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## European Financial Solidarity: A Concept in Search of Definition

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European University Institute

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## Abstract

The aim of this paper is to understand the conceptual and legal scope of financial solidarity in the European Union (EU). To this end, the paper offers a theoretical account of EU solidarity that highlights its two inherent dimensions, interstate and interpersonal, and argues that given the complex constitutional nature of the EU and following its most recent crises EU solidarity should be normatively understood as a distributional concept, implying the willingness to share a modicum of resources. Within this conceptual framework, the paper then asks whether the transfers of resources between Member States during the euro area crisis amounted to a genuine expression of solidarity also between citizens. To answer this question, the paper uses *Pringle* as a test to understand empirically what interstate solidarity in the EU amounted to from a positive law perspective. It concludes that the notion of solidarity that emerged in the Eurozone in the aftermath of the financial crisis does not adhere to a redistributive rationale, being instead rooted in private law and commutative justice.

## Keywords

Solidarity; Eurozone; Euro area crisis; Economic and Monetary Union (EMU); *Pringle;* Citizenship; Redistribution, Fiscal federation; Bailouts, Fiscal transfers; Conditionality; Market discipline

## Author Information and acknowledgment

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## 1. Introduction

"Europe is not just an economic market. It is a project".[1] In these words of the French President Emmanuel Macron, Europe is not just a soulless place of tradable commodities, it is an aspiration and a political vision. In a letter addressed to the citizens of Europe, rather than to the 'consumers of a common market',[2] he evokes the importance of political imagination to reinvent 'the shape of our civilization in a changing world'. The rediscovery of European collective values, especially solidarity, is often invoked as a panacea for all the evils affecting Europe.[3] The euro crisis, migration, Brexit, resurgent nationalism, illiberal populism, and, more recently, the Covid-19 pandemic are some of the biggest upheavals which have triggered a deeper reflection on the trajectory of European integration. Frequent calls for more solidarity between the members of the Union witness how crucial is the direction of the EU beyond its purely economic *acquis*. To say it with Macron, the question is what the European 'project' stands for beyond the single 'market'.

The aim of this paper is to provide a normative and practical understanding of solidarity in the EU. To this end, the paper proceeds as follows. Section 2 offers a general account of solidarity in the EU, delimiting its conceptual scope and framing it as *financial* solidarity. This section argues that, given the complex constitutional nature of the EU and following the most recent crises within it, solidarity should be normatively understood as a distributional concept, implying the willingness to share a modicum of resources. Section 3 offers an analysis of the CJEU's case law, specifically of *Pringle,* to provide a case law-based understanding of financial solidarity. This section argues that the notion of solidarity that has emerged during the Eurozone crisis is not embedded into a redistributive paradigm, being instead rooted in

[1] Emmanuel Macron, 'Dear Europe, Brexit is a lesson for all of us: it's time for renewal' *The Guardian* (4 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/04/europe-brexit-uk> accessed 17 October 2021.

[2] Nick Robinson and Matthew Patten, 'Are we citizens of Europe or just consumers of a common market?' *The Guardian* (5 March 2019) <https://www.theguardian.com/world/2019/mar/05/are-we-citizens-of-europe-or-just-consumers-of-a-common-market> accessed 17 October 2021.

[3] See 'Angelique Chrisafis and Helena Smith, Emmanuel Macron calls for solidarity as he vows to lead EU rebuild' *The Guardian* (7 September 2017) <https://www.theguardian.com/world/2017/sep/07/emmanuel-macron-calls-for-solidarity-as-he-vows-to-lead-eu-rebuild> accessed 17 October 2021.

commutative justice. Section 4 concludes by highlighting the mismatch between the normative aspirations and empirical realities of solidarity in the EU.

## 2. Framing EU solidarity in conceptual terms

Despite the rhetorical consensus on the need for 'more solidarity', there is little agreement on what this nebulous and elusive concept actually means (or should mean) in the EU.[4] This definitional problem – which embraces the substantial issue of what solidarity *is* – inevitably intersects the question of the legal status of solidarity in the EU. This section seeks to shed light on the scope and status of solidarity in the EU. Specifically, Subsection 2.1 explains how solidarity fits into the EU constitutional framework, while Subsection 2.2 offers a brief overview of the theoretical accounts that have investigated solidarity in the EU. This section concludes by developing a conceptual framework for EU solidarity.

### *2.1. The uncertain status of solidarity in the EU*

Enlisted among the values of the Union in Article 2 TEU as well as its objectives in Article 3 (3) TEU, solidarity stands between constitutional and international law. It is captured by two different readings of the EU legal order. On the one hand, solidarity can be interpreted as a founding value of the Union, bearing a constitutional relevance similar to the one that imbues national constitutions; on the other, from a functionalist perspective, it can merely constitute an objective towards which an international organisation strives.

This dual nature of solidarity is also reflected by the different levels at which it is placed. While solidarity in Article 2 TEU is situated at the level of citizens, as this provision refers to 'a society in which pluralism, non-discrimination, tolerance, justice, *solidarity* and equality…prevail'[5], the same concept as referred to in Article 3 (3) TEU is located on a different plane, i.e. the one regarding the relations between Member States ('solidarity among Member States'), and seems to be confined to the specific context of the internal market. In its former fashion, i.e. solidarity between citizens of the EU, solidarity assumes the connotations of *social* solidarity, as it seems to refer to a European society in the making. This social dimension of solidarity is also echoed in the Preamble to the Treaty on the European Union, which proclaims the aspiration of Member States to deepen solidarity between their peoples, and in the EU Charter of Fundamental Rights, where under Title IV solidarity develops into a catalogue of social rights.

The ubiquitous presence of solidarity among values and objectives reflects the tension between a constitutional and an international narrative of the EU legal order. Whereas values are attributes of any constitutional entity, objectives are the engine of a cooperative project. Therefore, when it comes to international organisations, the role of objectives is paramount because they justify the *raison d'etre* of such derivative subjects of international law, created by states to pursue certain goals.

However, it is well known how, already in its foundational phase, the EU started to exhibit constitutional features that made it depart from classical international law, and thus from being

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

[5] According to Article 2 TEU 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

a merely functional entity. The 'constitutionalisation' of the Treaties first and the Maastricht moment later contributed to a shift in the understanding of the EU, which was no longer defined by the functions it performed. This marked a passage from what Europe *does* to what Europe *is*,[6] or, in other words from 'a legal entity that, in the first place, exists to strive for certain goals to one which, above all, expounds what it stands for'.[7]The place that values now occupy in the Treaty, where they precede the objectives of the Union, reflects the transformation of the Union into a more mature constitutional system. This 'thickening' of the EU legal order contributed to a significant change in the role of objectives.[8]

In the first decades of European integration, objectives justified the very *existence* of the Union[9] and played a meta-teleological function: not only did they indicate the purpose that certain rules seek to attain but they also revealed 'the telos of the legal context in which those rules exist'.[10] However, the elevation of the EU to an autonomous legal order with constitutional features prompted a shift in the function of Union objectives, which ceased to be the source of and reason for Union powers.[11] In the seminal case *van Gend & Loos*,[12] the Court already introduced an element of 'originality' into its epistemological understanding of the Union legal order and interpreted the Union as an 'agreement between the peoples of Europe and not simply their States'.[13] Not only did the Treaty create a new legal order – as, in a Kelsenian way, every treaty does so[14] – but it also conferred binding force to its provisions without resorting to any higher norm. In short, the binding force of the Treaty did not come from a higher legal order but from the Treaty itself (the so-called 'originality hypothesis').[15] Thus, the abovementioned meta-teleological function of the objectives generates a conceptual tension with the 'originality' of the Union legal order. As has been convincingly argued, the Union became less dependent on objectives and more grounded in the values it represents. [16] With the decreased importance of objectives as an existential feature and 'competence-enabling' instrument, the Union looked progressively more similar to a constitutional order than a functional entity.[17]

The concept of solidarity in the European Union, thus, should be understood in the context and evolution of this peculiar constitutional order. Solidarity has a multifaced significance, being both a value and an objective. In the pre-Lisbon era, solidarity among Member States, together with social cohesion, was an integration objective, mostly pursued through the internal market. In the post-Lisbon era, solidarity features among the foundational values of the Union.

This role of solidarity as a value was first introduced by the draft treaty establishing a constitution for Europe, specifically by Article 2 thereof, which later inspired the formulation of Article 2 TEU in the Lisbon Treaty. As the *travaux préparatoires* of the aborted Constitutional

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[6] This expression is borrowed from Joseph H. H. Weiler, 'Integration Through Fear' (2012) 23 EJIL 1.

[7] Joris Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union (2014) 63 ICLQ 935, 951.

[8] ibid 952.

[9] See for instance Case 126/86, *Gímenez Zaera* [1987] ECR 3697, where the Court affirmed that the then Article 2 EEC Treaty, enumerating the Community objectives, 'concerned the existence and functioning of the Community'.

[10] Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2003) EJLS 140.

[11] See Larik (n 7) 954.

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

[13] Maduro (n 10) 140.

[14] This observation is made in Robert Schütze and Takis Tridimas, *Oxford Principles of European Union Law*, Vol 1, *The European Union Legal Order* (OUP 2017) Preface.

[15] ibid

[16] See Larik (n 7) 961-962.

[17] ibid 950-957.

Treaty show, there were some perplexities regarding the inclusion of solidarity in the second sentence of Article 2 for two main reasons. The first reason regarded the general problem of the legal effects of values, which contrary to principles, lack enforceability.[18] The drafters of the European Convention assumed that only principles 'might be legally binding and its violation invoked before a Court'.[19] However, despite the choice to maintain the terminology of values instead of that of principles, the implicit assumption was that the first sentence of Article 2 TEU had legal effects. Both the procedure in Article 7 TEU and the accession procedure supported this conclusion.[20] The second reason lies in the obscure meaning of solidarity. As pointed out in one of the proposed amendments, the insertion of solidarity among the values of the Union should have required further semantic clarification.[21]

Indeed, solidarity might be considered as an 'empty signifier',[22] a word that does not convey any precise meaning and generally accepted practice. Besides the intrinsic unclarity surrounding the term on a general level, the exact meaning of solidarity in the context of the European Union is even more opaque considering that in a multi-layered constitutional system, such as that of the EU, solidarity can refer to the mutual obligations between Member States or between citizens of the different European societies. The text of Article 2 TEU, precisely the second sentence thereof, seems to suggest that solidarity in the EU should be an aspiration of a nascent European society, thus situating it on the level of citizens. Doubts about the 'site' of solidarity, however, were not dissipated according to the Final Report of Working Group XI on Social Europe which was set up by the European Convention.[23] This Report acknowledged that solidarity can be intended as solidarity between Member States or solidarity between peoples.

The different levels at which solidarity can be placed are relevant to its conceptualisation. In fact, if solidarity pertains exclusively to the relations between Member States, it should be established whether it expresses a principle of international law or whether it bears some constitutional relevance in the vertical dimension between States and the Union. In other words, it is unclear whether the principle of solidarity shapes the mutual obligations between Member States as it would do in a federal State or whether obligations between Member States in the context of the Union are the same as those they would have under international law. The content of such obligations — i.e. the meaning of solidarity — is strictly intertwined with the status (more constitutional or more international) that solidarity has in the EU. In other words,

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[18] For a definition of values as 'intersubjectively shared preferences' without normative effect see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg 1996) 255.

[19] In these terms, two members of the European Convention, Ernâni Lopes and Manuel Lobo Antunes, in their 'Suggestion for amendment of Article I-2', available among the 'Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe' <http://european-convention.europa.eu/EN/amendemTrait/amendemTrait2352.html?lang=EN>. accessed 17 October 2021. In a similar vein, the proposal of Hubert Haenel and Robert Badinter, 'Suggestion for amendment of Article I-2', available at the link *supra*. In this latter proposed amendment, the term solidarity is placed in the first sentence and is referred to as a principle.

[20] For the argument that attributes legal enforceability to the values enshrined in the first sentence of Article 2 TEU see Esin Küçük, 'Solidarity in EU law: an elusive political statement or a legal principle with substance?' in Andrea Biondi, Egle Dagilyt and Esin Küçük (eds), *Solidarity in the EU Law: Legal Principle in the Making* (Elgar Publishing 2018) 50.

[21] See 'Suggestion for amendment of Article I-2' by Mr Hain at the link *supra*. In the explanation given for the proposed amendment, Mr Hain also pointed to the erroneous conflation between values and objectives.

[22] See Andreas Grimmel, 'Solidarity in the European Union: Fundamental Value or 'Empty Signifier' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis* (Springer 2017) 164, using Laclau's conceptual paradigm to explain how the meaning of solidarity is dependent on political competition.

[23] The European Convention, 'Final Report of Working Group XI on Social Europe' (30 January 2003) 6 <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00516-re01.en03.pdf> accessed 17 October 2021.

the semantic dimension of solidarity cannot be separated from its constitutional significance. To define European solidarity means to unveil its role in the EU legal order.
On the other hand, if solidarity entails mutual commitments among Union citizens, it would assume a thicker meaning. It would signal a passage from 'a Union based on international relations to a Union as a federal polity'.[24] In light of the peculiarity of the Union legal order that, by establishing a direct link with individuals, affirmed itself as a constitutional order, solidarity in the EU would assume a role similar to the one it performs in the nation-state. It would forge the bonds of a European society, thus fulfilling the aspiration that Article 2 TEU confers to solidarity. As has been observed, the textual novelty that the Maastricht Treaty introduced with regard to Article 2 TEU — substituting the word 'relations' with 'solidarity' when referring to the relationship between Member States — can be interpreted as a conceptual shift towards a more federal understanding of the Union, where solidarity becomes a 'value of a diffuse European society'.[25]

**Visual Chart of Solidarity in the EU no. 1**

| **Level** | **Status** | **Site** | **Nature** |
|---|---|---|---|
| Interpersonal | Value<br>(Art 2 TEU) | Citizens/European society | Constitutional<br>(redistributive) |
| Interstate | Objective<br>(Art 3(3) TEU) | Member States | International or Federal? |

### *2.2. Retracing solidarity in the EU legal scholarship*

Although solidarity in the EU oscillates between two dimensions, interstate and interpersonal, in the past it has been mostly explored in relation to the mutual relationship between states. As been observed, the literature has barely explored solidarity as 'pertaining to a European society as a whole'.[26] In particular, in the pre-Maastricht era, there have been attempts to conceptualise the interstate dimension of solidarity, i.e. solidarity between Member States, as well as its role in the functioning of a common organisation, i.e. solidarity towards the then Community.[27]
Notwithstanding the aim to examine the full significance of solidarity — sometimes clearly stated as the intention to explore the 'triple nature of solidarity as it constitutes a political, economic and social objective of the Community'[28] — earlier contributions have mostly looked at solidarity as a political means to achieve unity. As a result, solidarity has been assimilated to the principle of loyalty (vis-à-vis the Community), mutual trust (vis-à-vis other Member

[24] Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd rev edn, Hart Publishing 2009) 53.

[25] ibid

[26] Florian Rödl, 'The Labour Constitution' in von Bogdandy and Bast (n 24) 636.

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

[28] Marias (n 27).

States) or mutual assistance.[29] In this latter fashion, solidarity has then been vested with an economic nuance,[30] though without any significant repercussion on its general conceptualisation. Generally, by retracing the pre-Maastricht case law, these pioneering studies have thus interpreted solidarity, the obscure objective of the founding Treaties, as the equivalent of a duty of cooperation in spite of own conflicting conceptions of national interest.[31] In the post-Maastricht era, instead, scholarly reflection has started exploring solidarity in relation to EU citizenship, which the CJEU case law has deemed to entail a 'certain degree of solidarity between citizens of different Member States'.[32] This relationship between citizenship and solidarity has been described in terms of 'overlap or causal connection', because it implies that citizenship without solidarity 'is hardly citizenship at all', or in any case 'a gutless project'.[33] After all, as Habermas puts it, citizenship is nothing but 'an abstract, legally mediated solidarity between strangers'.[34]

This interpersonal dimension of solidarity has long influenced the discourse on redistribution in the EU. Free movement provisions, constituting the core of EU citizenship, have performed a (limited and contested) redistributive function at the European level, allowing (conditional) cross-border access for EU citizens to welfare benefits. It is no coincidence that some commentators have seen other provisions of the founding Treaties, such as those regarding the common agricultural policy or the structural funds, as forms of redistribution between States and not citizens, in that they do not directly involve citizenship entitlements.[35] In the same vein, others have advocated the replacement of such arrangements with 'redistribution policies which are no longer conceived of as state to state but as citizen to citizen and are embodied by a criterion of distributive justice'.[36] In short, it has been asked whether the European Union can be described as a community of people rather than a mere order of states.[37]

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

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

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

[32] See Case C-184/99 *Grzelczyk* [2001] ECR I-06193 para 44.

[33] Malcom Ross, 'The Struggle for EU Citizenship: Why Solidarity Matters' in Anthony Arnull, Cathrine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 283, 285.

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

[35] See Thomas Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 JCMS 37, 51, where agricultural policy and structural funds are discussed in the context of a 'solidarity deficit', in that these policies do not 'imply explicit individual entitlements'. See also and Miguel Poiares Maduro, "Europe's Social Self: 'The Sickness unto Death" in Jo Shaw (ed), *Social Law and Policy in an Evolving EU* (Hart Publishing 2000) 342, where EU economic and social cohesion policy is criticised for being the 'result of ad hoc intergovernmental bargaining' rather than 'a constitutive element of an emerging polity founded upon a social contract which includes a criterion of distributive justice'.

[36] Maduro (n 35) 348-349. This contribution does not argue for the necessity of a supranational direct taxation or a European social security system but for a social contract at the EU level, so that directly or indirectly redistributive policies could be underpinned by a deliberate criterion of social justice *'among European citizens and not states'* (emphasis added).

[37] Ross (n 33) 283.

Only recently, the literature has adopted an approach to solidarity that seems different from both the citizenship narrative and the pre-Maastricht discourse examined above. Some scholars have indeed started to transpose a sociological notion of solidarity to the sphere of relations between Member States.[38] As an idea borrowed from social theory, solidarity — as noted by Stjerno, who retraced its intellectual history — implies the preparedness to share some resources.[39] The understanding of solidarity emerging in the last years, then, has mainly looked at *interstate* solidarity away from any citizenship discourse; contrary to pre-Maastricht accounts, this recent approach has also focused more deliberately on the *financial* aspect of solidarity, not least because the multiple crises of the European Union — the financial crisis, the migration crisis, and the pandemic, to cite just those having a more evident distributional dimension — have questioned the capacity of the Union value of solidarity to act as a tool for distribution of some economic resources between Member States.

The limit of these accounts, however, is that they do not explain to what extent redistribution is an aspect of interstate solidarity in the EU or, to frame it in other words, whether interstate solidarity also encompasses interpersonal solidarity, and thus a principle of redistributive justice.

The recent crises unfolding in the EU have exposed the problem of what we owe as EU citizens to our fellow European and why. In other words, the current political malaise basically raised a question of justice, well captured by the idea of debt, i.e. 'who will receive what from whom under which conditions'.[40] The multiple crises of the EU have shown how the issue of solidarity is basically interwoven with that of debt and ultimately justice. They have also exposed how *financial* solidarity — which is the form that European solidarity cannot but take in the context of the euro and Covid-19 crisis — is necessarily *interpersonal*, as it ultimately regards European taxpayers and citizens.

The Eurozone crisis first and the Covid-19 pandemic later have situated the problem of justice at the level of citizens, with the consequence that intergovernmentalist approaches to solidarity proved unsuitable for the EU. The necessarily interpersonal dimension of solidarity was evident during the Eurozone crisis because the bailout measures adopted to tackle its effects — contrary to international aids between states, which have only indirect effects for citizens — were not immune to challenges under EU law.[41] Some of these measures created EU legal obligations for Member States and provided a basis for explicit individual entitlements.

Besides the 'site of justice', the Eurozone crisis has also raised the question of what patterns of distribution the EU realises, i.e. how it distributes burdens and benefits among its participants, who are not only states but also citizens. The euro crisis has also exposed the problem regarding the conditions under which redistribution, namely the correction of the distributive outcomes perceived as unfair, happens in the EU. The issue of 'conditionality' has

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[38] In recent times, many contributions started using a notion of solidarity borrowed from social theory, in particular from Durkheim's work. See for instance Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: How Much, What For, For How Long?' (2012) Notre Europe Policy Paper 51/2012; Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 167; Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7; Gianni Lo Schiavo, 'The European Stability Mechanism and the European Banking Union: promotion of organic financial solidarity from transient self-interest solidarity in Europe?' in Andrea Biondi, Egle Dagilyt and Esin Küçük (eds), *Solidarity in the EU Law: Legal Principle in the Making* (Edward Elgar Publishing 2018); Esin Küçük, 'Solidarity in EU law: an elusive political statement or a legal principle with substance?' in Andrea Biondi, Egle Dagilyt and Esin Küçük (eds), *Solidarity in the EU Law: Legal Principle in the Making* (Edward Elgar Publishing 2018).

[39] See Steinar Stjerno, Solidarity in Europe: the history of an idea (CUP 2005).

[40] This expression is borrowed from Viehoff, who uses it to define normative ideals and concrete forms of justice in the EU. See Juri Viehoff, 'Maximum convergence on a just minimum: A pluralist justification for European Social Policy' (2017) 16 European Journal of Political Theory 164.

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

indeed taken centre stage in the Eurozone developments. Rescue measures adopted to avoid state default have been subject to 'strict conditionality' for their beneficiaries.
The outbreak of the Covid-19 crisis, more recently, has further emphasised the importance of a conceptualisation of solidarity transcending a mere interstate dimension and magnified the need for interpersonal and thus redistributive solidarity. Being a health crisis, the pandemic has exposed how the Union is a deeply interconnected legal space where individuals cannot be either reduced to market actors or states' agents.
Therefore, accounts that place an EU notion of solidarity only among Member States underestimate that it ought to be between citizens too since Union citizens share the same currency as well as legal space and the efforts required by a financial notion of solidarity are directly upon them. As has been noted in one of the most influential studies on solidarity, 'a full account of EU solidarity must develop principles for three main contexts', which reflect 'the complex nature of European integration'.[42] Specifically, an EU notion of solidarity must be sound at the national level, expounding obligations among nationals of member states (principles of *national* solidarity); at the interstate level, establishing obligations among member states (principles of *member state* solidarity) and at the transnational level, defining duties among EU citizens *as such* (principles of *transnational* solidarity).[43]
Against this conceptual framework, the second part of the paper explores the Eurozone crisis through the lens of a multidimensional model of solidarity. Specifically, the next section analyses whether the most notable of the bailout measures adopted in the aftermath of the Eurozone crisis, i.e. the European Stability Mechanism (ESM), adheres to the normative model of solidarity exposed above, which implies a modicum of redistribution across national citizenries of the Union. The aim is to ascertain whether the transfer of resources between Member States has been a genuine expression of solidarity, i.e. whether Member States have acted according to the principle of horizontal federalism or differently put as units of a fiscal federation,[44] thus in accordance with the principle of transnational solidarity. In other words, whether financial assistance during the euro area crisis manifested a certain degree of solidarity not only between Member States but also between their citizens.
This question has received conflicting answers. As said by the Greek Prime Minister Alex Tsipras in his speech at the European Parliament in July 2015, 'lending is certainly a form of solidarity'; however, he also pleaded for a debt reduction so as not to 'be constantly obliged to seek new loans in order to repay previous loans'.[45] A different vision, instead, argues that solidarity is not 'a one-way street'[46] and frames it as 'negative solidarity', that is the duty to conduct a sound fiscal policy.[47]

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

[43] ibid 217.

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

[45] See Grimmel, 'Solidarity in the European Union: Fundamental Value or 'Empty Signifier' (n 22*)* 163 citing Alexis Tsipras, 'Summary comments at the European Parliament' (Strasbourg, 2015). For the full speech see Alexis Tsipras, 'Closing speech of PM Alexis Tsipras in the European Parliament on 8th July 2015' (*CADTM*, 9 July 2015) <http://www.cadtm.org/spip.php?page=imprimer&id_article=11923> accessed 17 October 2021.

[46] In this sense, the German Finance Minister Wolfgang Schäuble, cited in Grimmel (n 22) 163.

[47] See Herman Van Rompuy, 'The economic and political challenges for Europe' (Speech at the opening of the academic year 2011-2012 European University Institute, Fiesole 11 November 2011) <https://ec.europa.eu/commission/presscorner/detail/en/PRES_11_425> accessed 17 October 2021, reported in

The purpose of the following analysis is then to assess whether the notion of solidarity that emerged in the euro area is coherent with a normatively sound account of solidarity in the EU.

## 3. The notion of solidarity emerging from the CJEU's case law

This part of the paper analyses how the Court of Justice of the European Union (CJEU) has interpreted the most significant among the bailout measures, namely the ESM, in the P*ringle* case. In particular, this section examines the most relevant (and controversial) aspects of *Pringle* regarding solidarity. Ultimately, *Pringle* is here used as a case study to discern whether the bailout measures adopted during the Eurozone crisis were a mere *price stability-saving mechanism* or rather a *vehicle of transnational solidarity*. These financial assistance operations pose the question of their justification.
Whereas financial assistance towards EU citizens has been justified by the argument of a 'certain degree of solidarity between nationals of different Member States' stemming from the notion of European citizenship, the bailouts measures are still quite problematic in relation to their possible justification. These measures can indeed be interpreted as a mere euro-saving mechanism or as the manifestation of solidary obligations between states. In order to understand their nature, it is worth then looking at the case law of the Court of Justice so as to find out what arguments the Court has put forward to justify them – premised that it had found financial assistance lawful under EU law. The next sub-sections examine the *Pringle* judgment (3.1), exploring how the personal (3.2) and material (3.3) scope of financial assistance substantiate the meaning of solidarity in the EU**.**

### *3.1. The judicial scrutiny of the ESM: Pringle*

The question of the legality of the bailout measures was brought before the CJEU in the *Pringle* case.[48] Here, the Court had to assess the compatibility of the European Stability Mechanism (ESM), established by Decision 2011/199/EU,[49] with EU law. On 25 March 2011, indeed, the European Council adopted a Decision aiming at the amendment of the Treaty on the Functioning of the European Union (TFEU) through the addition of a third paragraph to Article 136, which confers on Member States the power to create a permanent crisis resolution mechanism 'to safeguard the stability of the euro area as a whole'. In a preliminary ruling, the Court had to pronounce on the compatibility of such a mechanism with a number of EU legal provisions. The most interesting part of the decision concerned the legality of the ESM in light of the no-bailout clause in Article 125 TFEU.
The paramount importance of such a rule from a constitutional perspective motivated the more structured approach of the decision on this point. The Court had to consider whether the ESM was in breach of Article 125 TFEU, which prevents the Union and its Member States from assuming other sovereign debts thus implying Member States' own responsibility for their public finance. At first glance, Article 125 TFEU seems to stand against any form of intervention aimed at rescuing a Member State from default. However, the Court held that such a provision does not categorically ban financial assistance *per se*. It tried to examine the ambit of application of the norm having regard to its personal and material scope, as well as its underlying rationale.

Grimmel (n 22) 163: 'solidarity consists […] not merely in receiving but also in giving. Solidarity is a duty, not only a right. A lax national policy is therefore contrary to the spirit of solidarity'.

[48] C-370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C: 2012:756.

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

Starting by the wording of Article 125 TFEU, which states that neither the Union nor the States is to 'be liable for' or 'assume' the commitments of another Member State, the CJEU held that such a provision does not preclude 'any financial assistance whatever to a Member State'.[50] To corroborate this conclusion, the Court adopted two systematic arguments. First, it recalled the provision under Article 122 TFEU, which allows for *ad hoc* financial assistance to a Member State experiencing temporary and serious difficulties. Secondly, the Court referred to the prohibition of monetary financing in Article 123 TFEU pointing at its *stricter* scope of application to justify the possibility of other forms of financial assistance.

Having stated that under the existing legal framework not every form of financial assistance is prohibited, the Court addressed the question of what instruments of financial assistance are then allowed by Article 125 TFEU. Inquiring into the legislative history of the provision, the judgment went back to the Treaty of Maastricht which originally introduced the no-bailout provision in its Article 104b EEC. The Court found that the objective of that provision was ultimately market discipline, from which the necessity of a sound budgetary policy followed. According to the Court, the no-bailout clause 'ensures that Member States remain subject to the logic of the market when they enter into debt since that ought to prompt them to maintain budgetary discipline', with the consequence that 'compliance with such discipline contributes […] to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'.[51]

In this passage, the CJEU seems to hold that financial stability obeys the same logic underlying price stability, that is market discipline. The Court implies that financial *in*-stability derives from reckless fiscal behaviour rather than from structural imbalances inherent to the design of the euro area. In support of this implicit assumption, the Court establishes a link between financial assistance and market discipline by way of the 'strict conditionality' attached to the former. As a result, the ESM is compliant with Article 125 TFEU as far as the financial assistance disbursed is indispensable and made subject to conditions such as to prompt a sound budgetary policy implementation. In this way, the recipient Member State remains responsible for its commitments to its creditors. In sum, the disbursement of financial assistance should not result in an incentive to conduct a profligate fiscal policy.

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

Similarly, the purchase of bonds on the primary market by the ESM pursuant to Articles 17 and 18 has the substantial nature of a loan, as the ESM merely becomes the creditor of the issuing Member State. The same holds true in the case of a purchase of bonds on the secondary market, given that by paying the price of the bond to the respective holder, the ESM does not replace the original debtor (that is the issuing Member State). This conclusion, according to the CJEU, is not affected by the fact that the price paid by the ESM to the holder is different from the nominal value of that bond, as this difference depends on the rules governing the secondary market. Furthermore, the CJEU noted that the ESM does not intervene as soon as the Member State in receipt of financial assistance is experiencing difficulties on the market. The observance of a certain time lag between the emission of bonds and their purchase on

[50] *Pringle,* para 132.

[51] *Pringle,* para 135.

the secondary market ensures that the grant of financial support is subject to a necessity test in accordance with Articles 3 and 12 (1) ESMT, so that the ESM does not automatically become a guarantor for Member States' commitments.
Lastly, the Court dismissed the claim according to which the ESMT provisions on capital calls are incompatible with the no-bailout clause. Specifically, Article 25 ESMT provides that, when a Member State that is called to pay authorised unpaid capital fails to meet this obligation, other ESM Member States have to step in to restore the level of paid-in capital. According to the referring court, this revised increased capital call meant that Member States were supposed to act as guarantors for the debt of the insolvent Member State. However, the CJEU noted that by virtue of the same provision, the defaulting Member State remains under an obligation to settle its debt and pay the default interest.

### *3.2. The institutional dimension of financial assistance*

One of the hard questions raised by *Pringle* concerns the *ratione personae* aspect of financial assistance on the side of the obligor, i.e. who, either compulsorily or voluntarily, is committed to it.[52] The CJEU, albeit not deliberately, touched upon this issue while addressing the compatibility of the Treaty amendment — and thus of the ESM Treaty per se — with the Union's economic policy competence and rules (in particular Article 125 TFEU). And yet, the personal scope of the no-bailout clause remains controversial. There are at least three different subjects to which it can be addressed: the Union, the Member States, and the distinct legal subjects created by Member States under private international law.[53]
Financial assistance from the Union is regulated by Article 122 TFEU, which seems to stand in contradiction with Article 125 TFEU. A way to reconcile the apparent discrepancy between the permission of financial assistance under Art 122 TFEU and the preclusion of financial assistance under Article 125 is by looking at the nature of the mechanism of financial support in question. In fact, the two provisions are not in contradiction because neither of them allows for the establishment of a *permanent* mechanism. Article 122 TFEU is the basis for *ad hoc* assistance in an emergency scenario and has been used for the adoption of Regulation 407/2010 which established the European Financial Stabilisation Mechanism (EFSM), a loan facility under EU law.[54] This provision enables the Union to assist a country in financial distress when exceptional circumstances 'beyond the control' of the state occur. Hence, the exceptionality of these occurrences may justify the exclusion from the scope of application of Article 122 TFEU of situations such as fiscal crises brought about by the country's own behaviour.[55]
The other two possible forms of financial assistance are financial assistance directly provided by Member States through bilateral loans and financial assistance from funds established by Member States through intergovernmental agreements (such as the ESM). As to their relationship with Article 125 TFEU, it can be argued that both these forms stand in the same position vis-à-vis the no-bailout clause as they raise the same kind of issue. In fact, if EU law precludes (or allows) certain conduct, Member States are consequently prohibited (or allowed) from taking that course of action when they act either individually or collectively in their capacity of international law actors, and regardless of whether the financial facilities created by them

[52] Actually, given the exclusion of structural stabilisation mechanisms from the EMU's architecture, the issue of compulsory financial support is of no practical relevance.

[53] See Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (CUP 2014) 122.

[54] See Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism.

[55] This reading of Article 122 TFEU has been deemed ungrounded by some commentators, who have used an argument based on the legislative history of such a provision to conclude that economic crises were actually covered by its scope of application. See Tuori and Tuori (n 53) 138-139.

through intergovernmental agreements have distinct legal personality or not.[56] Hence, both forms of financial assistance can be assimilated for the purposes of their compatibility with Article 125 TFEU.

Contrary to the structured opinion of Advocate General Kokott on the personal scope of the no-bailout provision, the Court did not expressly address the dimension *ratione personae* of financial assistance under Article 125 TFEU.[57] The reason for the omitted analysis is not to be sought in a side-stepping intention, but rather in the prevalence of the exclusionary effects descending from the substantial scope over the personal scope. Once the ESM was deemed not to be falling within the material scope of Article 125 TFEU, there was no practical reason for the Court to examine the *ratione personae* aspect of the no-bailout clause.

What is left unclarified in the Court's analysis is the interaction between financial assistance from the Union under EU law and financial assistance from Member States (or financial institutions created by them) under international law. In other words, the question left open is whether Article 122 TFEU grants an 'exclusive' competence to the EU to provide financial assistance in emergency situations, thus precluding Member States from acting in the intergovernmental sphere. Having briefly examined Articles 122 TFEU and 352 TFEU, *Pringle* held that the Union does not have a legal basis to establish a mechanism such as the ESM; and yet, it did not explain why it had the competence to create the EFSM under Article 122 TFEU.[58]

The circularity of this reasoning can be justified by the implicit assumption that Article 122 TFEU does not have pre-emptive effects on treaty-making powers of Member States under international law.[59] In short, the Union does not have the power to establish a mechanism such as the ESM because Article 122 TFEU does not constitute an appropriate legal basis; however, such a provision does not prevent the Member States to resort to international instruments outside the EU framework to establish one insofar as strict conditionality is attached.

This conclusion seems to be based on the implicit scheme of pre-emption. First of all, it should be premised that in the EU studies literature there are conflicting opinions about the relevance of the doctrine of pre-emption in the context of EU law,[60] considering the fact that the principles of supremacy and sincere cooperation serve a similar, and to some extent fungible, function.[61] It is common to distinguish between three different forms of pre-emption: field pre-emption, rule pre-emption and obstacle pre-emption.[62]

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[56] ibid 123.

[57] See Tuori and Tuori (n 53), according to which the silence of the Court can be interpreted as intentional for two different reasons: either the Court considered the matter quite self-explanatory or it deemed a pronouncement on the issue to be unnecessary, given the exclusion of the ESM from the scope of the bail-out provision *ratione materiae.*

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

[59] See Tuori and Tuori (n 53) 150. An analysis through the lens of pre-emption is suggested, although not embraced, by these authors. They similarly suggest that Article 121 TFEU and 126 TFEU do not prevent the strict conditionality — as specified by macroeconomic adjustment programmes — attached to intergovernmental bailouts.

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

[61] Tuori and Tuori (n 53) 152.

[62] For this distinction see Robert Schütze, 'Supremacy Without Pre-emption?: The Very Slowly Emergent Doctrine of Pre-emption' (2006) 43 CMLR 1023–1048, 1038, who refers to US 'pre-emption frameworks'. A different terminology which corresponds to a similar, and yet distinct, classification can be found in Cross (n 60), who

The first category has the widest scope, as it implies that whenever the federation has exercised its regulatory prerogatives, the whole field in which its action situates itself is pre-empted. This form of pre-emption seems not to find place in EU law due to the principle of subsidiarity, which establishes a presumption in favour of Member States' action in areas of shared competences.[63] Of limited practical relevance is also the second category, so-called rule pre-emption, according to which the exercise of power by the centre precludes the adoption of contradictory legislation at the level of federated entities. This time, it is the principle of supremacy that militates against the import of rule pre-emption into the EU system, given that Member States are precluded from adopting legislation against EU law under the aegis of supremacy.[64] A further reason to exclude these two models from the EU legal system is the Protocol on shared competence, according to which Union action only covers the elements envisaged by the act adopted and not also the whole area.[65] Therefore, it seems appropriate to hold i) first, that pre-emption in EU law presupposes the *exercise* rather than the mere *existence* of a Union *competence* in a certain area, with the consequence that the virtual 'occupation' of the field never occurs; and ii) second, that it does not presuppose a *direct* conflict, but the mere existence of Union *legislation*. This means that Member States' action is precluded within the scope of the Union act even in the absence of a direct conflict between national rules and EU legislation and thus for the sole reason that the Union has already exercised its legislative prerogatives. Pre-emption in EU law is then somewhere in between those two categories, being broader than rule pre-emption but narrower than field pre-emption.[66]

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

The pre-emption paradigm, conceptually transposed to the level of Member States' treaty powers, may clarify why the Court stated that the conclusion and ratification of the ESM Treaty neither 'jeopardise in any way the objective' pursued by Article 122 (2) TFEU or by Regulation

distinguishes between 'occupation of the field pre-emption', 'direct conflict pre-emption', and 'obstacle conflict pre-emption'. It should be noted that the doctrine of pre-emption, although generally understood in the US context as regarding *legislative prerogatives*, can be extended to Treaty-making powers of Member States. There is not a practical difference in terms of pre-emption between the adoption of legally binding legislation or the conclusion of intergovernmental agreements. In this sense, see also Tuori and Tuori (n 53) 153.

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

[64] However, it should be noted that on a conceptual level the principle of supremacy and the doctrine of pre-emption are not equivalent. If the former determines *how* a certain normative conflict should be resolved (the prevalence of a legal order over another), the latter signals *when* a conflict arises. See in this regard, Amedeo Arena, 'The Doctrine of Union Preemption in the EU Single Market: between *Sein* and *Sollen*' (2010) Jean Monnet Working Paper 03/10, 10 <https://jeanmonnetprogram.org/paper/the-doctrine-of-union-preemption-in-the-eu-single-market-between-sein-and-sollen/> accessed 17 October 2021. Schütze (n 62) describes supremacy as the 'superior hierarchical status of the Community legal order over the national legal orders' while pre-emption is defined as 'the actual degree' to which national law will be displaced'.

[65] See Protocol no 25 on the exercise of shared competence OJ C 115, which recites that 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by Union act in question and therefore does not cover the whole area'.

[66] For the same conclusion, see Tuori and Tuori (n 53) 155.

407/2010 establishing the EFSM, adopted on the basis of that provision, nor 'prevent the Union from exercising its own competences in the defence of the common interest'.[67]

Two points are of particular interest in this statement. First, the conceptual scheme implicitly employed here, as the language also suggests, corresponds to obstacle pre-emption[68] and at the same time excludes field pre-emption, given that the field has not been 'occupied' by the Regulation adopted under Article 122 TFEU.[69] Second, there seems to be a two-level order of pre-emptive effects: pre-emptive effects of primary law (Article 122 TFEU) and pre-emptive effects of secondary law (Regulation 407/2010).

In relation to the pre-emption paradigm employed, it is useful to recall that obstacle pre-emption does not require the existence of an outright contradiction between the Member State act (in this case an international agreement) and the EU legislative act, but a teleological incompatibility. Recourse to this model allows the scrutiny of the actual effects of the ESM on the EU economic constitution and the assessment of the *degree* to which the financial assistance mechanism can be considered compatible with EU law. In *Pringle*, this appraisal resulted in the finding that insofar as conditionality is attached to financial assistance no risk of incompatibility arises. There might be doubts about the soundness of the doctrine of pre-emption in an area, such as economic policy, in which the Union does not have a shared competence but one of coordination. In fact, pre-emption presupposes the allocation of concurrent powers with two distinct subjects, as it adjudicates whether a 'legal space' has already been 'occupied'. In this regard, despite the *sui generis* nature of Union's economic policy competence, this power goes beyond the mere coordination and allows — as recognised by the Court — the grant of financial assistance,[70] with important implications for the applicability of the pre-emption doctrine.

Moving to the second point, the interesting question that arises is whether Treaties provisions can exert pre-emptive effects likewise EU legislation. Or, in other words, whether pre-emption covers Member States' intergovernmental agreements which do not fall within the scope of an EU *act*, but rather within the scope of the *Founding Treaties*. The answer of the Court was that it is possible to resort to international agreements in order to establish a permanent stability mechanism because the EU does not have a *specific* legal basis, not because it prohibits from doing so. Therefore, *Pringle* lends the authority to affirm that Member States can fill a *lacuna* in the Treaties by making use of their treaty-making powers.

However, another way envisaged by EU law to 'complement' the Treaties is the enhanced cooperation procedure under Articles 20 (1) TEU and 329 (1) TFEU.[71] It is then necessary to understand whether Member States need to act within the EU legal framework by resorting to the enhanced cooperation procedure or they can act outside the EU legal framework. The CJEU opted for the second solution as it interpreted the conditions required for enhanced cooperation very strictly, arguing for the necessity of not only a virtual Union's competence in the area in which cooperation takes place, but also of a specific competence basis. This reasoning seems to be based on the underlying assumption that, had the Union possessed a

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[67] *Pringle,* para 106.

[68] For the same conclusion see Amedeo Arena, 'The twin Doctrines of Supremacy and Pre-emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Law*, Vol 1 *The European Union Legal Order* (OUP 2018) 344.

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

[70] For this argument see also Gianni Lo Schiavo, 'The Judicial 'Bail out' of the European Stability Mechanism: Comment on the Pringle case' (2013) College of Europe Research Paper in Law No. 9/2013 <http://aei.pitt.edu/47514/1/researchpaper_9_2013_loschiavo.pdf> accessed 17 October 2021.

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

competence basis for the establishment of a stability mechanism, enhanced cooperation would have precluded Member States' intergovernmental action. This conclusion might dissipate the perplexities surrounding the intergovernmental road as a way of side-stepping the procedural requirements prescribed by the Treaties.
And yet, although enhanced cooperation is more desirable in terms of transparency, it is not void of constitutional doubts too. In fact, it has been argued that this procedure cannot be employed to circumvent a political impasse over a Treaty amendment.[72] Enhanced cooperation can certainly be used to overcome a disagreement blocking secondary legislation or other measures, but it can be hardly justified as an expedient to amend the Treaty. The constitutional difficulties would not disappear even in the case of an amendment *complementing* the Treaties.[73]
In conclusion, the question of subjectivity vis-à-vis financial assistance, namely who between the Union and the Member States is entitled to catalyse the process of 'deepening' the Economic and Monetary Union (EMU), is quite complex and open to political and constitutional contestation. In short, what the case law left open is whether there are some matters exclusively 'reserved' to the EU constitutional legislator. Definitely, the issue is of paramount importance for the future of the Eurozone, since it shapes the direction to give to the EMU: more intergovernmental or more democratic. In this respect, who is the subject granting financial support plays a crucial role. Maduro's proposal for strengthening the EMU is extensively based on *Union*'s fiscal capacity and central taxation as the supranational equivalent of fiscal transfers between Member States coming from national budgets.[74]

### *3.3. The substantive dimension of financial assistance*

Provided that financial assistance has a more pronounced international than constitutional dimension, being something of which the Union is not to a large extent capable and thus left to the Member States, it should be examined whether such assistance operations fit into a solidarity paradigm. In other words, what the content of solidarity obligations between Member States is.
As *Pringle* shows, the Court had not resorted to any solidarity argument. On the contrary, Advocate General Kokott argued that prohibiting Member States from granting financial assistance by virtue of a broad interpretation of the no-bailout clause of Article 125 TFEU would be incompatible with the concept of solidarity, and thus to the basic fundamental purpose of the Union to deepen solidarity between the peoples of Europe (Preamble to the TFEU).[75] She recalled Article 3 (3) TEU and Article 122 (1) TFEU, both provisions referring to solidarity between Member States, and defined solidarity as a 'fundamental principle of the Treaties' which, together with sovereignty, 'militate[s] against a broad interpretation of Article 125 TFEU'. The broad interpretation of the no-bailout clause, to which the Advocate General referred, meant a total prohibition of financial assistance whatever. Instead, she found that Article 125 TFEU should be read as prohibiting only *direct* assumption of commitments of other Member States, either by making payment or by becoming the obligated party.[76]According to this reasoning, then, solidarity does not entail a *duty* to provide financial assistance, and thus a

[72] In this sense Tuori and Tuori (n 53) 179.

[73] ibid

[74] Miguel Poiares Maduro, 'New Governance for the European Union and the Euro: Democracy and Justice' (2013) 16 Yearbook of Polish European Studies 111.

[75] Case C- 370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:675, Opinion of AG Kokott, paras 142-144.

[76] ibid para 121.

positive action of Member States. Nevertheless, it does not preclude any *voluntary* action of Member States, which under international law can then decide to provide financial assistance. Therefore, in relation to the constitutional scope of solidarity, it can be affirmed that EU primary law does not *impose* but merely *allows* financial assistance. This means that Member States are not obliged to rescue euro area partners on the basis of an EU principle of solidarity. As expressly stated, 'the existence of monetary union does not mean that there is an implicit mutual guarantee of the commitments of Member States'.[77] *A fortiori*, given the lack of a structural principle of solidarity in international law, they would not have a solidary obligation in the sphere of their horizontal relations.

Even though solidarity cannot be elevated to a legal principle prescribing a certain course of action, it can still work as an interpretative tool. Albeit not legally enforceable, solidarity as a constitutional principle can serve the hermeneutic function to (re)orient the interpretation of other provisions of the economic and monetary union, such as the no-bailout clause. In the reasoning of the Advocate General, however, solidarity did not fulfil such a function. Advocate General Kokott briefly referred to solidarity without elaborating further on it. Solidarity was more an ancillary argument supporting her conclusion than a constitutional principle guiding her reasoning. Definitely, it was not the justification adduced to validate the bailouts. The Advocate General justified financial assistance only by resorting to a literal interpretation of the no-bailout clause. In her view, the ESM did not breach Article 125 TFEU because this provision only prohibits *direct* assumption of the debt with the effect of benefiting the creditors of the recipient Member State.[78]

On the contrary, the reasoning of the CJEU was mostly based on a teleological, rather than literal, interpretation of the no-bailout clause. The Court made indeed use of a principle which played a constitutional role, such as that of orienting the interpretation of other EU law provisions, and specifically of Article 125 TFEU. Surprisingly, it was not the principle of solidarity that assumed such a function, exerting a mitigating effect on the rigour of the bailout prohibition. It was the newly discovered principle of financial stability that the Court 'constitutionalised'.

In the CJEU's reasoning, financial stability seems to have a higher status than the cornerstone principle of the EMU constitution, that is price stability. However, from a substantial point of view, financial stability does not derogate from price stability. Indeed, by virtue of so-called 'strict conditionality', these two principles do not stand in contradiction to one another. They ultimately obey the same logic: market discipline. Financial stability, as understood by the Court, is causally linked to budgetary policies — although economic theory proves that financial instability largely depends on factors other than fiscal profligacy (for instance, structural imbalances or unfettered capital movements).[79] Therefore, attaching strict conditionality to financial assistance aimed at complying with the rationale of the bailout prohibition. From the CJEU's perspective, the intervention of the ESM through loans or the purchase of bonds could indeed jeopardy the attainment of the objective of market discipline. The stepping-in of Member States or the Union would not discourage moral hazard both for the beneficiary Member State and its creditors, as they will reasonably rely on a third party. A too permissive approach to Article 125 TFEU would then encourage the kind of behaviour that this provision aimed to prevent, i.e. fiscal recklessness. The 'constitutionalisation' of 'strict conditionality', which has found its way in EU primary law through Article 136 (3) TFEU, was

[77] ibid para 114.

[78] ibid paras 145-149.

[79] See for instance Richard Baldwin et al., 'Rebooting the Eurozone: Step 1 – Agreeing a Crisis narrative' (*Vox, CEPR Political Portal*, 20 November 2015) <https://voxeu.org/article/ez-crisis-consensus-narrative%20accessed%2017%20October%202021>. In this document, leading economists agreed upon a crisis narrative according to which the euro area crisis was a 'sudden stop' crisis caused by the large intra-Eurozone capital flows.

then the compromise introduced to respect the market paradigm underpinning EMU constitutional rules.

In this line of reasoning, the principle of solidarity was not even mentioned by the Court, which showed its reluctance to engage with such an argument by declaring inadmissible part of the question referred regarding the interpretation of Articles 2 TEU and 3 TEU. Moreover, it is not hard to observe how ESM financial assistance operations can hardly embody a normatively sound principle of solidarity, considering the harsh welfare cuts and high social costs imposed on the citizenries of the receiving Member States. This conclusion is true, but motivated by an underlying assumption that is a state-centric conception of solidarity which also imbues the account of EU solidarity described in Section 2 of this paper. In the general understanding, the conception of solidarity is redistributive and egalitarian as it is oriented towards fairness and social justice.

And yet, solidarity has another, more mundane meaning, which dates back to Roman law and still constitutes the rationale of solidary obligations in private law. In this sense, it does not aim at fairness but simply entails the assumption of responsibility for someone else's debt. The very notion of solidarity is etymologically intertwined with the concept of debt. *In solidum obligari*, in Roman law, described a joint and several liability of more debtors towards their creditor; therefore, by virtue of an *obligatio in solidum*, a creditor can demand payment of the whole debt from each of the joint debtors. This legal construct does not apply to the relation between Member States under the ESM for the evident reason that Member States stepping in are not *directly* liable for the beneficiary state's debt. However, its underlying logic, which is to ensure the fulfilment of the obligation that the state receiving financial assistance has towards its creditors, can explain why financial assistance under the ESM can still be framed in terms of solidarity. The function of solidarity here is to provide a contractual and insurance guarantee.

This function can be found in the ESM financial instruments. Although *Pringle* emphasises how the ESM does not constitute a guarantee of the commitments of a Member State (since neither loans nor the purchase of bonds on the primary or secondary market pay off its debts),[80] *in practice* the ESM allows the satisfaction of creditors. It is true that financial assistance under ESM instruments amounts to the creation of a new debt that the beneficiary state will have to pay to the ESM[81] — and that Member States' commitments towards their creditors remain unchanged, because the ESM does not discharge the beneficiary Member State's obligations. However, by virtue of financial assistance provided via the ESM, the recipient state would be able to pay its creditors, especially when the amount of financial support received corresponds to the level of the commitments to be discharged. Therefore, the creditors of the recipient state would be satisfied indirectly and *de facto* by other Member States disbursements, similarly to what happens with solidary obligations in private law.

Therefore, there is another possible interpretation of Article 125 TFEU. This provision can be read as a prohibition of *redistributive* solidarity, not of solidarity *tout court*. According to this reading, Member States would be allowed to step in, though without redistributing but by simply lending money. In this perspective, rescue operations would be a token of solidarity, albeit not *redistributive*. The notion of solidarity emerging in the Eurozone, then, might be said to encompass forms of financial assistance that serve a guarantee function, specifically the protection of the smooth execution of an obligation. Rather than embracing a redistributive vocation, this model of solidarity rests on the market.

[80] ibid paras 113-119.

[81] ibid para 122.

## 4. Conclusion: the dual nature of European financial solidarity

As the *Pringle* case has shown, the conceptual framework developed in the case law on the euro crisis does not match the normative account of EU solidarity exposed in Section 2. Financial assistance offered during the euro crisis did not have any (re)distributive connotation. Rather, it seems to be an expression of another kind of solidarity, the definition of which stems from private law, and in particular from the law of obligations. Applied to the sphere of relationships between euro countries, such a notion of solidarity implies the responsibility that some states — similarly to private guarantors who are jointly liable — have to step in to ensure the repayment of a debt. It does not imply a redistributive act of transfer to the debtor states. Therefore, such bailout operations do not amount to genuine fiscal transfers, which in federal systems perform an automatic stabilisation function. In fact, Member States seem to act as individuals do in their sphere of private autonomy, where they interact through economic transactions.

Borrowing a dichotomy that applies to individuals — which is the distinction between society and community[82] — the Eurozone resembles more a *society* of states than a *community* of states. In the first relational dimension, i.e. society, Member States resort to loans in the horizontal plane of their relationships. States make then use of instruments that, at the interpersonal level, pertain to the contractual domain. This analogy well illustrates how states interact horizontally and what is missing in the realm of their relations: a vertical organisation of their mutual obligations under EU law. This lack of a vertical dimension impedes the creation of a *community* of states, where members act on the basis of moral obligations mediated through public law. Actually, it is *because* of EU law that Member States cannot act in solidarity, as they are required to comply with EU law — and thus with the bailout prohibition and its rationale — when acting under international law.

Drawing on the comparison with individuals, it can be recalled that there is a sphere of social life in which all persons are (at least formally) equal as they count *qua* citizens rather than *qua* market actors. It is the space that the welfare state creates to ensure the non-market allocation of resources through citizenship entitlements. In this community, the obligations of individuals are not contractual but stemming from the common consciousness of being part of the same 'community of fate'. This shared sense of community is expressed by citizenship, which defines the membership to a political community and thus has an intrinsic and 'morally demanding component, as 'citizenship built upon ties of national solidarity […] is geared towards security through serial reciprocity and redistribution'.[83] The duties arising from this morally compelling membership are acts of subsidisation of fellow nationals. Translated into the international sphere and applied to states, this paradigm of redistribution would result in a mechanism of fiscal transfers, which are indeed present in fiscal federations. The units of a fiscal federation, as members of a political union, would act to subsidise their partners, and a central public authority would organise such redistributive acts. Membership of such a community would be the equivalent of what citizenship is for individuals.

A reference to this community dimension was for instance present in a speech that Angela Merkel gave to the *Bundestag*, in which she affirmed that 'the monetary union is a community of destiny', adding that 'if the euro fails then Europe fails'.[84] However, the bailout measures adopted in the Eurozone do not reflect this sense of community of destiny. On the contrary, these measures aim to ultimately ensure that 'Member States have differentiated interest rates on the capital markets'.[85] Although bailouts develop a framework of partial risk-sharing, they

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[82] See Ferdinand Tönnies, *Fundamental Concepts of Sociology: Gemeinschaft and Gesellschaft* (C. P. Loomis tr., American Book Company 1940).

[83] Faist (n 35) 51.

[84] Angela Merkel, 'Regierungserklärung von Bundeskanzlerin Merkel zu den Euro-Stabilisierungsmaßnahmen' (19 May 2010), cited and translated in Tuori and Tuori. (n 53) 129.

[85] AG Kokott (n 75) para 148.

do not operate in a system of cross-border fiscal redistribution. The absence of equalisation transfers is further aggravated by the 'strict conditionality' attached to such bailouts.
Conditionality is not a new phenomenon in the realm of financial assistance disbursement, but it normally serves the function to ensure the fulfilment of policy objectives and, especially in federal and regional systems, to facilitate the institutional functions of lower government levels. In the context of the Eurozone, conditionality attached to financial assistance not only has the function to prevent future moral hazard, but it also 'punishes' the beneficiary with austerity measures.[86] Ultimately, in the words of the CJEU, the recipient Member State 'remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such to prompt that member State to implement a sound budgetary policy'.[87] The emphasis put on the objective of sound budgetary policy reinstates the importance of the market paradigm for the financing of Member States. Despite cross-border transfers, financial assistance in the Eurozone remains market-based.
Quite illustrative in this respect is the narrative of the euro crisis, which has been dominated by the argument of moral hazard. Described as a market failure, moral hazard is deeply rooted in the logic and semantics of the market with the consequence that conditionality, being a corrective measure of such a failure, aims at restoring the efficient functioning of the market. Moreover, moral hazard further confirms how the type of solidarity that emerged in the Eurozone reflected a conception of justice which pertains to private law: commutative justice.[88] This kind of justice typically arises from contractual obligations, for instance insurance relations, and can offer a conceptual paradigm for the solidarity shown by euro countries, which *de facto* acted as guarantors. This 'contractual' nature of solidarity has not thickened into distributive justice, which does not simply call for fairness but for 'fair shares'.
For some, this substantial shift from commutative to distributive justice is *a priori* precluded in the realm of international law. According to a widely accepted reading, distributive justice can only bear on individuals and not states.[89] It implies a kind of solidarity that can be found *within* states rather than *between* states. The single currency, however, blurred the contours of this polarised division. Without the instruments of devaluation and inflation, Member States no longer had sovereign instruments to ensure redistribution. The euro put a strain on solidarity *within* Member States. On the other hand, this loss had not been compensated by the creation of redistributive mechanisms *between* Member States at the supranational level. The conditionality attached to financial assistance to avoid moral hazard, then, creates tension for the beneficiary state, which has to choose between *contractual* obligations towards creditor countries and *constitutional* obligations towards its citizenry. It ends up stigmatising Member States' recourse to public debt as a way to finance their welfare state. Without control of the currency and supranational redistributive mechanisms, how could Member States perform their core tasks? They are faced with a serious dilemma: whether to honour the social contract or loan contracts.
In conclusion, solidarity in the EU remains a haphazard concept, which does not 'develop principles for [the] three main contexts' already mentioned.[90] Whilst in the free movement area, solidarity has shown a redistributive potential, in the EMU solidarity is an instrument of cooperation that is merely situated at the level of horizontal relations between Member States, which resort to international and private law tools to regulate their relationships. In this area,

[86] Conditionality is a practice used by the IFM in the provision of financial loans.

[87] *Pringle,* para 137.

[88] In the same vein, Eleftheriadis speaks of 'corrective justice'. See Pavlos Eleftheriadis, 'Corrective Justice Among States' (2020) 2 Jus Cogens 7.

[89] This position is generally attributed to Savigny. For an overview of the stream of literature adhering to such a position see Eleftheriadis (n 88).

[90] Being the principles of *national* solidarity, *member state* solidarity, and *transnational* solidarity. See Sangiovanni (n 42).

what is missing is a vertical dimension that makes Member States act as members of a Union. Here, solidarity does not function as a value bearing some constitutional relevance in the relationships between Member States. EMU remains the telling example of this incomplete architecture, as EU law does not have the authority to govern Member States' expressions of solidarity. As a consequence, the notion of solidarity emerging from this EU law area does not exhibit redistributive features. It is instead rooted in commutative justice — which is not concerned with socially just distributional outcomes, as it only requires a just reparation, i.e. to restore a preferred resource allocation.

To recall the binary distinction between values and objectives, constitutional and international readings of the EU legal order made in the introduction of this paper, solidarity in the EU has not (yet) evolved into a value bearing constitutional weight and largely remains an objective towards which the Union must strive if it wants to undeniably stand as something more than a market.

**Visual Chart of Solidarity in the EU no. 2**

| **Institutional level (personal scope)** | **Legal status** | **Substantive meaning (material scope)** |
|---|---|---|
| Interstate | Principle of International Law | Market-based (Commutative) |
| Interpersonal | Constitutional Principle | Redistributive |