constitutions; federal states tend to have lower (unconditional) transfer schemes, which are the expression of national solidarity as classically intended. It remains to be seen, however, to what extent this constitutes, on the one hand, a political-philosophy and constitutional fiction and, on the other hand, to what extent this is a true feature of our societies. Also, the ultimate consequences of a strict adherence to the myth of the *demos* are yet to be explored. In particular, many questions remain open: several existing nation states in Europe suffer from the threat of internal separatism; are these legitimate claims just in

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name of any historical *demos?* Is autonomy and self-government a right belonging only to historically-defined *demoi* or any group of people is endowed with the right of defining itself as a *demos* thus becoming eligible to sovereignty and to the power of calling themselves out of any form of solidarity agreement? To the roots, the origins of the myth of the *demos* boil down to understand the limits of self-determination of people, which- at least in international law- is severely limited.[IV]

On the other hand, the *no demos thesis* does not constitute an existential threat for schemes of inter-national solidarity, which are by definition non-automatic and ad hoc mechanisms whose deployment is completely subject to the willingness of the contributors to participate. There is no *demos* issue in inter-national solidarity, as there is no *democratic* (i.e., majoritarian) redistributive policy. In the inter-national arena, acts of solidarity are an expression of sovereignty of the Parliament, whereby national solidarity is an expression of the sovereignty of the *demos* standing above its citizens. As long as we maintain this approach of understanding identity as a precondition of transfer schemes, however, the issue of the *demos* becomes unsolvable in the European context. For the Monetary Union to survive we need indeed a form of fiscal union, which cannot be conditional to a constantly reiterated and unanimous approval of all participating parliaments; the Monetary Union requires a *nation-like* kind of solidarity, among citizens and not among states; but such kind of solidarity is impossible outside of the *demos* if we take the *demos thesis* as it stands.

3.3. The demos thesis and the crisis

Clearly, the *demos* shines in its full albedo when discussing the need for legitimacy for fiscal integration in Europe. In section I we pointed out that fiscal integration is unavoidable. However, on the basis of the *demos thesis* discussed hereby, the only possible form of legitimization of fiscal policies at EU level would be –adopting Scharpf's (1970) typology- through output legitimacy (i.e. through the benefits provided by the common policies) rather than through input legitimacy (i.e. through the election of the decision makers). Majority-voting democracy may be the most notable victim of the *demos* thesis, which pushes Europe in a clear-cut trilemma (Nicoli, 2015, figure 1). Differences with apparently similar trilemmas proposed by Rodrik (2011) and Crum (2013) are discussed in the endnote. [V]

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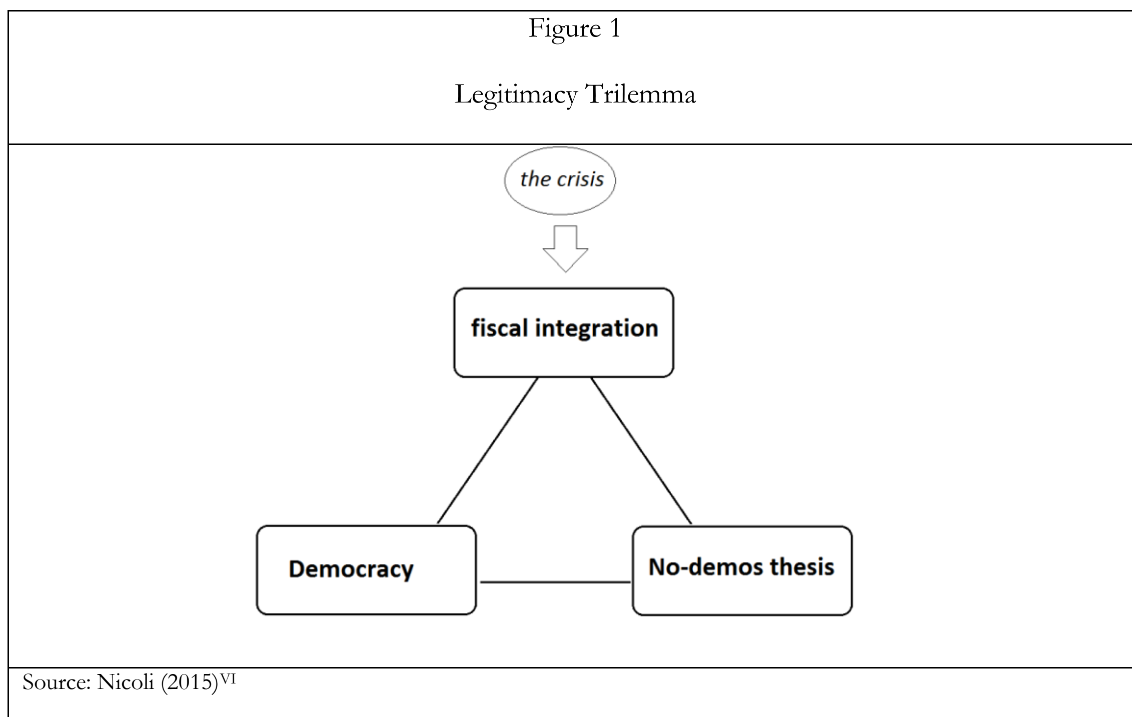
According to the legitimacy trilemma, if we take the *demos thesis* as a given, then we either have to choose whether to pursue fiscal integration in a non-democratic framework, or to make a step back and give up monetary integration. In the former case, the respect of national sovereignty is, of course, largely fictional: it is exactly in the attempt to formally respect the principle that the EU has not obtained true fiscal powers and has delegated its crisis-management policies to unelected non-majoritarian institutions such as the ESM or the IMF; it is in accordance with the formal respect of national sovereignty that the new fiscal treaty (the TSCG) had to be adopted in a purely inter-governmental framework.

Figure 1

Legitimacy Trilemma



Source: Nicoli (2015)[VI]

In the instant we respect national sovereignty on common fiscal matters, sovereignty itself has to disappear the instant later through "constitutionalization" of the new common policies in order to maintain their credibility and effectiveness. Since Majone (1999), this approach has been known as "insulation"- a strategy to increase effectiveness and credibility of agencies and regulatory policies by minimizing political influence. As Majone (2014) acknowledges, however, fiscal policies are qualitatively different from regulatory policies; insulation of the latter may strengthen their output legitimacy by making them more efficient, but insulation of the former will undermine fundamental democratic legitimacy.

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One of the reasons behind this paradox is that the combination of fiscal integration and the *demos* thesis have to be output-legitimized by necessity which means that results should be positive in all countries in all periods. Provided that this is unlikely to happen (preferences concerning favorite outcomes can be time -and space- inconsistent), the only way out developed by classical sovereignty theory is the constitutionalization of the agreement through an international treaty, which is an expression of national sovereignty as much as a bond on the change of national preferences. The fiction of national sovereignty, and its underlying *demos* thesis, is thus maintained at the expenses of factual democracy, reduced to a mere confirmation, at national level, of decisions adopted elsewhere. On the contrary, a democratic, input-legitimized fiscal union would maintain democracy and solve the Eurocrisis, at the cost of overcoming national identities. Are European democracy (and Europe altogether) therefore condemned to fall under its identity divisions? While at a first glance it could seem so, a more detailed reading of the *demos thesis,* in fact, provides hints of the contrary. The *demos thesis* is constituted by three distinct bits of argumentation. First comes the causal relation between the identity of the *demos*, solidarity and democracy: democracy implies redistribution which requires solidarity which requires a shared identity within the *demos*. Second comes a positive statement: Europeans are not a *demos*. Last we find, in some authors, a normative statement: Europeans shall not become a *demos* (Weiler, 2004). Weiler's reasoning is suggestive of one way to paradoxically solve the problem: the foundative *telos* of Europe, its shared identity, is precisely the respect of the differences, i.e. a *constitutional tolerance;* by respecting the differences between its constitutive *demoi,* Europe creates its common identity and constitutional order. Weiler's approach to the dilemma is echoed in Nicolaidis (2013) *demoi-cracy* approach to the EU. In Nicolaidis' vision, the different *demoi* maintain their precise nature in respect to the others, but they are bound to each-other by a mutual duty of solidarity and collaboration. *Demoi* are not fully separate, nor merged in one single entity; redistribution is to happen, but in a way that is radically different from redistribution *within* nations, and *among* nations. While Nicolaidis' *demoi-cracy* and Weiler's Constitutional Tolerance are interesting and challenging principles, the latter fails to provide a practical answer to the urgent need of fiscal integration and economic coordination Europe is today facing, which may require to exert taxation and economic policy across different *demoi* even if a majority of voters *within* one of the constituencies opposes it. Similarly, *demoicracy* is all but clear in setting the boundaries of shared economic

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and fiscal policy-making. Both, moreover, don't address the issue of a common European identity, but suggest that integration may be preserved (let alone strengthened) without it.

3.4. Federative solidarity

A different approach to overcome the *no-demos thesis* is instead possible. The foundative logics of the argument is that the undeniable link between identity and solidarity is that the former is a condition for the latter. It is reasonable, however, to assume that identity and solidarity are co-determined: we feel part of a community *because* there is a practice of solidarity among its members. Failing to achieve mutual solidarity destroys trust within communities, ultimately dismantling identity. Such inversion of the reasoning echoes a long-standing debate in constitutional law, the egg-and-chicken discussion concerning whether it is the *demos* which gives itself a Constitution, or the individuals that, through the Constitution, establish themselves into a *demos*. If the two variables (identity and solidarity) are co-determined, however, none come first but both are jointly and simultaneously established. When two variables are co-determined, an interesting situation (at least in game-theoretical perspectives) emerges: both "bad" equilibria and "good" equilibria are in fact possible, as each of the agents react to the strategic choice of the others. In a "bad" and "good" equilibrium game, i.e. in each situation when two variables are co-determined, institutions and rules are key to push agents towards the "good" equilibrium. An appropriate set of rules about solidarity on the one hand, and fiscal responsibility on the other, may create a positive dynamics where the *no-demos* thesis is overcome by the mutual trust embedded in a joint effort of responsibility and solidarity. We are saying in fact: there is no European *demos* yet, but if we create appropriate institutions which build mutual trust through responsibility *and* solidarity, we will lay the foundations for a European identity to emerge. We Europeans we cannot achieve, just yet, a national *federal* solidarity; but we can endow ourselves with a *federative solidarity* which eventually will create a strong feeling of common belonging. By repeating over time the trust-by-solidarity game, Europeans will gain their own identity. The reciprocal generosity-vs-responsibility should provide sufficient output legitimization in the early stages of the process, while building a shared identity which could work as a basis for input legitimization farther on the way. Moreover, as the next sections will show, Federative solidarity –as a co-determination of solidarity and mutual responsibility- constitutes the precondition for a stable solution to the Eurocrisis

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which cannot be achieved under the national-organic and international paradigms of solidarity.

4. Redistribution, sustainability and moral hazard: *"the myth of the beggar"*

4.1. The Samaritarian dilemma

The second leading argument against European-wide transfer systems is the so-called "moral hazard", also known as the 'Samaritarian Dilemma' (Buchanan, 1975). In general words, a situation of moral hazard stems from information asymmetry: if an agent *a* pays, unconditionally, a sum to a recipient *b* at any moment agent *b* is in a status of need, agent *b* will have little or none incentive (if the sum is large enough) to make an effort to solve its own negative situation or even attempt to prevent running in the situation of need. This rough description of moral hazard can be labeled as 'Samaritarian Dilemma' or, in the narrative of this paper, "the *myth of the beggar*". [VII] The idea that the core countries should not provide financial assistance to peripheral countries because, if this were to happen, market pressure would disappear and peripheral countries would have little incentive to implement reforms, has been a recurrent theme of the political debate since before the inception of the monetary union (see, for instance, De Grauwe, 2003). This debate has intensified since the beginning of the crisis, as testified by the words of the President of the Bundesbank Mr. Weidmann in relation to the introduction of Eurobonds:

> 'Croire que les eurobonds résoudront la crise actuelle est une illusion. (…) On ne confie pas sa carte de crédit à quelqu'un si on n'a pas la possibilité de contrôler ses dépenses.'
> (Weidmann, interview with Le Monde, May 25th, 2012)

More in detail, two versions of the moral hazard can be individuated: the mathematical logics of moral hazard can be qualified either in the classical ex ante "insurance" game, or as an ex post "bail-out" game. In the insurance game, an agent covered ex-ante by an insurance against the potential negative consequences of a risky but profitable behavior has an incentive to undertake the risks as the expected profits are high and the losses are

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socialised (Dowd, 1982). Moral hazard explanations have flourished both during the US financial crisis (see for instance Dowd, 2009) and the European crisis (Alt, Lassen and Wehner, 2012). In macroeconomic terms, the existence of a centralized automatic insurance mechanism against shocks implies that –if no conditionality is attached, as is often the case within nation states- temporary shocks may become permanent because the presence of automatic stabilisers removes the incentive for adjustment (De Grauwe, 2003: 10). The same applies to the ex-post version, in which an agent receives a certain amount of resources for undertaking a given project (for example a reform or a stabilization programme) but once it has received the sum it finds it would be better-off by not investing the resources in the project (Stiglitz and Basu, 2012).

4.2. The myth of the beggar and the Eurocrisis

Clearly, moral hazard is one of the main concerns when looking at redistributive measures with solidaristic features. However, national systems tend to overlook the issue: within one single national polity, moral hazard often turns out to be an accepted risk. As noted by Habermas (2013), national-organic solidarity emerged as reaction to the modern "class struggle" on the one hand, and national differentiation on the other. In fact national-organic solidarity schemes are in general "permanent" (meaning that they are usually not established to deal with exceptional, short duration issues, but to fulfill a redistributive and equalizing mission) and they are "automatic", meaning that they often have no active conditionality attached on the side of the recipients. Thus, they provide the ideal conditions for moral hazard without it constituting a problem. The costs of solidarity associated with moral hazard are accepted on behalf of the *demos,* for which -in theory- the community grants its support to the disadvantaged individuals unconditionally.[VIII] In contrast, inter-national solidarity schemes are set to deal with specific situations through ad-hoc measures, and are often attached to strict conditionality. There is no socialization of the costs on behalf of the common belonging to the *demos,* and thus –as suggested by De Grauwe (2003), conditionality must be introduced. The framework for European financial assistance, as created since 2011, fits rather well in the classical paradigm for inter-national solidarity, despite the lack of a formal treaty basis; the reform of the TSCG introduced in 2011 and finally approved in 2013 explicitly refers to "strict conditionality" (art. 136), and the practice of bail-out programmes for Cyprus, Greece, Ireland, Spain and Greece have all

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been anchored into memoranda of understanding inspired by long-standing IMF practice. When the discussion moves on solidarity as a mean to address (and, in economic terms, stabilize) the Eurocrisis, however, it is clear that inter-national solidarity schemes would not fulfill their task: as pointed out by the Bundesverfassungsgericht in 2012 any disbursement shall not be permanent and approved, case by case, by the Bundestag; similar requirements are expected to be raised by other constitutional Courts across the Euro Area.

Provided that confidence is essential for any fiscal stabilization effort (Draghi, 2015 B, among others), any stabilization instrument which capacity to deliver is subject to the will of each parliamentary majority in each parliament at each time the mechanism is activated, is of little use. In other words, classical inter-national solidarity schemes are deemed not to work, or being largely insufficient, as stabilization mechanisms in a monetary union. Other proposed stabilization instruments, like the creation of Eurobonds to mutualize the debt stock, the emission of Eurobills to jointly finance expenditure, the enlargement of the mandate of the ECB to directly intervene on primary markets, and the creation of a common unemployment insurance all have features borrowed from national frameworks, meaning that they are permanent and unconditional; thus creating moral hazard in a multi-national environment. This kind of solution is unpractical at EU level, for the shared identity among Euro Area countries is not enough developed; in the words of the ECB president, Mr. Draghi:

> 'In other political unions, cohesion is maintained through a strong common identity, but often also through permanent fiscal transfers between richer and poorer regions that even out incomes *ex post*. In the euro area, such one-way transfers between countries are not foreseen' (Draghi 2015a).

For a solution to address the flaws of both previous schemes, it should be non-discretional, in the sense that it would not need a case-by-case approval typical of inter-national schemes; but –being moral hazard a real problem outside polities with a strong shared identity- it would be conditional, meaning that active, corrective behavior will be required on the side of the recipients. Conditionality, on the one hand, and non-discretionality, on the other, would mark a departure from both national and inter-national solidarity approaches. It would be equal to say: a set of rules for joint solidarity is set so that in the

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extent you fulfill the duties the rules assign to you, you will enjoy solidarity without political discretion. Non-discretionality and conditionality seem to provide practical meaning to the idea of *federative solidarity,* which aims to build identity by co-determining responsibility and solidarity.

4.3. Federative solidarity and the Samaritarian dilemma

We believe that *federative solidarity* could be naturally implemented in the existing governance structure of the EU –built around the European Semester of Policy Coordination- in particular by introducing a financing vehicle for the implementation of country-specific recommendations. The disbursements would cover the priorities identified by the European Commission and the European Parliament each year and would target member states that -having received a recommendation concerning the given priority- succeed in implementing it into their national framework. A proposal following these lines was advanced by the communication of the European Commission of 20th March 2013, on the creation of a "Convergence and Competitiveness Instrument", which however was not taken up by member states as for today. The scheme would be automatic but would deal with moral hazard by ex-post refunding after project completion and evaluation; thus constituting a divergence both from national and international schemes of solidarity. A proposal with an even more pronounced supranational nature is the creation of a European unemployment benefit scheme (EUBS) which would directly target individuals. Depending on the design of the scheme, the monetary disbursements may be automatic but would also require (as it happens already within certain member states) an active stance of the recipient in job-seeking activities. Finally, a debt-mutualisation instrument such some forms of Eurobonds may be constructed with built-in supranational features.

At this regard a common guarantee could be created for bills emitted by member-states for the share of their expenditure which falls into a fully-coordinated process where policy contents and spending targets are the result of a shared, iterative decisional mechanism (Nicoli, 2013). By adapting the European Semester it is possible to create a true system of economic governance for which, by October each year, member states achieve a set of fully coordinated budgets and expenditure ceilings; bills emitted accordingly would enjoy seniority status and be fully guaranteed by a Union institution (like the ESM); bills emitted outside of the coordination framework, on the other hand, would be junior in respect to

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their counterpart and not being shielded by the Union institutions. The combination of these two forms of bills echoes the "blue bonds, red bonds" proposal advanced by Weizsäcker and Delpla (2010; 2011) although the scheme would concern only newly emitted debt and the attribution mechanism of the red/blue status would follow the abovementioned rules. In such scheme, the moral hazard would be dealt with by linking the solidarity implicitly in the mutualisation scheme to successful coordination, removing the risk of free-riding, without endangering the automaticity of the system (Nicoli, 2013).

In conclusion, a properly designed *federative solidarity scheme* would strongly mitigate the European Samaritarian Dilemma by creating a conditional but non-discretional transfers system. While it would constitute a real problem if supranational solidarity were to be a simple transposition of national schemes into the supranational arena without the (fictional) protection of *the demos,* by borrowing some features by inter-national schemes, a properly designed federative solidarity mechanism could create, over time, a degree of protection similar to existing national schemes without the need of pre-existing national identity, which is –up to a certain extent— substituted by the active behavior of the recipient. Moreover, by co-determining increasing degrees of mutual responsibility and generosity it would build up a common European identity which could allow for stronger solidarity in the future without undermining its sustainability today.

5. European Solidarity and optimal allocation of resources: *"the myth of the efficient markets"*

A third criticism to the creation of solidarity mechanisms at the Euro Area level argues that the real market conditions are being distorted by artificially providing financing streams to states and institutions. This distortive effect is supposed to work through three main channels: (a) by distorting efficient allocation of resources (for example, by investing in underproductive sectors or countries); (b) by distorting competition (for example by subsidizing troubled banks or companies which would otherwise go out of the market); and (c) by providing wrong incentives to governments (for example by artificially decreasing market financing rates for public bonds). These effects are deemed to concern both risk-sharing solidarity schemes, and transfer-subsidies from the center to the periphery.

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On the one hand, it is argued that -when a risk-sharing mechanism is in place- risk cannot be adequately internalized by financial institutions, leading to the creation of bubbles that would not exist otherwise. In other words, solidarity (and other forms of risk-sharing mechanisms) would distort the functioning of otherwise efficient markets, weakening the capacity of the financial system to respond to signals and adapt portfolios before the crisis actually happens, *de facto* preventing it. The underlying theory is known as "efficient market hypothesis" developed by economist Eugene Fama (Fama, 1965): according to the hypothesis, financial markets price-in all available and relevant information, so in a world with perfect information financial crises should never happen. By distorting the degree of information provided to the markets through risk-sharing mechanisms, the capacity of the markets of anticipating, and thus prevent, a financial crisis is greatly reduced. It is worth noting that the efficient market hypothesis does not claim that markets are actually perfectly efficient, but that they would tend to be so if all relevant information were to be disclosed. A recurring example of this dynamics (although only loosely linked with solidarity mechanisms) concerns the dynamics of the yields on the 10-years public bonds in the "good" EMU years, from 2001 to 2007 (figure 2). Among others, Beirne and Fratzscher (2013) suggest that the convergence of sovereign yields occurred in the period was the result of an implicit guarantee on public bonds within the Euro Area which led to a mispricing of sovereign risk. In other words, financial agents deemed the prohibition of monetary financing included in article 123 TFEU, and the prohibition of debt mutualisation in article 125 TFEU, not credible; they expected that, if a country of the monetary union were to fall into a financial crisis, institutions would have played their part; hence the collapse of borrowing costs across peripheral countries down to the German level from 2001. The implicit guarantee expected by the markets led them to behave as if a Greek public bond were as risky as a German one, notably until the outbreak of the crisis when it became clear that no implicit guarantee was in place.

De Grauwe and Ji (2013 a) find evidence of the bubble-like behavior of public bonds before the crisis and explain the burst as a sudden realization, by financial agents, that a liquidity crisis can in fact happen, thus transforming the liquidity crisis into a solvency crisis. On the other hand, it can be argued that subsidies and transfers may also have distortive effects: by artificially providing a stream of resources, subsidies and transfers allow the peripheral country to enjoy –for the same level of services- a lower tax rate; this

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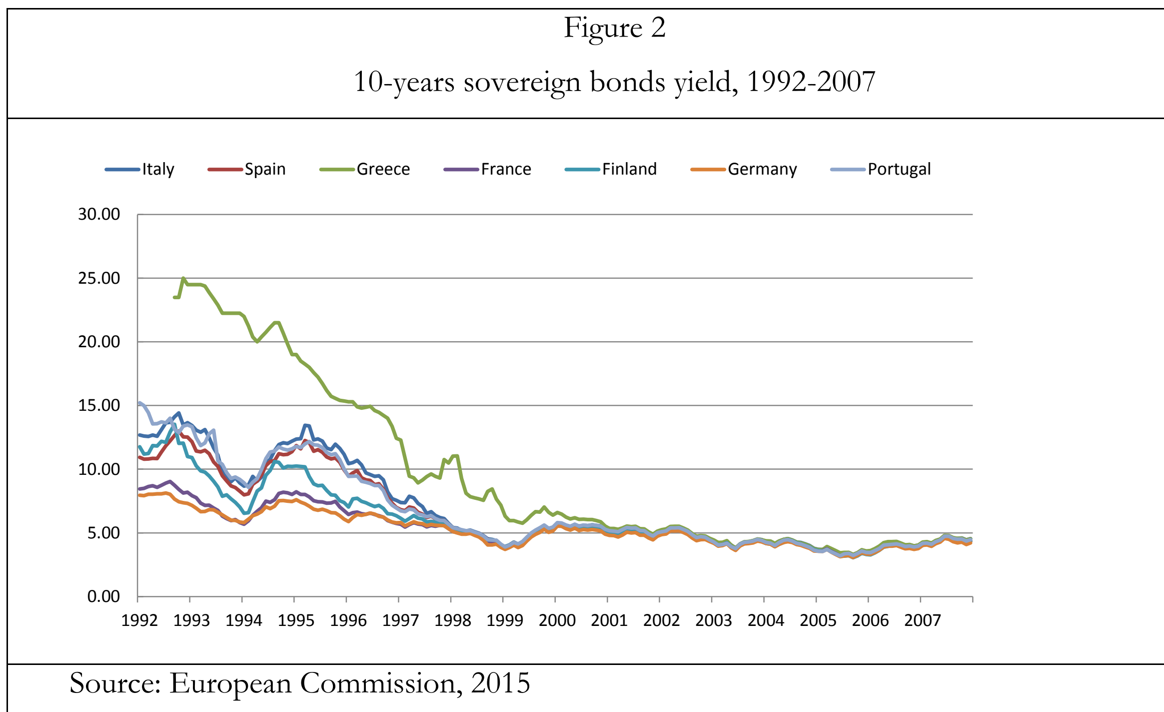
in turn produces a distortion in the allocation of investment, as returns are deemed to be higher in a subsidized sector than elsewhere. It must be noted that, although article 107 of TFEU bans any form of market-distorting subsidy, such a result would nevertheless stem from a transfers system, because the recipient countries would be allowed to reduce taxation. In this line of reasoning, capitals that would have been invested in more productive regions and sectors are instead invested in the less productive, subsidized regions and sectors because equalizing transfers make up for the difference. If the transfers were not to be in place, the investment would have occurred in the more productive economy, producing an overall higher growth rate.

At national level the market-distortive characteristics of both forms of solidarity mechanisms are either accepted on behalf of the shared identity of the *demos*, or off-set by other institutions. In the case of risk-sharing mechanisms, for instance, the main cost is associated with a sudden realization of financial actors of the weakness of the system; but nation states are usually able to cope with average-sized financial shocks through monetary policy and banking unions.

Figure 2

10-years sovereign bonds yield, 1992-2007



Source: European Commission, 2015

In the case of transfers and other forms of regional subsidies, the distortion of competition and the sub-optimal allocation of resources is often not dealt with; this in turn

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does indeed produce distortion and -through the previously-discussed moral hazard issues- the iteration of the problems that caused the situation of need at the origins. This, however, is accepted on behalf of the nation: the distortive effects of subsidies are a cost that polities are willing to pay to ensure that the less advantaged of its members receive what they need.

On the international stage, the market-distortive effects of solidarity measures may be limited. Although there is a wide literature on the issue of the effects of international aid (cf., among many others: Economides, Kalyvitis and Philippopoulos, 2008; Peterman, 2013 for tied-aid practices) it mainly refers to the distortion happening *within* the recipient economy, not between the developed and developing countries. This is due, in particular, to two reasons: on the one hand, international solidarity measures between developed countries tend to be ad hoc, temporary, and conditional; thus, the distortive effect, when existing, is limited in time. On the other hand, international solidarity measures between countries with very large development gaps have a longer timeframe; however, the development gap is often so wide that the two countries would anyway not be in competition in the capital markets for resources allocation.[IX] Moreover, international development aid can often be qualified as tied aid (Peterman, 2013) so the donor country makes up in additional demand for domestic production what it loses in potential investment. In general, if we consider the two features (ad-hoc, conditionality) of inter-national solidarity, we can safely conclude that optimal resources allocation does not constitute a big issue as long as conditionality is set to resolve the ad-hoc situation that generated the need for support in the first place; in other words, if conditionality strengthens market conditions, investment in the country would no longer be sub-optimal. Conditionality is key to ensure that any ad-hoc funding does not translate into a permanent stream of public resources, as it happens in national, non-conditional systems. However, the particular nature of inter-national solidarity schemes renders this typology of agreements inefficient to deal with the problems faced by the Euro Area, for which a permanent solution is needed.

The question is, thus, whether a federative solidarity scheme can address the Euro Area issues without suffering from the flaws which characterize national and inter-national systems when dealing with optimal resources allocation. Can the Eurozone be saved without producing a distorting effect on markets? The Eurocrisis case is a particularly

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powerful example: in fact, the supporters of the efficient markets hypothesis implicitly argue that the system would be in general better off if resources were invested where they are more productive instead of being used to ensure solvability of peripheral countries. However, as De Grauwe (1998) already noticed, the issue was not that resources where flowing into less productive markets, but that they were flowing in markets where the high returns were associated with non-productive investment (like housing) fuelling a housing bubble without strengthening a country's productivity, especially in the Spanish case. Moreover, a narrow interpretation of the hypothesis leads to assume that the mistake was in considering a non-existing protection as real; if such a protection scheme were to exist, then the markets' choice would be efficient. The inefficiency, strictly speaking, was due to financial markets acting like a solidarity mechanism was in place, when actually none was. This problem can be solved in either way: by pushing the markets into realizing there is no solidarity mechanism in place (as they did) and thus restructuring their portfolios, or providing the missing solidarity mechanism. The landmark speech by ECB President Mr. Draghi in Summer 2012 clearly went in the latter direction, as well as the introduction of the OMT programme in late 2012, and of the Quantitative Easing in early 2015. Thus, the idea that solidarity distorted the markets before the crisis is simply wrong: the distortion was generated by an assumption, on the financial agents' side, about the implicit existence of a solidarity mechanism even when, in fact, the Treaties prohibited it.

The second concern related to the efficient markets' thesis is that investing resources into solidarity schemes will both 1) detour the same resources from more productive investments and 2) distort competition. However, when discussing the moral hazard issue, we found out that for moral hazard to be properly addressed, a degree of conditionality is needed. Moreover, we can also consider that if a solidarity mechanism were used to strengthen productivity and promote pro-market reforms, then it would not be considered as decreasing the efficiency of the market but instead strengthening it. In other words, to achieve an effective and non-distortive solidarity mechanism, the contents of conditionality should be linked to productivity-strengthening policies, so that not only the incentive for the recipients to rely on solidarity transfers tends to be removed over time, but that it is comparatively efficient to use resources to achieve this goal.

In sum, if we consider a situation in where 1) a solidarity scheme is in place effectively removing risk from distressed countries, 2) this solidarity is conditional to governmental

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(or individual) action, and 3) the contents of the conditional action improve productivity and/or market efficiency, then the three versions of the efficient markets' hypothesis opposition against EU-wide solidarity would be dealt with. It would actually be inefficient, for financial markets, *not* to invest in the distressed countries if pro-market, conditional solidarity is in place. In a normal inter-national scheme this would not be achievable, because the size and nature of fiscal integration needed at the Euro Area is out of reach of politically-brokered ad hoc transfers; in a national situation, the market distortion produced by unconditional, permanent solidarity schemes is ignored and its costs accepted on behalf of national unity. At Euro Area level, where automatic transfers are needed, productivity-improving conditionality attached to the transfers would produce efficient outcomes without creating under-productive market distortions. Market-oriented federative solidarity would therefore produce results putting the whole economy better-off of both situations where there is no solidarity in place, and situations where national-organic, non-conditional forms of solidarity exist.

6. Beyond national-international solidarity dilemma: federative solidarity as a pathway towards a common European identity

Solidarity is a necessity for contemporary Europe. Not only is it required to permanently stabilize the Eurozone, but it is a core element of both the European treaties and all national Constitutions. Unfortunately, the dichotomy between the "inter-national" solidarity of the Treaties and the "national-organic" solidarity of the Constitutions prevents a stable solution of the crisis. If Europe were to continue with this classical understanding of solidarity, then as long as we maintain that Europeans are *not* a *demos* and that such a form of solidarity is impossible outside of *demoi,* we would find that the monetary union cannot be saved; national-organic solidarity cannot be deployed outside the *demos,* and inter-national solidarity is ineffective. A simple extension of national solidarity to supranational would fail to address all three 'Myths". While it would address the Euro Area's economic problems, a national-like scheme between different *demoi* will be unable to solve moral hazard and efficiency issues (because of its automaticity and non-conditionality) without providing the constitutional and philosophical "shroud" of the common *demos.* In other words, national-like solidarity would be politically unsustainable

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because it does not provide policies to address moral hazard but there is no justification for accepting the ensuing costs. It would be rejected by the people (who would be unwilling to "pay" for individuals they feel they share little with) and repelled by Constitutional Courts, because its automaticity would severely violate the unanimity needed for redistributive policies outside of the *demos* as set by the Bundesverfassungsgericht (2012). For national-like solidarity schemes to be applied efficiently, legitimately, and sustainably at European level, a truly European *demos* is to be constructed; a *demos* which is yet to appear, as underlined, among many others, by the Bundesverfassungsgericht in 2009. Moreover, provided the definition of the *demos* we are used to -meaning a group of people linked by linguistic, cultural, religious and ethnical bonds- it can be argued, along with Weiler (2000) that such a *demos* is not to emerge in Europe.

Table 1
solidarity schemes: a comparison

Solidarity principle	*National*	*Inter-national*	*federative*
Range	Within nations	between nations	**Between citizens, Despite nations**
activation	**Automatic**	ad-hoc	**automatic**
Disbursements	Automatic	**Conditional**	**Conditional, market-oriented**
Problems when deployed at EU level	Unsustainable, inefficient, illegitimate (but effective in solving the crisis)	Sustainable and efficient, but either illegitimate or non-effective in solving the crisis	Sustainable, effective, efficient, legitimate?
Examples	National Pension System; National unemployment Insurance	ESM financing; international aid.	Structural funds; deficit-linked Eurobonds; certain kinds of EUBS

If national-like solidarity mechanisms were to be chosen, then a different determining principle for the *Eurodemos* is to be created; a principle which, despite the numerous attempts, is yet to be individuated. In sum, national-like solidarity schemes would address the economic needs of the Euro Area, but would fail to be legitimate (both politically and constitutionally) as they would be neither efficient nor sustainable, with no *Eurodemos* as a backstop. Similarly, adoption of inter-national forms of solidarity to address the Euro Area's woes is unpractical. For the Euro Crisis to be solved, a proper fiscal union is needed. However, as exemplified by the decision of the Bundesverfassungsgericht in 2012, inter-national solidarity is characterized by a null transfer of sovereignty, by its ad-hoc activation and by its strict conditionality.

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While conditionality is an essential feature for dealing with moral hazard and optimal resources allocation in a non-national environment, the ad-hoc, temporary nature of international solidarity renders this approach useless to solve the crisis. By making the activation of each single disbursement subject to a veto power exerted by each national parliament involved, inter-national solidarity applied in normal times would simply not work: we can only imagine how politically sustainable a joint unemployment scheme, or pension fund would be, whose payments towards the entitled individuals are subject, each and every time, to the unanimous approval of all European Union Parliaments. While addressing, thanks to conditionality, the myths of the *beggar* and the myth of *efficient markets,* international solidarity fails to address the fiscal needs of the Euro Area in the extent national solidarity would do. So while international-like solidarity schemes would be sustainable and efficient, they would either fail to address the Eurocrisis, or be illegitimate in front of Constitutional Courts.

Against this background, we argue that, for the monetary union to be saved, our understanding of the core logics behind the *Myth of the demos* as a foundation and condition for social solidarity has to change. By considering solidarity and identity co-determined, in the convincement that solidarity creates identity as much as it requires it, we develop a concept of *federative solidarity* which is originally anchored into classical social contractualism and not into "romantic" visions of the nation, but that contributes to develop a shared identity the more responsibility and generosity progress together. Our so-defined *federative* solidarity would then incorporate both elements stemming from national-organic solidarity, and conditional solidarity typical of inter-national settings. Federative solidarity transfers would therefore be *automatic,* i.e. not subject to the approval of each single Parliament of the Monetary Union each time a disbursement is made (against what decided by the Bundesverfassungsgericht in the 2012 ESM decision). However, they also would not be *unconditional*, as it is often the case in national systems. Individuals (more than the states, as it is the case for the inter-national schemes of solidarity created during the crisis) would be the subjects of such conditionality by being directly bound to each other into a European social contract, thereby acquiring rights (to the solidarity transfers) and individual duties to be fulfilled in order to be eligible for the transfers. Of course, this would require a reversal of the *demos* thesis, for which eligibility to automatic solidarity schemes is dependent from the *demos* of belonging. In federative solidarity schemes, the willingness to take an active

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role into the social contract becomes the condition for eligibility; the construction of the shared identity stems from the mutual responsibility built over time. In this, it would also differ from classical national-organic visions of solidarity, because it will be grounded into social contractualism and not on *kin*. Finally, it would differ from *inter-national* solidarity, because –despite the presence of conditionality- on the one hand it applies directly to individuals, and, on the other hand, it will be designed as a permanent instrument (which is also a condition for the monetary union to work properly).

As we have shown, a *federative solidarity* approach is optimal in respect to both previous approaches not only in the extent it allows for stronger solidarity among societies otherwise disconnected; it also reinforces the sense of common belonging over time (instead of weakening it) by overcoming typical limitations of national-organic solidarity, such as moral hazard and inefficient allocation of resources. Finally, the creation of a *federative solidarity mechanism* would boost the legitimacy of the European construction as a whole, by providing renewed output legitimacy in its early stages, and by posing the conditions for a common identity required for input legitimacy thereafter. In front of the growing need for the creation of a full-fledged fiscal union in the Euro Area endowed with redistributive powers, this paper has challenged the view that European redistributive measures –if properly designed- would be illegitimate, unsustainable, and inefficient. The rejection of supranational stabilization mechanisms is due to the failure to recognize that supranational solidarity cannot simply represent the translation of national schemes at supranational level, but shall borrow from both classical and international solidarity schemes, and requires the development of a new paradigm of mutual generosity-for-responsibility, which, over time, would lay the foundations of shared identity on the once-parted European continent.

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[*] Francesco Nicoli is PhD Researcher at the University of Trento – School of International Studies.

[I] It can be argued, however, whether to apply a radical or moderate version of this principle. If solidarity is regarded as the provision of resources with a loss, it then becomes a concept relative to the market return rate; so lending money to a partner at a lower cost than the market return rate would still constitute a measure of solidarity even if it implies a positive return, as the lender is willing to accept a loss.

[II] It is worth noting that the authors of this paper don't agree with the theoretical argument and theoretical implications of the "no-demos thesis", and especially not with its ethnic/linguistic version. However, the reality of todays' politics renders impossible to exclude it from any analysis because the belief in the *no-demos* thesis is widespread and must be reckon with.

[III] Indeed, the reasoning of the Bundesverfassungsgericht is as follows. According to Lisbon (2009: 252), any fiscal decision must be approved by a Parliament and not by a Governments. Provided the absence of a European public sphere and appropriate representative institutions (assessed, again, in Lisbon) the only representative institution legitimized to approve a redistributive decision is the German Parliament. The requirements for a supranational representative institution to take over are unchanged in respect to Lisbon:

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the European Parliament still lacks adequate representativeness and a truly European Public sphere. Lacking these elements, there is no functional Euro-demos in which the German demos is adequately participating and represented, and thus the German Parliament is the one in charge of redistributive decisions.

IVThese issues have been largely dealt within international law jurisprudence in relation with the right to secession, which is generally recognized only in four cases: agreement between local authorities and central government; cases of lack of constitutionally-guaranteed local autonomy (failure in protecting the fundamental right of self-determination), in the case of oppressed populations during the era of colonization, and in case of ethnic cleansing ("remedial secession").

[V]It is worth noting that while, the Trilemma may recall a similar conceptual framework developed by Rodrik (2011) and applied to the European Union by Crum (2013) in fact it differs in several aspects. As discussed in Nicoli (2015), two fundamental distinctions exist: first, differently from Rodrik/Crum framework, not any level of economic integration puts in question the democratic legitimacy of a political system: only institutions and policies with clear redistributive implications (Majone, 1999; 2014, Bundesverfassungsgericht, 2009). Second, Rodrik/Crum consider that "nation-states" should be considered as a vertex of the trilemma. In fact, we argue that nation-states constitute a *solution,* rather than a vertex, of the trilemma. In a nation-state, democracy is in functional equilibrium, because redistributive functions are held at the same level of democratic institutions, legitimated by a single *demos.* Creating a Euro-demos would solve the trilemma by getting rid of the "no-demos" (which is substituted by a "Euro-demos") and not of the "nation-state", which is simply shifted upwards. The opposite is untrue: eliminating the very notion of "nation-state", failing, however, to create a *demos* would fail in solving the issue.

[VI] To save the monetary union we need a fiscal union; fiscal union implies redistribution which, according with modern understanding of democracy, should be democratically legitimized; but such a democratically legitimized fiscal union would require majority voting, which- accordingly with the proponents of the Thesis, is impossible outside of a demos. We could therefore proceed with a democratic legitimized fiscal union if we give up the demos theory, or we could proceed with non-democratic fiscal union maintaining individual national sovereignty but giving up democracy on a fundamental issue such as fiscal and economic policy; finally, we could dismantle the monetary union tout court maintaining democracy and the demos thesis unaffected. For a detailed discussion of the legitimacy trilemma, including the differences with Rodrik (2011) global economy trilemma, please refer to Nicoli (2015).

[VII] We often self-justify ourselves when we limit our contributions to people asking for money in the streets by believing that our only result would be to remove their incentive to find a job of their own.

VIII In fact, this is changing even within unitary states, especially in relation to welfare programmes where moral hazard is most harmful, like in unemployment insurance schemes; several European countries have in place unemployment insurance schemes that, albeit automatic, require active behavior on the side of the recipient.

[IX] Note that, in this case, there is still a distortive effect- that given the higher productivity and expected returns in a developed economy, resources would still be best invested there.

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ISSN: 2036-5438

Promoting solidarity in crisis times: Building on the EU Budget and the EU Funds

by

Katerina Pantazatou*

Perspectives on Federalism, Vol. 7, issue 3, 2015

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Abstract

This article examines the evolution of the EU 'redistributive' policies in the (post-) crisis EU era. By reviewing the EU cohesion policy, the financial assistance mechanisms, the new economic governance measures and the potentials of attributing the EU fiscal capacity, it aims to conceptualize the notion of solidarity as redistribution as this has evolved by reason of the crisis. The article argues that by virtue of the diverging economies, interests and preferences of the Member States, reciprocal or 'effects-based solidarity' is the only type of solidarity that has been exhibited among the Member States during the crisis. It, further, shows how the principle of solidarity has not lived up to its potential in the present crisis context, but it has instead been cropped up in sharply different ways in the rhetorics and communications of political parties of all hues across the Union.

Key-words

EU budget EU cohesion policy, EU Funds, crisis, redistribution, solidarity

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1. Introduction

There has been a lot of debate recently as to whether the EU has exhibited a spirit of solidarity during the crisis. The answer, I believe, depends on two variables; first, on how one defines solidarity, and secondly, whether there was/is room from a realistic and legal perspective to be solidary on a transnational level.

This article sets out up by providing an overview of the concept of solidarity and its evolution. It argues that by reason of the crisis the economic and social differences among the Member States have been exacerbated. This has further deepened the division between national or social and transnational or inter-state solidarity and has impacted on the decisions and choices of the Member States with regard to the national and the EU budget(s). In times when national budgets are shrinking it is more likely that the remaining funds will be used for national purposes, instead of transnational aid. This contribution will argue that by virtue of the increasing division, 'transnational solidarity' is to be discerned as a reciprocal or 'negative' concept. To bring that point home, I will explore the areas that pertain to the 'redistributive' character of solidarity; the EU cohesion policy, the financial assistance mechanisms, the new EU economic governance measures and the potential that the EU acquires fiscal capacity.

The article, hence, proceeds by delimiting the notion of solidarity for its purposes, into solidarity as redistribution. Upon reviewing the main redistributive policy in the EU, the EU Cohesion policy as it materializes through the EU Funds, I will turn to examine the new economic governance measures of the EU in order to investigate whether the 'EU redistributive' framework has been solidary and what type of solidarity it has been premised upon.

2. The concepts of solidarity

The concept of solidarity has been enshrined in the Treaties and has regularly been used under different Titles as a fundamental guiding principle, in particular when crises occur.[1] In this 'crisis' context, the legislator has perceived solidarity as a 'positive' or altruistic concept which does not merely exist by reason of factual interdependence among

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the involved States.[II] In its empirical, factual or 'commonly understood sense' solidarity expresses the support by one person or group of people for another because they share feelings, opinions or aims. It is, thus, perceived as an expression of altruism from groups of people towards others.

In lack of a definition of the concept in the Treaties and in view of its stable presence therein, the concept of solidarity encompasses different constituents and perspectives. In EU law, the most commonly employed division relates to the solidarity between Member States (inter-state or transnational solidarity) and solidarity between Member States and their individuals (social or national or intra-state solidarity). Both these types of solidarity can further be divided as altruistic or positive and reciprocal or negative.

Because of its abstract nature, the concept of solidarity is rather malleable from a legal perspective. Its legal 'provenance' and value although advocated,[III] is debated, in particular by political scientists, and so is its enforceability.[IV] Its lack of direct effect may often lead to the confinement of the concept in mere rhetoric, or might require its realization through more 'legal' and enforceable tools, such as the more precise Treaty provision pertaining to the EU's social policy, or the Charter of Fundamental Rights provisions.

Political and social scientists, philosophers and constitutional lawyers have repeatedly attempted to divide solidarity in specific models, either in terms of the different ideological and political contexts within which the concept was developed (for instance, the idea of Marxist solidarity, of the Christian democratic solidarity or of the classic social theory) or in connection to the societal preferences, functioning and development (Durkheim 1964). Other designations of the notion of solidarity have related to its constitutional 'standing' and evolution, or have distinguished solidarity pursuant to its many functions and expressions, such as the social and the redistributive ones.

Solidarity, in the sense of 'social' or 'intra-state' solidarity is further a relative, dependent, evolving and 'clashing' concept with implications at the supranational level. Its relativity draws a lot from the different understandings of solidarity at the national level, which, in turn, are shaped by long-established traditions and 'prosperity' or 'depression cycles'. Low levels of social welfare provided in many EU countries, both in more recent and more 'senior' members, possibly create different levels of expectations in comparison to traditionally high level protective Member States, such as the Scandinavian countries. Similarly to being a relative concept, solidarity is also a dependent concept. It often

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depends on a *'quid pro quo'* interaction which can be discerned both at the national and supranational level. The trade-offs required for the redistributive state to perform, entail, in most cases, the choice among different levels and quality of supply of public (or *quasi* public) goods, different taxation systems and rates and different state intervention levels. These decisions usually take place at the national level and they are shaped in accordance with each state's traditions, culture and preferences, represented at a higher level by the elected governments. This way these choices enjoy democratic legitimacy. Naturally, these national preferences and benchmarks are then, transposed to the EU level, creating different expectations and different dispositions towards the associated 'trade-offs' among people who are united by a certain degree of economic integration, but not by any sense of demos or identity.

It is, in principle, the EU who has to bridge these different dispositions via harmonization or regulation. The situation is similar at the EU level, where choices have to be made both with regard to the objectives of the redistribution, the share each of the partners contributes, the anticipated results and the potential gains for all the participants. At this redistribution level the EU is, thus, called to perform some sort of cost benefit analysis while respecting and allocating –to the extent possible - the different political, economic and social backgrounds of the Member States.

The witnessing of the deterioration of social benefits and services–in particular in the financially assisted Member States, and the increase of the economic, social and political disparities among the Member States by reason of the crisis made more skeptical the people of the Union with regard to the EU's room and willingness to act against the crisis. The 'bail out' mechanisms that prevented the default of some countries and the state aids that halted the bankruptcy of major banks could be perceived more as an effort to save the Eurozone and the huge economic interests involved, rather than as an attempt to alleviate the burden from the socially disadvantaged. Similarly, the dire economic situation and the shrinking budgets of most Member States were calling for swift decisions with regard to solidarity; solidarity within the state and towards each state's own nationals, or trans-national solidarity that would help keep the EU construct together? The perception of the peoples of Europe would play a key role in this dilemma, as the democratically elected governments would, at least in theory, be called to apply policy choices for and from the people (input and output legitimacy). However, despite the intergovernmental character of

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the new economic governance measures, democratically deliberative decision-making remained absent in the process of their adoption. With or without democratic legitimation, in view of this economic situation, the increasing divide between the Member States and the growing uncertainty about the future, the solidarity to be 'provided' would, inevitably, be limited and could not any more function in its altruistic understanding but had to come with guarantees, safeguards and mutual returns for all participants (Giubboni 2010).[V]

3. Solidarity as redistribution: Altruism versus Reciprocity

In most scholarly literature solidarity is deeply connected to redistribution and, in turn, to distributive justice. Should there be redistribution, what purposes should it serve and should it be connected to moral assessments are only a few questions that pertain to the concept of solidarity.[VI]

In EU law solidarity has been perceived as a legal concept. Already in the TEC the Communities intended to promote *inter alia* economic and social cohesion and solidarity among Member States (Article 2 TEC). The instutionalization of solidarity which has underpinned the EU integration project since its very beginnings has historically served to bridge 'social conflicts and redistributing resources in accordance with the normative assumptions that are implicit in a polity' (de Witte 2012: 704). Solidarity has, thus, been associated (both at national and supranational level) not only with the concept of redistribution which constitutes the *means* to achieve it, but also with the concept of social justice (*the purpose* or *the normative assumption*), including the promotion of social rights, labour and employment rights, fundamental rights and related policy areas that derive from a welfare state. But in the '*quid pro quo*' trade-off between market principles and social objectives, the Court of Justice has repeatedly given priority to economic integration and market(s)' liberalization while ignoring the 'social state'.[VII] This finding cannot be disassociated from the fact that it has been the economic freedoms and the competition law provisions in the Treaties that constituted the motor of the European integration throughout the years. While the Member States agreed to a transfer of powers with respect to the aforementioned economic policy areas to the EU, powers relating to the social sphere and the welfare state remained at nation-state level, where it was believed they could be better addressed. As social policies remained decoupled from the 'economic' European

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project, economic integration was advancing while social integration was lagging, to say the least, behind. Thus, the welfare state evolved along territorial lines based on – however diffuse – notions of national solidarity between citizens of nation States. By being 'stranded' at the national level, the welfare or social state was dependent on redistributive choices at the national level.

This article will examine redistribution as a constituent of solidarity.[VIII] Redistribution, in turn, is to be understood as distributive justice or distributional equity.[IX] Redistribution as a constituent of solidarity and as an essential component of most welfare states has been shaped through time by social, political and economic considerations and within the appropriate historical contexts. Similarly to the concept of solidarity, redistribution is characterized by a relative, evolving and contextual nature. Rawls's preference for a consumption tax to an income tax, and a flat tax rate over a progressive tax rate, for instance, sits uneasily with the empirical understanding of '(re)distributive justice' or the best means to achieve it.[X] Similarly, a progressive income tax rate of up to 70% (with a redistributive purpose) for the very wealthy taxpayers would possibly be perceived as 'fair' by the beneficiaries of redistribution but unjust for the highly taxed people. These choices are usually reflected at Member State level through elections, and as they entail income and/or wealth reallocations they require enhanced democratic legitimacy. Compulsory taxation and the associated tax transfers, for instance, as the main source of redistribution are telling of the need for increased democratic legitimization and as such they still remain within the nation-state (or Member State ambit).[XI]

In the current crisis framework the first question that arises is whether the redistribution that takes place at the supranational level serves welfare purposes (distributive justice). Secondly, should the materialization of 'transnational solidarity' via 'state redistributions' be decoupled from motives and moral assessments behind redistribution? In other words, should solidarity as redistribution at the state contribution level be connected to the ideas of altruism, empathy and of noble moral motives?

As with the case of 'justice as reciprocity' advanced by John Rawls, Brian Barry and many others, solidarity (as redistribution or in any other form) can materialize even under pure reciprocal or *quid pro quo* grounds, whereby the contributor *shares* with the recipient in anticipation of a (future) counter-contribution or fair return.[XII] For some authors, however, motives *do* matter when defining solidarity. Accordingly, the behavior as such is not

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sufficient to establish solidarity if it is not accompanied by an appropriate kind of belief and altruism (Harvey 2007). A more moderate approach with regard to the values of altruism and self-interest in solidarity has been expressed by Viehoff and Nicolaidis, who placed solidarity in their 'solidarity compass' at the intersection of the two continuums of self-interest and Community and of altruism and obligation. For them, solidarity describes 'a relationship that is motivated to some extent by each of these powerful motives, but [remains] irreducible to either one of them' (Viehoff and Nicolaidis 2015).

Understanding solidarity as redistribution and accepting the idea that this concept need not necessarily encompass any altruistic or empathetic elements is crucial in order to evaluate whether the EU response in the current crisis has exhibited a spirit of solidarity, as termed for the purposes of this contribution. If one, however, disassociates solidarity from any motives and moral assessments, solidarity will be assessed only by reason of its effects to distributive justice and the welfare state.

As the following parts aim to highlight, in the EU redistribution context there is no pure altruism. In the best case scenario one can place solidarity in the 'solidarity compass' at the intersection of the aforementioned continuums. This, however, does not mean that solidarity is absent altogether in the (post-) crisis legal framework. By contrast, as the EU cohesion policy and the new economic governance measures' analyses will show, it exists *partly* by virtue of its effects and processes rather than by reason of the intentions behind it.

At present, redistribution is divided in the EU. Similar to direct taxation, redistribution is entrusted, to a large part, to the Member States – in agreement with the fiscal federalism theory. It is the Member States, *in principle*, that decide how they will allocate their revenues, how they will form their budget and to what degree they will opt for a 'social' and welfare state model. In accord with that, the main instrument for redistribution, taxation, is almost entirely reserved for the Member States. In an effort, however, to balance the uneven distributive impact of Europeanisation the EU has obtained an institutionalized and constitutionalized redistributive role which is fulfilled by virtue of the EU budget and the EU cohesion policy (EU funds) and through regulation both at EU and national level.

3.1. The EU Cohesion Policy

The EU Cohesion policy is dedicated to bridging the discrepancies among the various Member States and to assisting the Member States 'in need'. It thus, aims to attain

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economic, social and territorial cohesion among the Member States (Art. 174-178 TFEU) and it currently figures as a major cornerstone in the 'Europe 2020' strategy. After the numerous and complex reforms it has undergone, since its first appearance in the mid-1970s, the EU Cohesion policy, which is effectuated through the EU Funds, currently accounts for a large part of the EU budget at EUR 351.8 billion for the period 2014-2020. Consequently, a large part of the EU budget is being spent on effectuating the EU cohesion policy into the major redistribution policy instrument in the EU.

The EU cohesion policy has an important place in EU philosophy and is governed by the 'redistributive idea' which stems from the intuitively reasonable assumption that the 'less favoured' regions are in need of 'EU funding' in order to be able to compete in the common market against the more favoured ones.[XIII] This idea of the 'subsidization' by the beneficiaries of European integration and regulatory competition seems to match partly, Maduro's idea of being solidary 'by establishing a link between the wealth generated by European integration and the requirement to distribute it fairly' and seems to confirm the idea that solidarity in EU law should be discerned as a 'reciprocal' concept (Maduro 2012: 6). As a redistributive idea, the EU cohesion policy is intrinsically linked to the development of the EU budget.

The, by comparison, small amounts destined to reduce the regional economic and social disparities among the Member States and their regions are *per se* a problem in the realization of this goal. The unwillingness of many Member States to contribute to this redistributive policy is the second obstacle in this process. As the role of cohesion policy is to bring closer the richer and poorer parts of the EU, it is inevitable that the EU budget allocations would not be unanimously endorsed. National interests in the amounts and the allocations involved are divided, with the 'traditional net payers' or, in other words, the 'richer' Member States opposing more spending and the traditional 'beneficiaries' or the poorer States aiming for even more financing to compete with the richer ones on equal grounds (Bachtler et al. 2013).[XIV] This opposition to a larger EU budget for redistributive purposes has been exacerbated as a result of the crisis. The 'profligate south', a habitual recipient of EU Funds, being in a dire economic situation, inevitably asks for more money, whereas the 'prudent north', the main financier of both the EU funds and the EU financial assistance has been more hesitant to disburse funds merely for benevolent reasons established on mutual trust and the need for a more coherent Europe.

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On the same reciprocal basis, the political bargaining, inherent in the decision-making procedure that leads to the adoption of the EU budget has been extended also in the 'greatest redistributive' representative policies of all, the EU cohesion policy. Many Member States have used cohesion policies as a bargaining tool to obtain resources in return for political compromises (Nicola 2015) or as a side-payment and a redistributive mechanism for budgetary contributions to compensate states in the context of a new enlargement (Wishlade 1996) or even as an enforcement mechanism in case a Member State does not respect the rule of law desiderata (Closa et al. 2014). In the last case, the Commission has repeatedly suspended the EU funds' disbursement to Hungary on grounds of unscrupulous processes in the selection of projects (2015) of the transfer of responsibilities of the funds' administration to the Office of the Prime Minister and other ministries (2013) and of excessive deficits (2012).

The source of this lack of altruism in a purely redistributive policy could be found in the diametrically different economies, and by implication, to the diverging preferences and priorities of the Member States, the lack of a 'Union' and a common ethos, demos and purpose. It can also be justified by the different 'performance' of the Member States in the implementation of the EU cohesion policy which pertains to their different administrative, absorption and spending capacities, their participation and administrative cultures, their corruption levels as well as the complicated and multi-level governance the EU has designed for this policy.

The first pitfall relates to the poorer Member States' capacity to absorb and utilize the allocated funds. The complex legal framework of the ESI Funds necessitates a very sophisticated administrative capacity at Member State level to manage and implement the Funds. In consequence, the spending capacity of the Member States depends largely on the ability of the (multiple) involved authorities, at national, regional and local level to set up authorities adept at complying with the highly demanding administrative work entailed, as well as to the ability of the Member States or regions to secure co-financing for the projects (Regulation 1303/2013, Recitals 26 and 105). Such an undertaking comprises the selection of the projects to be financed, in accordance with the multi-annual planning approved by the Commission and the monitoring of their implementation. Evidence from the Commission, for the programming period 2007-2013, highlight a series of other factors that affect the low absorption rates by some Member States, including the challenges in

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preparing major infrastructure projects and obtaining the Commission's approval, the changes in EU legislation and the changes in the national political set up (including changes in national and regional governments).

Similarly to the administrative incapacity of some Member States to absorb the funds, the principles of additionality and complementarity that undergo the EU Funds aim at ensuring that the funds provided by the EU are not intended to substitute national investment but only to supplement it. In conjunction with the co-financing principle, thus, the EU can only partly finance projects. Although this requirement might pose significant problems to the absorption of the funds by the poorer Member States, the Commission has, by reason of the crisis, waived or reduced the fixed co-financing rates in order to facilitate the disbursement of EU funds. Furthermore, taking stock of the prior problematic implementation of the EU cohesion policy instruments by the Member States, Regulation 1303/2013 has placed particular emphasis on thematic and general *ex ante* conditionality provisions. Compliance with those conditionalities, however, although aiming at ensuring a better implementation of the EU funds, it also increases the administrative and real costs for the candidate Member States.[XV]

Besides the different absorption levels of the Member States, the implementation of the EU Funds relates further to the diverging political, administrative and cultural 'profiles' of the Member States. The partnership principle is another distinctive principle of the EU cohesion policy and is complementary to the shared management principle. Its main goal is to involve, throughout all the stages (implementation, monitoring and evaluation of Partnership Agreements), different actors at both supranational and national level in order to

> 'ensure respect for the principles of multi-level governance, and also of subsidiarity and proportionality and the specificities of the Member States' different institutional and legal frameworks as well as to ensure the ownership of planned interventions by stakeholders and build on the experience and the know-how of relevant actors.' (Regulation 1303/2013, Recital 11).

The involvement of different actors (national, sub-national, private, NGOs) in the decision making and implementation process depends on the different political 'traditions'

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of the Member States and certainly affects the outcomes of the EU Cohesion policy. The 'north' versus 'south' divide is conspicuous also in this respect; Southern countries tend to 'centralize' the decision making, whereas the northern countries are more apt to the involvement of other actors in the decision making process. This, certainly, has an impact on all levels of the implementation process, from the priorities and the goals to be served, to the project-selection process. Likewise, the different corruption levels at various Member States influence the EU funds' allocations. While examples of mismanagement, fraud and EU money waste are not to be found only in 'southern' countries, it is mostly the countries with the highest corruption perception index (CPI) that either fail to carry out the projects they were funded for, or prove to have invested the money in poor 'value for money' projects.

The European Anti-Fraud Office (OLAF) and the European Court of Auditors (ECA) provide ample data that bespeak the EU Funds' amenability to abuse and fraud. During the annual audit the ECA carried out for 2013, it found with regard to the regularity of the transactions underlying the EU accounts, that while both revenue and financial commitments for 2013 were regular, the estimated error rate for 2013 payments was 4.7%, remaining persistently higher than the "materiality threshold" of 2%. (ECA 2014a) Errors arise when payments from the EU budget 'are neither legal nor regular, for example when claimed by ineligible beneficiaries, for expenditure that should not be financed by the EU, or when the conditions for receiving the aid are not followed.' (ECA 2014c) Thus, for a payment to be classified as 'error' it has to be contrary to the law and have a potentially harmful impact on the EU's financial interests.

Typical sources of error, besides compliance with eligibility criteria, include serious breaches of public procurement rules either deliberately, in order to favour certain applicants over others, or inadvertently because of the complexity of the rules (ECA 2015); effectively 'poor' checks and controls by both the Commission and the Member States, focus of the Member States on the absorption of the Funds rather than on their 'good spending' and incorrect declarations of agricultural areas. (ECA 2014a)

With regard to financial recommendations, upon conducting significant investigations, OLAF recommended in the area of EU Funds a financial recovery of 476.5 million Euros for year 2014, almost triple the size in comparison to the next in the ladder external aid (amounts recommended by OLAF for financial recovery in this sector, 174.0 million

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Euros) (OLAF 2014). Similarly for 2011, OLAF revealed that of the total amounts recovered, approximately 85% comes directly from the EU Funds.[XVI]

One cannot, therefore, be taken by surprise at the suspiciousness of the 'performing' and 'donor' Member States regarding the value and effectiveness of the EU Cohesion policy as well as the geographical coverage of the policy. [XVII] The incapacity of some states to absorb the funds, or to spend them in the best possible way often results in unfinished or poor value for money results which in turn, deepens the divide between intra- and inter-state solidarity. Why 'waste' money on a 'lost cause' when this money could be used for improving the wellbeing of your own 'nationals'? The discontent of some Member States about the continuation of the 'cross-subsidization' of the poorer regions and states shows, once again, that solidarity in the EU should not be understood in its altruistic capacity. This is further advocated by the fact that this subsidization does not come for free and is not unlimited. Member States have to participate in the financing of the projects in accordance with the additionality and complementarity principles and they have to provide evidence as to their capacity to absorb and manage these funds towards the desired goal.

The Member States, their different cultures and their very different economies and interests are not the sole culprits of this building of apprehension, and possibly even, mistrust behind this redistributive policy. The role of the EU in this is not to be neglected; the number of material errors, and everything this is associated to, could certainly be reduced had the disbursement of the EU Funds been properly and adequately monitored and sanctioned by the EU when needed. The current legal framework leaves too much leeway to the Member States not only to implement the ESI Funds but also to monitor this implementation.[XVIII] Among the *ex post* conditionalities, lays the Commission's or the Member States' obligation in close cooperation with the Commission, to carry out evaluations in order to examine the effectiveness and efficiency of the ESI Funds and their contribution to the Union strategy for growth. In case of non-compliance with the designated criteria (as these are laid out in the Partnership Agreements) the most severe remedial action is the suspension of the interim payments or a reduction of the funds to be disbursed, a remedy that does not seem sufficient to deter mismanagement actions. Similarly, in case the preemptive ex ante conditionalities fail to ensure compliance with the

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EU standards, the Member States and/or the Commission can impose financial corrections, in other words, they may recover payments that should not have been paid out.

The often 'poor results' or the questionable motives, however, do not negate the positive effects of the EU cohesion policy to the 'welfare state'. Indicatively, only for part of the programming period 2007 – 2013 and only by virtue of the ERDF co-financed interventions, approximately 593,954 jobs had been directly created across the EU. (European Commission 2014c).

3.2. The EU Budget as an expression of solidarity

The EU budget and the EU funds disbursed therefrom do not constitute the only means of redistribution in the EU. Redistribution can be achieved through regulation in other EU policy areas, for instance via the Single Resolution Mechanism and the Single Resolution Fund or via 'distributional steering' at the national level through the involvement of the EU in the budgetary policies of the Member States.[XIX]

In a complete economic Union where the EU would be granted tax raising powers, redistribution could further be attained through taxation and in the post-crisis framework redistribution can be attained through the financial assistance mechanisms such as the ESM and the EFSF.

3.2.1. The first hybrid indirect redistributions in the face of the crisis

The EU budget constitutes the main form of redistribution in the EU. In lack of an EU fiscal capacity, whereby redistribution would depend largely on the revenues arising from taxation, redistribution via the EU budget is currently effectuated through regulation, as the example of the EU Cohesion policy demonstrates. The crisis, however, and the need for imminent actions in order to save countries from defaulting and the Euro-currency as a whole initiated new structures, what I term for the purposes of this article, hybrid indirect redistributions.

The first type of 'hybrid indirect redistributions' materialized through the granting of financial assistance to the Member States in need, either through the European Stability Mechanism (ESM), and earlier under Memoranda of Understanding (MoU) or the European Financial Stability Mechanism (EFSM) or the European Financial Stability

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Facility (EFSF). These indirect redistributions were not effectuated directly via the EU budget, but instead they constituted some form of fiscal transfers among the Member States. These transfers have temporarily – at least – contributed to the rescue of certain Member States in need and have, thus, exhibited a spirit of assistance in that each euro area Member State has participated with its capital to the ESM.

But are these two elements sufficient to mitigate the 'negative' solidarity caveats the financial assistance mechanisms entail; First of all the *conditionalities* attached to all the financial assistance programmes and secondly the ulterior motives behind their granting. It has been argued that the institutionalization of these financial assistance mechanisms, which was culminated with the establishment of the permanent ESM, marked the transition from 'negative' to 'positive' solidarity and demarcated a new era for 'normative' solidarity (Borger 2013). This 'crisis-induced' shift can be illustrated, according to Borger, via the 'departure from an economic policy that is predominantly focused on budgetary prudence and price stability to one that takes better into account financial stability as well.' The broad interpretation of the 'no-bail out' clause by the CJEU in the Pringle case,[XX] and the authorization the CJEU gave the ECB for bond-buying in the secondary markets[XXI] point indeed towards a more 'altruistic' version of solidarity, one that aspires to the common good.

While, indeed, both from an *ex post* factual assessment, as well as from a strictly legal perspective, the financial assistance that allowed some Member States not to default cannot be overlooked,[XXII] the motives and the conditions attached to this financial assistance are not, in my view, capable of altering the reciprocal character of solidarity into an altruistic or positive one (Hilpold 2014). With regard to the ulterior motives behind the granting of financial assistance, as the press at that time argued, the granting of assistance aspired to the saving of the Eurozone as a whole, given the possible domino effects the default of one Eurozone country could cause to the other Eurozone members. This finding is further reinforced by the fact that the response to the two alleged causes of the crisis, the EU's structural problem of a single currency union without a fiscal union, in other words the EU being a non-optimal currency area, and the fiscal profligacy of the Member States resulting from the unenforceability of the Stability and Growth Pact, was initially focused on enhancing fiscal surveillance and fiscal discipline in the EU.

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Despite many political assertions that one of the driving powers behind the strengthening of stability, unity, and integrity of the euro area was solidarity, Draghi's speech in July 2012 who reassured the markets that "the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough" revealed the true motives behind the 'solidary character' the EU and the Member States had demonstrated recently. Certainly, one could not expect much more from an independent institution entrusted with conducting the monetary policy of the Union (Article 282 TFEU).

However, it soon became clear that the use of the 'solidarity rhetorics' in various political statements, both at national and supranational level, was not sufficient to upgrade the solidarity principle into a critical principle in the crisis resolution nor to attribute it a 'positive' or altruistic meaning. As such, despite solidarity being a legal concept in EU law and a long-standing principle in the process of the European integration, it has not unfolded to lead to *in concreto* solutions in the present crisis. From the recent economic governance measures, the concept of solidarity, surprisingly, figures only in the Preamble of the ESM Treaty, where it is confined in the statement that '[T]his Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union.' Similarly, the concept of solidarity was entirely absent in the Pringle judgment with the exception of the citation of Art. 122 TFEU, which makes reference to the principle. The Court, unfortunately, did not build upon AG Kokott's opinion, who elaborated on the concept of solidarity and the requirement to provide inter-state financial assistance, and missed, hence, an opportunity to define transnational solidarity in its EMU and crisis contexts.

Similarly, the very strict conditionalities attached to the provision of financial assistance are, certainly, not sufficient to cancel out the financial assistance's redistributive character but could prove adequate to refute the financial assistance's 'positive solidary' character. They instead, simply, ascribe a different feature to the notion of solidarity, that of a reciprocal disposition, or rather a 'solidarity of fact'. The conditionalities the bailout programmes entail, for instance, fail to promote social solidarity as they impinge upon the social policies of the Member States and they often require introducing detrimental to the welfare state measures.[XXIII] They, hence, aim at ensuring that the benefited States will comply with the 'budgetary discipline' attached to the assistance and that moral hazard will

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be avoided rather than guaranteeing that the citizens of the assisted states will enjoy a higher degree of welfare at no additional cost.

3.2.2. The 'supranational regulation' of national budgetary policies: a new window of opportunity?

The second hybrid form of redistribution relates to the EU's *increased participation* in the formation of national budgets. This enhanced role, in particular by the Commission, has been reinforced by the new crisis legal instruments, such as the European Semester and the Six-Pack.[XXIV] The former aims at intensifying, synchronizing and centralizing the coordination of national budgets and economic policies by allowing the Commission to review the Member States' budgets and to assess whether the national draft budgetary plans comply with the 'Sic Pack' criteria. At the end of the calendar year, and the beginning of the 'Semester cycle' year the Commission publishes its Annual Growth Survey and its Alert Mechanism Report which identifies the Member States that need an in-depth review because of the potential imbalances detected, likely to disrupt the smooth functioning of the Member States' economies. Based on the findings of these reviews the embedded in the European Semester Macroeconomic Imbalances Procedure (MIP) might be triggered, and if the imbalances are considered excessive the Excessive Imbalance Procedure (EIP) will be launched. In contrast, if the imbalances are not found excessive the 'preventive arm' of the MIP will be activated and the Commission's recommended policy responses to the imbalances will be integrated into the Country Specific Recommendations (CSR).

Looking at the specific country recommendations for 2014, one can observe that some recommendations address sensitive issues relevant to Member States' national sovereignty, like taxation and social policies. The conditionalities attached to any (pre- or post- ESM) financial assistance, as well as the Country Specific Recommendations made by the Commission to the Member States have direct and immediate implications for the economic and social policy choices for the future of Europe and its Member States, pertaining for instance to employment, social security and taxation issues. These recommendations, whether of a very specific nature or not, can produce sanctions under the Excessive Deficit Procedure and the Excessive Imbalance Procedure, if the Member States fail repeatedly to take action on public finances or macroeconomic imbalances respectively. This possibility of intervention to the national budget-planning of the Member States given to the European Commission under the European Semester in conjunction

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with the Six-Pack can open new pathways for the EU to promote both transnational and social solidarity. As the improvement of employment policy and social protection figures among the cornerstones to boost growth, I see this involvement as a window of opportunity for the Commission to coordinate all budgets towards a welfare state. While this statement is quite far-fetched, in particular as the potential sanctions for non-performance relate not so much to the specific recommendations but rather to the achieved results with regard to the macroeconomic imbalances and public finances, it is useful to demonstrate the increased involvement of the Union in national budgetary decisions.[XXV] This expanding intervention signifies, further, a disregard –on behalf of the Union -- of the 'higher democratic legitimacy' required in fiscal and budgetary policies, than the one delivered by a strongly intergovernmental approach. Leaving, however, aside the democratic legitimization of the Commission, and the Union altogether, to have a say in, if not dictate, the budgetary policies of the Member States; the bait lies for the EU, in balancing, when interfering to the national budgets either through the conditionalities or via the Semester means, market and social objectives. Fiscal entrenchment and consolidation and the promotion of social policies and employment are not always easy to match. Fears are increasing, therefore, as to whether the EU's goals include the promotion of a welfare state or whether they will advance '[…] a regime that would allow for the projection of *market imperatives* onto national budgets without any specific democratic legitimation' (Habermas 2011).

While the history of European integration, the crisis legal framework as well as the case law of the CJEU point towards a market-oriented approach, the dire economic *and*, often, humanitarian situation of many Member States has pushed the EU decision-makers to review the impact of the new economic governance measures on the social policies. According to the 'five presidents'' report 'employment and social concerns must feature highly in the European Semester. Unemployment, especially long term unemployment, is one of the main reasons for inequality and social exclusion.' In order to promote more 'social cohesion' and 'social justice' the European Commission can commence from promoting through its interference in the national budgets more 'socially' or 'solidary' (in its social sense) policies. Such a venture could be achieved, for instance, by taking social imbalances into account when assessing convergence and imbalances (Notre Europe Policy Paper), or by 'coercing' the Member States to apply social redistributive measures, such as

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progressive taxation, or wealth taxes or special levies on luxury goods, instead of increasing taxes related to labour. Through this 'backdoor' intrusion, the EU as a whole can for the first time influence the 'hard core' national policies towards a more 'social justice' oriented goal.

3.2.3. The 'potential': Attributing the EU a fiscal capacity?

By reason of the fact that the EU is not a federal state, it is caught in the paradoxical situation where it has little fiscal capacity but regulates the fiscal conduct of the member states (Hallerberg 2014).

The recent discussions on the possibility of attributing the EU fiscal capacity, in other words, giving the EU the power to raise taxes, in order to create a 'federal budget' that could be used as a 'crisis-buffer' are stretching the EU's competences and challenge its creativity in finding new ways to overcome constitutional and institutional problems.[XXVI]

The primary advantage of granting the EU fiscal capacity would be the increase of the EU budget. The second big advantage is that the transfer of tax raising powers to the EU, provided it is democratically legitimized, would 'democratize' also the EU's spending powers.

The Van Rompuy report recommended that the central level of the euro area should be equipped with powers for common decision-making on national budgets or else be given a fiscal capacity of its own.[XXVII] By analogy with the existing minimal EU budget, a fiscal capacity could be funded from contributions of member states in relation to their economic output, or via a fixed share of national taxes (e.g. value-added tax), or a common European tax like the financial transaction tax (FTT), which, however, unlike the FTT would have to be collected in all Member States. Such an option would require Treaty amendments, providing, *inter alia,* the legal basis for 'a new taxation power at the EU level, or a power to raise revenue by indebting itself on the markets (presently barred by Articles 310 and 311 TFEU)' (European Commission 2012). Such a central fiscal capacity could materialize, according to the van Rompuy report, via the establishment of a mechanism 'where contributions and disbursements would be based on fluctuations in cyclical revenue and expenditure items, or on measures of economic activity' (macroeconomic approach) which would 'be more directly linked to a specific public function sensitive to the economic cycle.'

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The Commission's discussion on the fiscal capacity of the EMU, suggesting, among other solutions, a Treaty amendment to include a legal basis attributing tax raising powers to the EU seems highly unlikely in view of the unanimity required under the ordinary legislative procedure in order to proceed to such a conferral of a new competence.[XXVIII] The merits of such an unrealistic proposal were listed by the Commission in the same document: 'In contrast, that problem [the fundamental accountability problem in case of joint and several guarantees of all euro area Member States] would no longer arise in a full fiscal and economic union which would itself *dispose of a substantial central budget, the resources for which would be derived, in due part, from a targeted, autonomous power of taxation* and from the possibility to issue the EU's own sovereign debt, concomitant with a large-scale pooling of sovereignty over the conduct of economic policy at EU level. The European Parliament would then have reinforced powers to co-legislate on such autonomous taxation and provide the necessary democratic scrutiny for all decisions taken by the EU's executive. Member States would not be jointly and severally liable for each other's sovereign debt but at most for that of the EU' (European Commission 2012).

Regardless of the political unlikelihood of attributing taxing powers to the EU, the latter should not be confused with 'tax harmonisation'. Article 311 (2) TFEU on the Union's own resources provides that the Council may establish new categories of own resources, upon unanimous approval by the Member States. The use of this provision as a legal basis for the establishment of an EU tax has been contested. An expansive reading of Article 311 (2) TFEU would argue that under the 'own resources' provision, the Council (acting unanimously) could actually also introduce outright, as a new 'own resources' even an EU income tax (Plasschaert 2004). In contrast, a more restrictive reading, interprets the provision as only implying that the Member States cannot refuse to pay their contributions to the EU budget.

While the relationship between the 'approximation of tax laws' provisions (Art. 113 – 115 TFEU) and the 'own resources' one (Art. 311 TFEU), is unclear, the political constraint of unanimity they both suffer from makes the chances of harmonisation of tax laws or the creation of a new tax, rather limited. The adoption of the indirect Financial Transaction Tax (FTT) under Article 113 TFEU and not under Art. 311 (2) TFEU, is a curious one. One reason for the selection of this legal basis could be the fact that

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'part of receipts generated by the FTT shall constitute an own resource for the EU budget [...] and the portion of the FTT revenue that remains in the national budgets could be used to help consolidate public finances, invest in growth-promoting activity or meet development aid commitments. Ultimately, it will be for participating Member States to decide how the revenues of the FTT should be used.'[XXIX]

Another possibility lies in the preexistence of this type of tax in the most national orders' of the Member States, which would call for 'harmonization' of the existing taxes. A more suspicious 'reading' of this choice could possibly argue that the choice of Art. 113 TFEU allows for enhanced cooperation to apply (if there is no unanimity), as happened in the FTT case, while art 311 TFEU cannot be circumvented by enhanced cooperation (meaning that decisions can only be taken unanimously). Indeed the possible application of enhanced cooperation in the establishment of an 'EU tax' under Art. 311 TFEU would create practical problems, in the sense that a number of Member States would be forced to pay their contributions –in the form of the newly established taxes, while another one would contribute to the EU budget via the traditional own resources means.[XXX] Such a possibility, however, by creating an additional taxing burden (raised revenue for public services) to the taxpayers of the participant states, will lead to inequalities within the EU and most likely to a 'two-tier' EU budget; An 'enhanced' one and the 'traditional' one.

Even if we assume that Art. 113 and/or Art. 311 TFEU are meant to give the Eurozone tax raising powers, a statement the Commission does not endorse, we should not neglect the (unfeasible or not very probable to be attained) unanimity required under both provisions. This unlikelihood in conjunction with the unlikelihood, to say the least of a Treaty amendment, suggests one possibly (more) tenable solution; building the tax raising or tax policy making power of the EMU on the legitimacy-shaky grounds of the enhanced cooperation, as was eventually employed for the introduction of the Financial Transaction Tax. This circular argument presupposes the (problematic) choice of Art. 113 TFEU as a legal basis. Recourse to the *passerelle clause*, if accepted at the Council level, would enhance the democratic legitimacy of such a decision but would certainly add to the unfeasibility of such an undertaking.[XXXI]

All these political and legal constraints advocate the reliance of the EU on other institutional 'ways out' such as the creation of an EMU Treasury within the Commission and a corresponding, dedicated budgetary and own resources procedure,[XXXII] which

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certainly comes with its own set of problems, most notably acceptance by the participating Member States and democratic legitimization. Other solutions proposed in the framework of a 'fiscal federation by exception' (Trichet 2012, Vanistendael 2010 and 2011) suggest the setting up of a ministry of Finance of the Euro area, which would have the responsibility of the activation of the economic and fiscal federation when and where necessary, while it would be responsible for the handling of the crisis management tools like the ESM. Another suggestion advances the ECB as the optimal solution, an institution which certainly does not meet the democratic legitimacy criterion, or a new institution to be created within the Euro group that would fulfil the political legitimacy and accountability criteria (Vanistendael 2010).

Regardless of the potentials of such tremendous institutional and constitutional changes, the fact that at a political level such ambitious projects of centralisation are being contemplated demonstrates the change in the perception and the mentality of the EU executives that are trying to find ways to build a 'fiscal Union' as a complement of the EU and as an antidote to the current and future crises. If this undertaking is implemented and on condition that it meets the necessary legality and legitimacy criteria, it will provide the first opportunity for the EU citizens

4. Conclusion

The answer to the question whether the EU, faced with the recent unprecedented crisis has demonstrated a solidary spirit, depends on one's understanding of the concept of solidarity. As the analysis of the EU 'redistribution framework' showed even in the 'most redistributive policy of all', the EU Cohesion policy, political conflicts and bargaining show that there is no room for purely altruistic motives and transfers completely detached from self-interest or Member States' interdependencies. For this it is not only the Member States to be denounced. Instead, this 'negative' or 'reciprocal' solidarity is inherent in the EU by reason of the huge differences among the Member States and the lack of a common demos and ethos among the EU people. The different interests, performances and preferences displayed by the participating Member States at the EU cohesion, the financial assistance and the new economic governance branches are telling of the unfavorable environment within which a positive or altruistic solidarity was expected to flourish. Despite the lack of

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these normative elements, the invention by the EU of new mechanisms to redistribute money and to better monitor the budgets of the Member States proves that inter-state solidarity in its reciprocal or 'effects-based' form was exhibited at an inter-state level.

While social justice and 'social solidarity' were not the main drive behind the financial assistance measures, a window of opportunity has opened to the EU to promote its social values through its increasing interference in the budgets of the Member States as stipulated in the Six Pack and the European Semester. Despite the democratic legitimization deficit this competences' expansion entails, this opportunity, if utilized accordingly by the Commission, could allow the EU to finally assume an active role towards a 'bottom-up' approach for an 'EU social policy'.

The lesson from the EU response to the crisis is not only that solidarity, at least in what concerns the EU 'redistributive' policies, cannot be understood as an altruistic or positive concept, but also, rather gloomily, that it seems completely deprived of its legal value. The fact that (transnational) solidarity is not considered among the main driving principles behind the recently adopted measures as a response to the crisis, but it has instead cropped up in sharply different ways in the rhetorics and communications of political parties of all hues across the Union is demonstrative of the malleability of the principle as well as the self-interest motives that underpin it.[XXXIII]

Against the hybrid but effective redistributive mechanisms created by reason of the crisis, the road towards a fiscal Union that would allow the EU to raise taxes and operate a federal budget seems long and the prospects of an EU fiscal federation appear bleak. Such an undertaking would require, in addition to the revision of the current legal framework, an increased democratic legitimacy that could only be provided if the people of Europe were united by a common identity.

In lack of other effective redistributive means in the EU, the better management of the EU budget should be put in the spotlight. In this respect, in order for optimal redistribution to be achieved and social and economic cohesion to be attained, a revision and simplification of the current very complex multi-level governance structure of the EU Funds is needed and better monitoring and sanctioning on behalf of the EU is required.

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* FNR – Marie Curie Post-Doctoral researcher, University of Luxembourg (aikaterini.pantazatou@uni.lu).
The author would like to thank the participants of the conference 'Solidarity in Hard Times: Solidarity and the European Social Model in times of economic crisis', (CEU San Pablo University, Madrid) as well as two

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anonymous referees for their valuable comments. All errors remain my own.

I See Article 2 TEU, Art. 122 TFEU and the 'solidarity clause' under Art. 222 TFEU.

II Borger has termed the solidarity that exists by reason of this interdependence as 'factual' solidarity, as opposed to the 'normative' solidarity which is distinguished from the 'factual' one as it aspires to serve a common good. See in Borger 2013: 10.

III See for instance Barnard 2005: 157-160; Giubboni 2007: 374; Somek 2007 and Ross 2010 who argue that solidarity is a legal concept in EU law.

IV In this sense, the principle of solidarity is unable to fulfil the direct effect conditions, that the obligations it entails must be **precise, clear** and **unconditional** and **that they do not call for additional measures**, either national or European.

V The concept of limited solidarity in the EU is not new but has been affirmed by the CJEU in Case C‑184/99 Grzelczyk [2001] ECR I‑6193, paragraph 44, and Case C‑209/03 Bidar [2005] ECR I‑2119, paragraph 56.

VI These questions draw heavily from the discussion on distributive justice. See, Rawls 1971, Nozick 1974 and Narveson 2003.

VII See Cases C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet [2008] and C-438/05 International Transport Workers' Federation v Viking Line ABP [2008]. For a discussion see Scharpf 2002 and Scharpf 2010..

VIII According to Stjernø, 'solidarity can most fruitfully be defined as the preparedness to share resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organised by the state'. Similarly, for Habermas 'Such an effort would require Germany and several other countries to accept short and medium-term negative redistribution effects in its own longer-term self-interest — a classic example of solidarity [...] [Habermas 2013b].

IX In this sense, redistribution as used in this article encompasses the 'social dimension' of solidarity, for instance, the promotion of social welfare functions.

X For a discussion on the merits and demerits of progressive income taxation and its 'justice' see F.A. Hayek 'Taxation and Redistribution' in *The Constitution of Liberty* (Routledge Classics, 2006), 266-281.

XI See the famous critique of Nozick (1974) to Rawls (1971).

XII The idea of a Reciprocity Based Internationalism (RBI) was developed by A. Sangiovanni, as an idea best expressing EU solidarity at present. According to this concept, 'demands for social solidarity at all levels of governance can be understood as demands for a fair return in the mutual production of important collective goods' (Sangiovanni 2013).

XIII Note, however, the 'neoliberal' objection, according to which the EU cohesion policy's objective is to create an internal market insulated from political and governmental interferences. In this respect, cohesion policy has more an *allocative* rather than a distributive function, whereby it aims to stimulate growth and competitiveness in the market by increasing GDP per head rather than redistributing income to poorer regions. For this argument, see Marks 1996: 391.

XIV For the division between 'net payers' and 'net beneficiaries' see for instance, European Commission, 'Cohesion Policy 2007 – 2013: Commentaries and Official Texts' (2007) 24. According to the Commission's report of the past programming period, Poland figured as the leading recipient, followed by Italy, Spain, Hungary and the Czech Republic.

XV See Regulation 1303/2013, Article 19 'ex ante conditionalities'.

XVI OLAF reports that for 2011 €691.4 million was recovered as a result of OLAF's cases, out of which the highest recoveries were recorded in the structural funds sector (€524.7 million), followed by customs (€113.7 million) and agriculture (€34 million).

XVII See for instance the opposition voices raised by the Netherlands and Denmark during the Agenda 2000 debate and by Sweden, the UK and Germany during the 2000 – 2005 period, in Bachtler et al. 2013: 130.

XVIII The Managing Authorities (MA) of the Member States are responsible for tasks ranging from the selection of operations and the management of the Funds to the auditing, payment, monitoring and drawing up of evaluation plans. (Art. 125 Reg. 1303/2013).

XIX On the pursuit of distributive and allocative goals through regulation see also Posner 1971: 22-23: '[...] only if we modify existing views by admitting that one of the functions of regulation is to perform distributive and allocative chores usually associated with the taxing or financial branch of government.'

XX Case C-370/12 Pringle [2012] ECR I-0000.

XXI Case C-62/14 Gauweiler and Others v Deutscher Bundestag (OMT) of 16 June 2015,

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ECLI:EU:C:2015:400.
XXII I am referring here to the recent case law of the CJEU (Pringle, Gauweiler) as well as the Treaty amendment and the insertion of Art. 136 (3) TFEU.
XXIII Taking the example of Greece, the idea behind the first MoU and the Council Decision that incorporated it was to reinforce fiscal supervision and reduce the Greek deficit. Following this challenge both the MoU and the subsequent adjustment programmes laid out a very specific list of measures to be undertaken by Greece, including measures pertaining to direct taxation, limits to the maximum pensions and the abolition of the solidarity allowance. According to Article 2 Council Decision 2010/320/EU, 10 May 2010: 'Greece shall adopt the following measures before the end of June 2010: (a) a law introducing a progressive tax scale for all sources of income and a horizontally unified treatment of income generated by labour and capital assets; […] (d) the abolition of most of the budgetary appropriation for the solidarity allowance (except a part for poverty relief) with the aim of saving EUR 400 million;(e) a reduction of the highest pensions with the aim of saving EUR 500 million for a full year (EUR 350 million for 2010); (f) a reduction of the Easter, summer and Christmas bonuses and allowances paid to civil servants with the aim of saving EUR 1 500 million for a full year (EUR 1 100 million in 2010); (g) the abolition of the Easter, summer and Christmas bonuses paid to pensioners, though protecting those receiving low pensions, with the aim of saving EUR 1 900 million for a full year (EUR 1 500 million in 2010) […]'.
XXIV Regulation 1175/2011 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Regulation 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Directive 2011/85/EU on requirements for budgetary frameworks of the Member States [2011] OJ L306/41; Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Regulation 1174/2011 on enforcement measures to correct macroeconomic imbalances in the euro area [2011] OJ L306/8.
XXV The recent example of France is telling of the Commission's involvement in budgetary decision-making. After a long political clash between Paris and Brussels, the danger of France becoming the first Member State to be sanctioned for the first time for failing to comply with the EU set budget deficit standards, has for now been averted. On this see Dalton 2015.
XXVI The discussion on attributing the EU a fiscal capacity and on turning it into a full fiscal Union is not new; It was discussed during the negotiations of the 'failed' Constitutional Treaty and as a result of the Laeken Declaration but failed to pass the Council.
XXVII The report argued, *inter alia* that: 'The smooth functioning of the EMU requires not only the swift and vigorous implementation of the measures already agreed under the reinforced economic governance framework (notably the Stability and Growth Pact and the Treaty on Stability, Coordination and Governance), but also a qualitative move towards a fiscal union.'
XXVIII The creation of a new taxation power at the EU level, or a power to raise revenue by indebting itself on the markets (presently barred by Articles 310 and 311 TFEU) would require unanimity as provided under the ordinary revision procedure in Article 48 TEU.
XXIX European Commission, Proposal for a Council Directive 'Implementing enhanced cooperation in the area of financial transaction tax', (14 February 2013) COM(2013) 71 final.
XXX The traditional own resources comprise custom duties from imports outside the EU, Gross National Income (GNI), VAT.
XXXI The enhanced cooperation mechanism does not attribute to the European Parliament the requisite role for the fulfilment of the principle 'no taxation without representation'. Instead, the Parliament's role could only be upgraded through the use of the '*passerelle* clause*'* as provided in Art. 333 (2) TFEU. On the '*passerelle* clause' see Amato 2007: 1272. On the use of the '*passerelle* clause' in the EU's tax raising powers, see Fabbrini 2014: 173-174.
XXXII European Commission, A blueprint for a deep and genuine economic and monetary union - Launching a European Debate, (30 November 2012)COM(2012) 777 final/2, p. 33.
XXXIII To illustrate this, the left-leaning Syriza in Greece and Podemos in Spain have used the notion of solidarity as a sword to argue for further and deeper integration, while extreme right wing parties in France, Denmark and the UK have wielded solidarity as a shield against the very same process. These examples demonstrate the understanding of solidarity in its 'negative' sense, that is solidarity for one's self, directed to the satisfaction of one's own interest, for the Member State itself, as opposed to solidarity in its 'positive'

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sense which is undergone by the principles of reciprocity and altruism and is directed towards the 'common good'.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

How much Solidarity is in the EU Budget?

by

Mario Kölling*

Perspectives on Federalism, Vol. 7, issue 3, 2015

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Abstract

In this article I argue that the EU budget is (slowly) moving from a budget based on the rationale that richer EU countries help poorer EU countries in exchange for their engagement to the process of economic integration, and because economic development of the EU has positive economic returns for them, to a concept of solidarity based on a different rationale; that all member states and the Union are confronted with the same challenges and risks. In order to support this argument I analyse the development of the different budget headings as well as the increasing flexibility within the budgetary system.

Leaving aside the discussion as to whether this change is considered to be positive or negative, a reform of the own resources system and a stronger involvement of the European Parliament in the negotiation of the Multi Financial Framework would be essential to foster the trend. These reforms, together with an increase in the financial resources available, are necessary if the EU budget is to be reconciled with a solidarity role it should and has to play, in addition to giving the EU the means to properly address current and future challenges.

Key-words

EU budget, European Parliament, Multiannual Financial Framework

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1. Introduction

For Robert Schumann, Europe could only be forged through concrete achievements creating a de facto solidarity[I]. However, solidarity is a complex and ambiguous concept, especially in multi-level political systems. Even among consolidated federal countries and between different levels of government there is no consensus about the required level of financial solidarity or its economic sustainability. In fact there are different expectations on the right size, expenditure priorities and optimal revenue structure of the EU budget. There is even more confusion with respect to what solidarity means in budgetary terms. The same confusion reigns with respect to how much solidarity is needed and for what purpose. Some warn about the risks of a "transfer union", whereas others believe that the only way to address current problems is to create specific permanent solidarity mechanisms, and that there is to date little sign of an "European solidarity". For some member states the budget is the true instrument for measuring the spirit of solidarity, while others underline how much solidarity has been shown so far. Following this, in the debate on the MFF 2014-2020, two opposing principles, "European added value", and "European solidarity", became the adopted positions of net payers and net beneficiaries. While the net payers instrumentalised the unclear concept of European added value to argue for an overall restriction of the budget, net beneficiaries appealed to the principle of European solidarity, insisting on the need of increasing European spending and subsidies. The debate on European solidarity has been especially intensive in recent years, as more and more European countries have been hit by the economic crisis.

However, EU policies are in fact primarily designed to carry out the aims of the European Union which are mainly set out in article 3 of the TUE; and these objectives include both economic aims, such as the creation of the internal market and the establishment of an economic and monetary union, and principles which have a normative foundation such as economic, social and territorial cohesion. The EU budget is expected to finance EU policies related to these aims, irrespective of their relation to economic growth, but this raises questions as to whether financial solidarity be an underlining principle for EU expenditure, and to whether solidarity mechanisms are needed in order to address specific challenges.

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In order to address these questions, I concentrate in this article on the questions of the extent and nature of solidarity already present in the EU budget. For this purpose, I analyse the size of the EU budget, the rationale of the different spending headings and the spending norms as well as the role of the European Parliament (EP) in the budgetary process and compare this analysis with four different concepts of solidarity. The argument I make is that the EU budget is (slowly) moving from a rationale based on the logic that richer EU countries help poorer EU countries in exchange for their engagement in the process of economic integration, and because net contributors realized that the development of the poorer EU economies has positive economic returns for them, to a concept of solidarity based on the assumption that all member states and the Union are confronted with the same risks. My argument is based on theoretical assumptions regarding financial solidarity based on classical principles of fiscal federalism, and a range of concepts of solidarity, as well as on an analysis of the development of the different budget headings and the characteristics of the budgetary system. Although we will concentrate in this text on the EU budget, the EU budget is not the only way for the EU to express solidarity.

2. Some theoretical assumptions regarding financial solidarity

The concept of solidarity is ambiguous; it may be understood as a moral value, or as an agreement of mutual assistance linking members of a community, and this ambiguity is also present in the EU Treaties (Fernandes; Rubio, 2012). Since the Schuman declaration, solidarity has been used in different legal contexts: while article 2 of the Lisbon Treaty refers to solidarity as one of the EU's values, as a principle of Community solidarity, in other parts of the Treaty there are references to "mutual solidarity" and the fair sharing of responsibilities (e.g. on external and security policies or on freedom and justice) among member states and between the Union and its member states. However, the Lisbon Treaty went deeper, and referred not only to interstate solidarity but also considered the promotion of solidarity between regions, between citizens and between generations as objectives of the EU, and moreover enshrined the 'solidarity clause' including mutual assistance among member states in specific events (e.g. if a member state is the object of a terrorist attack or the victim of a natural or man-made disaster).

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In the post-Lisbon EU I identify four different rationales that inspire solidarity, based on: (1) bargaining side payments, (2) indirect mutual benefit, (3) short term direct mutual benefit and (4) long term direct mutual benefit.

The first rationale, (*bargaining side payments*) means that some countries help others in exchange for their support in other decisions. Historical accounts suggest that powerful member states determine EU policy formation, and induce the cooperation of weaker members with side-payments (Moravcsik, 1998). The exchange relations are between the country benefitting directly and the contributor, but the policy fields may differ. The incentives for these side payments can be very low; they may incur high domestic political costs, and side-payments may become institutionalised in the future, but side payments can also be frequent if bargaining costs are low. If there are no secondary negotiations or bargaining chips to exchange, or opportunities for issue-linkages, there will only be weak incentives to establish these kinds of solidarity instruments. Thus, solidarity based on *side payments* is the outcome of bargaining and temporary situations. One example could be found in the negotiation of the Delors II package where several member states related their approval of the economic and monetary union with increasing funds for structural actions.

The second *(indirect mutual benefit*) means that some countries help others because this may benefit them. Political support to exercise solidarity is ensured as far as the help is conceived of as temporary or because the objectives of these policies are seen within a broader normative framework. If there is no clear temporal or normative framework, public support will vanish. The exchange relations are also established between the direct beneficiary country and the contributor and these relations are more or less institutionalised. One example could be the Cohesion Policy, where, for example, for every euro spent in Poland, on average €0.46 goes back to other member states, particularly to Germany, Austria and France, which are its top three trading partners.

The third (*short term mutual benefit)* is the rationale inspiring the classic insurance-type schemes. One example would be the above mentioned ‘solidarity clause’ (article 222 TFEU).

In this sense member states should act jointly in a spirit of solidarity if a member state is the object of a terrorist attack or the victim of a natural or man-made disaster. The need for solidarity stems from the equality of chances that member states might be confronted with the same risks. (Fernandes; Rubio, 2012) Here solidarity is conceived as a ‘last resort’

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instrument, to be activated only in exceptional circumstances when a country is affected by an exogenous risk, a negative event that is not under its own control. Public support is based on the assumption that the instrument will be activated only in case of these circumstances and will not be costly in the long term. Hence, solidarity based on short term mutual benefit considerations is characterised by punctual help for specific risks.

The fourth rationale, "*long term mutual benefit*", may also be applied for considerations related to the establishment of mechanisms toward challenges, and in this case to the need for solidarity stems from a situation in which all member states seem to be confronted with the same risks. However the risk is not very clearly defined and may not materialise in the short term perspective. In order to address the risk all members of the community agree to invest resources with specific purposes. There may be some conditionality attached to the use of the aid (although not necessarily related to geographic criteria) based on the assumption that a coordinated action of the Union could help to prevent the risk and transform the challenge into an opportunity. The mechanism is established between all member states and the representatives of the Union, and support is based on the assumption that without coordinated action there may be negative consequences for the whole Union. Coordinated action might include an increased involvement of common institutions and procedures. There are no clear defined temporal limitations, for in this case, solidarity is not temporary and not related to specific risks; one example could be the support of the Europe 2020 Strategy for smart, sustainable, and inclusive growth.

3. Analysis: What kind of solidarity in the EU Budget?

3.1. The negotiation of the budget

Solidarity as a European concept was not explicitly the basis for the establishment of the EU budget, nor is the development of the EU budget related to arguments based on efficiency. However, in the past the EU budget has played an important role in compensating member states for anticipated losses in the integration process. Most resources have been allocated to spending programmes following quantitative arbitration among policies, rather than as a result of an assessment of the cost of each programme by reference to specific objectives. (Cipriani, 2014) This development can be seen in the evolution of the successive multiannual financial frameworks (MFF). The first MFF was

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agreed for the period 1988-1992 (Delors I package), and was negotiated in parallel with the Single European Act, where some member states linked their support for the internal market to an increase in structural funds. The final agreement included a significant increase of budgetary resources, especially structural funds, which doubled from 1988 to 1992 despite resistance from net contributors to the budget. (Wagner, 2001; Laffan, 2000; Laffan; Shackelton, 1996). According to Brennan, Spain, Greece and Portugal insisted on a doubling of the structural funds as a strict *quid pro quo* for agreeing to the package as a whole because their accession and the proposed reforms would lead to intensified competition for structural transfers in the poorest regions. (Brennan, 2006)

The MFF 1993-1999 (Delors II package) also contained a significant increase in structural and cohesion funds as a basis for the preparation of member states for the single currency. Moreover, the negotiations on the Delors II package took place in the aftermath of the Danish 'NO' vote on the TEU, when most member states had a strong interest in demonstrating both unity, and the capacity of the Union of reaching agreements (Kölling, 2014a). In 1999, the MFF for the period 2000-2006 secured the necessary resources to finance the eastern enlargement process of the EU. Again, several member states related their support for the eastern enlargement to specific transition periods and increasing spending in Cohesion Policy. Although the MFF 2007-2013 contained more resources and established a new and fragile link between spending programmes and policy strategy oriented towards sustainable growth and competitiveness, in line with the Lisbon Agenda, several member states demanded a freezing of the EU budget. Even though some member states tried to link the negotiation of the MFF to the debate on Treaty reform, the two debates were not carried out in parallel, and for the first time redistributive and financial negotiations were not linked to normative or constitutional debates.

The MFF 2014-2020, negotiated during the financial and economic crisis, resulted, for the first time in history, in a reduction in the overall budget. This was a clear victory for member states which are net contributors to the budget and which had taken this position from the early stages of the negotiation process. However MFF 2014-2020 reinforced the link between the budgetary headings and a policy strategy. In this sense the Europe 2020 Strategy plays an important role in the Cohesion Policy 2014-2020 and Common Agricultural Policy (CAP) 2014-2020 where spending is conditional on the fulfilment of the objectives of this strategy.

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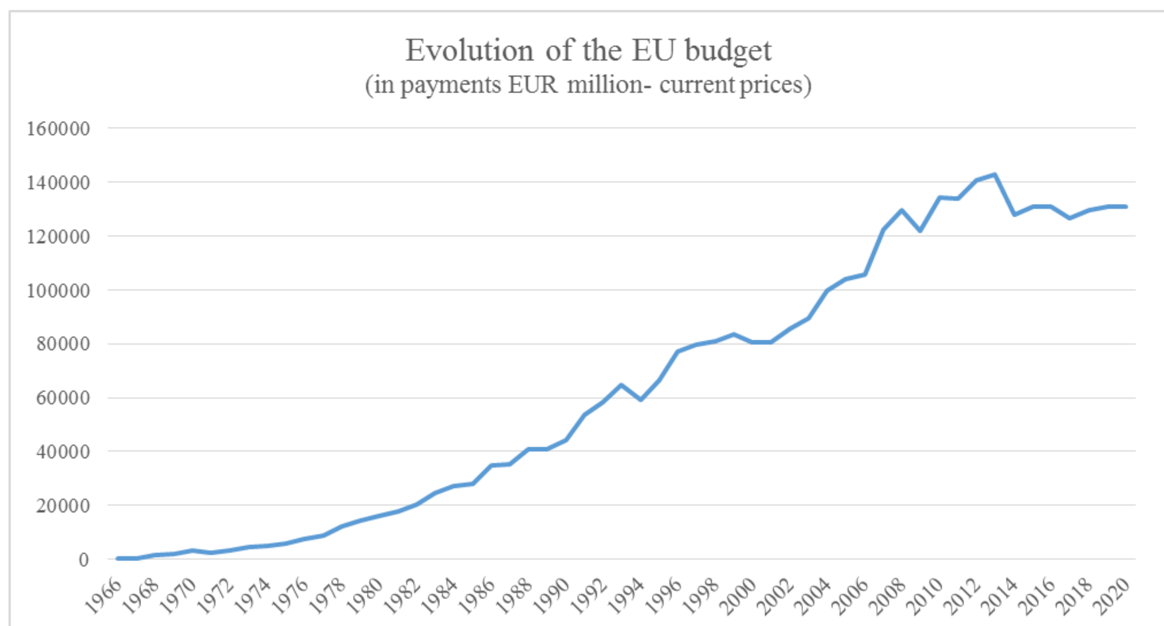
3.2. The size of the budget – How much money for solidarity

The budget of a national state is generally of a considerable size, owing to the important financial consequences of many of its socio-economic policies. The combined national budgets of EU member states account on average for about 47% of total GDP – enabling member states to offer welfare systems which are in general terms seen as solidarity instruments. The EU budget stands at about 1% of the EU GDP. However, the size of the budget may not always give insights on the level of solidarity, since 94% of the EU budget is spent in the EU countries on policies and programmes that benefit citizens directly. Moreover, an examination of the size of the EU budget shows that there is a clear tendency, at least until 2014, of increasing resources (see Figure I). As already mentioned, the sharp increase in size of the EU budget in the late 1980s and in the 1990s were caused by the two Delors packages that reformed the budget and significantly increased the amount of structural funds allocated within the Union. The reforms of the Cohesion Policy were part of a much larger reform of the European Community which culminated in the Single European Act in 1992.

Figure I:



Source: Own elaboration

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In the context of budgetary constraints at the national level during the financial and economic crisis starting in 2007, the MFF for the period 2014-2020 was reduced for the first time in its history. The overall level for commitments has been set at €960.000 million for 2014-2020 which remains 1% of the EU GDP but represents €15.000 million less than in the period 2007-2013. However, until 2013 we had seen a trend in which annual budgets have been lower than the ceiling established through the MFF. Moreover, there have also been 'quantitative' ceilings, with member states agreeing an overall limit to the resources for the EU budget and a limit for financial aid that a country can receive. In this sense solidarity (meaning the resources which a country can receive from the EU budget) has been fixed first (2004) at 4% and later set at between 3.23% and 3.78% of national GDP. Together with other restrictions, the absorption limits had led to the situation where not all budgetary resources could be spent, and had to be returned to the national budgets. However, after 2015, unspent money can be carried over from one year to another and the Commission can adjust the payment ceilings using unspent money from the previous year. In this sense, although the overall ceiling has been reduced, the allocated resources will be available for the whole spending period. (Kölling, Serrano 2013)

3.3. The budget headings

The difference in size between the EU's budget and those of the member states explains why broad social redistribution cannot be a principal task of the Union. Moreover the EU has no great capacity to promote macroeconomic stability through its budget– a role routinely undertaken by the highest level of government in other systems. During the debate on measures designed to combat the crisis, it was striking that there was virtually no discussion of whether or how the EU budget could be used for this purpose. While social redistribution and its effectiveness on the economic crisis has been uneven among member states, there are scenarios that affect all member states in a similar way.

In fact, analysing the different budget headings we can see a shift from traditional spending towards spending on policy goals. Since 2007, R&D and competitiveness have become a key priority (see figure II, III and IV). This trend has been reinforced since 2010 with the adaptation of the Europe 2020 Strategy, in which the EU set out its aims to "promote a more resource efficient, greener and more competitive economy" and to become the most competitive region in the world.

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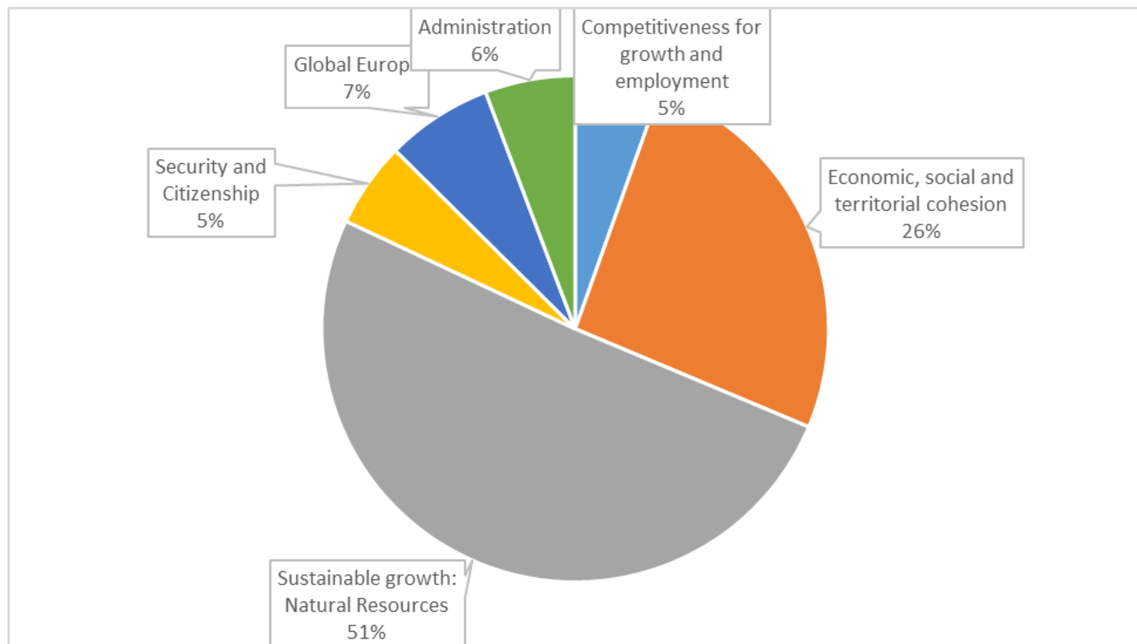
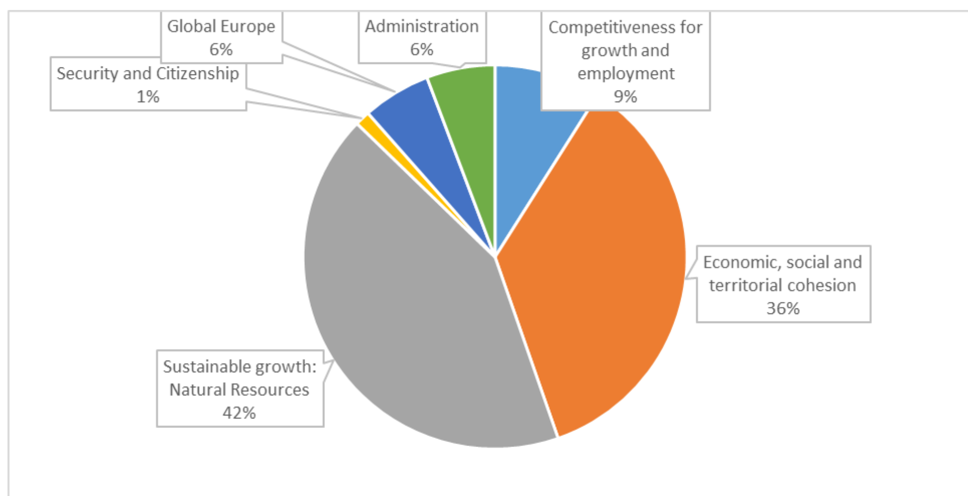
Figure II: Distribution of spending headings 2000 - 2006[II]



Source: Own elaboration, European Commission (2009), EU budget 2008, Final report, Luxembourg: publications office of the European Union.

Figure III: Distribution of spending headings 2007 - 2013



Source: Own elaboration, European Commission (2009), EU budget 2008, Final report, Luxembourg: publications office of the European Union.

Figure IV: Distribution of spending headings 2014 - 2020

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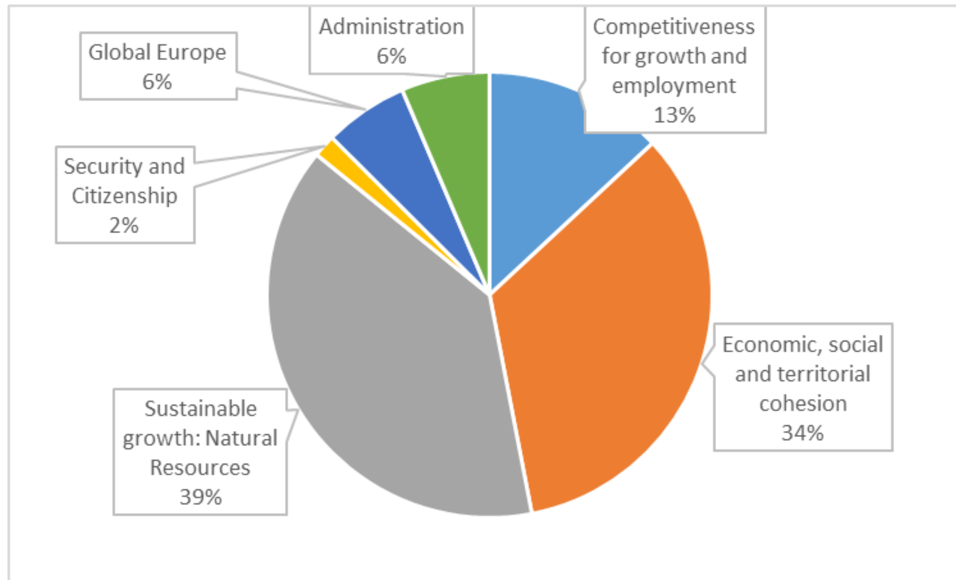

Source: Own elaboration

Figure V: Comparing of the spending headings between the MFF 2007-2013 and the MFF 2014-2020.

(EUR million - 2011 prices)	**MFF 2007-2013**	**MFF 2014-2020**	**Variation MFF 2014-2020 to MFF 2007-2013**
1a. Competitiveness for growth and employment	91.495	125.614	+34.1 (+37,3%)
1b. Economic, social and territorial cohesion	354.815	325.149	-29.7 (-8,4%)
2. Sustainable growth: Natural Resources	420.682	373.179	-47.5 (-11,3%)
of which: market related	304.830	277.851	-52.234

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expenditure and direct payments			
3. Security and Citizenship	12.366	15.686	+3.3 (+26.8%)
4. Global Europe	56.815	58.704	+1.9 (+3.3%)
5. Administration	57.082	61.629	+4.5 (+8%)

Source: Own elaboration

An analysis of the different budget headings confirms the shift from traditional spending on the CAP and Cohesion funds towards spending on specific policy goals. While during the nineties the EU targeted over 80% of its budget in favour of structurally weak, and agricultural members, this percentage has been reduced. As already mentioned this is not only due to budgetary constraints but also because of the growing importance of policy strategies, and their interlinkage with the EU budget. According to this trend, in the MFF 2014-2020 the two main spending headings have been renamed in accordance with the main strategies in Europe 2020. Indeed, besides semantic enhancements, spending programmes under sub-heading 1a ("Competitiveness for growth and jobs") contribute to the fulfilment of the Europe 2020 Strategy, in particular as regards to the promotion of research, innovation and technological development, as well as specific actions in favour of the competitiveness of enterprises and SMEs. In the MFF 2014-2020 this spending block sees its funding go up by 37% to €125.700 million compared to the former MFF (see Figure III). In this sense programmes are oriented towards increasing the competitiveness of the EU as a whole within a global market; among the strategic goals of this programme is the challenge facing the EU in increasing the Union's position in international innovation scores (Kölling, 2014b).

On the other hand, spending programmes on traditional headings, e.g. sub-heading 1b ("Economic, social and territorial cohesion"), have been reduced. Cohesion Policy had been traditionally one of the largest budget items, which had been considered as the main tool of solidarity through its support of the socio-economic development of the poorer member states and territories and to a certain extent as a weak equalization arrangement;

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however there are important differences to federal equalization programmes, both in philosophical and economic terms. According to the Lisbon Treaty, the EU "[…] shall promote economic, social and territorial cohesion, and solidarity among member states." Article 3 TUE therefore implies that Cohesion Policy is aimed at providing solidarity between the member states and regions, and particularly at helping the poorer member states and regions "catch up" economically with the EU average. Cohesion is made evident in various ways but notably through significant transfers from the EU budget, where resources are redirected to peripheral and economically weaker regions, not in order to reshuffle assets in the short-range perspective, but to upgrade their enduring productive capabilities. However, under the Commission's list of territories benefiting from territorial cohesion, almost all types of geographic and socio-economic areas are covered: urban, rural, coastal and fishing areas; regions suffering from natural disadvantages or serious, chronic demographic issues.

Cohesion policy has always been tied to implementation rules, creating a dynamic equilibrium between solidarity and responsibility. It has had a long history in which it has been shown to be capable of adapting its objectives and delivery structure to new challenges, mainly because criteria for eligibility for existing funds and the equilibrium between solidarity and responsibility have been adapted during the past decades. In budgetary terms Cohesion Policy has helped to achieve a significant level of solidarity. However, as already mentioned, the Cohesion Policy 2014-2020 also contributes to the objectives of the Europe 2020 Strategy. In this sense, and in addition to the objective of structural development, the European Regional Development Fund and the Cohesion Fund have to pursue the goals of economic growth and jobs creation.

Moreover there are new and stricter conditions for implementation. While macro-economic conditions, which combine penalties and enforced aid, will ensure that the rules of economic governance are followed; "ex ante" conditions have to make sure that the conditions necessary for effective support are given.

The origin of the Common Agricultural Policy - ("Sustainable growth: Natural Resources") - dates back to the Treaty of Rome and could be considered the unique distributive policy of the EU. European solidarity in terms of farming was initially expressed in the financing of the CAP. In 1958, the Declaration of Stresa defined its basis: "In the name of financial solidarity, all the member countries of the EEC take part in the

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financing of the burdens of the Community such as guaranteed prices for farmers, the export of surpluses or even the policy of aid and improvement of structures. All the costs engendered by the CAP must be borne in common." (Chambon, 2012) Distributive policies involve allocations of financial resources and benefit, not from one side to another but rather from the contributors to selected beneficiaries. There is also an element of redistribution in the common agricultural policy, where the second pillar of the CAP should ensure development of rural areas. Although the achievements in these fields are far from negligible, the redistributive impact is nevertheless commensurate with the modest volume of the budget for rural development. Distributive policies are also often "patronage" policies which are characterised by close political ties between the bureaucracy and strong sector specific interests. In this sense where the distribution of direct aid is more advantageous to big farming countries, it is to the detriment of countries with little agriculture; moreover the distribution of direct aid is less advantageous for new member states and for countries with different territorial specialisation.

Although market related expenditure and direct payments remain the main spending categories of the budget there have been some important reforms made. With regard to MFF 2014-2020 firstly, spending on heading 2 has been reduced by 11%. Secondly the CAP has also been integrated into the Europe 2020 Strategy objectives. In this sense a strong emphasis has now been put on expenditure aimed at boosting growth and creating jobs. The change in the orientation of the CAP can be seen in the evolution of expenditure, reflecting the policy shift since 1992, away from product based support towards producer support and considerations for the environment.

Actions under the heading "Security and Citizenship" constitute a diversified range of programmes related to asylum and migration and initiatives in the areas of external borders and internal security, as well as measures in the field of justice. With regard to the current MFF, there are significant changes in the headings compared to the 2007-2013 period. Starting from a low level the budget allocation for 'Security and citizenship' has grown by around 27%. Many aspects of asylum and migration policy, including external borders and internal security, are based on long term common risk perceptions, which affect all member states of the Union.

The same trend can be confirmed for the heading "Global Europe", which supports solidarity actions beyond EU borders, in particular by delivering urgent humanitarian

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assistance and development aid. During MFF 2014-2020 the envelope for the development cooperation instrument was of €17.300 million, the neighbourhood policy €13.600 million, and the pre-accession instrument, €10.500 million. This represents an improvement with regard to the former MFF (Kölling; Fernandez, 2012). The programmes of heading 4 can be considered to be similar to the spending on headings 3 in that they are motivated by the rationale of common risks prevention. Although member states have geographic preferences, neighbourhood policy, development cooperation and the creation of the European External Action Service can be considered to be in the common European interest. Within this category we could also name the European Development Fund[III] which provides aid for development cooperation with African, Caribbean and Pacific countries, as well as overseas countries and territories.

3.4. The spending rules – less autonomy more solidarity

3.4.1. Solidarity and flexibility

As already mentioned increasing flexibility of the budget has resulted in less control by the member states and has increased the discretionality of budgetary actors. Within the current MFF we can confirm an increased flexibility within the budget both related to the temporal dimension but also among budgetary headings.

- The mid-term adjustment of the national allocations under the "Investment for growth and jobs" goal of the Cohesion Policy (thus applicable to the period 2017-2020) will be carried out on the basis of up-dated GDP statistics in 2016.
- The agreement includes a contingency margin aimed at allowing flexibility within the MFF 2014-2020 to cope with unforeseen circumstances.
- As regards to the CAP, the MFF maintains its relevance while, at the same time, introduces elements of reform in an effort to modernize this common policy. Allowing for greater flexibility in the use of the rural development funds is a step forward in narrowing the "technologic gap" between different regions, and addressing the specificities of different countries.
- Regarding flexibility the final compromise between the EP and the Council includes a formula for calculating the sums that can be carried over from one year to another, after 2015 the Commission will adjust the payment ceilings using unspent

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money from the previous year, but with a cap of €7 billion for 2018, €9 billion for 2019 and €10 billion for 2020.

3.4.2. Conditionality and spending priorities

The EU budgetary instruments are grants and loans which are increasingly characterised by a low level of discretion given to beneficiary member states, mainly due to higher control mechanisms but also due to increasing conditionality, where the precise conditions and restrictions have been changing and growing. In this sense more solidarity means less autonomy, and the MFF 2014-2020 especially makes clear that the relationship between solidarity and normative commitment has changed, and that other, more political factors, are at work in the implementation of the policy.

The new macroeconomic conditionality aims to link the allocation of structural funds to good economic governance, is applied to all funds and may result in a suspension of part or all payments. However macro-conditionality does not mean that a member state would see its aid automatically suspended for an excessive budget deficit procedure. Nevertheless this could be the case if the government of a member states does not react to a request from the Commission to adjust its programmes.[IV] With regard to the CAP we can also find increasing conditionality related to more targeted cross-compliance, in which the compulsory basic layer of environmental requirements and obligations to be met in order to receive full CAP funding are represented.

3.5. The growing role of the EP – the representative of the common interest

The EU's budget has been traditionally negotiated between member states which considered the specific budgetary headings as acquired 'budgetary rights'; these were framed by the unanimity rule, which fostered resistance to the reform of the budget. However, the European Parliament has assumed a new role in the negotiation of the MFF 2014-2020, where the Lisbon Treaty gave the EP a new formal role in the adoption of the regulation which sets up the MFF. The EP has the right of consent over the spending side of the budget where a majority of MEPs can approve or reject the agreement reached by the European Council, although formally it cannot negotiate it. But the EP has not only a new formal role in the final phase, as it has already been one of the major players from the very beginning of the current negotiation process:

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- the EP did not wait for the Commission's proposal before presenting their own position and adopting a Resolution on the MFF,
- the EP elaborates position papers on conflictive issues according to the negotiation steps of the Council, and
- the EP representatives meet the Trio Presidency ahead of the Council of General Affairs.

Conscious of this new role, the EP highlighted on several occasions during the negotiation process that the budget proposal debated by EU leaders did not reflect the priorities and concerns of the Parliament which were much more concentrated on, and oriented towards, common EU goals. The new informal procedure enabled the MFF 2014-2020 to be "negotiated" between the Council and the EP. Alain Lamassoure, the European Parliament's chief MFF negotiator commented that "It is only since the Lisbon Treaty that the European Parliament has fully deserved to be called a parliament. It now has all the budget powers a parliament in a federal system has. It is the first time that these new powers can be exercised on a multiannual financial framework."[V] The new role of the EP enabled the "politicisation" of the discussion on the MFF and the introduction of budgetary goals related to both the expenditure and the revenue side which represent the common interest of the whole Union.

4. Conclusions

At the beginning of the integration process financial solidarity as a particular guiding principle was not part of the considerations of member states. Later on the budget was, rather, rooted in the national calculation of implementing self-interests, and it is only during recent years that the budget has become an instrument to support policy programmes related to addressing common challenges.

Nevertheless the concept of solidarity remains ambiguous, and has been used in different contexts: as one of the EU's values, as a principle of Community actions, but also as "mutual solidarity" and related to the fair sharing of responsibility. Furthermore solidarity refers to the relations among member states, between the Union and member states, but also between regions, between citizens and between generations, as objectives of the EU.

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Consequently, I have been able to identify four different rationales inspiring solidarity in the EU, which have specific focus and purpose in solidarity arrangements, and different natures and motivations, levels of institutionalisation; time frames and promotors.

In this article I have argued that the EU budget is (slowly) moving from a rationale that richer EU countries help poorer EU countries in exchange for their support for the process of economic integration and because economic development of the EU has positive economic returns for them, to a concept of solidarity based on the assumption that all member states and the Union are confronted with the same challenges and risks. In other words the budget is changing from being an instrument to accommodating member states preferences to a policy instrument.

The analysis of the development of the negotiation of the MFF, the budget headings, and spending rules, as well as the role of "new" budgetary actors confirms this argument.

It may be hard to detect elements of solidarity in the budget, especially if we consider the development and/or the role of the EU budget in the current economic crisis. However, we have to specify the means and rationale of solidarity and differentiate between long and short term solidarity. Since the beginning of the integration process solidarity arrangements have been driven by bargaining and side payments e.g. the creation of the CAP and Cohesion Policy. Moreover the shift in the EU revenue system from own resources to member states' contribution (based on national GNI) has reinforced the trend that richer EU countries help the most distressed ones; both because net contributors would also benefit from the measures, and because beneficiaries interrelated re-distributive polices to further integration steps.

However there is also a growing understanding that the EU is facing an increasing number of challenges which affect all member states. This new perception has underlined the shift from traditional spending towards spending on targeted policy objectives. Growing numbers of instruments are based on the rationale of short and long term mutual benefit.

With regard to short term direct reciprocity, there is a growing number of EU operations in the wake of disasters and major accidents, which are undertaken in the interest of the victims. For this purpose there have been specific instruments created (e.g. the Emergency Aid Reserve; the European Globalisation Fund; the Solidarity Fund and the Flexibility Instrument). EU countries commit themselves to reciprocal aid instruments in

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face of a risk that is equally spread among member states. All EU countries are thus potential givers and receivers of help. Alongside the increasing resources for these instruments, also comes an increased scope for intervention, and, taking into account past experience, more flexible mechanisms enable the EU to mobilise funds to react to unforeseen events such as a crisis and emergency situations.

The structure of the MFF 2014-2020 differs from the Delors I package; the structure of the spending headings confirms the decreasing importance of the traditional spending headings (Cohesion Policy and CAP) and the increase of competitiveness and job creation expenditures. Whilst evidently the EU budget is too small to be a useful instrument, it is generating a long lasting impact.

One of the main questions and challenges of the Union could be to make this solidarity visible. Citizens do not know how the budget is spent. In this sense, there is a clear need for more transparency and an increasingly clear visibility of European solidarity in the form of EU programmes. The visibility of EU's spending and revenue could well be the catalyst for an unprecedented debate about the EU budget, and ultimately about Europe as such. The shifting of the liability for funding the EU budget from member states directly to citizens might especially foster the role of the European Parliament and enable autonomous decision at EU level on the volume of the resources for the EU budget and the level of European solidarity.

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[*] Senior Researcher, Fundación Manuel Giménez Abad, Zaragoza. Mario Kölling's contribution is part of the research developed in the context of the project 'Costes y beneficios de la descentralización política en un contexto de crisis: el caso español' (MEC, DER2012-39179).

[I] Schuman Declaration, 9 May 1950

[II] This table provides the distribution of the spending period 2000-2006 based on the headings of MFF 2007-2013 in order to provide an overview of the evolution of EU policies. There have been mayor changes in the EU, mainly in relation to the number of member states.

[III] As it is not funded from the EU budget but from direct contributions from EU Member States, the EDF does not fall under the MFF.

[IV] The Commission may request a Member State to review and propose amendments to its Partnership Contract and the relevant programmes, where this is necessary to support the implementation of:
(a) recommendations under the broad guidelines of the economic policy;
(b) employment recommendations;
(c) specific measures addressed to euro area Member States in accordance with Article 136(1);
(d) recommendations under the excessive deficit procedure;
(e) recommendations under the excessive imbalances procedure;
(f) union support under the medium-term balance of payments facility;
(g) union support under the European financial stabilisation mechanism;
(h) financial assistance under the European Stability Mechanism.

[V] "If we abdicate our powers, we no longer deserve our name" - Interview with Alain Lamassoure, European Parliament's chief MFF negotiator, EUROPOLITICS, 01 March 2013.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The emergence of New Economic Governance and its impact on Services of General Economic Interest

by

Marta Legnaioli*

Perspectives on Federalism, Vol. 7, issue 3, 2015

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Abstract

This paper evaluates the impact of austerity measures on national social protection mechanisms and on the European Social Model. The study is based on an in-depth analysis of austerity measures adopted in Italy and Portugal and the evolution of several indicators, such as unemployment rates and the percentage of citizens at risk of poverty.

The analysis demonstrates that measures adopted in the field of new economic governance have had an impact on the organization and provision of SGEIs and have affected the solidity of the national welfare state. It will be argued that in this context the promotion of a social dimension of the EU requires innovative methods for the regulation of new economic governance.

Key-words

New Economic Governance, Services of General Economic Interest, European social model

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1. Introduction

The development of European Economic Governance, and the promotion of austerity policies, whilst addressed mainly at national budgets, entailed a social dimension as well, occasioning a general decrease in the level of protection of social rights linked to public services such as health, social assistance and education.

The paper's research develops in two parts. In the first part the focus is on the impact of austerity measures on the protection of social rights at the national level, especially in Portugal and Italy. These two countries have been selected as they represent the two main Union approaches to the financial crisis: on the one hand, Portugal benefited from financial assistance from the EU under specific economic policy conditionality, set out in the Economic Adjustment Programme, signed on 2011. On the other hand, the case study of Italy is interesting in order to question the impact of austerity measures adopted in the field of macroeconomic surveillance. The study will focus on the country-specific recommendations addressed to Italy in 2013 and 2014.

The second part of the paper questions whether austerity measures subsequently impact on national public policies and the current division of competences between the Union and Member States (MS). In the field of public services, the notion of 'Services of General Economic Interest' (SGEIs) is an exemplar of the interaction between MS' competences and EU law. Indeed, the role national welfare policies play in meeting social needs was taken into consideration by the Union legislator through the introduction of SGEIs, defined as

> 'economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention.'[1]

In an acknowledgement of their role, SGEIs enjoy derogations in the application of the 'rules contained in the Treaties, in particular to the rules on competition' (Article 90(2) EEC, now Article 106(2) TFEU). The notion of SGEIs may also extend to include Social

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Services of General Interest, such as social security systems covering the main risks of life, depending on their economic nature. Both categories are then included in the broader category of Services of General Interest.

What is relevant for this study is the division of competences set by Protocol 26 TFEU, where it is recognised that

> 'the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users' represents a shared value of the Union (Article 1, Protocol 26 TFEU).

The originality of the study is found in the research question of the second part of the article, namely if austerity policies have limited the margin of discretion enjoyed by MS in the organisation of SGEIs.

2. The new European Economic Governance

This section aims at demonstrating that social services, traditionally excluded from the sphere of European regulation and left to MS competence, can be indirectly influenced by new economic governance in terms of budgets, policy objectives and the quality of service provided.

New European Economic Governance is the result of the measures adopted in the EU legal order and by the Eurozone MS through international treaties. The impact of this new governance on national polies aimed at protecting social rights varies according to the object of the measures adopted. It is therefore necessary to identify the four pillars that compose new economic governance.

Originally economic governance was structured in two main pillars (de Streel 2013: 455-456): budget surveillance established in 1997 by the Stability and Growth Pact[II] then reformed in 2005 and 2011[III], and the Open Method of Coordination (OMC) set by the 'Lisbon strategy' in 2000, which took the form of instruments aimed at promoting the coordination of national socio-economic policies.

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The sovereign debt crisis not only necessitated the introduction of two new pillars, but also changed and strengthened the two previous mechanisms, particularly in the field of budget surveillance. The two new pillars comprised macroeconomic surveillance, established in 2011 and governed by two regulations[IV] which are included in the 'Six Pack', and financial assistance, initially granted through a 'temporary rescue mechanism'[V] originating in the European Financial Stabilisation Mechanism (EFSM)[VI] and the European Financial Stability Facility (EFSF). From 2011, these tools were replaced by the European Stability Mechanism (ESM),[VII] an 'intergovernmental organisation under public international law.'[VIII] The establishment of the ESM signalled a shift from actions inspired by necessity and urgency, to a more stable mechanism. Moreover it can be observed that new economic governance is the result of a combination of EU law and international instruments, where EU institutions are nonetheless empowered with new functions; factors which contribute to the complexity of the overall system.

This study will focus on the macroeconomic surveillance and the financial assistance, as the 'budget surveillance pillar' is primarily linked to the single area of the respect of limits set for public expenditure and debt.

2.1. Macroeconomic surveillance and country-specific recommendations

The Macroeconomic Imbalance Procedure (MIP) is aimed at monitoring, and if necessary correcting, macroeconomic imbalances, and functions in two phases. The first phase consists of 'an alert mechanism which works as a filter' and consists of 'a scoreboard with early warning indicators put in place by the Commission', such as 'current account balance in per cent of GDP', 'net international investment position', 'changes in the house price index' and 'unemployment rate.'[IX] In the case of 'serious imbalances, the corrective arm of the procedure requires the Member State to put in place a detailed policy plan to achieve their correction and provides means to effectively enforce it.'[X]

The second phase involves the adoption of country-specific recommendations by the European Council, that contain measures on a

> 'broad range of topics: the state of public finances, reforms of pension systems, measures to create jobs and to fight unemployment, education and innovation challenges, etc. "that each country" should adopt over the coming 18 months.'[XI]

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The proper implementation of country-specific recommendations should not be considered in terms of legally binding acts, but in terms of political pressure on national governments and incentives in order to avoid the 'Excessive Deficit Procedure' (Article 126 TFEU).

In the country-specific recommendations addressed to Italy in 2013 and 2014, a tendency in favour of increasing competition can be noted, which implies the adoption of liberalisation measures in the field of public services. From this perspective it was suggested that to

> 'ensure the proper implementation of the measures aiming at market opening in the services sector,' MS should 'remove remaining restrictions in professional services and foster market access for instance in the provision of local public services where the use of public procurement should be advanced (instead of direct concessions).'[XII]

This tendency towards the opening of the markets can also be observed in the field of network industries.[XIII] Moreover in the field of local public services, the Commission called on Italy to 'rigorously implement the legislation providing for the rectification of contracts that do not comply with the requirements on in-house awards by 31 December 2014.'[XIV]

In respect of social services, the 2013 recommendations acknowledged that

> 'the risk of poverty and social exclusion, and in particular severe material deprivation, are markedly on the rise, while the social protection system has increasing difficulties coping with social needs since it is dominated by pension expenditure.'[XV]

As a consequence, demands were made of the Italian government to 'ensure effectiveness of social transfers, notably through better targeting of benefits, especially for low-income households with children,'[XVI] and in the proposal for the 2014 recommendations the Commission added that the government should

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‘address exposure to poverty and social exclusion, scale-up the pilot social assistance scheme, in a fiscally neutral way, guaranteeing appropriate targeting, strict conditionality and territorial uniformity, and strengthening the link with activation measures.’[XVII]

In short, in the field of public services the recommendations addressed to Italy identify open and competitive markets as a core element for increased competitiveness needed to create the necessary conditions to start a process of economic recovery and national growth.

Nonetheless considering that the recommendations were adopted in the context of the MIP and that the object of the indicators was not especially addressed towards verifying the level of liberalisation of markets, a lack of justifications can be observed with reference to the eleven indicators on which the MIP is based.[XVIII] In fact the content of country-specific recommendations does not appear as a direct consequence of the MIP, but rather seems to be the result of highly discretionary and political choices, which should require an in-depth motivation.

It is important to highlight two key elements: first, country-specific recommendations can have an impact on the management of SGEIs. Second, the content of the recommendations is not an automatic consequence of imbalances identified during the MIP, which grants the Commission a wide margin of discretion in drafting recommendations, not counterbalanced by a requirement to give justifications on how policies will promote macroeconomic stability in MS. In other words, the recommendations do not show their causal link with the ‘warning indicators’ that should guide the evaluation of the Commission in the context of the first phase of Macroeconomic Surveillance.

Indeed the final document approved by the Council does not expressly refer to specific macroeconomic imbalances, and regarding public services it prescribed general policies to Italy aimed at promoting further liberalisation.

2.2. Financial assistance and the conditionality clauses

The fourth pillar of new European economic governance is financial assistance, which can be granted as a measure of last resort in order to restore economic and financial stability in a MS, and at the same time to avoid the spread of the debt crisis to other MS, in

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order to guarantee the stability of the single currency. However, the Treaty of Maastricht established the 'no bailout clause' that prohibits the Union and MS from being

> 'liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project' (Article 125 TFEU).

Therefore in the absence of an amendment to the 'no bailout clause' the establishment of a 'permanent stability mechanism', such as the ESM,[XIX] required the adoption of an international treaty and the amendment of Article 136 TFEU.

The granting of such financial assistance is subject to 'strict conditionality' (Article 136(3) TFEU), which means that the MS has to adopt a program of macroeconomic structural reforms negotiated with the Commission, together with the European Central Bank. These measures are embedded in a 'Memorandum of Understanding' (MoU) and their implementation is subject to constant surveillance and, where necessary, to modifications.

As with the country-specific recommendations, the MoU does not entail a transfer of competences from the MS to the 'Troika' of the Commission, the ECB and the IMF, and it is not an international treaty. Notwithstanding the absence of a legally binding nature, the implementation of the MoU should however be considered as a necessary step in order to obtain financial assistance.

2.3. The impact of austerity measures on public services in Portugal

The measures adopted in the granting of financial assistance granted to Portugal give an example of the consequences on the margin of discretion enjoyed by MS in the provision of SGEIs.

On April 2011, the Portuguese government asked for financial assistance from 'the EU, the euro area MS and the International Monetary Fund (IMF).'[XX] This request led to the negotiation of an 'Economic Adjustment Programme' where the Troika agreed to grant an assistance package of '€78 billion (EU/EFSM – €26 billion, Euro area/EFSF – €26 billion, IMF – about €26 billion) '[XXI] under several conditions established in the MoU, including

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the reduction of 'Government deficit to below EUR 10,068 million (equivalent to 5.9% of GDP based on current projections) in 2011, EUR 7,645 million (4.5% of GDP) in 2012 and EUR 5,224 million (3.0% of GDP) in 2013.'[XXII]

Besides the general request for a reduction of the deficit, the MoU provided for a series of specific reforms aimed at reducing government expenditure, therefore affecting some public services.

In the light of the EU's definition of Services of General Interest (SGIs), the areas involved in this austerity strategy can be divided in two categories: the first is composed of SGEIs, such as energy, telecommunication, transport, postal service and water supply; the second includes some elements of social services, such as health care, unemployment benefits and education.

In the first category of services the MoU called for a substantial programme of liberalisation of State owned enterprises (SOEs), with the aim of 'reducing the Government's financing needs, stimulating competition and attracting foreign capital.'[XXIII] The programme of privatisation addressed a number of service areas: transport (ANA, TAP and CP Carga), energy[XXIV] (GALP, EDP, and REN), communications and postal[XXV] (Correios de Portugal) and insurance (Caixa Seguros). This strategy was in line with a privatisation programme in the public sector which began in the 1990s, considered one of the most extensive of any MS (Clifton et al. 2003: 70).

In the case of the water supply sector

> 'instead of selling the company Águas de Portugal (AdP), as a whole it was agreed to first restructure the water and waste branches before selling the waste management holding (EGF) and considering opening up water activities to private capital and management.'[XXVI]

In the second category, social services, one of the major areas concerned in the structural reforms promoted by the Troika was the public health care system. In this sector, the MoU called for a general cut in public expenditures of €550 million for 2012 and of €375 million for 2013. Besides this general objective, the MoU indicated specific measures to be adopted in order to reform the health care system, such as increasing co-payments (called moderating fees or *taxas moderadoras*) paid by patients. The Portuguese government

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agreed with the Troika's proposal of the introduction, by September 2011 of: a) 'a substantial revision of existing exemption categories, including stricter means-testing in cooperation with Minister of labour and social affairs;' and b) an 'increase of moderating fees in certain services while ensuring that primary care moderating fees are lower than those for outpatient specialist care visits and lower than emergency visits.'[XXVII]

In order to comply with the first requirement, the government reformed the rules on co-payment, on the one hand raising 'the threshold for exemption due to low income' (Rodrigues 2014: 5) to a monthly household income of €628.83 per adult, which also included self-employed persons. On the other hand,

> 'exemptions were severely limited for members of other groups,' such as 'people with certain chronic conditions who are currently only exempt from paying fees for healthcare services directly related to their condition; firemen and blood donors who are now exempt for primary care only; older people (aged 65 and older) who previously paid only 50% of the co-payments and who now pay the full amount, unless they are exempt due to other reasons' and unemployed persons, who under the previous regulation enjoyed an automatic exemption if they were 'registered at employment centres, as well as beneficiaries of the Minimum Guaranteed Income (*Rendimento Social de Inserção*)' (Rodrigues 2014: 5).

As a consequence the increased number of patients exempt from co-payments because of low income contributed to an increase in the total number of people exempt from the co-payment (see Table 1). Nonetheless in a context of high level of unemployment, this category appears to be the most affected.

	2006	2014 (a)
Low income	1,692,617	3,051,882
Unemployed and their relatives	207,438	92,426
Pregnant women and children below 13	1,501,210	1,396,426
Incapacity to work	3,861	150,487
Firemen	160,606	25,716
Blood donors	34,225	113,706
Chronically ill	572,019	890,120
Other		9,223
Total	4,196,737	5,729,986

Table 1: Patients exempt from co-payments[XXVIII]

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The second measure contained in the MoU aimed at the regulation of the value of co-payments in order to encourage 'the use of primary over emergency care' (Table 2) (Rodrigues 2014: 4).

	2007	2011	2012	2013	2014
Emergency care					
Central hospital	8.75	9.60	20.00	20.60	20.65
Primary care facility	3.40	3.80	10.00	10.30	10.35
Outpatient care					
Central hospital	4.30	4.60	7.50	7.75	7.75
Primary care facility	2.10	2.25	5.00	5.00	5.00

Table 2: Co-payment for emergency and outpatient care (Euros)[XXIX]

Moreover the MoU required the government 'to cut substantially (by two thirds overall) tax allowances for healthcare, including private insurance.'[XXX]

Even if some of the measures were part of national policies started before financial assistance was received, such as those aimed at facing the 'disproportionate use of emergency care' (Rodrigues 2014: 6), from the point of view of this research it is interesting to note that the austerity measures imposed by the Troika limited MS discretion in establishing the amount of the co-payment for emergency and primary care and in identifying the categories of people that enjoy an exemption from the co-payment. As will be analysed in the following paragraph, it is relevant to interpret the regulation of services imposed by the Troika in the light of the provision of the Treaties.

The MoU included demands for a reform of the 'unemployment insurance system.'[XXXI] The Portuguese system of insurance comprises two types of benefit, 'one is purely contributory ('subsídio de desemprego'– SD) and the other is means-tested ('subsídio social de desemprego' – SSD)' (Pedroso 2014: 23). While the first, SD, is based on the contributions paid by the beneficiary, the second, SSD, is granted 'to the poorer unemployed if they do not qualify for the SD or when the period for which the beneficiary can receive the SD is over' (Pedroso 2014: 23).

During the first period of the crisis, from 2009 to 2011, the general approach adopted by the government was aimed at enhancing the access to these benefits.[XXXII] The agreement

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in the MoU determined a drastic change in the policy of the government. Indeed the MoU called for a reduction of the

> 'maximum duration of unemployment insurance benefits to no more than 18 months,' limiting the 'unemployment benefits at 2.5 times the social support index (IAS) and introducing a declining profile of benefits over the unemployment spell after six months of unemployment (a reduction of at least 10% in the benefit amount).'[XXXIII]

In order to diminish the impact of these measures a reduction in the 'necessary contributory period to access unemployment insurance from 15 to 12 months' was established and the Troika asked the government to adopt 'a proposal for extending eligibility to unemployment insurance to clearly-defined categories of self-employed workers providing their services to a single firm on a regular basis.'[XXXIV]

In times of crisis, characterised by high rates of unemployment and economic recession, social benefits such as unemployment subsidies and the 'minimum guarantee income' play a fundamental role in protecting the more vulnerable groups of civil society. As shown by Table 3, the introduction of the measures envisaged in the MoU resulted in a drop in the percentage of persons obtaining unemployment subsidies among the unemployed, decreasing from 68.3% in 2009 to 43% in 2013.

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	2006	2007	2008	2009	2010	2011	2012	2013
Poverty rate (total)	18.1%	18.5%	17.9%	17.9%	18.0%	17.9%(b)	18.7%(b)	NA
18-64 years old	15.2%	16.3%	15.8%	15.7%	16.2%	16.9%(b)	18.4%(b)	NA
65+	25.5%	22.3%	20.1%	21%	20%	17.4%(b)	14.7%(b)	NA
Anchored poverty rate (total)(a)	NA	NA	NA	17.9%	19.6%	21.3%	24.7%(b)	NA
18-64 years old	NA	NA	NA	15.7%	17.7%	20.4%	23.7%(b)	NA
65+	NA	NA	NA	21%	21.6%	20.1%	22.4%(b)	NA
No. of unemployed (1000)	427.6	447.9	426.6	527.5	600.8	703.2(c)	855.3	872.6
Of which receiving unemployment subsidy (d)	67.9%	55.7%	61.1%	68.3%	49.0%	44.9%	46.6%	43.0%
No. of beneficiaries Minimum Guaranteed Income (1000)	332.3	369.8	418.3	486.8	526.4	448.1	420.0	360.4
Average monthly benefit (Euros)	79.86	82.59	87.61	92.59	87.70	89.17	83.71	87.11

Source: PORDATA, 2014 based on data from INE and Ministry of Solidarity, Employment and Social Security, INE, 2014b.

Notes: (a) Poverty rate calculated using the poverty threshold for 2009 updated for inflation, i.e. accounting for changes in the median income that is used to calculate the 'standard' poverty rate.

(b) Provisional value.

(c) Break in series for unemployed people.

(d) Data include those receiving unemployment insurance and social (means-tested) unemployment benefit.

Table 3: Evolution of income and social protection[XXXV]

Another social service affected by the MoU was 'education,' where the MoU imposed a reduction of costs 'with the aim of saving EUR 195 million.'[XXXVI] As a consequence 'the government cut education spending to 6.7 billion EUR - back to the level of 2001 - and down from a peak of 8.6 billion EUR in 2010' (Minder 2013). Despite the adoption of these measures the IMF remained critical of the Portuguese education system, and in 2013 still considered it 'overstaffed and relatively inefficient by international standards,' suggesting that Portugal make it 'more flexible and limiting the State's role as a supplier of education services.'[XXXVII]

The amount of public expenditure in the area of education was reduced from €8.7 billion in 2010, to €6.6 billion in 2013. These cuts led to a reduction in 'the number of PhD and postdoctoral fellowships awarded by the country's principal funder, the Science and

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Technology Foundation (FCT),' that 'fell by 40% from 2012 to 2013, and the 2014 budget for fellowships fell by 16.5%' compared to the previous year (André 2014).

Finally, financial assistance to Portugal represents an interesting case study because the Portuguese Constitutional Court, as well as Italian and Greek ones, declared some of the national austerity measures unconstitutional (Cisotta 2014). According to the Court, the 'suspension of the additional holiday month of salary or equivalent for Public Administration staff' enshrined in the 'State budget Law for 2013' violated the principle of equality 'compared to persons who earn income in the private economic sector.'[XXXVIII] Despite the urgent and exceptional situation that related to the financial crisis, following the proportionality test the Court found that the measure imposed an unequal treatment of civil servants in comparison to private sector workers.

Even if this judgement did not entail a direct evaluation of the MoU, and did not refer the question to the European Court of Justice for a preliminary ruling, nonetheless its importance can be found in two aspects. Firstly, it expressly stated that this kind of measure has a relevant impact on general principles, such as the principle of equality, even if adopted in a context of necessity and urgency. Secondly, the legality of the restrictions to these principles was assessed in accordance with the principle of proportionality, which indirectly recalls the influence of the European legal order. The importance of the role played by general principles, allowing this ruling to talk the same language used by the Court of Justice, demonstrates that this decision is not strictly linked to the application of specific national rules.

3. The role of social protection systems and of the European social model under new economic governance

3.1. The consequences of new economic governance on social protection systems

In order to complete the study, it is necessary to assess if austerity measures entailed a 'social cost' in terms of effects on the level of protection of social rights.

Traditionally the three main functions of social policy are

> 'social investment (primarily linked to the allocation of resources), social protection (primarily linked to the distribution function aimed at securing adjustments in the

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distribution of income and wealth, considered in a very broad sense covering in particular distribution of incomes over the life course) and stabilisation of the economy' (Bontout et al. 2013: 5).

During economic crises characterised by a drop in GDP, economic recession and high levels of unemployment, social protection systems can contribute to limiting both social and economic consequences of the situation. On the one hand, such systems mitigate 'the social shock and limit increased poverty' (Vaughan-Whitehead 2014: 18). On the other hand,

> 'social protection expenditure provides for automatic stabilisation of the economy in bad economic times, since expenditure generally increases and thus partly compensates for the initial decline in households' disposable income following the decline in market income' (Bontout et al. 2013: 13).

During the first phase of the recent crisis national governments tended to invest in social protection mechanisms; in 2009, expenditure in this sector increased by around 7% in the EU (Bontout et al. 2013: 14). This growth is mainly attributed to 'increases in unemployment expenditure, but also in health and disability as well as in old age and survivors expenditure and to a lower extent [to]…an increase in family and social exclusion and housing expenditure' (Bontout et al. 2013: 14) (see Figure 1).

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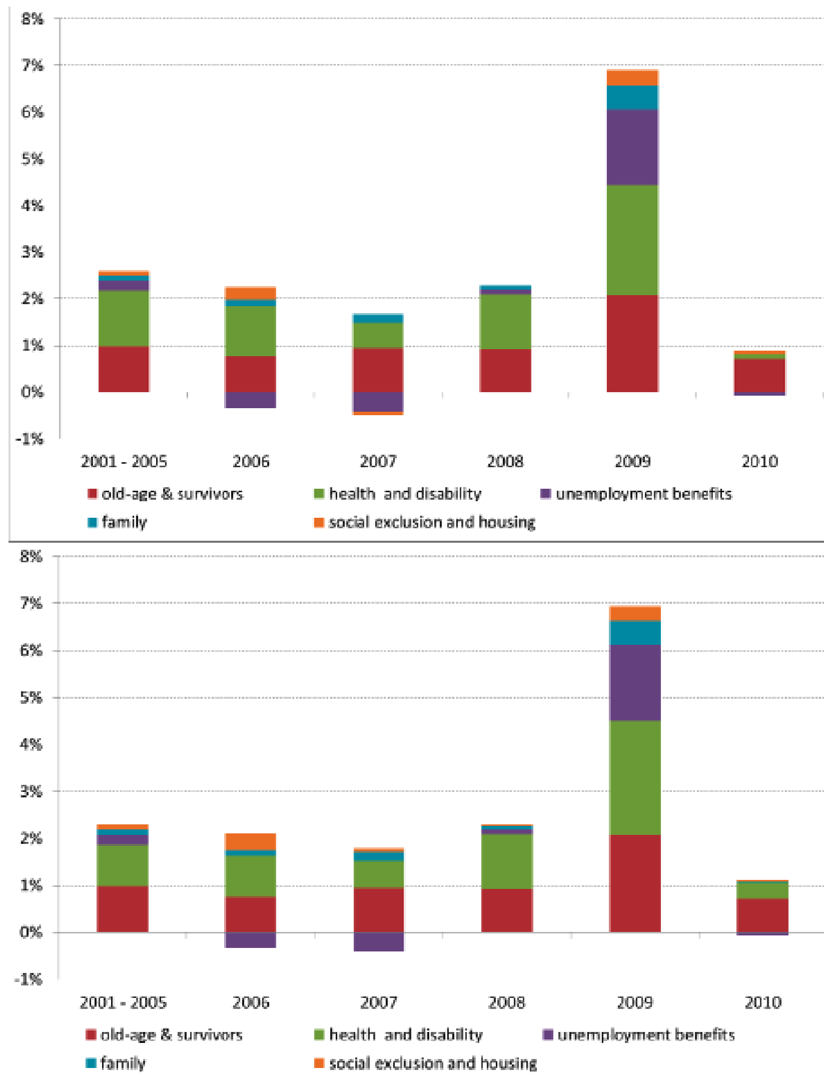

Figure 1: Contribution to real growth of social expenditures in EU27 and EA17 (2001-2010)[XXXIX]

Portugal is an interesting example, where social expenditure increased significantly in 2009, in particular compared to the period between 2001 and 2005. It then rapidly decreased in 2010 (Figure 2). This can be attributed to the attempts of the newly elected government to cope with the State deficit, which in 2009 amounted to 10.2% of GDP (compared to 3.6% in 2008).[XL]

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Figure 2: Growth in (real) social expenditures in Europe 2001-2005, 2009 and 2010[XLI]

In relation to Italy, a Caritas 2014 report noted that the Italian 'social welfare system is not well placed to deal with the impact of the crisis, nor of the austerity measures.'[XLII] Among the factors taken into account in this assessment was the absence of a 'nationwide minimum income system,' as this leaves 'some workers, such as those on temporary contracts, with no safety net if they lose their jobs.'[XLIII]

The first aspect to be considered is the growth in the unemployment rate, especially since 2010 (Table 4). Among the States that are members of the OECD, Portugal 'is one of

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the countries in which the increase in the unemployment rates has been greatest since the start of the crisis (along with Greece, Spain, Ireland, Italy and Slovenia).'[XLIV]

GEO/TIME	2007	2008	2009	2010	2011	2012	2013
EU (28 countries)	7,2	7,0	8,9	9,6	9,6	10,5	10,8
Portugal	8,1	7,7	9,6	11,0	12,9	15,9	16,5
Italy	6,1	6,8	7,8	8,4	8,4	10,7	12,2

Table 4: Unemployment rates by age (15-74 years old)[XLV]

Young people represent one of the categories most affected by this increase in unemployment, which raises major concerns. According to recent findings, 28.5% of young adults in Portugal and 29.6% of young adults in Italy are unemployed (Table 5).

GEO/TIME	2007	2008	2009	2010	2011	2012	2013
EU (28 countries)	12,1	12,0	15,6	16,6	16,8	18,2	18,7
Portugal	13,8	13,2	15,3	17,6	21,7	27,4	28,5
Italy	14,5	15,3	18,3	20,2	20,5	25,2	29,6

Table 5: Youth unemployment (15 - 29 years old)[XLVI]

The picture appears even bleaker when the increase in the numbers of young people who are neither in employment nor education or training (NEETs) is taken into account. This is particularly true for Italy, where the rate of NEETs is above 20% of the young adult population, though similar rates are visible in Bulgaria and Greece.

These figures are particularly relevant for the present study as they call into question the role of social protection mechanisms, which have traditionally been central in preventing those who are unemployed from falling into poverty.

The portion of the population considered 'at risk of poverty or social exclusion' in Portugal appears to be stable and in line with the European average. In Italy, however, where in 2012 that portion amounted to almost 30% (Table 6), it presents serious concerns.

GEO/TIME	2007	2008	2009	2010	2011	2012	2013
EU (28 countries)	:	:	:	23,7	24,3	24,8	:
Portugal	25,0	26,0	24,9	25,3	24,4	25,3	:
Italy	26,0	25,3	24,7	24,5	28,2	29,9	28,4

Table 6: People at risk of poverty or social exclusion 2007-2013[XLVII]

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People who are unemployed run a higher risk of falling into the category of those considered 'at risk of poverty or social exclusion'. In 2012 almost 34% of unemployed people in Portugal were at risk of poverty, and in Italy the figure stood at 38% (Table 7).

GEO/TIME	2007	2008	2009	2010	2011	2012	2013
EU (28 countries)	:	:	:	34,0	35,0	35,3	:
Portugal	37,3	35,6	35,0	35,7	34,2	35,6	:
Italy	36,1	34,9	33,3	32,9	36,8	38,3	36,7

Table 7: People at risk of poverty or social exclusion - Status not employed persons[XLVIII]

Finally, a particular source of concern is the increase, especially since 2011 in Italy, in the numbers of those who can be described as severely materially deprived, or, in other words those with 'living conditions severely constrained by a lack of resources.'[XLIX] Indeed, Italy registered an alarming increase in this group, with figures almost doubling from 6.9% to 12.4% in the three-year period from 2009 to 2013 (Table 8).

GEO/TIME	2007	2008	2009	2010	2011	2012	2013
EU (28 countries)	:	:	:	8,4	8,9	9,9	:
Portugal	9,6	9,7	9,1	9	8,3	8,6	10,9
Italy	6,8	7,5	7	6,9	11,2	14,5	12,4

Table 8: Severely materially deprived people 2007 - 2013[L]

The policies adopted in Portugal following the MoU were not exempt from criticism, as demonstrated by the advisory opinion on the 'Proposta de Grandes Opções do Plano para2012-2015,'[LI] by the Conselho Económico e Social (CES), a 'constitutional body for consultation and social concertation.'[LII] The CES underlined the weakness of measures in crucial areas such as health and education, raising concerns about the role the State was playing in social and territorial cohesion. It stressed the need to fully examine the consequences of budget cuts in times of economic adversity.[LIII]

The CES also expressed concerns regarding the extended programme of privatization taking place in Portugal, given that changes to public services may have major consequences for both the economy and society as a whole. In many cases the measures concern companies that provide services of general interest, which have a strategic importance for the country. According to the CES, particular attention should be paid to the quality of, and access to, public services, as well as to the State's ability to intervene in the management of the economy.[LIV]

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As the long-term effects of austerity measures are still unknown, the analysis of their impact can only be partial at best, and continued evaluation over time will be necessary. It will, for example, be of interest to monitor the long-term consequences of the co-payment reform currently being carried in the Portuguese public health sector.

3.2. The protection of social rights under the European welfare approach

The definition and the role of the European Social Model in the process of European integration have been extensively discussed. The European Social Model has been presented as a 'weak' counterpart of the market-making process, arguing that the predominance of the market-making approach undermines the protection of fundamental rights. Nevertheless, it has been pointed out that economic and social cohesion has been part of the European project since the Treaty of Rome. Moreover, the adoption of the Charter of Fundamental Rights and the growing body of European legislative acts on social protection has placed doubt on the market-oriented approach to fundamental rights, in favor of a social dimension of the EU.

Space precludes a discussion of constitutional theories on the concept of the Welfare State, and the different models of social protection adopted by the legal systems of the various MS, but it is necessary to underline that social rights require public action aimed at guaranteeing an adequate standard of living. In this respect, together with civil and political rights, social rights are fundamental to the concept of 'citizenship' (Marshall 1950: 10-11). One of the differences between civil and social rights is that the latter can only be achieved and protected through the involvement of the State, which determines expenses. This means that social rights must, by definition, have a financial impact on national budgets.

Even if the competence to set the 'content, scope and organization of welfare policies remains within national competence in the EU *as long as* the exercise of that competence does not contradict EU law' (Martinsen 2013: 54), and even though welfare policies have always been perceived as a national prerogative, there has been a marked emergence of welfare as a dimension of the debate at European level. MS' reluctance to delegate competences in this particular field was not sufficient to prevent a process of (negative and positive) integration with reference to social policies. Indeed, both the principle of freedom of movement and competition law have challenged the traditional link established at national level between entitlement to social services or benefits, and citizenship. Justified

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by the need to remove obstacles to the creation of the internal market, the European legislator has begun to adopt harmonization measures with particular reference to employment rights and non-discrimination. Notwithstanding the absence of a specific social competence, the gradual adoption of such measures 'has led to the imposition of an increasing number of positive social obligations on MS'(O'Leary 2005: 57).

Furthermore, the social dimension of the European integration process has been strengthened with the adoption of the Lisbon Treaty. On the one hand, this established the binding nature of the Charter on Fundamental Rights, where an entire Title is devoted to the principle of solidarity. On the other, the inclusion of 'solidarity' among the EU's values, and of 'social justice' among EU's objectives, represents an important recognition of the social dimension of the Union.

These arguments explain why the impact of austerity measures on the protection of social rights is relevant not only at the national level, but also at European level.

New economic governance has also affected the process of social integration at European level as the adoption of loan conditions has led to a fragmentation in the level of protection of social rights at national level.

What is more, the emergence of a welfare dimension has been challenged by new economic governance. Evidence shows that the social cost of the economic crisis would have required stronger intervention of the State through public services (Caritas Europa, 2014). Such stronger intervention would have contributed not only to stabilising the economy, but also to social protection, by fostering a more inclusive growth, in line with the Europe 2020 strategy.

The fundamental role played by SGIs in the economic and fiscal crisis has also been recognised by the Commission, which pointed out that

> 'in areas such as health care, childcare or care for the elderly, assistance to disabled persons or social housing, these services provide an essential safety net for citizens and help promote social cohesion.'[LV]

The Commission also recognised the importance of SGIs 'in the field of education, training and employment' as factors that could contribute to the 'growth and jobs agenda.'[LVI]

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Despite such statements, the response of the Troika to the economic crisis has been criticised for a 'failure to integrate economic and social policies, and a lack of a longer-term commitment to an inclusive society, which in turn is necessary to building a sustainable economy.'[LVII]

The debt crisis 'generated a radical transformation of social policies as a way to curb the deficit and with the willingness to enhance competitiveness' (Vaughan-Whitehead 2014: 48).

From the point of view of national social services new economic governance has on the one hand contributed to shifting the balance between social needs and budget constraints in favour of the latter, and on the other, limiting the role of social security mechanisms in a period when their intervention was more necessary than ever.

A more prudent approach would have been for austerity measures to have respected the fundamental nature of SGEIs, as 'shared values of the Union', and their 'central role in promoting social and territorial cohesion' (Article 14 TFEU). Indeed, the right to access services of general economic interest for the purpose of 'the social and territorial cohesion of the Union' is recognised in the Charter of Fundamental Rights (Article 36).

It has been observed that the broad notion of SGI 'may be examined under two competing socio-economic models': the first refers an 'ordoliberal perspective, [where] SGI may be seen as derogation from the Treaty provisions on competition' (Lenaerts 2012: 1249) and, as such, subject to a strict interpretation; the second considers SGI

> 'as the symbol of the European social model, according to which Member States try to counter market forces which, in the absence of any public control, would prevent certain groups – for example, persons facing financial and economic difficulties or who are geographically isolated – from having access to SGI' (Lenaerts 2012: 1249).

The data presented in the previous section and the content of the measures adopted in the context of new economic governance demonstrate that, between these two main models, the 'exception' interpretation now predominates. Indeed, as a consequence of the implementation of austerity measures, the 'European Social Model' 'has been subject to a much more generalized calling into question' (Degryse et al. 2013: 5).

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Having considered the role of the European Social model 'as [a] cushion [for] the social shock of the crisis' (Vaughan-Whitehead 2014: 48) and the right to have access to SGEIs, the approach adopted by new economic governance appears to lack a concrete understanding of the 'social' role of public services and the consequences of limiting access to SGEIs, for example with reference to those excluded from the co-payment benefit in Portugal.

4. The fragmentation of the notion of SGEI in the EU legal order

4.1. The new definition of the margin of discretion enjoyed by MS in the organization of SGEIs

In the EU legal order the concept of SGEIs is to be found in the middle of several conflicting forces, such as that between State intervention and market forces.

The relevance of SGEIs in the EU legal order is two-fold. On the one hand, they have an economic dimension, which relates to the role of the EU aimed at promoting internal market integration and competition. On the other hand these services assume importance 'given the place' that they occupy 'in the shared values of the Union as well as their role in promoting social and territorial cohesion' (Article 14 TFEU). Moreover 'access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union' is now enshrined in the Charter of Fundamental Rights of the European Union (Article 36).

In this perspective SGEIs 'form an essential element of the European model of society', since they contribute to increasing the 'quality of life for all citizens and [assist them] to overcome social exclusion and isolation.'[LVIII]

In relation to the division of competences between the Union and its MS, discretion in their definition therefore lies with national public authorities.[LIX] The Court of Justice recognised that MS enjoy 'a wide discretion not only when defining an SGEI mission but also when determining the compensation for the costs, which calls for an assessment of complex economic facts.'[LX] In other words, 'neither the ECJ nor the EU legislator are entitled to second-guess the determinations made by national authorities as to whether a service is of general interest, unless the latter commit a manifest error of assessment' (Lenaerts 2012: 1258).

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Besides the concept of 'general interest', usually associated with 'public interest' (Malaret Garcia 1998: 57), the definition of what is considered to be a SGEI calls into question the notion of 'economic activity'. As a general principle 'the economic constitution of the Treaty, only applies to economic activities' (Hatzopoulos 2011: 2). The qualification of an activity as economic or non-economic is therefore one of the prerequisite steps in determining whether the EU or its MS have competence, and for this reason it acquires constitutional relevance (Hatzopoulos 2012: 38). Social services of general interest could also be considered SGEIs provided that they are economic in nature.

If we agree on the assumption that it is the economic nature of the service that represents a core factor in determining whether a certain public service of general interest falls under the scope of application of EU regulation of SGEIs, *a contrario* it could be argued that the application of EU rules to public services would imply the presence of an 'economic nature' in the service. This assumption would then imply that, in the application of EU acts in the field of new economic governance to certain social services traditionally excluded from the field of application of EU law, this would not only extend the field of application of EU law, but could entail as well a broader interpretation of 'economic nature.' In other terms such broader interpretation would extend to include the consequences of the provision of the service on the national budget.

Moreover this new approach does not take into account the margin of discretion of MS in the definition of the economic or non-economic nature of these services of general interest. Indeed there is no possibility for MS to invoke the social nature of a service, or indeed to present an argument of 'manifest error' in the Troika's assessment of the nature of the service.

New economic governance seems to provide a third interpretation of public services regulated by EU law, that in the case of Portugal appears broader than the one applied by the Court in the field of competition and internal market. Indeed, the MoU is also addressed to services such as unemployment benefits and co-payment benefits in the health and education sectors, which traditionally do not involve economic activity carried out by an 'undertaking', as understood in competition law. Those activities are in fact inspired by the principle of solidarity, funded from social security contributions and subject to public control.[LXI]

It should not be excluded that this new approach, limited to new economic

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governance, could have consequences on the definition of SGEIs, making the boundaries between economic and non-economic activities more uncertain, in favour of the first one.

Even if the argument that the impact of MoUs on the definition of SGEIs could be rebutted by maintaining that regulation is the result of an intergovernmental agreement, and that it therefore should not to be considered as an EU act, financial assistance and its conditionality is nevertheless part of the European economic governance. A new interpretation of SGEIs not only does not support the identification of a common approach, it contributes to the fragmentation of the notion of SGEIs in general.

By extending the 'economic' nature of certain services and therefore providing a new definition of SGEIs, the provisions of MoUs have narrowed down the discretion enjoyed by MS in this area. In the light of previous remarks on the 'intergovernmental' nature upon which MoUs are based, it will be interesting to observe if this interpretation will influence the Court of Justice and contribute to an evolution of the notion of SGEIs in the EU legal order, or if this will remain an isolated case.

4.2. New economic governance and the emergence of an original approach towards SGEIs

New European economic governance has not only had an impact on the definition of SGEIs, it has also changed the approach towards SGEIs in general.

The definition of the 'economic' nature of services in the area of competition and internal market is influenced by various elements, such as the principle of solidarity, the exercise of public authority, and the definition of a service provided for remuneration. However the exact impact of services on national budgets has not traditionally been an area of concern for EU law.

In sharp contrast to this, under new economic governance the 'economic' notion seems to be linked to the financial sustainability and efficiency of the service provided by the State. In this perspective austerity measures have introduced a new approach to SGEIs, comparable to approaches adopted under competition and internal market law.

The intervention of the Troika in several public services has been criticized, as 'ideally, policy decisions should be guided by a focus on enhancing value in the health system rather than on identifying areas in which cuts might most easily be made.'[LXII]

With reference to SGEIs already regulated under EU law, such as energy, transport,

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postal services and electronic communications, the measures adopted in the context of new economic governance are in line with the general aim already pursued, i.e. a 'gradual, controlled opening to competition.'[LXIII] Nevertheless, less attention is paid to the regulation of 'universal service' (Davis and Szyszczak 2011: 159), that is 'the provision of a defined minimum set of services to all end-users at an affordable price.'[LXIV]

The approach of new economic governance reinforces the 'implicit assumption that SGEIs will always gain in quality through the introduction of competition, that the reduction of exclusion of limits to competition will always rebound in better public services' (Zeitlin 2005: 207; Sauter 2007: 12).

Once again, the predominance here of a competitive aspect has been criticised: 'the pursuit of "full competition" as the most desirable of ends takes for granted that there is no trade-off between competition and services of general economic interest, including their social and territorial functions' (Zeitlin 2005: 209).

5. Conclusions

The process of 'Europeanization' of public services, and their increasing assimilation into the sphere of influence of EU competition and internal market rules, has been counterbalanced by the recognition of their role in the construction of a 'European social model'.

The sovereign debt crisis could be seen as a new phase in this process. As has been shown, new economic governance enlarged the sphere of influence of EU law in public services, placing a strong focus on the financial implications of the provision of these services.

The analysis carried out has demonstrated that measures adopted in the field of new economic governance have not only limited the role of national social protection mechanisms, but could also have an impact on the definition of SGEIs. In all of these respects, new economic governance represents a decisive development in the process of 'Europeanization' of public services.

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[*] PhD in Public Law at the University of Turin; LLM in European Law at the College of Europe, Bruges; Legal Officer at European Commission.

[I] Communication from the Commission to the European Parliament, the Council, the European Economic

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and Social Committee and the Committee of the Regions, A Quality Framework for Services of General Interest in Europe, 20 December 2011, COM(2011) 900 final, p. 3

[II] Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [1997] O.J. L 209; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, [1997] O.J. L 209.

[III] Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97, [2005] O.J. L 174; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97, [2011] O.J. L 306; Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No1467/97, [2005] O.J. L 174; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97, [2011] O.J. L 136.

[IV] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (adopted on the basis of art. 121(6) TFEU), [2011] O.J. L 306; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, [2011] O.J. L 136, (adopted on the basis of art. 136 TFEU together with art. 121(6) TFEU).

[V] http://www.efsf.europa.eu/about/index.htm

[VI] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, [2010] O.J. L 118, (adopted on the basis of art. 122(2) TFEU).

[VII] The international Treaty establishing the European Stability Mechanism (ESM) was signed on 11 July 2011 by the 'finance ministers of the 17 euro-area countries' (http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm). The Treaty was signed after the adoption of the European Council Decision 2011/199/EU of 25 March 2011, that amended Article 136 TFEU, [2011] O.J. L 91.

[VIII] http://www.esm.europa.eu/index.htm#

[IX] European Commission, *Scoreboard for the Surveillance of Macroeconomic Imbalances*, Occasional Paper 92, February 2012, on http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp92_en.pdf, pp. 3 - 5.

[X] *Ibidem*, p. 3.

[XI] http://ec.europa.eu/europe2020/europe-2020-in-your-country/italia/index_en.htm.

[XII] Council of the European Union, Recommendation for a Council Recommendation on Italy's 2013 national reform programme and delivering a Council opinion on Italy's stability programme for 2012-2017, 19 June 2013, 10640/1/13, on http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010640%202013%20REV%201.

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[XIV] European Commission, Recommendation for a Council Recommendation on Italy's 2014 national reform programme and delivering a Council opinion on Italy's 2014 stability programme, Recommendation n. 8.

[XV] Council of the European Union, Recommendation for a Council Recommendation on Italy's 2013 national reform programme and delivering a Council opinion on Italy's stability programme for 2012-2017, recital 16.

[XVI] *Ibidem*, Recommendation n. 4.

[XVII] European Commission, Recommendation for a Council Recommendation on Italy's 2014 national reform programme and delivering a Council opinion on Italy's 2014 stability programme, Recommendation n. 5.

[XVIII] Those indicators are: the current account balance, the net international investment position, the export market shares, the nominal unit labour cost, the real effective exchange rates, the private sector debt, the private sector credit flow, the house price index, the general government sector debt, the unemployment rate (European Commission, *Scoreboard for the Surveillance of Macroeconomic Imbalances,* pp. 4 - 5).

[XIX] Treaty Establishing the European Stability Mechanism, 2 February 2012, recital 1).

[XX] http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm.

[XXI] *Ibidem*.

[XXII] Memorandum of Understanding on Specific Economic Policy Conditionality, signed the 17 May 2011,

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on http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf, p. 2.
XXIII According to the Commission 'by January 2014, the accumulated proceeds from privatisations amounted to about EUR 8.7 billion', the Economic Adjustment Programme for Portugal - Eleventh Review, European Commission, DG for Economic and Financial Affairs, Occasional Papers 191, April 2014, on http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp191_en.pdf, p. 29.
XXIV Memorandum of Understanding on Specific Economic Policy Conditionality, points 5.1 and following, pp. 25 and followings.
XXV *Ibidem*, points 5.16 and following, pp. 27 and following.
XXVI The Economic Adjustment Programme for Portugal - Eleventh Review, p. 30.
XXVII Memorandum of Understanding on Specific Economic Policy Conditionality, p. 17.
XXVIII Rodrigues Ricardo, et al., 2014, *Impacts of the crisis on access to healthcare services: Country report on Portugal*, European Centre for Social Welfare Policy and Research, p. 5.
XXIX *Ibidem*, p. 4.
XXX Memorandum of Understanding on Specific Economic Policy Conditionality, p. 17.
XXXI *Ibidem*, p. 21.
XXXII Among the measures adopted by the government it could be mentioned the extension of the SSD for the persons that 'were due to lose the benefit that year'; the reduction of the contributions required for the SD 'from 450 days to 365 days'; the increase of the SD 'by 10 % for families with children in which both parents were unemployed and for single-parent families', *ibidem*, p. 23.
XXXIII Memorandum of Understanding on Specific Economic Policy Conditionality, p. 21.
XXXIV *Ibidem*, p. 21.
XXXV Rodrigues, Ricardo, et al., 2014, *Impacts of the crisis on access to healthcare services: Country report on Portugal*, p. 10.
XXXVI Memorandum of Understanding on Specific Economic Policy Conditionality, point 1.8, p. 3. At the same it is established that the Government shall 'continue action to tackle low education attainment and early school leaving and to improve the quality of secondary education and vocational education and training, with a view to increase efficiency in the education sector, raise the quality of human capital and facilitate labour market matching' (Memorandum of Understanding on Specific Economic Policy Conditionality, point 4.10, p. 25).
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XLIII *Ibidem*, pp. 44-45.
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XLV Eurostat, (2014).
XLVI Eurostat, (2014).
XLVII Eurostat, (2014).
XLVIII *Ibidem*.
XLIX This means that they 'have experienced at least 4 out of 9 following deprivations items: cannot afford i) to pay rent or utility bills, ii) keep home adequately warm, iii) face unexpected expenses, iv) eat meat, fish or a protein equivalent every second day, v) a week holiday away from home, vi) a car, vii) a washing machine, viii) a colour TV, or ix) a telephone', Eurostat, (2014).
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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The ESM and the Principle of Transparency

by

Matteo De Nes*

Perspectives on Federalism, Vol. 7, issue 3, 2015

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Abstract

This note analyses a peculiar feature of the ESM, namely the lack of an acceptable set of standards for the fundamental democratic principle of transparency. Moving from the particular nature of this mechanism, we will highlight the most critical concerns connected to secrecy, confidentiality and inviolability of documents, looking not only at the ESM Treaty but also at relevant documents approved by its bodies (in particular the *Code of Conduct* and the *By-Laws*).

Key-words

European Stability Mechanism, transparency, disclosure, democratic control

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1. Introduction: the EU emphasis on transparency

Since the early `Nineties, the European Union (EU) has introduced and implemented the principle of transparency into the activities of its institutions, prompted, in particular, by the European Parliament (EP) (Santini 2004: 6-7). The EP sought to fill this democratic gap, hoping at the very least to make European decision-making processes more accessible and open to public scrutiny (Santini 2004: 7), in order to shorten the distance between decision-makers and civil society. At the same time, national governments sought to introduce some counterbalances to the technocratic and almost impenetrable power of the European Commission (EC), with the intent of having a deeper knowledge of its activities and internal processes in order to make its members more accountable (Lodge 1994: 346).

After a lengthy process, the principle of open administration became explicitly expressed in the Treaty of Amsterdam (Craig 2012: 358), which enshrined access to documents as a right; the first important step in realizing transparency (von Bogdandy 2012: 330). Subsequently, Regulation n. 1049/2001, regulating access to documents, has been subject to a considerable number of judgments (Heliskoski and Leino 2006; Craig 2012: 361-365) that had the effect of restricting the expansion of this principle (Heliskoski and Leino 2006: 778). Indeed, the Court of First Instance (the CFI – now called the European General Court, or GC) and the European Court of Justice (ECJ) have applied the right to access and its numerous exceptions in many different ways, depending case-by-case on the other rights and interests involved, while still affirming the centrality of open institutions in the EU legal order (Craig 2012: 366).

The Lisbon Treaty, which provided for transparency and openness in several Articles of the TEU and the TFEU, was a step forward toward transparency. First of all, transparency became one of the EU's general purposes, pursuant to Article n. 1 of TEU, according to which "decisions are taken as openly as possible (…)". Other important wording about this matter can be found, among other places, in: Article 10(3) TEU, which states that every European citizen has the right to participate in the democratic life of the Union; Article 11(2) TEU, which provides that "[t]he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society"; and Article 15(1) TFEU, which prescribes that the Union's institutions, bodies, offices and

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agencies shall work as openly as possible. As Mendes has pointed out, such provisions introduced a general principle of participation in decision-making processes that was explicitly raised as a pillar of EU democracy (Mendes 2011: 1875). Several concerns about the interpretation of these Treaties' rules remain, as some commentators have shown (Mendes 2011), but there is undoubtedly an increasing emphasis specifically on transparency in the EU legal order. This is confirmed by the provision of the right to access to documents in Article 42 of the Charter of Fundamental Rights of the European Union, according to which "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents".

The recent economic crisis, however, has put this important principle's fulfilment at stake within the Eurozone, as intergovernmental solutions to the crisis have been characterized by a "closed doors" approach (Hinarejos 2015: 26). The Euro-area Member States signed international treaties in order to strengthen the EU fiscal rules on public deficit and public debt (e.g. the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – TSCG) and grant assistance to States in conditions of severe financial instability (by the "rescue funds", namely the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM)[1]). The EU's emphasis on transparency, in particular, does not find an adequate equivalent within the construction of the ESM, the well-known permanent intergovernmental anti-crisis mechanism formally set outside EU law. Several legal scholars have cast some light on many critical features of this mechanism. First, although it is not part of EU law, it is surely part of the economic governance of the Eurozone, and it could threaten the constitutional balance within the Eurozone itself (Dawson and de Witte 2013). It could also jeopardize social and economic human rights within States that face severe economic conditions (Salomon 2015; Schwarz 2014) and undermine the principle of democratic rule (Schwarz 2014; Ruffert 2011: 1789). Another sign of the ESM's questionable construction, as we will argue, is how it harms the principle of transparency. This aspect seems alarming, as there is an intimate connection between transparency and the basic principle of democratic control of public expenditures and budget policy. The risk of opacity within the ESM could represent a step back from the increasing importance that EU law attaches to transparency.

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After a brief description of the nature of the ESM, the paper will give an overview of the main problems the mechanism has with the fulfilment of the principle of transparency. Both the German Federal Constitutional Court and the Finnish Constitutional Law Committee have underlined the ESM's potential opacity, as we will describe in order to highlight the crucial role of transparency for parliamentary control. Subsequently, the ESM has imposed upon itself several disclosure rules, which still appear soft and barely effective in allowing the widespread transmission of ESM's activities to civil society. After analysing these rules, the paper will sketch possible solutions at the EU and national levels.

2. The nature of the ESM and its lack of transparency

The ESM, as defined by its establishing Treaty (hereinafter referred to as ESMT), is an "international financial institution"[II] created to "mobilise funding and provide stability support under strict conditionality (…) if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States".[III] In a general sense, the ESM is an international organization (Ruffert 2011: 1783; Schwarz 2014: 400), established by an international treaty, with its own governance, whose decisions have to be respected by the ESM Member States, namely the Euro-area Member States. Although it has a close connection with the European Monetary Union (EMU), it is set outside EU law. Moreover, the ECJ in the famous *Pringle* judgment even affirmed the ESM's compatibility with several provisions of the EU Treaties.[IV]

The ESM does not formally have a fiscal redistribution function,[V] since it operates in the market through granting aid for the re-capitalization of financial institutions, loaning funds, purchasing bonds on the primary market and arranging for operations on the secondary market.[VI] Nonetheless, these mechanisms substantially affect domestic redistribution policies within States that have asked for financial assistance. Indeed, financial aid is granted on the basis of strict conditionality, included in Memoranda of Understanding (MoUs) which encapsulate the results of negotiations between applicant States and the EC, the European Central Bank (ECB) and, wherever possible, the International Monetary Fund (IMF).[VII] The MoUs contain conditionality measures, aimed at stabilising the financial condition of the State by imposing austerity policies on important welfare services, such as pensions, healthcare, education and employment protection.

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As some legal scholars have noted, the ESM is not subject to the same transparency obligations as the EU institutions (Napolitano 2012a: 464; Maduro, de Witte and Kumm 2012: 10; Hinarejos 2015: 95-96; Tuori 2012: 47), notwithstanding the fact that almost all of its actors are EU actors as well (Euro-area Member States, EC, ECB).[VIII] Moreover, although the EU legal order and the ESM system must be kept separate, the ESM pursues a goal, the stability of the Euro, which directly concerns the Union (or at least concerns the EMU, a relevant subset of the EU itself)[IX] and it is linked with the EU institutions.

The ESMT, quite apart from lacking any particular transparency obligations, also contains rules on confidential documents, immunity and inviolability. According to Article 34 ESMT, the main bodies, namely the Board of Governors (whose members are the financial ministers of the Euro-area States), the Board of Directors, the Managing Director, and any other person who works in connection with the ESM, "shall not disclose information that is subject to professional secret". As highlighted by Tuori and Tuori (2014: 218), "what professional secrecy comprises is not defined" in the text of the Treaty. Subsequently, Article 35 states that, "in the interest of the ESM", members of the Board of Governors, the Board of Directors, the Managing Director and other staff members "shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents". Finally, Article 32(5) establishes that "[t]he archives of the ESM and all documents belonging to the ESM or held by it, shall be inviolable".

Such broad confidentiality, immunity and inviolability have exacerbated democratic control concerns in the Eurozone specifically within the intergovernmental solutions adopted to manage the crisis (Hinarejos 2015: 95). Moreover, it seems alarming that an institution like the ESM lacks transparency obligations, since this absence affects not only national parliamentary control, but also civil society's control, and the ability of the media and academia to highlight critical issues because of the impossibility of officially accessing a large number of documents (Schwarz 2014: 402).

In addition, the ESM is substantively a public agency with an ambitious constitutional program and, specifically, with the reputation of being "a collective insurance device against future damages that could affect a country or a people" (Napolitano 2012b: 45).[X] It is true that the ESM acts within the financial market, so secrecy and confidentiality can be essential in certain circumstances, but public bodies that have this kind of impact on

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welfare policy should adhere to minimum standards of political accountability and transparency.

These concerns about opacity stand in stark contrast with the aforementioned emphasis on transparency in the EU Treaties.

3. The ESM before the Finnish Constitutional Law Committee and the German Federal Constitutional Court: aspects related to parliamentary control

The ESM's opacity has not gone unnoticed by some national Constitutional Courts and Committees (specifically German and Finnish), which have underlined critical issues regarding its lack of transparency and highlighted the inevitable necessity of some forms of democratic control. The Finnish Constitutional Law Committee,[XI] as reported by Tuori and Tuori (2014: 219), "has emphasised that the provision on immunity does not affect the possibility of realising legal ministerial responsibility pursuant to the national constitution". This statement confirms that, indisputably, the financial ministers who sit on the ESM Board of Governors are responsible to their national parliaments. Such a responsibility, however, appears strong only in a few cases on which the Board must decide unanimously.[XII] In particular, the veto power of every single Minister is significant in the decisions to grant financial aid. For most of the deliberations, however, it is necessary to reach a qualified majority of 80% of the votes/shares,[XIII] which can be reached with the agreement of the top five contributors (Germany, France, Italy, Spain, and the Netherlands). In such decisions, only Germany and France have the power of veto*,* as their contributions exceed the 20% threshold of capital.[XIV]

The German Federal Constitutional Court (FCC), in turn, highlighted this lack of transparency in its famous judgement of 12 September 2012.[XV] According to the ruling of *Karlsruhe*'s Court*,* certain interpretations of the provision concerning the inviolability of documents and the professional secrecy of the ESM's legal representatives "might violate the *Bundestag*'s overall budgetary responsibility".[XVI] Therefore, such ESM provisions would be compatible with the German Basic Law only if the German parliament were to receive "comprehensive information"[XVII] (see: Majone 2014: 146; Rivosecchi 2014: 480; Schneider 2013: 54). Indeed, in a representative democracy, a parliament needs sufficient information

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from the government in order to exercise its monitoring function for budget policy knowingly. Minimum standards of transparency are fundamental, first of and foremost, to enable effective control by the citizens' representatives. For these reasons, according to the FCC, ESMT provisions on secrecy, confidentiality and the inviolability of documents should not preclude the possibility (and the necessity) that the German parliament be given full knowledge of ESM activities; however, ESMT provisions do not foresee any exchange of information with parliaments, other than the annual report of the ESM Board of Auditors that the Board of Governors makes accessible to national parliaments.[XVIII]

It is desirable that every ESM Member's parliament, following this principle, receive the same information about the ESM's activities. But the principle of giving comprehensive information to the parliament seems to require domestic constitutional decisions for its implementation.

The FCC judgment, however, takes into account only the transmission of information to the *Bundestag* and to the *Bundesrat* without considering the issue of transparency in a more direct way. Consequently, although German parliamentarians have the power to control several of the ESM's activities, citizens cannot have direct access to such information. From a constitutional point of view, this could represent an additional detriment to the democratic principle, since the ESM manages a significant amount of financial resources coming from European taxpayers and its actions have a relevant impact on redistributive policy in States where aid is provided to tackle financial crises.

4. Soft rules of disclosure in the ESM *Code of Conduct* and in the *By-Laws*

During 2014, the ESM adopted two important documents: the Board of Directors approved the *Code of Conduct* (Code) for the Managing Director, members of the staff and, to the extent applicable, the Directors (12 March 2014);[XIX] and the Board of Governors approved the *By-Laws* (8 December 2014), pursuant to Article 5(9) ESMT.[XX]

The Code, regulating among other things the duty of confidentiality, seemed to take into account the German FCC's statements, even using the same wording. Indeed, according to its Article 11(1), "[t]he duty of confidentiality does not prevent Directors and alternate Directors from providing *comprehensive information* to national parliaments, in case

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this is foreseen at national level" (emphasis added). This provision simply takes note of the possibility for national parliaments to ask for and receive information on ESM activities, but it does not provide any particular duty to release information directly to citizens (for instance, in this Code there are no provisions about publication of relevant documents on the official website). Moreover, the other provisions of Article 11 of the Code confirm the duty of professional secrecy provided by Article 34 of the ESMT, but without specifying its concrete meaning, which is still undefined and seems dependent on the broad discretion of the three main bodies (the Board of Governors, Board of Directors and Managing Director).

These lacunae notwithstanding, this Code does take into account the will of parliaments to obtain as much information as possible, and providing comprehensive knowledge seems to prevail over confidentiality and secrecy duties. However, there are no specific procedures aimed at enforcing this power, which could render the Code ineffective; it is, above all, voluntarily adopted (the ESMT does not contain any indications about it) and can be reviewed by the Board of Directors (the executive body).

Article 11 of the Code must comply with Article 17 of the ESM *By-Laws*, which states specific rules for the disclosure of documents (Article 11(1) and (3), ESM *Code of Conduct*). Article 17 of the ESM *By-Laws*, in turn, contains numerous provisions on document disclosure, which actually seem very soft. There is no mention of the "comprehensive information" that the ESM must give to national parliaments; the only duties that the Board of Governors has imposed on itself are to refer requests for information or documents by national parliaments to the government of the relevant ESM Member[XXI] and to publish an annual report on the main activities of the ESM on its official website.[XXII] Instead, the most important documents of the ESM *may*, not *must*, be communicated to ESM Members, the EC, the ECB, and the IMF.[XXIII] These documents may also be disclosed to other parties, but only at the discretion of the Managing Director.[XXIV] In any case, the Board of Governors has the power to derogate from these rules "when necessary or appropriate for an overriding public interest or to effect the intent and purpose of the Treaty".[XXV] Moreover, in several cases, the ESM *By-Laws* impose the duty *not* to communicate or disclose confidential information, in particular internal information. Minutes and summary records of the proceedings of the Board of Governors, for instance, are generally confidential.[XXVI] This is in addition to the duty, provided by the Treaty, to

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keep inviolable all documents belonging to the ESM or held by it.[XXVII] Furthermore, the *By-Laws* have been adopted by a qualified majority of the Board of Governors (80% of the shares),[XXVIII] and can be amended through the same process.[XXIX] The implication is that such rules are fully in the hands of five or six of the Mechanism's main contributors.

Other secrecy and confidentiality rules are set out in several of the documents approved by the ESM's bodies, which for brevity I have added in a footnote.[XXX]

Finally, with the exception of the text of the Treaty, which is available in all of the official languages of ESM Members,[XXXI] documents published on the official website are only available in English. Supposedly, this is not a problem for parliaments, media and academia, but could hamper widespread access by the civil societies of all Member States.

5. Final remarks

After these brief notes, we can easily argue that, in the ESM governance, confidentiality and secrecy are the rule and transparency and disclosure the exception. This could be tolerable in a private company or even in international organizations in general, but it is problematic in international institutions that have an impact on welfare policy, and has prompted concerns regarding the protection of human rights (Salomon 2015; Schwarz 2014). The ESM's function means that it has to act in financial markets with a certain degree of discretion, but it should have higher standards of transparency because of its great influence on domestic economic and social policy.

One of the most critical points concerns the aforementioned safeguard clause regarding document disclosure, as stated by Article 17(13) of the ESM *By-Laws*, which gives the Board of Governors the significant power of derogating from the described soft rules, if necessary or appropriate for an overriding public interest. The meaning and the possible extension of "overriding public interest" are not defined, leaving to the discretion of the Board of Governors (voting by qualified majority – 80% of the votes/shares) the potential ability to go as far as to ignore the entire Article. However, a possible interpretation of the boundaries of this clause could be developed by the Court of Justice of the European Union. Indeed, according to Article 37 ESMT, any question of interpretation or application of the provisions of the Treaty and the ESM *By-Laws* should be decided by the ESM Board of Governors; subsequently, contested decisions can be submitted to the Court of Justice,

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in accordance with Article 273 TFEU.[XXXII] Therefore, an ESM Member State could bring a case to the Court, with the purpose of defining the content of Article 17(13) ESM *By-Laws* in greater detail.

In any case, this theoretical possibility does not, as such, solve the problems of the disclosure's soft and barely effective rules. In this realm, a potential solution would seem to be feasible at the national level rather than at the EU level, given the intergovernmental nature of the mechanism. The Constitutional or Supreme Courts of the Euro-area Member States could implement information duties for the ESM – duties that the German FCC has rightly affirmed with regard to its parliament – perhaps extending such duties to civil society and promoting a general open government policy. In this way, the impact of additional cracks in the democratic principles in the European regional system (and in particular in the Eurozone) could be mitigated.

Finally, of course, transparency must not be considered a magic bullet and, in certain circumstances, disclosure of sensitive documents could produce more negative than positive effects (Grimmelikhuijsen 2012). For example, parts of documents containing personal data concerning individuals are generally (and properly) excluded from disclosure rules.[XXXIII] However, as a matter of fact, the ESM system represents a countertrend compared to European Law, with regard to the fulfilment of the principle of transparency. As Norberto Bobbio wrote, a democracy should be, at least in a perfect world, a government of public power in public (Bobbio 1980: 182). This final statement should prompt reflection on the current developments in the Eurozone integration process, with particular regard to the instruments that its actors have created to face the economic and financial crisis.

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[*] PhD candidate in Constitutional Law and Public Comparative Law at the University of Venice, Ca' Foscari (matteo.denes@unive.it); fellow in Public Comparative Law at the University of Padua.

[I] The very first "rescue fund", the European Financial Stabilization Mechanism (EFSM), was created by a EU Regulation (N. 407/2010), with a quite narrow financial capacity. See Ruffert (2011: 1779-1780).

[II] Article 1, ESM Treaty, (T/ESM 2012-LT). The text of the Treaty is available at http://www.esm.europa.eu/about/legal-documents/index.htm (last visited 15 Dec. 2015).

[III] Article 3, ESMT.

[IV] ECJ, Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and the Attorney General,* 2012, nyr in ECR. See, among others, de Witte and Beukers (2013); Van Malleghem (2013); De Lhoneux and Vassilopoulos (2014). On the nature of the ESM see also von Bogdandy and Ioannidis (2014: 94).

[V] According to ECB, the ESM does not act as a fiscal transfer "but only as a liquidity bridge that allows euro area countries in distress to 'buy time' to take the necessary measures to restore fiscal sustainability and competitiveness in the medium term" (ECB, Monthly Bulletin, "The European Stability Mechanism", June 2011).

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[VI] Articles 15-18, ESMT.
[VII] Article 13(3), ESMT.
[VIII] The only non-EU actor is the International Monetary Fund, which is actually a consulting actor, brought on under appropriate circumstances at the discretion of the ESM (see points 8, 12 and 13 of the "Whereas"; Article 5(5), Article 13, Article 38 ESMT).
[IX] As Tomkin (2013: 188-189) pointed out: "[t]he establishment of a body that is fundamentally and intrinsically concerned with the Union's single currency outside the Union Treaties is not easily reconcilable with the central place of economic and monetary union within the Union legal order".
[X] On the constitutional features of the ESM see also: Maduro, de Witte and Kumm (2012: 10); Chiti and Teixeria (2013: 697); Dawson and de Witte (2013: 826); Scicluna (2014: 546).
[XI] PeVL 13/2012.
[XII] Article 5(6), ESMT.
[XIII] Article 5(7), ESMT.
[XIV] Germany 26,9%, France 20,2% (Annex 1, ESMT).
[XV] Budesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1390/12, Sept. 12, 2012 (hereinafter *ESM* case). Citations refer to the paragraphs of the English translation, available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html (last visited 15 Dec. 2015).
[XVI] *ESM* case, para 240.
[XVII] *ESM* case, para 256 and 259.
[XVIII] Article 30(5), ESMT.
[XIX] Available at http://www.esm.europa.eu/about/governance/code-of-conduct/index.htm (last visited 15 Dec. 2015).
[XX] Available at http://www.esm.europa.eu/about/legal-documents/index.htm (last visited 15 Dec. 2015).
[XXI] Article 17(11), ESM *By-Laws*.
[XXII] Article 23(3), ESM *By-Laws*. Moreover, according to Article 17(12), ESM *By-Laws*, "[t]he Board of Directors, acting by qualified majority, shall adopt detailed guidelines reflecting the ESM's policy regarding the matters referred to in this Article 17 [disclosure of documents]". To date (15 Dec. 2015), such guidelines are not yet available on the ESM official website.
[XXIII] Article 17, ESM *By-Laws*.
[XXIV] Article 17(5) b, ESM *By-Laws*.
[XXV] Article 17(13), ESM *By-Laws*.
[XXVI] Article 17(6), ESMT.
[XXVII] Article 32(5), ESMT.
[XXVIII] Article 5(7) c, ESMT.
[XXIX] Article 28, ESM *By-Laws*.
[XXX] For example, in: *Terms and condition of capital calls for ESM* (9 October 2012), point 3; *European Stability Mechanism High Level Principles for Risk Management* (20 May 2015), point 5.2; *European Stability Mechanism Guideline on the Secondary Market Support Facility*, art. 5(1); *European Stability Mechanism Guideline on Precautionary Financial Assistance*, art. 5(2) b; *Guideline on Financial Assistance for the Direct Recapitalisation of Institutions* (8 December 2014), art. 12(1). All documents are available at http://www.esm.europa.eu/about/legal-documents/index.htm (last visited 15 Dec. 2015).
[XXXI] See the final provision of the Treaty, according to which the texts in the correspondent languages of the ESM Members are equally authentic.
[XXXII] Point 16, ESMT Whereas.
[XXXIII] Article 17(8), ESM *By-Laws*.

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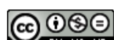
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ISSN: 2036-5438

The European Stability Mechanism: Human Rights Concerns Without Responsibilities?

by

Arianna Vettorel*

Perspectives on Federalism, Vol. 7, issue 3, 2015

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Abstract

The current financial problems of some Euro-area Member States have been tackled by *ad hoc* financial institutions, formed outside of the EU as international institutions and aimed at granting financial assistance on the basis of strict conditionality measures, which seriously affect human rights (particularly social and economic rights).

The paper focuses on the impact of the actions of the European Stability Mechanism and analyses whether this institution (or the European institutions and the Member States involved in it) should bear the responsibility for such violations.

Key-words

European Stability Mechanism, Memoranda of Understanding, conditionality measures, human rights, responsibility

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1. Introduction

In recent times, the Eurozone Member States (MS) have devised complex international financial mechanisms, tightly linked to themselves and European Union (EU) institutions but formally set outside the EU. These mechanisms were necessary because of the EU's perceived inability to help MS, and the Eurozone MS in particular, to get out of the crisis. Indeed, in the same way as the *no bail out clause*[I] prevents the Union from assuming the commitments of central Governments, the Treaty on the Functioning of the EU (TFEU), in turn prevents 'national central banks' from financing public debt.[II] It is in this context that extra-EU mechanisms have been created to support Eurozone MS by avoiding the economic crisis's effects in those MS experiencing financial difficulties and combating these effects in the Euro-area as a whole.

However, as legal scholars have already explained, these financial institutions undermine the stability and legitimacy of the EU project (Dawson and de Witte 2013; see also Joerges 2014: 1109-1013 on the implications of the new modes of European economic governance for the EU's state). Moreover, such mechanisms jeopardize the protection of human rights (particularly social and economic rights) for citizens and inhabitants of MS in receipt of aid, as a consequence of conditionality measures attached to financial assistance.

After briefly analyzing how the financial crisis has been managed, this article will focus on human rights concerns that stem from these strict conditionality measures, and on the responsibility for possible human rights violations, with particular regard to the European Stability Mechanism (ESM) framework.

2. Managing the crisis

2.1. Financial devices: the EFSM, the EFSF, the ESM

In order to address the crisis of sovereign debt, three financial stability mechanisms have been created: the European Financial Stabilization Mechanism (EFSM), the European Financial Stability Facility (EFSF) and the ESM. Such measures, aimed at granting assistance to avoid the risk of State failure as a consequence of market failure, are also known as "Rescue Funds".

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The EFSM was established by EU Regulation No. 407/2010,[III] on the basis of Article 122(2) TFEU, to grant Union financial assistance to a MS affected by or seriously threatened with a severe economic or financial disturbance caused by exceptional occurrences beyond its control. According to Article 3(2) of this Regulation, such assistance is granted via a decision adopted by the European Council, which essentially dictates the payment methods and the economic conditions attached to the Union's financial assistance. The EFSM, however, could only provide financial assistance of up to €60 billion, through a joint process between the EU and the International Monetary Fund (IMF);[IV] and the total amount provided for the EFSM was, therefore, quite low in the context of the ongoing economic crisis.

Thus, in order to increase the amount of financial assistance available, new steps were necessary; for this reason the Euro-area MS signed an agreement to establish the EFSF, a public limited liability company (*société anonyme*) incorporated in and governed by the laws of Luxembourg, with its registered office in Luxembourg-City.[V] The EFSF was funded by the Euro-area MS as shareholders, while its decisions were made by the EFSF's governing bodies. This early mechanism granted financial assistance to Ireland, Portugal and Greece but was just a temporary measure.[VI] This temporary aspect notwithstanding its significant financial capacity (€440 billion),[VII] led the Euro-area MS to adopt the ESM as a replacement for the EFSF, and to assume the tasks fulfilled by it.[VIII]

The ESM is, in contrast, a permanent financial mechanism with a lending capacity of up to €500 billion ("including the outstanding EFSF stability support"),[IX] established through an international agreement signed on 2 February 2012 between Euro-area MS, in accordance with the previous Decision No. 2011/199 of the European Council of December 2010.[X] The amendment of Article 136 TFEU was made on the basis of Article 48 TFEU, which governs the simplified revision process.[XI] Such an amendment was necessary in order to create the ESM financial mechanism and avoid infringements of the TFEU, in particular the *no bail out clause*, enshrined in Article 125 TFEU (Napolitano 2012).

The Preamble of the ESM Treaty states that the ESM, in connection with the "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union" (TSCG), commonly known as the "Fiscal Compact",[XII] fosters fiscal responsibility and solidarity within the economic and monetary union. Its aim is then more specifically mentioned in Article 3 of the ESM Treaty, which specifies that financial support will be

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provided to the benefit of ESM Members experiencing or threatened by severe financing problems, if such support is indispensable to safeguard both the stability of the Eurozone as a whole and that of its MS. The ESM can grant assistance in three ways: it may decide to a) arrange for the purchase of an ESM Member's bonds on the primary market; b) arrange for operations on the secondary market in relation to the bonds of an ESM Member; or c) grant financial assistance through loans to an ESM Member for the specific purpose of re-capitalizing that Member's financial institutions.

Such assistance, as has already been provided to Cyprus, Spain and Greece,[XIII] is granted on the basis of a decision by the Board of Governors, composed of representatives of Governments.[XIV] The financial assistance facility agreement is then approved by the Board of Directors, the other ESM body, composed of Governors' representatives.[XV] Thus, while adopted by ESM bodies, financial assistance decisions are in fact steered by the ESM's shareholding States. Notwithstanding the fact that ESM bodies formally adopt decisions, it is worth noting the important role played by two EU institutions – namely the European Commission (EC) and the European Central Bank (ECB) – in the granting of financial assistance to a requesting Euro-area MS. Indeed, once the State involved has asked the President of the Board of Governors for financial assistance, the EC, together with the ECB and the IMF, has to evaluate the risk the State's instability would bring to the stability of the Euro-area as a whole.[XVI] When such a risk is identified, and after the decision of the Board of Governors on the granting of financial assistance, the EC must negotiate a Memorandum of Understanding (MoU), containing strict conditionality measures attached to the provision of financial assistance.[XVII] The EC then signs this document[XVIII] and the Board of Directors approves the financial assistance facility agreement detailing the financial aspects of the stability support.[XIX]

Thus, like Euro-area MS, which are represented in the ESM's bodies discussed above, the EC and the ECB are also relevant actors in the process of granting assistance.

2.2. The procedure to grant financial assistance and ESM compatibility with the *no bail out clause*: the role played by the conditionality measures

Since the ESM, like its predecessor the EFSF, ensures financial assistance on the basis of decisions adopted by Euro-area MS representatives, and through a procedure that also

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involves the EC and the ECB, there has been a question whether the ESM's actions in fact constituted a violation of the *no bail out clause*.

Specifically, the possibility of establishing such a permanent stability mechanism has been challenged before the European Court of Justice (ECJ) in the *Pringle* case.[XX] In the judgment, the ECJ, after having affirmed the validity of Decision No 2011/199 (de Witte and Beukers 2013; De Lhoneux and Vassilopoulos 2014; Van Malleghem 2013),[XXI] addressed the question of whether Euro-area MS were allowed to enter into the ESM Treaty according to EU law. Such an issue, which concerns the validity of posterior agreements concluded by MS *inter se*, is not specifically addressed in Article 351 TFEU (Klabbers 2008: 205-211; de Witte 2000: 31-58). However, Member States' ability to enter into such agreements is traditionally admitted when there is no exclusive competency of the EU in that area, and where the agreement complies with EU primary law. This assumption has been confirmed by the ECJ, which, in *Pringle*, stated that the ESM does not affect the exclusive competency of the EU,[XXII] and also affirmed that the ESM complies with EU law. In particular, the ESM Treaty does not infringe the *no bail out clause*, as the EU institutions involved are not acting by themselves within the ESM framework and the ESM grants financial assistance in the form of a credit line, without assuming the debts of the receiving Member State.[XXIII] Moreover, it is worth noting that the ECJ highlighted the relevance of the strict conditionality measures attached to the financial assistance in guaranteeing the consistency of commitments undertaken by the Euro-area MS with EU law. Indeed, according to the ECJ,

> "the conditionality prescribed […] does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union".[XXIV]

Thus, the ECJ has interpreted these conditions as key factors for ESM compatibility with the *no bail out clause* and the coordinating measures adopted by the EU.[XXV]

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3. ESM and the strict conditionality rule as a *vulnus* to human rights protection

I argue that it is these conditionality measures, set out in the MoUs, and interpreted by the ECJ as important for the consistency of ESM's financial assistance with the EU law, that are controversial.

Indeed, such measures usually impose cutbacks in welfare expenditures, namely pension funds, social insurance schemes, healthcare, and education. In the name of macroeconomic adjustments, the MoUs have already prescribed, for instance, a reduction in pharmaceutical spending, a decrease in the minimum wage and suspension of collective bargaining agreements (Poulou 2014: 1147-1148; Karger 2014: 33-53). Such prescriptive conditions are usually extremely detailed and peremptory; for instance, the MoU signed by the Greek Government with the EFSF imposed a progressive reduction of a specific number of personnel in public entities, an increase of the retirement age by two years starting in January 2013, the re-capitalization process for the banking sector, and a program for controlling pharmaceutical spending.[XXVI]

As a consequence, human rights protection is therefore seriously threatened, a concern shared by some legal scholars, who have highlighted that

> "[t]he strict conditionality contained in the MoU may very well and very directly impinge on the social and economic rights of the EU citizens" (Schwarz 2014: 398; see also Tomkin 2013*:* 187, and also Salomon 2015).

The effects of economic adjustment programs on social and economic rights have also been highlighted by the UN General Assembly, in a series of Reports about the effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.[XXVII] Specifically, these reports have given evidence for the impact of economic management on several aspects: work, social security, health, education, adequate housing, poverty and social exclusion, and other rights such as civil and political rights. The report of the Independent Expert concerning Greece,[XXVIII] in particular, has clarified that

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> "[t]he measures implemented as part of adjustment, in particular the job cuts, and cuts to wages and pensions, have had the overall effect of compromising the living standards of the population and the enjoyment of human rights. According to the National Ombudsman, 'the drastic adjustments imposed on the Greek economy and society as a whole have had dramatic consequences on citizens, while vulnerable groups increase and multiply' […]. In a similar vein, the National Human Rights Commission observed a 'rapid deterioration in living standards coupled with the dismantling of the welfare State and the adoption of measures incompatible with social justice, which are undermining social cohesion and democracy' […]".[XXIX]

According to the report, in Greece there have been specific examples of an exponential rise in unemployment[XXX] and a substantial reduction in unemployment benefits, pensions and family benefits.[XXXI] In addition, the cuts in health care spending have led to the resurfacing of illnesses that had been eradicated in the country, such as malaria,[XXXII]and an increase in HIV infections and mental health problems has been reported.[XXXIII] Lastly, the cuts on social expenditures have led to the closure of schools and the reduction in numbers of teachers[XXXIV] as well as an increase in homelessness.[XXXV] The rise of poverty has also caused numerous protests in the country, which has led the national authorities to adopt several security measures; this in turn has raised concerns with regard to the freedom of assembly and association.[XXXVI]

In this way, therefore, human rights protection is seriously threatened, in particular those human rights enshrined in the Charter of Fundamental Rights of the European Union (CFREU), in the European Convention on Human Rights (ECHR) and its Protocols and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Specifically, conditionality measures could affect social rights such as: the right to education, enshrined in Article 14 of CFREU, Article 2 of Protocol No. 1 to the ECHR, and Article 14 CESCR; the right to social security and social assistance provided for in Article 34 of CFREU; the right to social security enshrined in Article 9 of CESCR; and the right to health enumerated in Article 35 CFREU and in Article 12 CESCR. Moreover, such conditionality could affect the right to property enshrined in Article 17 of CFREU and in Article 1 of Protocol No. 1 to the ECHR,[XXXVII] as can happen, for instance, when

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adjustment programs impose a reduction in the value of bank deposits or cuts of salaries or pensions.

Given the potential for infringements of the human rights provisions, the issue regarding the responsibility for human rights violations then arises. Particularly, it could be questioned whether the ESM itself, the EU institutions involved in the ESM, or the Euro-area MS could bear any responsibility for the ESM's decisions affecting the human rights of citizens in assisted States. A legal scholar has already addressed similar issues on a global level regarding the IMF and the World Bank (WB) (De Sena 2010).

4. Strict conditionality and responsibility

4.1. The legal nature of the ESM and its (lack of) responsibility for human rights violations

In order to address the ESM's potential responsibility and the possibility of filing suits against it before an international court, it is necessary to understand the legal nature of the ESM and whether it is bound by human rights law.

The first question, namely that of the ESM's legal nature, is not clearly answered by the wording of the ESM Treaty. Indeed, while Article 1 of the Treaty defines the ESM as an "international financial institution", this is an expression notable for its ambiguities, as pointed out by Napolitano, who has highlighted that, although created by an international agreement, the ESM has a European dimension, which makes it quite close to a European agency (Napolitano 2012). According to Napolitano, this dimension is seen in several of its characteristics, such as the ESM Treaty's link to EU primary law, its peculiar membership composed only of EU MS, the role played by the EC and the ECB, and the ESM's complementarity with European monetary and economic policy. Other legal scholars, conversely, argue that the ESM in fact constitutes an international organization (Ruffert 2011: 1783 and 1790; Schwarz 2014: 400). The ESM, indeed, has been established by an international treaty and has its own governance.

With regard to the second question, namely whether the ESM is bound by human rights law, some legal scholars affirm that the ESM should respect EU principles in this area. In fact, the ESM Treaty itself requires the EC to act cohesively with EU law, and the MoUs must be

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"fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned".[XXXVIII]

However, this requirement to respect EU law is confined to a narrow sector, namely EU provisions on economic policy coordination and EU acts specifically addressing the ESM.

Indeed, as von Bogdandy and Ioannidis affirmed, the ESM is an international instrument completely separate from the TEU and the TFEU systems (von Bogdandy and Ioannidis 2014: 94), which means that it is not bound by the EU fundamental rights enshrined in the CFREU. Thus, since the ESM is placed outside the EU and within its own Treaty, with no reference to the CFREU, consequently the validity of an ESM decision could not be challenged in light of that legal text.

The ECJ in the *Pringle* case expressly excluded the possibility of taking the CFREU into consideration within the ESM framework. Specifically, the ECJ affirmed that the Euro-area MS were not prevented from signing the ESM Treaty in the light of EU fundamental rights, in particular the general principle of effective judicial protection, the right to an effective remedy and the general principle of legal certainty, enshrined in Article 47 of the CFREU.[XXXIX] Such concerns were raised because Article 37(2) of the ESM Treaty affirms that "the Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of the ESM Treaty".[XL] Only if "an ESM Member contests [that] decision […], the dispute shall be submitted to the Court of Justice".[XLI]

In light of these provisions, the question was raised as to whether the ESM Treaty was consistent with the CFREU. On this point, the ECJ recalled that, under Article 51(1) of the CFREU, the provisions of the CFREU apply to the MS when they are implementing Union law. The ECJ also affirmed that this situation does not occur when MS establish a stability mechanism such as the ESM,[XLII] which stands outside of the EU.

The inapplicability of the CFREU to the ESM Treaty therefore impedes assigning direct responsibility to the ESM for human rights violations in light of it.

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Such a responsibility cannot arise from the ECHR or the CESCR either, since the ESM is not part of those Agreements. Finding that the ESM bears responsibility based on *jus cogens*, then, is unrealistic, since, as De Sena already explained with regard to the IMF and the WB, it is unlikely that the ESM itself commits strong violations of human rights (De Sena 2010).

Thus, it is difficult to identify the ESM's direct responsibility for violations of human rights caused by conditionality measures; one may wonder, however, whether it is possible that the EU institutions and the ESM's MS could be responsible for ESM actions that violate these rights.

4.2. The ESM's measures and the potential responsibility of EU institutions

The issue of the responsibility of EU institutions involved in the ESM for acts adopted by the latter that affect human rights arises for two reasons: first, because of the EU institutions' relevant role in granting financial assistance within the framework of the ESM, and second, because even in that framework such institutions should respect EU law in general, and human rights in particular. The Advocate General Kokott had clearly expressed this assumption with regard to the *Pringle* case, where she affirmed that

> "[t]he Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights" .[XLIII]

However, the potential responsibility of the EU institutions have subsequently been denied by the European General Court (GC), which is part of the ECJ, in the set of orders regarding Cyprus.[XLIV] There, the applicants filed several suits against the EC's and ECB's acts, assuming, in particular, the inconsistency of some of the conditions negotiated by the former and set in the MoU.

These cases arose from the recapitalization of a number of banks established in Cyprus, which experienced financial difficulties during 2012. At that time, in order to recapitalize them, the Republic of Cyprus petitioned the President of the Eurogroup for financial assistance from the EFSF or the ESM. The Eurogroup approved the request on 27 June 2012, indicating that either the EFSF or the ESM would provide the financial assistance

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requested in the framework of a macro-economic adjustment program to be set out in the MoU. The Republic of Cyprus and the other Euro-area MS reached a political agreement on a draft MoU in March 2013.

With a view to signing the final draft, Cyprus adopted two laws providing for the re-capitalization of two banks, "Trapeza Kyprou Dimosia Etaira Ltd" (BoC) and "Cyprus Popular Bank Public Co Ltd" (Laïki). This re-capitalization happened at the expense of its uninsured depositors, shareholders and bondholders (in particular, some deposits were converted into shares or other financial instruments and some deposits were transferred by Laïki to BoC).[XLV]

This macro-economic adjustment program, which entailed a reduction of bank deposits, was approved by the Eurogroup. After this approval, not in itself required by the ESM Treaty,[XLVI] the ESM Board of Governors mandated that the EC sign the MoU on behalf of the ESM. The MoU, which was signed on 26 April 2013, specifically favoured the restructuring plan adopted by Cyprus, particularly taking into consideration the measures related to the aforementioned banks.

Since these measures resulted in a substantial reduction in the value of bank deposits, though, suits were filed before the GC against the EC and the ECB on the basis of the property right enshrined in Article 17 of the CFREU and in Article 1 of the ECHR Protocol No. 1.

The GC, however, pointed out that the MoU was in fact adopted by the ESM, not by the EU institutions, and the MoU merely approved the measures already adopted by the Republic of Cyprus. Therefore, the GC dismissed the actions as inadmissible in part and in part manifestly lacking any foundation in law.

The GC thus denied that there was any worth in the behavior of EU institutions involved in the MoU negotiations or in the approval of conditionality rules adopted by the Republic of Cyprus, even after the lengthy negotiations at the EU level that were guided by a process that involved EU institutions and the Eurogroup. Moreover, the GC affirmed the non-applicability of the CFREU because the ESM is set outside the EU. However, pursuant to Article 13 TEU, the EU institutions "shall aim to promote [the EU's] values, advance [the EU's] objectives, serve [the EU's] interests, those of [the EU] citizens and those of the Member States"; it is worth noting that this Article does not confine the EU institutions' aims strictly within the EU framework. Thus, as the Advocate General Kokott

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affirmed, the EU institutions should be considered bound by the full extent of EU law, including the Charter of Fundamental Rights, when acting within the ESM's framework.

4.3. The ESM's measures and the potential responsibility of Member States

In addition to EU institutions, the question arises as to whether the ESM's shareholders – namely the Euro-area MS – could be responsible for acts that the ESM adopted.

In this perspective, the responsibility of Euro-area MS could be derived from the ICESCR (to which all the ESM's MS are parties).

Specifically, this possibility could be derived following, *mutatis mutandi*, the reasoning of De Sena regarding the responsibility of State members of the WB and the IMF for acts adopted by these financial institutions (De Sena 2010).

Indeed, according to Article 2(1) of the ICESCR,

> "[e]ach State Party to the […] Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

According to De Sena, such a "progressive obligation" requires MS to use due diligence to ensure that financial institutions contribute to human rights in their financial assistance activities (De Sena 2010: 257). Within the WB and the IMF, this contribution could be made during the decision-making process, since the IMF Executive Board and WB Board of the Executive Directors, two bodies composed of representatives from MS, adopt their decisions according to an absolute majority rule. Therefore,

> "member States do not lack the possibility of acting to ensure that the conditionality clauses comply with the needs stemming from the ICESCR" (De Sena 2010: 259). And "it is precisely in the absence of any effort in this regard that they commit a violation of the general obligation envisaged by Article 2 of the Covenant" (De Sena 2010: 259).

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The same reasoning could be applied within the ESM's framework, for in this case also it is the members who represent States that then adopt its decisions. Specifically, these decisions are adopted by two bodies – the Board of Governors and the Board of Directors – composed of persons appointed by governments, who are revocable at any time.[XLVII] The Euro-area MS can, thus, steer ESM decisions on financial assistance and conditionality measures.

However, although State responsibility could stem from the ICESCR, the guarantees enshrined therein are difficult to implement for two reasons. Firstly, to date many ESM States are not parties to the Optional Protocol to the ICESCR,[XLVIII] which would allow individuals or other Members to submit a communication to the UN Committee for Human Rights. Secondly, there are challenges in demonstrating the causal link between the claimed violation and the State's behavior within these financial institutions.[XLIX]

Because of the link between the ESM's decisions and the Euro-area MS, the latter's responsibility could also be derived from the ECHR, and Protocol No. 1 of the ECHR, which all the ESM MS have ratified, and on the basis of which an action could be brought by individuals before the European Court of Human Rights (ECtHR).

In light of this Protocol, conditionality measures could infringe the right to property enshrined in Article 1, as a consequence of cuts to public expenditures or where conditionality affects banks' depositors, shareholders and bondholders. Moreover, a violation of Article 2 ECHR (namely a violation of the right to education), could arise as a consequence of cuts to public expenditures specifically where social expenditures in educational systems are concerned.

However, within the ECHR framework, the guarantees enshrined in the ECHR and in the ECHR Protocol No. 1 seem difficult to implement because of the challenges in demonstrating the causal link between the claimed violation and the State's behavior within these financial institutions. Thus, *de facto,* identifying the responsibility of ESM MS for financial measures that infringe their own human rights provisions is unrealistic.

A finding of a possible violation of the ECHR by the State that adopts the economic adjustment measures in order to receive financial aid is also unrealistic, due to the wide margin of discretion that States enjoy in social and economic matters. The question regarding the compatibility of such national measures arose in *Koufaki and Adedy v. Greece*,[L] where the applicants claimed that cuts in public servants' wages and pensions were

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inconsistent with Article 1 of the Protocol No. 1 of the ECHR.[LI] The ECtHR, after having evaluated the Greek law that provided the basis for the reductions in question, affirmed that

> "[…] the notion of "public interest" is necessarily extensive. As it has already noted, the decision to enact laws to balance State expenditure and revenue will commonly involve consideration of political, economic and social issues, and the margin of appreciation available to the legislature in implementing social and economic policies is a wide one".[LII]

According to the ECtHR, then, a fair balance was struck between the general interests of the [Greek] community and the requirement to protect the fundamental rights of the applicants.[LIII]

One last consideration is whether there is some potential legal basis to invoke the responsibility of the ESM MS for the circumvention of obligations as State members of an international organization. Such a suggestion, as De Sena has already pointed out with regard to the IMF and the WB (De Sena 2010), finds some confirmation following Article 61 of the 2011 Draft of Article on the Responsibility of International Organizations (DARIO), according to which

> "[a] State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".[LIV]

However, as legal scholars have pointed out, in the 2011 version of DARIO Article 61, the International Law Commission "decided in favor of a subjective concept – other than in the preliminary version of DARIO Article 61 where an objective approach had been pursued" (Möldner 2011: 321, fn 153). Specifically, the Commentary regarding Article 61 affirms that the term "circumvention" implies "the existence of an intention to avoid compliance" (Möldner 2011: 321), thus requiring a difficult burden of proof.[LV]

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5. Final remarks

This analysis has shown that the tools established to tackle Euro-area MS' difficulties in fact give rise to human rights concerns because of the conditionality measures attached to economic adjustment programs.

Furthermore, this analysis has illustrated the difficulty in invoking any responsibility for possible infringements of human rights provisions.

Primarily, the ESM itself is not bound by human rights treaties, and the possibility to recall *jus cogens* seems not to be a viable option.

Secondly, the ECJ has also denied any possible responsibility of EU institutions involved in such a financial mechanism because the ESM is set outside EU law. This is true of course. But, while EU institutions might be acting within the confines of the ESM, they should respect EU law, including the CFREU. Such a circumstance could be inferred by Article 13 TEU, and moreover has been highlighted by the Advocate General Kokott in her opinion regarding the *Pringle* case. The latter's suggestion, expressed with regard to the *Pringle* case was, however, not even considered by the ECJ in the set of rulings regarding Cyprus, where the Court was expressly required to consider the possible responsibility of the ECB and the EC in light of potential fundamental rights breaches.

Lastly, the responsibility of Eurozone Member States, which are parties to the ESM, although theoretically possible, is *de facto* unrealistic.

Thus, in this realm, possible violations of human rights depending on conditionality measures are not likely to be remedied through the traditional legal channels.

This scenario would probably change if the ESM was to be set within the EU legal system. Indeed, as it would then be a body of the EU, it would certainly have to act in cohesion with the full extent of EU Law, and thus with the CFREU.

The possibility of linking the mechanisms to manage crisis situations (such as the ESM) to the EU system has been already considered by legal scholars (Schwarz 2014; see also Gallo 2015: 31); such a possibility, however, inevitably implies a new political will to reform the current legal framework governing financial aid within the Eurozone.

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[*] PhD in International Law at the University of Padua; fellow in EU law and Private International Law at the

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University of Padua (arianna.vettorel@unipd.it).

I Art. 125 TFEU (ex 103 EC).

II Art. 123 TFEU (ex 101 EC): 'Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments'. The clause is aimed at avoiding the risk of *moral hazard*.

III O.J. 2010, L 118/1, "Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism".

IV See COM(2010) 713, "Communication from the Commission to the Council and the Economic and Financial Committee on the European Financial Stabilization Mechanism", Brussels, 30.11.2010.

V The text of the EFSF statute and the other legal documents are available at http://www.efsf.europa.eu/about/legal-documents/index.htm (last visited 15 Dec. 2015).

VI According to Art. 4 of the EFSF Consolidated Articles of Association ,(available at http://www.efsf.europa.eu/about/legal-documents/index.htm, last visited 15 Dec. 2015) "[n]o new financing program and no new loan facility agreements will be established or entered after 30 June 2013", even if the general meeting of shareholders could unanimously extend this date. The Irish financial assistance program concluded on 8 December 2013; the Portuguese one ended on 18 May 2014. The Greek program, instead, has been extended until 28 February 2015. Data available at http://www.efsf.europa.eu/about/operations/index.htm (last visited 15 Dec. 2015).

VII See the Preamble, point 2, of the EFSF Framework Agreement, available at http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf (last visited 15 Dec. 2015).

VIII See, in particular, Art. 40 ("Transfer of EFSF supports") of the ESM Treaty (T/ESM 2012-LT). The text of the Treaty is available at http://www.esm.europa.eu/about/legal-documents/index.htm (last visited 15 Dec. 2015).

IX See the Preamble, point 6, of the ESM Treaty. During a transitional period, ended in June 2013, the EFSF and the ESM granted financial assistance in parallel, with a total lending capacity of 700 billion Euro.

X O.J. 2011, L 91/1, "European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is euro", 2011/199/EU.

XI According to the procedure established by Art. 48 TFEU, the Decision 2011/199 added a third paragraph to Art. 136 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 granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

XII TSCG, available at http://www.consilium.europa.eu/en/workarea/downloadAsset.aspx?id=27066 (last visited 15 Dec. 2015).

XIII See http://www.esm.europa.eu/assistance/index.htm (last visited 15 Dec. 2015).

XIV In particular, the Governor shall be an individual from an ESM Member's Government who has responsibility for financial decisions within his or her Member State. Every ESM Member shall appoint an alternate Governor. See Art. 5 of the ESM Treaty.

XV The membership of the Board of Directors is explained by Art. 6 ESM Treaty, which, after providing that "[e]ach Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters", affirms that "[s]uch appointments shall be revocable at any time".

XVI Art. 13(1) ESM Treaty.

XVII Art. 13(3), ESM Treaty.

XVIII Art. 13(4), ESM Treaty.

XIX Art. 13(5), ESM Treaty.

XX ECJ, Case C-370/12, *Thomas Pringle v Governement of Ireland, Ireland and The Attorney General*, nyr in ECR.

XXI The Decision No. 2011/199 was adopted on the basis of Art. 48 TFEU, which concerns the simplified revision process. However, since this process can be used only with regard to Part Three of the TFEU and cannot increase the competences of the EU, the referring court asked whether such conditions were met by this Decision. Specifically, with regard to the first condition, namely whether the Decision dealt with only

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Part Three of the TFEU, the referring court highlighted the potential impact of the establishment of a permanent stability mechanism on the common monetary policy, enshrined in the Part One of the TFEU and on which the EU has an exclusive competence. Since the TFEU does not provide any specific definition of monetary policy, the ECJ gave its interpretation in light of the different objectives pursued by the common monetary policy and the ESM. While the former is aimed at maintaining price stability, the latter is aimed at safeguarding the stability of the Euro area as a whole. Thus, according to the ECJ, "[e]ven though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro" (Case C-370/12, *Pringle,* para 56). For this reason, according to the ECJ, the ESM does not concern Part One of the Treaty. With regard to the second condition, namely whether this Decision would have increased the competences of the EU, the ECJ affirmed that the amendment of Art. 136 TFEU did not create any legal basis for the EU to be able to take any action that was not also possible prior to the amendment. Specifically, according to the ECJ, "[e]ven though the ESM Treaty makes use of the Union's institutions, in particular the Commission and the ECB, that fact is not, in any event, capable of affecting the validity of Decision 2011/199, which in itself provides only for the establishment of a stability mechanism by the Member States and is silent on any possible role for the Union's institutions in that connection" (Case C-370/12, *Pringle, cit.*, para 74). Thus, Decision 2011/199 did not increase the competences conferred on the EU in the Treaties.

[XXII] The Court also stated that Member States are allowed to enter into an international agreement between themselves, provided that the commitments undertaken by the Member States who are party to such an agreement are consistent with EU law. Specifically, the ECJ affirmed that the ESM does not prevent the Council of the European Union to decide, in a spirit of solidarity between Member States, upon measures appropriate to the economic situation, according to Article 122 TFEU. See Case C-370/12, *Pringle,* para 109.

[XXIII] Case C-370/12, *Pringle*, para 139.

[XXIV] *Ivi,* para 111.

[XXV] *Ibidem*.

[XXVI] See European Commission, "The Second Economic Adjustment Programme for Greece. First Review – December 2012", Occasional Papers 123/December 2012, available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf (last visited 15 Dec. 2015) at 205, 209, 210-211.

[XXVII] Report of the independent expert on the effects of the foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, at http://www.ohchr.org (last visited 15 Dec. 2015).

[XXVIII] UN General Assembly, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, Mission to Greece (22 – 27 April 2013), 27 March 2014, available at http://www.ohchr.org (last visited 15 Dec. 2015).

[XXIX] *Ivi*, at 12.

[XXX] According to the report, "unemployment grew from 7.3 per cent in June 2008 to 27.9 per cent in June 2013, the highest in the European Union". Moreover, "[y]outh unemployment reached an unprecedented rate of 64.9 per cent in May 2013 (compared with an average of 24.4 in the euro zone)", *ivi* at 13.

[XXXI] The report also registered that "[o]wing to the rise in long-term unemployment, only a fraction of all registered unemployed persons receive benefits (27 per cent as at February 2013). Moreover, unemployment benefits expire after 12 months, resulting in the loss of public health insurance cover. Many young people are not eligible for support because they have never had a job and have not paid the required national insurance contributions. […] These wholesale pension cuts have pushed a large proportion of the population into poverty. […] The Independent Expert shares the view of the European Committee of Social Rights that the 'cumulative effect' of the various laws introduced as 'austerity measures' in Greece since May 2010, restricting and reducing both public and private pension benefits, constituted a violation of the right to social security enshrined in article 12(3) of the European Social Charter". *Ivi*, at 15-16.

[XXXII] According to the report, such illness has resurfaced owing to the discontinuation of anti-mosquito spraying programmes. *Ivi*, at 17.

[XXXIII] *Ibidem*.

[XXXIV] *Ivi*, at 19.

[XXXV] *Ivi*, at 20.

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XXXVI The International Expert reported that "[i]n May 2013, the Government invoked national emergency legislation allowing it to compel public sector employees to work to ban a planned strike by the National Union for High School Teachers against austerity measures during university entrance examinations. […] There has also been a rise in hate crimes and xenophobia against the country's immigrant community, largely targeted in an attempt to find a scapegoat for the crisis. […] In April 2013, the National Commission for Human Rights (UNHCR) and a coalition of 30 non-governmental organizations documented 154 incidents of racist violence in 2012 alone, of which 151 committed against refugees and migrants and three against European citizens. It is believed that most attacks were committed by members of extremist groups, and that only a fraction of all cases are actually documented. […] Lastly, the enjoyment of human rights has been further undermined by the limited ability of public accountability bodies, such as the Greek Ombudsman and the National Commission for Human Rights, to respond adequately to human rights issues in the context of the economic crisis owing to insufficient funding for operations. Other barriers to access to justice include lengthy proceedings before civil and administrative courts, higher fees for initiating legal proceedings and inadequate funding for legal aid". *Ivi*, at 21-22.

XXXVII On this topic, see *infra* paras 4.2. and 4.3.

XXXVIII Art. 13(3) ESM Treaty.

XXXIX Case C-370/12, *Pringle,* para 178-180.

XL Art. 37(2) ESM Treaty.

XLI Art. 37(3) ESM Treaty.

XLII Case C-370/12, *Pringle,* para 180.

XLIII View of Advocate General Kokott, Case C-370/12, *Pringle*, nyr in ECR, para 176.

XLIV GC, Case T-289/13, *Lerda Advertising v. Commission and ECB,* nyr in ECR; GC, Case T-290/13, *CMBG v. Commission and ECB*, nyr in ECR; Case T-291/13, *Eleftheriou and Papachristofi v. Commission and ECB*, nyr in ECR; Case T-292/13, *Evangelou v. Commission and ECB*, nyr in ECR; Case T-293/13, *Theophilou v. Commission and ECB*, nyr in ECR; Case T-294/13, *Fialtor v. Commission and ECB*,nyr in ECR. All orders were issued on 10 November 2014.

XLV Specifically, uninsured deposits were converted into BoC shares (37.5% of each uninsured deposit), into instruments that were convertible by BoC either into shares or into deposits (22.5% of each uninsured deposit), and into instruments which were convertible into deposits by Central Bank of Cyprus (40% of each uninsured deposit). Additionally, certain assets and liabilities were transferred from Laïki to BoC, including deposits of up to Euro 100,000. Deposits over Euro 100,000 remained with Laïki, pending its liquidation. See GC, Case T-289/13, *Lerda Advetising*, para 17-18; Case T-290/13, *CMBG*, para 17-18; Case T-291/13, *Eleftheriou*, para 17-18; Case T-292/13, *Evangelou*, para 17-18; Case T-293/13, *Theophilou*, para 17-18; Case T-294/13, *Fialtor*, para 17-18.

XLVI Only within the EFSF did the Eurogroup Working Group play a role in granting financial assistance. See Art. 2, EFSF Framework Agreement.

XLVIIArt. 5(1) and Art. 6(1) ESM Treaty.

XLVIII Data available at http://indicators.ohchr.org/ (last visited 15 Dec. 2015).

XLIX It is precisely for that reason that De Sena highlighted the role played by inter-State communications "to bring to the fore violations raising issue of 'general importance', since such communications are not required to show – in order to be received by the Committee – that a 'clear disadvantage' has been suffered as a consequence of the alleged violation" (De Sena 2010: 261).

L ECtHR, *Koufaki and Adedy*, 7 May 2013, App. No 57665/12 and 57657/12, available at http://www.echr.coe.int/ (last visited 15 Dec. 2015).

LI The first applicant was a member of the Athens Bar, who worked as a member of the scientific staff of the Greek Ombudsman's Office and was later seconded to the central department of the Technical Chamber of Greece, a corporate body governed by public law. Thus, her pay was governed by laws on the salary rules applicable to public servants and public-sector employees. The second applicant was a trade union organisation representing several unions of public-sector workers employed on a permanent basis or under private law by the State, corporations governed by public law and the local and regional authorities. During 2010, the Greece Government adopted a law that reduced the pay of persons working in the public sector – irrespective of their employment status – by a percentage ranging from 12% to 30%, notwithstanding any other specific or general legislation, collective agreement, arbitration ruling or individual agreement or contract. *Ivi*, paras 3 and 4.

LII *Ivi*, para 39.

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LIII The Court considers that "the extent of the reduction in the first applicant's salary was not such as to place her at risk of having insufficient means to live on and thus to constitute a breach of Article 1 of Protocol No. 1. In view of the foregoing and of the particular context of crisis in which the interference in question occurred, the latter could not be said to have imposed an excessive burden on the applicant". *Ivi*, para 46. Moreover, as to the proportionality of the impugned measures with regard to the wages and pensions of the public servants affiliated to the second applicant, the Court referred to the text of the memorandum of understanding itself and affirmed that "[a]ccording to the memorandum, the abolition of the thirteenth and fourteenth pension payments was compensated for, in the case of persons receiving less than EUR 2,500 per month, by the introduction of a flat-rate bonus of EUR 800 per year. Furthermore, while the thirteenth and fourteenth salary payments were abolished across the board, an annual bonus of EUR 1,000 was introduced, funded by the reduction in the allowances previously payable to higher earners. This bonus was introduced with the aim of protecting those in the lowest income segments (persons receiving less than EUR 3,000 per month)". *Ivi*, para 47.

LIV Art. 61 of DARIO.

LV On the conditions for international responsibility to arise, see the Commentary to Art. 61 DARIO.

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PERSPECTIVES ON FEDERALISM
Centre for Studies on Federalism
Via Real Collegio, 30
10024 Moncalieri - Torino - Italy
Tel. +39 0116705024
Fax +39 0116705081
Mail to: castaldi@csfederalismo.it