

Competition and redistribution in Economic and Monetary Union

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Abstract

Measures taken by the EU institutions and Member States in response to major crises of the EU over the past decades, culminating in Next Generation EU (NGEU), the EU's Covid-19 recovery programme, have been both praised as expressions of 'real' European solidarity and criticized for representing a profound change in the EU's constitutional fabric lacking proper constitutional legitimation. These two viewpoints, while seemingly opposed, go hand in hand. Economic and Monetary Union is built on the principle of national fiscal responsibility, which is in tension with mechanisms that involve financial assistance, risk sharing and debt mutualization. This article examines the solidaristic elements that have been present in the EU's economic policies since the early days of the European Communities to probe whether Eurozone financial assistance and NGEU indeed constitute such a profound shift. The article argues that both are in the tradition of a narrow, instrumental version of solidarity that underpins much of the internal market and cohesion policy. Solidarity, in this sense, has the purpose of balancing constraints on competition between the Member States with certain redistributive elements. While this view on solidarity may not dispel all doubts about the constitutionality of financial assistance and debt mutualization, it helps to put claims about a shift towards 'real' European solidarity into perspective.

Keywords

Next Generation EU, Eurozone crisis, European solidarity, fiscal solidarity

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I. Introduction

According to some, the last few years have witnessed ‘a profound shift in the EU’s constitutional fabric’ regarding the distribution of resources among Member States, brought about by reinterpretation of the existing Treaties rather than formal Treaty change.¹ In economic and monetary policy, this shift has been attributed primarily to two developments: an increased willingness to grant financial assistance to Member States that experience financial distress and vastly increased borrowing powers of the European Commission, used to raise funds on the financial markets that are disbursed to the Member States as grants and loans under the EU’s COVID-19 recovery programme, Next Generation EU (NGEU). It has been claimed that particularly the funds mobilized through NGEU go ‘far beyond the traditional redistributive instruments in the EU,’² such as the Common Agricultural Policy and the structural funds, and amount to ‘real European solidarity in action’.³

Solidarity as a concept integral to European economic policy and market integration, however, is not novel. The European Court of Justice referred to solidarity as ‘the basis of the whole of the Community system’ and of the Member States’ mutual obligations in an internal market already in the 1960s.⁴ This article asks whether there is a difference between the ‘real solidarity’ (driven by altruism) allegedly observed in response to the Eurozone crisis and the COVID-19 pandemic, and the solidarity that the Court of Justice has spoken of in its internal market case law since the 1960s, and if so, how the understanding of solidarity in economic and later monetary union has changed over the years. To my knowledge, there has not yet been any attempt in the literature to examine the evolution of solidarity in this area of EU law in depth, starting with the Court’s early case law.

When the Commission president and others refer to ‘real solidarity’, they presumably have altruistic actions in mind informed by moral precepts and a desire to do ‘what is right’ in a union of members with shared values and beliefs, a conceptualization of solidarity that resonates with what Durkheim has called ‘mechanical solidarity’.⁵ In the EU, it is commonly associated with social solidarity between the EU citizens.⁶ Through this lens, the claim that the last years have

1. P. Leino-Sandberg and M. Ruffert, ‘Next Generation EU and Its Constitutional Ramifications: A Critical Assessment’, 59 *CML Rev.* (2022), p. 433.

2. *Ibid.*, p. 439–40.

3. Speech by President von der Leyen on the Recovery Plan and Resilience at the Fundação Champalimaud, 29 September 2020.

4. Joined Cases 6/69 and 11/69 *Commission v. France*, EU:C:1969:68, para. 16. For an even earlier reference to solidarity, see the opinion of AG Lagrange, Joined Cases 14, 16, 17, 20, 24, 26 and 27–60 and 1–61 *Meroni & Co. and others v. High Authority of the European Coal and Steel Community*, EU:C:1961:12 (arguing that ‘the principle of solidarity which underlies the Community’ prevented firms in the coal and steel industries from objecting to a levy intended to equalize internal prices of scrap with import prices that affected the firms differently, [1961] ECR 172 at 176).

5. É. Durkheim, *The Division of Labor in Society* (Free Press, 1947), p. 31 et seq. On this understanding of solidarity, see also S.-C. Kolm, ‘Introduction to the Economics of Giving, Altruism and Reciprocity’, in S.-C. Kolm and J.M. Ythier (eds.), *Handbook of the Economics of Giving, Altruism and Reciprocity: Foundations* (Elsevier, 2006), p. 52–71 (explaining that the reason for solidarity can be a genuine concern arising from certain sentiments, such as charity, sympathy, affection or pity); H. Thome, ‘Solidarity: Theoretical Perspectives for Empirical Research’, in K. Bayertz (ed.), *Solidarity* (Springer, 1999), p. 102 (describing the motives behind solidarity as a ‘sense of obligation or value-based commitment’); S. Derpmann, ‘Solidarity and Cosmopolitanism’, 12 *Ethical Theory and Moral Practice* (2009), p. 303, 304 (associating solidarity with ‘the care and moral responsibility for the rights or welfare of others’).

6. It is a contested question, both in the literature and the courts, how far such social solidarity reaches. See, for example, P. Eleftheriadis, *A Union of Peoples* (OUP, 2020), p. 211–215; A. Sangiovanni, ‘Solidarity in the European Union’, 33

seen a ‘profound shift’ in economic and monetary union towards ‘real solidarity’ can be understood as an acknowledgment that altruistic motives and value-based rationales have become more important in shaping solidarity not only between EU citizens, but also the Member States.

Mechanical solidarity is often contrasted with instrumental or (in Durkheim’s words⁷) ‘organic’ solidarity. In a society with interdependent members, actions that benefit others may not primarily, or not at all, be motivated by altruism, but by the realization that they are, at least indirectly or in the long term, in the interest of all members because they facilitate the attainment of a common goal. This instrumental conceptualization of solidarity aligns with the logic of market integration. As markets become more integrated, interdependence between the Member States increases.⁸ Increased interdependence means that actions maximizing the interests of some Member States, or of some firms or other market participants, are more likely to impose costs on others.⁹ An integrated market would not be viable if these costs were pervasive and remained consistently uncompensated. Even though a course of action might be optimal for a market participant in the short run, it may therefore be in the interest of that person not to pursue it to promote the long-run viability of a market.

In this article, I argue that this second (instrumental or organic) understanding of solidarity, rooted not primarily in altruism, but in (enlightened) self-interest, informs many interventions in the internal market that were upheld by the Court of Justice based on considerations of ‘solidarity’.¹⁰ Often, these interventions are intended to preserve the competitive nature of a market spanning different jurisdictions and thus regulatory frameworks that could, without intervention, give some Member States and firms a competitive advantage over others. The self-interested nature of acting in solidarity in this type of cases stems from the fact that the preservation of an internal market ultimately benefits the whole Union, even if Member States or private firms are required to compromise on their short-term self-interest. The Union’s measures are not always solely guided by considerations of market efficiency; they also pursue other goals that deviate from allocative efficiency, as we will see in our analysis of solidarity in the common market for coal and steel and the common agricultural policy. Nevertheless, the overarching goal here is to ensure that the internal market, which, at its foundation, is conceived of as a competitive market, functions properly. This is discussed in section 2.

Solidarity arguments are also used to legitimize measures of a more redistributive nature, especially in the Union’s cohesion policy. However, as I will discuss in section 3, these measures need to be seen in the context of the preservation of a well-functioning internal market as well. They are therefore, despite their redistributive nature, better understood as expressions of instrumental solidarity motivated by self-interest, rather than mechanical solidarity driven by altruism.

It may be questioned whether it is convincing to speak of solidarity at all when the primary rationale behind measures termed ‘solidaristic’ is to achieve a common goal for the benefit of all Member States, and the Member States’ adherence to these measures can best be explained by

Oxford Journal of Legal Studies (2013), p. 213, 218–223; F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP, 2015), p. 208–210.

7. E. Durkheim, *The Division of Labor in Society*, 477–488.

8. F. de Witte, ‘Interdependence and Contestation in European Integration’, 3 *European Papers* (2018), p. 476, 477–482.

9. *Ibid.*, p. 481.

10. For a similar view on solidarity in the internal market and other policy areas, see A. Bobić, ‘Imagining Transnational Solidarity in the EU through Hegel’s Idea of Mutual Recognition’, and for a review of the early internal market solidarity case law in the broader context of an evolving understanding of solidarity in the EU, S. Garben, ‘The (Slow) Redress of the “Solidarity Deficit” in the EU and the Emerging Principle of Solidarity in EU Law’, both in this Special Issue.

their self-interest. It is indeed difficult to regard self-interested actions as genuinely solidaristic if they are strictly reciprocal or symmetric, in the sense of an even ratio of benefits to commitments that participants derive from a scheme set up in their mutual interest.¹¹ However, reciprocal solidarity in this strict sense is rare in EU law.¹² It does not characterize the policy interventions at issue here, which typically entail asymmetric effects and benefit some Member States (or private firms) financially or economically more than others (see the discussion in section 2). From this perspective, references to solidarity in the Court's internal market case law and in policy documents of the Commission, such as those on cohesion policy,¹³ may be seen as justified.

I further argue that policy initiatives in response to the Eurozone crisis and COVID-19 fit well within this traditional, instrumental understanding of solidarity.¹⁴ On a spectrum ranging from enabling efficient markets to effecting redistribution, Eurozone financial assistance is positioned towards the former and NextGenerationEU (NGEU) towards the latter, which may have prompted claims that NGEU constituted an inflection point and a shift towards 'real' solidarity. However, both are motivated by the recognition that the viability of Economic and Monetary Union was at risk without intervention, and they are thus in the tradition of what the Court of Justice had already in mind when it spoke of solidarity in the 1960s. This argument is made in section 4. Section 5 concludes.

2. Competition

The Court of Justice regularly relies on the principle of solidarity in its case law on the common market for coal and steel and the common agricultural policy. While explicit references to solidarity are otherwise rare in the Court's internal market jurisprudence, we will see that the same rationale that informs the Court's understanding of solidarity in the European Coal and Steel Community (ECSC) and the common agricultural policy underlies its interpretation of state aid rules. Through these, the obligation to act in solidarity permeates the internal market as a whole.

To understand the role that solidarity performs in the internal market, it is useful to briefly review the history of the ECSC and the common agricultural policy. When the ECSC and the European Economic Community were formed, the founding Member States decided to establish a system

11. Consider, for example, a solidarity instrument that is financed out of the EU budget and grants the right to receive assistance if certain risks materialize. Such an instrument is akin to an insurance scheme. On the assumption that potential losses from the materialization of risks covered by the scheme are on average proportional to the Member States' contributions to the scheme (for example, both are proportional to gross national income, see n. 89 and the accompanying text) and Member States have roughly the same risk exposure, the insurance-like solidarity instrument would also be symmetric. In this case, the ratio of costs to benefits, which are equal to the probability of suffering a loss multiplied by the amount of the loss (i.e. the amount against which all Member States are insured), is the same for all Member States.

12. Often, reciprocity is defined more broadly in the literature. For example, it has been argued that a scheme for the production of collective goods is reciprocal if all participants receive a 'fair return' on their contribution to the scheme. A. Sangiovanni, 33 *Oxford Journal of Legal Studies* (2013), p. 217. In the EU, participation in common schemes, such as the internal market, comes with costs and potential losses for the Member States. The return they receive is, on this view, fair if it corresponds to 'the level at which each state would ensure against the potential losses...had they known the distribution of risks but not their place in that distribution', *ibid.*, p. 229–230.

13. See n. 47.

14. This is also exemplified by an amendment to Article 136 TFEU of 2011, which added a third paragraph to the article empowering 'Member States whose currency is the euro [to] establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole.'

of state intervention in the markets for coal and steel and agricultural products in the form of minimum or maximum prices, direct payments to producers and, under certain conditions, production quotas. Apart from prohibiting measures that restricted the free movement of coal and steel, discriminatory practices and state subsidies,¹⁵ the ECSC Treaty conferred powers on the institutions of the ECSC to intervene in the market for coal and steel with a view to managing scarce resources, promoting the expansion of production capacity or improving the living and working conditions of the workforce.¹⁶ Similarly, in the agricultural sector, state intervention sought to ensure that prices were stable and sufficiently high to improve living standards of farmers, who represented a considerable fraction of the workforce in all six founding Member States,¹⁷ promote investment in technological progress, increase agricultural productivity and safeguard food supplies.¹⁸

Against this backdrop, the Court of Justice has repeatedly been asked to decide on the legality of Community or Union measures that interfere with demand and supply in the coal and steel market or the market for agricultural products, for example by fixing minimum prices. Some of the earliest cases were brought by undertakings in the iron and steel sector challenging decisions of the Commission that established minimum prices or production quotas.¹⁹ Pursuant to the ECSC Treaty, the Commission could take such measures if this was necessary to combat a 'manifest crisis' in the coal and steel industry.²⁰ The late 1970s and early 1980s were characterized by continued oversupply, falling demand and, as a consequence, falling prices of steel.²¹ These conditions had created difficulties for steel producers in several Member States, but some small and medium-sized firms, especially from Northern Italy, including several of the applicants in the proceedings before the Court, had remained competitive because of their lower production costs.²² When the Commission recognized the existence of a manifest crisis and imposed minimum prices and quotas, these firms were detrimentally affected in comparison with their less competitive counterparts and likely to lose market share.

In upholding the challenged decisions, the Court of Justice argued that the Commission was 'under an obligation by virtue of Article 3 of the [ECSC] Treaty to act in the common interest, but that does not mean that it must act in the interest of all those involved without exception'. Rather, the Commission 'may, in the general interest, exercise its decision-making power according

15. ECSC Treaty, Article 4.

16. The objectives of the ECSC are set out in Article 3 ECSC Treaty. See also K.J. Alter and D. Steinberg, 'The Theory and Reality of the European Coal and Steel Community', in S. Meunier and K.R. McNamara (eds.), *Making History: European Integration and Institutional Change at Fifty* (OUP, 2007), p. 89, 90–92.

17. For data, see H. Zobbe, 'The Economic and Historical Foundation of the Common Agricultural Policy in Europe', *The Royal Veterinary and Agricultural University, Food and Resource Economic Institute, Unit of Economics Working Papers* 12 (2001), p. 3.

18. These and other, partly conflicting, objectives of the common agricultural policy were set out in Article 39 EEC Treaty (now Article 39 TFEU).

19. Joined Cases 154, 205, 206, 226–228, 263 and 264/78, 39, 31, 83 and 85/79 *SpA Ferreria Valsabbia and others v. Commission*, EU:C:1980:81; Joined Cases 26 and 86/79 *Forges de Thy-Marcinelle et Monceau SA v. Commission*, EU:C:1980:82; Case 276/80 *Ferreria Padana SpA v. Commission*, EU:C:1982:57; Case 263/82 *Klöckner-Werke AG v. Commission*, EU:C:1983:373.

20. ECSC Treaty, Articles 58(1), 61(b).

21. On this crisis, see K.J. Alter and D. Steinberg, in S. Meunier and K.R. McNamara (eds.), *Making History: European Integration and Institutional Change at Fifty*, p. 98–101.

22. *Ibid.*, p. 99.

to the requirements of the situation, even to the detriment of certain individual interests.’²³ Solidarity, which was mentioned in the preamble to the ECSC Treaty, played a central role in the Court’s reasoning in these cases. The Court regarded solidarity as a ‘fundamental principle’ and made references to various provisions in the Treaty that, in its view, were expressions of solidarity, notably the requirement in Article 3 ECSC Treaty to give priority to the common interest. This, the Court argued, presupposed a ‘duty of solidarity’,²⁴ which might require ‘that certain undertakings..., by virtue of European solidarity, accept greater sacrifices than others’.²⁵

The Court’s line of reasoning is similar in cases concerning the EU’s common agricultural policy. Again, producers challenged measures of the Council and the Commission that established levies or production quotas to address structural surpluses, particularly in the markets for dairy products and sugar. They argued that the measures required the sharing of the costs of surplus production among all producers within the common market and thus discriminated against those who did not produce surpluses because of higher production costs.²⁶ The Court rejected this argument, pointing out that ‘the aim of the quota system [was] not to support the least profitable undertakings but to provide a degree of control over production whilst re-orientating it towards the needs of the market’.²⁷ The Court again referred to the ‘principle of solidarity’, which required producers to comply with a quota system that had been designed with the needs of the common market as a whole in mind and implied that the individual circumstances of producers, or of Member States, could not all be given equal weight.²⁸

While solidarity plays a less prominent role in the Court’s review of Commission decisions prohibiting national measures on the ground that they amount to state aid, solidarity considerations inform implicitly – and in at least one decision explicitly²⁹ – the Court’s reasoning in this context. As in the case of the ECSC or the common agricultural policy, the Court assesses the permissibility of interventions in the operation of the market (now by Member States, rather than Community or Union institutions) in light of the common interest of the Union and not the interests of individual undertakings or Member States. Thus the Court held that the Commission was justified in adopting a Union-wide perspective in interpreting the discretionary exceptions in Article 107(3) TFEU, for example when assessing whether the standard of living was abnormally low in a particular area.³⁰ Likewise, the Court and Commission construe the requirement that aid must

23. Joined Cases 154, 205, 206, 226–228, 263 and 264/78, 39, 31, 83 and 85/79 SpA Ferriera Valsabbia and others v. Commission, para. 49.

24. *Ibid.*, para. 59.

25. Joined Cases 154, 205, 206, 226–228, 263 and 264/78, 39, 31, 83 and 85/79 SpA Ferriera Valsabbia and others v. Commission, para. 120. Similarly, Joined Cases 26 and 86/79 Forges de Thy-Marcinelle et Monceau SA v. Commission, para. 10; Case 276/80 Ferriera Padana SpA v. Commission, para. 30–32.

26. Case 250/84 *Eridania v. Cassa Conguaglio Zuccheri*, EU:C:1986:22, para. 15.

27. *Ibid.*, para. 25.

28. *Ibid.*, para. 20–25. For similar arguments, see Case 39/72 *Commission v. Italy*, EU:C:1973:13, para. 19–21, 24–25; Case 179/84 *Bozzetti v. Invernizzi SpA*, EU:C:1985:306, para. 32–35; Case 203/86 *Spain v. Council*, EU:C:1988:420, para. 22–29; Case C-34/08 *Azienda Agricola Disarò Antonio and others v. Cooperativa Milka 2000 Soc. coop. a.r.l.*, EU:C:2009:304, para. 30–34. See also the Opinion of Advocate General Trstenjak in *Azienda Agricola*, EU:C:2009:120, para. 43 (arguing that the principle of solidarity justified measures that demanded ‘a concerted effort by milk producers’ to limit surplus production in the Community).

29. Joined Cases 6/69 and 11/69 *Commission v. France*, (n 4) para. 16.

30. TFEU, Article 107(3)(a). See Case 730/79 *Philip Morris Holland BV v. Commission*, EU:C:1980:209, para. 25 (pointing out that ‘the proposed aid would have permitted the transfer to the Netherlands, of an investment which could be effected in other Member States in a less favourable economic situation than that of the Netherlands where the national level of

'not adversely affect trading conditions to an extent contrary to the common interest' narrowly.³¹ They link the common interest to the preservation of a competitive market by requiring that aid must not solely be given in order to rescue an undertaking, but must be accompanied by a restructuring plan that puts the recipient undertaking in a position to compete effectively in the internal market.³²

At the heart of the above decisions is the idea that a common market can only function if market actors, which can take advantage of the free movement of goods, services and persons, are also bound by common obligations, either where the EU institutions determine that regulatory intervention in the operation of the market at the supranational level is warranted (ECSC and agricultural policy), or regulatory intervention at the national level is not warranted (state aid).³³ This is clearest in the case of state aid. It is part of the definition of state aid that a national measure is prohibited if it distorts competition in the internal market.³⁴ The basic principle is therefore that productive capacity must be allowed to migrate freely within the Union so that it can be put to its most efficient use, even if that entails disadvantages for certain undertakings and Member States. Interventionist measures adopted under the ECSC Treaty or the common agricultural policy that have the aim to reduce supply, for example by establishing minimum prices, ostensibly go against the efficiency rationale that underlies the state aid rules. They lead to a transfer of surplus from consumers to farmers and a dead weight loss, and thus to inefficiencies (i.e. a reduction in overall welfare). Nevertheless, the basic idea that the Court has in mind when it refers to solidarity is the same: The establishment of an internal market – be it a market that is created with a view to promoting an efficient allocation of resources or (also) other, non-efficiency related goals³⁵ – implies that the regulatory framework that governs such a market must be oriented towards market-wide interests. This involves compromise and, as a consequence, some market actors and Member States are potentially worse off than they would have been had they retained regulatory autonomy in a more fragmented market.

Solidarity as used by the Court in its internal market case law, therefore, does not refer to an action that supports the weak or those in need. Indeed, many of the measures adopted to implement the EU's common agricultural policy were diametrically opposed to such an understanding of solidarity. Initially, the policy makers sought to reduce structural surpluses by establishing a price floor. Given that minimum prices link government support to output, the distributional benefits of the common agricultural policy were larger for more productive and larger farms. When the common agricultural policy transitioned from price floors to direct payments in the 1990s, the general distributional key was retained, with most of the subsidies being paid to the

unemployment is one of the lowest in the Community'). A Union-wide perspective is explicitly adopted by Article 107(3)(b)–(d), which provides that state aid may in certain situations be considered to be compatible with the internal market if it promotes a project of common European interest or is not contrary to the common interest.

31. TFEU, Article 107(3)(c).

32. Case C-323/82 *Intermills v. Commission*, EU:C:1984:345, para. 39.

33. See, e.g., Case 39/72 *Commission v. Italy*, para. 21 (holding that the failure of a Member State to comply with obligations imposed under Community law – here the requirement to provide for a system of payments to dairy farmers in order to incentivize them to withhold milk and milk products from the market and reduce oversupply – 'undermine[d] the efficacy of the provision decided upon in common, while at the same time taking an undue advantage to the detriment of its partners in view of the free circulation of goods').

34. TFEU, Article 107(1).

35. The ECSC and the common agricultural policy seek to promote several goals in addition to competitiveness, a number of other goals, see the references in notes 16 and 18 and accompanying text.

largest landowners.³⁶ Solidarity can thus better be conceptualized as a tool to prevent a prisoner's-dilemma-like scenario. As illustrated by the cases discussed here, each Member State individually has an incentive to adopt measures that give undertakings based in their territory a competitive advantage. However, it is not in the collective interest of the Member States to take such protectionist measures, since the internal market would otherwise disintegrate, and the benefits associated with the internal market, the ECSC and the common agricultural policy would disappear. The obligations that the Court derives from the ECSC Treaty and the Treaty provisions on the common agricultural policy, as well as state aid rules, are designed to remove self-interested actions from the menu of options that Member States have at their disposal and enforce a cooperative solution.³⁷

Despite the instrumental nature of the solidarity obligations imposed on Member States in the internal market context, the Court was arguably justified in using the term 'solidarity', because the obligations affect Member States asymmetrically. As a result of secular economic differences, some Member States will *systematically* benefit more than others from an application of common rules structuring the internal market. The free circulation of factors of production, goods and services in a competitive market, safeguarded by a strict enforcement of state aid rules, accentuates competitive advantages that Member States may have in certain industries. Similarly, the structure of the coal and steel industry and the agricultural sector differ systematically between Member States, and market intervention in the form of price floors or production quotas puts producers in some countries at a greater disadvantage than in others.³⁸

3. Redistribution

While not part of Economic and Monetary Union in the structure of the TFEU, a discussion of solidarity in EMU would be incomplete without reflecting on the EU's cohesion policy, which can be regarded as a necessary counterweight to the instrumental understanding of solidarity that permeates the Court's internal market case law discussed in the preceding section.

One of the aims of the Union is the promotion of 'economic, social and territorial cohesion, and solidarity among Member States'.³⁹ Article 174 TFEU operationalizes this general aim by imposing an obligation on the Union to strengthen cohesion, in particular by 'reducing disparities between the levels of development of the various regions'.⁴⁰ The Union mobilizes considerable funds – typically amounting to about a third of the EU's budget – to implement its cohesion policy.⁴¹ The resources are mainly channelled through two 'structural funds', the European Social Fund (ESF) and

36. For data, see R. Baldwin and C. Wyplosz, *The Economics of European Integration* (McGraw-Hill, 7th edn., 2022), p. 225.

37. In the literature, the rules governing the internal market and state-aid rules have occasionally been linked to the goal of preventing a beggar-thy-neighbour policy, which displays the characteristics of a prisoner's dilemma, see, e.g. E. Fox, 'Vision of Europe: Lessons for the World', 18 *Fordham Int'l LJ* (1994), p. 379, 380; A. Heimler, 'State aid Control: Recent Developments and Some Remaining Challenges', in P.L. Parcu, G. Monti and M. Botta (eds.), *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar, 2020), p. 54, 62.

38. See the references in notes 22, 26–28 and accompanying text.

39. TEU, Article 3(3).

40. TFEU, Article 174(2).

41. In the EU's multiannual financial framework 2021–2027, this proportion was increased, owing to the provision of significant additional resources in response to the COVID-19 pandemic, see Council Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027, [2020] OJ L433I/11, Annex I; Council

European Regional Development Fund (ERDF),⁴² and a Cohesion Fund (CF).⁴³ The ESF seeks to improve employment opportunities for workers, facilitate their mobility and increase their adaptability to industrial and technological change.⁴⁴ The ERDF is intended to redress regional imbalances by investing in certain priority areas, currently innovation and research, digitization, the green economy and support for small and medium-sized enterprises.⁴⁵ The CF is used to invest in projects concerning the environment and trans-European transport networks.⁴⁶

At the heart of the Union's cohesion policy is a preference of policy makers, and by implication citizens of the Union, for broadly convergent socio-economic conditions. The transfer of wealth from richer to poorer regions of the EU that it entails can be seen as an expression of solidarity between the Member States.⁴⁷ It is thus no coincidence that solidarity among the Member States is mentioned together with the aim to promote the Union's economic, social and territorial cohesion in Article 3(3) TEU.

It is important to appreciate the link between cohesion policy, market integration and monetary union to understand the contours of solidarity in cohesion policy. At the time of the establishment of the single market with the Single European Act in 1986 and the creation of a common currency in 1992, there was broad agreement among economists and policy makers that the programme of economic and monetary integration was likely to aggravate regional imbalances.⁴⁸ The reason is that economic integration reinforces specialization and agglomeration effects. Nations have an incentive to specialize in the sectors where they have a competitive advantage and firms have an incentive to locate to regions that offer easy access to talent and other sector-specific factors of production, irrespective of national boundaries.⁴⁹ As a consequence, economic activity clusters geographically in the EU, increasing regional disparities.⁵⁰ At the same time, monetary union makes it impossible for Member States to use monetary policy and the exchange rate to support the economy and compensate for competitive disadvantages. Furthermore, the ability of Member States to grant aid to promote the economic development of underdeveloped regions is severely constrained to safeguard the competitive structure of the internal market.⁵¹ In light of these tensions created by economic

Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, [2020] OJ L 433I/23, Article 2.

42. TFEU, Article 175(1). A third structural fund, the European Agricultural Fund for Rural Development, is part of the common agricultural policy, Regulation (EU) No 1306/2013, [2013] OJ L347/549, Articles 3(1)(b), 30–38.

43. TFEU, Article 177.

44. Ibid., Article 162; Regulation (EU) No 1304/2013 on the European Social Fund, [2013] OJ L347/470, as amended.

45. TFEU, Article 176; Regulation (EU) No 1301/2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal, [2013] OJ L347/289, as amended.

46. TFEU, Article 177; Regulation (EU) No 1300/2013 on the Cohesion Fund, [2013] OJ L347/281.

47. Communication from the Commission to the Council and the European Parliament, Building our common Future – Policy challenges and Budgetary means of the Enlarged Union 2007–2013, COM/2004/0101 final, 4–5 (stating that '[t]he Union's cohesion policy exists to ensure solidarity between all regions and citizens'). See also R. Leonardi, 'Cohesion in the European Union', 40 *Regional Studies* (2006), p. 155, 158.

48. R. Leonardi, 40 *Regional Studies* (2006), p. 156–157 with references. See also Committee for the Study of Economic and Monetary Union, Report on economic and monetary union in the European Community (Delors Plan) (1989), 10–12; European Commission, The Regions in the 1990s: Fourth Periodic Report on the Social and Economic Situation and Development of the Regions of the Community (1991), 67–72.

49. R. Baldwin and C. Wyplosz, *The Economics of European Integration*, p. 235–236, 245.

50. Ibid., p. 248.

51. See the discussion of state aid rules in the text to notes 30–32.

integration and monetary union, some commentators have described the EU's cohesion policy as the price that had to be paid to 'buy' the support of poorer Member States for further integration.⁵²

These considerations show that solidarity as a rationale for the Union's cohesion policy is intertwined with the role it plays in the case law concerning the EU's common agricultural policy and state aid. In these policy areas, solidarity appears as 'two sides of the same coin', as has been argued in the literature.⁵³ Member States receive benefits from participating in the internal market, but they must also accept corresponding obligations. These include reducing inequalities between regions through the EU's structural funds and refraining from adopting unilateral measures that confer an advantage on undertakings based in certain regions to the detriment of inter-state trade.⁵⁴

Again, despite this quid pro quo inherent in the EU's cohesion policy, it is appropriate to speak of solidaristic obligations, since the associated benefits and costs are not evenly distributed across Member States. Cohesion spending per capita is inversely correlated with GDP per capita and thus consistently benefits some Member States more than others.⁵⁵ Symmetry in benefits and contributions would require that the net payers benefit more from economic integration than the net recipients in roughly the same proportion to which they pay more into the system than the net recipients.⁵⁶ The specialization and agglomeration effects of economic integration are difficult to quantify precisely, but it is unlikely that this condition will hold other than in exceptional cases.

4. Competition and redistribution in times of crisis

The period of upheaval, which some commentators argue has resulted in a shift in, or a transformation of,⁵⁷ the EU's constitutional fabric, began with measures adopted by EU institutions and Member States to strengthen the Eurozone's resilience to economic shocks and provide financial assistance to Member States experiencing financial distress in the aftermath of the Global Financial Crisis. This section will assess the impact of these measures to determine whether they represent not only a shift in how Economic and Monetary Union operates, but also a shift in the nature of solidarity underpinning it.

While commentators broadly agree that the Eurozone crisis has amplified the willingness of Member States to show solidarity,⁵⁸ it is interesting to note that the Court of Justice scrupulously

52. J. Bachtler and C. Mendez, 'Cohesion Policy: Doing More with Less', in H. Wallace et al. (eds.), *Policy-making in the European Union* (OUP, 8th edn., 2020), p. 232, 238.

53. J.P. Terhechte, 'EUV Art. 3 Ziele der Union', in E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union, Vol. 1* (C.H. Beck, 2024), para. 57.

54. *Ibid.*

55. See R. Baldwin and C. Wyplosz, *The Economics of European Integration*, p. 251 for data.

56. Assume there are only two Member States, a net recipient of cohesion spending, state A, and a net payer, state B. The symmetry condition can be expressed as $c_A / (r_{CS_A} + r_{int_A}) = c_B / (r_{CS_B} + r_{int_B})$, where c_A refers to the contributions of state A to the portion of the EU's budget that is allocated to cohesion policy, r_{CS_A} denotes the benefits derived by state A from cohesion spending, and r_{int_A} denotes state A's benefits from economic integration. The above equality implies $(r_{int_A} + r_{CS_A}) / r_{int_B} = (c_A / c_B)(r_{CS_B} / r_{int_B} + 1)$. Assuming the net payer (B) receives very little cohesion spending, this simplifies to $(r_{int_A} + r_{CS_A}) / r_{int_B} \approx c_A / c_B$. Thus symmetry requires that the higher contribution rate of the net payer (B) in comparison to the net recipient (A) is offset by an equally high ratio of benefits derived by B from economic integration to the total benefits derived by A (sum of A's benefits from cohesion spending and economic integration).

57. V. Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis* (Cambridge University Press, 2020).

58. See, e.g., *ibid.*, p. 205–260; P. Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union', 34 *Yearbook of European Law* (2015), p. 257; A. Hinarejos,

avoids any references to solidarity in its case law on monetary union, although it has upheld voluntary financial assistance measures by interpreting provisions of the Treaty that prohibit the monetary financing of Member State governments⁵⁹ or the assumption of the liabilities of a Member State⁶⁰ restrictively and the mandate of the ECB expansively.⁶¹ The reason is presumably that the provisions of the TFEU on economic and monetary union (Articles 119–144) have been drafted in a way that renders solidarity actions ostensibly impermissible,⁶² except in situations where severe difficulties arise in the supply of certain products,⁶³ a Member State is seriously threatened by exceptional occurrences beyond its control⁶⁴ or a non-euro-area Member State experiences a balance of payments crisis that jeopardizes the functioning of the internal market.⁶⁵ Nevertheless, as we will see, many of the measures adopted by the Union or the Member States result in debt mutualization and risk sharing and may therefore justifiably be regarded as expressions of solidarity.

A. Financial assistance

The cornerstones of the EU's attempt to address the fragilities of the Eurozone exposed by the sovereign debt crisis that gripped several Member States from 2009 until well into the second decade of

The Euro Area Crisis in Constitutional Perspective (OUP, 2015), p. 166–172. The importance of solidarity in monetary union is also regularly emphasized in policy reports and policy initiatives concerning monetary union, for example European Commission, Reflection paper on the deepening of the economic and monetary union, COM(2017), p. 291, 18; European Commission, The Five Presidents' Report: Completing Europe's Economic and Monetary Union (2015), p. 4; European Council, Towards a Genuine Economic and Monetary Union, Report by President of the European Council Herman Van Rompuy, EUCO 120/12, 3, 6; and was acknowledged early in the process of European monetary integration, see P. Werner, 'Perspectives de la Politique Financière et Monétaire Européenne', speech given in Saarbrücken on 26 January 1968; European Commission, A Plan for the Phases Establishment of an Economic and Monetary Union, Bulletin of the European Communities, Supplement 03/70.

59. TFEU, Article 123(1). In particular, the ECB and national central banks are prohibited from granting credit facilities to Member States or purchasing debt instruments directly from them on the primary market.

60. TFEU, Article 125(1) (no-bailout clause).

61. In the three leading decisions on the legality of the Member States' crisis response measures and the market interventions of the ECB, Case C-370/12 *Thomas Pringle v. Ireland*, EU:C:2012:756; Case C-C-62/14 *Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:400; and Case C-493/17 *Weiss and Others*, EU:C:2018:1000, solidarity is only mentioned once, namely in Advocate General Kokott's opinion in *Pringle*, EU:C:2012:675, para. 142–143. Advocate General Kokott suggested that the 'concept' of solidarity militated against a broad interpretation of Article 125 TFEU, the no-bailout clause, that prevented Member States from granting any form of financial assistance. While she acknowledged that it could not 'be inferred from the concept of solidarity that there exists a duty to provide financial assistance of the kind that is to be provided by the ESM', she was of the view that 'a broad teleological interpretation of Article 125 TFEU [that prohibited] the Member States...from voluntarily providing mutual assistance... would call into question the very purpose and objective of a Union.' *Ibid.*, para. 143. The Court, instead, relied on a technical line of reasoning in holding that the ESM and the ECB's asset purchases complied with the Treaty, see in particular Case C-370/12 *Thomas Pringle v. Ireland*, para. 139; Case C-C-62/14 *Gauweiler and Others v. Deutscher Bundestag*, para. 46–59, 104–108, 115–120; Case C-493/17 *Weiss and Others*, para. 53–61, 109–128, 137–142.

62. The three key provisions that seem to prohibit financial assistance comprehensively are prohibitions on monetary financing of Member State budgets (Article 123 TFEU), on granting national governments (or other public bodies or undertakings) privileged access to financial institutions (Article 124 TFEU) and on the assumption of the debts of Member State by the Union or other Member States (so-called 'no-bailout clause', Article 125 TFEU).

63. TFEU, Article 122(1).

64. *Ibid.*, Article 122(2).

65. *Ibid.*, Article 143.

the new millennium are loan facilities and the provision of liquidity support by the Eurosystem⁶⁶ through its government bond purchase programmes. As the Eurozone crisis unfolded, financial assistance was first granted in the form of bilateral loans to Greece ('Greek Loan Facility'). In 2010, the EU institutions then established the European Financial Stabilisation Mechanism (EFSM) based on Article 122(2) TFEU to provide loans to Member States experiencing or threatened by severe financial difficulties.⁶⁷ In the same year, the Member States created a temporary support mechanism on an intergovernmental basis, the European Financial Stability Facility (EFSF), which increased the total lending capacity of the EU's crisis resolution tools to €500 billion. The EFSF has now been replaced by a permanent assistance mechanism, the European Stability Mechanism (ESM).⁶⁸

The ECB and the national central banks of the euro area Member States have used three large-scale programmes to purchase government bonds in secondary markets, the securities markets programme (SMP),⁶⁹ the public sector purchase programme (PSPP) (also referred to as 'quantitative easing')⁷⁰ and most recently the pandemic emergency purchase programme (PEPP).⁷¹ The SMP, which was terminated in September 2012, targeted only government bonds of the five Member States most severely affected by the sovereign debt crisis, while the Eurosystem purchases eligible debt instruments of all euro area Member States under the PSPP and PEPP. In addition, the ECB announced that it was prepared to buy potentially unlimited amounts of government bonds of Member States in receipt of financial assistance from the EFSF or ESM in the secondary markets, although it has not yet carried out any transactions under this programme, called outright monetary transactions (OMT).⁷²

Bilateral loans and financial assistance granted by the EFSM, EFSF and ESM can be seen as (voluntary) expressions of solidarity between the Member States.⁷³ Article 122 TFEU, the legal basis of the EFSM, speaks of assistance measures adopted 'in a spirit of solidarity between Member States'. The lending activities of the EFSM are financed through borrowing on capital markets.⁷⁴ Any losses would be borne by the EU budget and thus indirectly by the Member States.⁷⁵

66. The Eurosystem is composed of the ECB and the national central bank of the euro area Member States, Article 282(1) TFEU.

67. Council Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism, [2010] OJ L118/1. See also the text to note 64.

68. The EFSF and ESM were established by the European Financial Stability Facility Framework Agreement, 7 June 2010, and the Treaty Establishing the European Stability Mechanism, 2 February 2012, respectively. For an overview of crisis response measures, see also C. Hofmann, 'A Legal Analysis of the Euro Zone Crisis', 18 *Fordham J. Corp. & Fin. L.* (2013), p. 519.

69. Decision 2010/281/EU of the ECB establishing a securities markets programme (ECB/2010/5).

70. Decision (EU) 2015/774 of the ECB on a secondary markets public sector asset purchase programme (ECB/2015/10), recast as Decision (EU) 2020/188 (ECB/2020/9).

71. Decision (EU) 2020/440 of the ECB on a temporary pandemic emergency purchase programme (ECB/2020/17), amended most recently by Decision (EU) 2021/174 (ECB/2021/6).

72. ECB Press Release, Technical features of Outright Monetary Transactions, 6 September 2012.

73. See, e.g., European Stability Mechanism, Safeguarding the euro in times of crisis: The inside story of the ESM (2019), 53.

74. Council Regulation (EU) No 407/2010, Article 2(1).

75. Communication from the Commission to the Council and the Economic and Financial Committee on the European Financial Stabilisation Mechanism, COM(2010) 713 final, 2–3. In the case of the bridging loans that the EFSM provided to Greece, the euro area Member States undertook to reimburse non euro area Member States for the amount that the latter had paid in own resources corresponding to the use of the general budget of the Union should losses arise,

Similarly, the EFSF and ESM are authorized to borrow on capital markets.⁷⁶ Their bonds are backed by guarantees, paid in capital, and callable capital provided by the Member States,⁷⁷ whose commitments are several and calculated according to a contribution key.⁷⁸ For two reasons, these commitments can be interpreted as a form of debt mutualization and therefore (indirect) financial assistance from one Member State to another. First, assuming the EFSF and ESM have sufficient funds to meet scheduled payments on their debt instruments despite a Member State defaulting on its loan repayment obligations, the losses either reduce the capital of the assistance mechanism, which was contributed pro rata by the Member States, or its net income, which affects the Member States' pro rata claims if the EFSF or ESM were to be wound up.⁷⁹ Second, assuming available funds are insufficient, the non-defaulting Member States are responsible to make up for the shortfall, including pro rata for the contribution of a defaulting Member State.⁸⁰

It is less obvious that the ECB's asset purchase programmes are expressions of fiscal solidarity between the Member States. Under the PSPP and PEPP, the majority of asset purchases are carried out by the national central banks of the Eurosystem, which purchase debt instruments of issuers based in their jurisdiction according to their percentage shares in the ECB's capital key. The potential mutualization of losses is therefore limited to the securities purchased by the ECB.⁸¹ However, this is different with the SMP and OMT. The SMP was set up to address what the ECB called 'tensions' in certain securities markets that hampered the monetary policy transmission mechanism.⁸² The Eurosystem central banks thus concentrated their asset purchases on issuers in Member States where the monetary policy transmission mechanism was perceived to be dysfunctional, notably because refinancing costs had become so high that credit markets had frozen.⁸³ Similarly, with its OMT programme, the ECB seeks to correct perceived distortions in government debt markets because of concerns about the solvency of some Member States. To prevent a liquidity crisis caused by these concerns from developing into a self-fulfilling solvency crisis, the ECB announced that it was prepared to provide unlimited liquidity to Member States in distress.⁸⁴ Thus, under both the SMP and OMT, euro area national central banks purchase government debt in accordance with

Council Implementing Decision (EU) 2016/542 on granting short-term Union financial assistance to Greece (2015/1181), [2016] OJ L91/22, recital 9.

76. EFSF Framework Agreement, recital 4, Articles 2(2), 4; ESM Treaty, Articles 3, 21.

77. EFSF Framework Agreement, recital 4, Articles 2(3)-(6), 6-8; ESM Treaty, Articles 8-9.

78. EFSF Framework Agreement, Article 2(3) and Annex 2; ESM Treaty, Article 11 and Annex I. Pursuant to the EFSF Framework Agreement, Member States are required to give an over-guarantee representing 165% of their contribution key percentage. A Member State that makes payments in excess of its contribution key percentage is entitled to be indemnified by the other Member States, Article 7.

79. The ESM charges losses first against a reserve fund, which consists of the net income from the ESM's operations and other proceeds, and then against the paid-in capital. If these funds are insufficient to cover the losses, additional capital calls will be made, Article 25(1) ESM Treaty. For the EFSF, see EFSF Framework Agreement, Article 5(2).

80. EFSF Framework Agreement, Articles 2(7), 7(1), 8(2); ESM Treaty, Article 25(2).

81. The ECB's share of purchases amounts to 10% of total public sector asset purchases under the PSPP and 20% under the PEPP, see Decision (EU) 2020/188, Article 6(2); Pandemic Emergency Purchase Programme (PEPP) Questions & Answers, Q7, www.ecb.europa.eu/mopo/implement/pepp/html/pepp-qa.en.html.

82. Decision 2010/281/EU (n 69), recital 2.

83. SMP holdings are limited to assets issued by five Member States, Greece, Ireland, Italy, Portugal and Spain. Data are available from the ECB, www.ecb.europa.eu/mopo/implement/app/html/index.en.html.

84. ECB, Introductory Statement to the Press Conference of 6 September 2012, www.ecb.europa.eu/press/press_conference/monetary-policy-statement/2012/html/is120906.en.html. See also V. Constâncio, 'Contagion and the European debt crisis', keynote lecture at the Bocconi University/Intesa Sanpaolo conference on Bank Competitiveness in the Post-crisis World, 10 October 2011.

the ECB's capital key, but the holdings of most national central banks will consist exclusively of government debt issued by other Member States. Since the Eurosystem has control over the money supply, even large holdings of assets of an issuer in financial distress do not, in principle, threaten the solvency of a national central bank. However, in practice, the ability of central banks to provide liquidity support is not unlimited. A central bank that made excessive use of its authority to issue money would impair its ability to control inflation and would potentially need support for its balance sheet by the treasury.⁸⁵ Thus, by participating in the SMP and OMT, Member States gain financial exposure to other states. The SMP and OMT (and, to the extent that the ECB purchases public sector assets and national central banks purchase assets of other Member States, also the PSPP and PEPP), consequently involve risk sharing between the euro area Member States.

Although bilateral loans, the EFSM, EFSF and ESM, and the Eurosystem's public sector asset purchases are all expressions of solidarity between the Member States, they are primarily motivated by self-interest, rather than other-regarding considerations. To see why, it is helpful to recall that monetary union, as envisioned by the drafters of the Maastricht Treaty, was founded on full fiscal sovereignty and fiscal independence of the Member States, with no provision for risk-sharing or financial assistance, except in emergencies.⁸⁶ In the absence of financial assistance, the legal framework relies on two main strategies to make the Eurozone resilient to asymmetric economic shocks that affect some economies more than others. Market integration and the establishment of a banking and capital markets union are intended to improve factor mobility and the absorption of asymmetric demand shocks by facilitating the movement of factors from low-demand to high-demand areas. In addition, the EU has adopted a detailed set of rules, the so-called Stability and Growth Pact and Fiscal Compact, which seek to coordinate fiscal policies of Member States and ensure that budgetary positions are sustainable over the short, medium and long term. However, it is widely accepted that this legal framework is insufficient to prevent economic shocks from having a potentially severe economic impact on euro area economies.⁸⁷ As illustrated by the Eurozone crisis, this may threaten the ability of governments to finance their budget deficits, trigger a liquidity and solvency crisis, and may, in the worst case, lead to the disintegration of monetary union.⁸⁸ It was therefore in the interest of the Member States to introduce corrective measures that provided for a certain level of debt mutualization and risk sharing.

85. M. Del Negro and C.A. Sims, 'When Does a Central Bank's Balance Sheet Require Fiscal Support?' 73(1) *J. Monet. Econ.* (2015), p. 5–6; R. Reis, 'Different Types of Central Bank Insolvency and the Central Role of Seigniorage', *NBER Working Paper* 21226 (2015).

86. See notes 64–65 and the accompanying text. The drafters of the Treaty were concerned that any form of financial assistance would give rise to moral hazard on the part of Member States and imperil the foundations of economic and monetary union, see, e.g. V. Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis*, p. 118–129; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, p. 52–58; K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP, 2014), p. 48–51.

87. In spite of a well-integrated internal market, risk absorption in the EU is significantly lower than in other internal markets, for example the United States, C. Alcidi, P. D'Imperio, and G. Thirion, 'Risk-sharing and Consumption-smoothing Patterns in the US and the Euro Area: A Comprehensive Comparison', *CEPS Working Document* 4 (2017), p. 12. Likewise, there is limited empirical evidence in support of a positive effect of the Stability and Growth Pact and Fiscal Compact on Member State finances, see, for example, F. Heinemann, M.-D. Moessinger and M. Yeter, 'Do Fiscal Rules Constrain Fiscal Policy? A Meta-regression-Analysis', 51 *European Journal of Political Economy* (2018), p. 69; D. Ioannou and L. Stracca, 'Have the Euro Area and EU Governance Worked? Just the Facts', 34 *European Journal of Political Economy* (2014), p. 1.

88. P. De Grauwe, *Economics of Monetary Union* (OUP, 14th edn., 2022), p. 138–140.

These corrective measures are asymmetric in the benefits and commitments they entail. The exposure of Member States to losses because of risk sharing corresponds roughly to their population size and economic strength. As mentioned, the EFSM is backed by the EU budget, which is financed through contributions of the Member States largely in proportion to the VAT base and gross national income.⁸⁹ The Member States' contributions to the EFSF and ESM are based on the ECB capital subscription key,⁹⁰ which, in turn, is determined in equal measure by a Member State's population and GDP.⁹¹ The ECB capital subscription key also determines the exposure of Member States where Eurosystem public sector asset purchases lead to risk sharing.⁹² On the other hand, the risk of default of some Member States is consistently higher than that of others, and there is no positive correlation between risk exposure and default risk.

B. Next Generation EU

Does the assessment of the preceding section change when it comes to Next Generation EU, the package of measures the EU adopted in response to the COVID-19 pandemic that mobilize considerable resources to support the recovery of the economies of the EU Member States from the pandemic?⁹³ The EU raises NGEU funds by borrowing on financial markets and disburses them in the form of non-repayable grants and loans.⁹⁴ The repayment of funds used for grants are borne by the EU's budget and thus indirectly by the EU Member States, which finance the EU's budget through contributions and certain levies, duties and taxes that would otherwise accrue to the Member States.⁹⁵ Similarly, the risk of default of a Member State is borne by the EU budget, which is required to repay all borrowed funds until 2058.⁹⁶ If the EU was unable to meet its repayment obligations, the Member States would be required to make the necessary resources available to the Commission in proportion to their budget contributions.⁹⁷ Both grants and loans advanced as part of NGEU thus lead to risk sharing and debt mutualization.⁹⁸

89. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, [2020] OJ L424/1, Article 2.

90. EFSF Framework Agreement, Annex 2; ESM Treaty, Article 11 and Annex I.

91. Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank annexed to the Treaty on European Union and to the TFEU, OJ C202/230, Article 29.

92. See the text to notes 81–85.

93. The recovery package consists of Council Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, [2020] OJ L 433 I/23 ('EURI'); Council Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, [2020] OJ L 424/1 ('Own Resources Decision'); and Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility, [2021] OJ L 57/17 ('RRF Regulation'). The EURI provides for an aggregate funding envelope of €750bn (in 2018 prices). The Own Resources Decision empowers the EU to borrow funds on capital markets to finance the recovery instrument. The RRF Regulation sets out the detailed objectives of the recovery facility and the principles governing the allocation of funds.

94. EURI, Article 2(2); Own Resources Decision, Article 5(1); RRF Regulation, Article 6.

95. Own Resources Decision, Article 5(2).

96. *Ibid.*

97. *Ibid.*, Article 9(4)–(5).

98. The idea of debt mutualization to enhance the fiscal capacity and resilience of the euro area had long been endorsed by economists but had been politically unacceptable to some Member States until the COVID-19 crisis, see B. de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *CML Rev.* (2021), p. 635, 650–51, for references.

Like the EFSM, the European Union Recovery Instrument (EURI), a core element of the NGEU package, is based on Article 122 TFEU.⁹⁹ As mentioned, Article 122 TFEU allows the Union, ‘in a spirit of solidarity’, to use its own resources to grant financial assistance to a Member State facing ‘severe difficulties’, particularly difficulties caused by ‘exceptional occurrences beyond its control’. The level of prescriptive detail of the article provides grounds for challenging the legality of the EURI, and this has indeed happened in both the literature and the courts.¹⁰⁰ For example, some commentators have identified a tension between the NGEU programme and the two paragraphs of Article 122 TFEU, which serve as separate legal bases for Union action.¹⁰¹ The NGEU package of measures cannot be based on Article 122(1) TFEU, because ‘measures appropriate to the economic situation’ pursuant to paragraph 1 cannot include financial assistance.¹⁰² But the NGEU package also goes beyond Article 122(2) TFEU, it has been said, because the EU’s recovery facility is not only concerned with counteracting difficulties created by the COVID-19 crisis, but it also (indeed, predominantly) pursues unrelated long-term policy objectives of the EU, including the green transition and digital transformation.¹⁰³ This only leaves the possibility of relying on the two paragraphs of Article 122 TFEU in conjunction, which the Commission had in mind when it referred simply to ‘Article 122’ in the Regulation establishing a European Union Recovery Instrument.¹⁰⁴ Some commentators agree with this approach,¹⁰⁵ others do not.¹⁰⁶

The debate about the correct legal basis for the Recovery Instrument reflects the fact that the NGEU package seeks to promote the industrial priorities of the EU and, additionally, address economic disparities across Member States. The NGEU allocation key is based on the inverse of GDP per capita and the relative unemployment rate of each Member State and thus supports economically weaker Member States.¹⁰⁷ The package therefore has clear redistributive effects and is comparable in its economic consequences to the structural and cohesion funds discussed in section 3. It is also worth noting that the Regulation on the Recovery and Resilience Facility that lays down the allocation key and the policy areas for which the recovery funds are intended is not based on Article 122 but on Article 175 TFEU, which is one of the legal bases of the Union’s cohesion policy.¹⁰⁸

99. While the EFSM is based on Article 122(2) TFEU (see Council Regulation (EU) No 407/2010, recital 1), the Commission does not distinguish between paragraphs 1 and 2 of Article 122 in the NGEU package. This ambivalence has been criticized as an attempt ‘to obfuscate the exact relation of the measures to Article 122 TFEU [that] seems intentional and instrumental’, P. Leino-Sandberg and M. Ruffert, 59 *CML Rev.* (2022), p. 446.

100. The NGEU package was challenged in the German Federal Constitutional Court on the ground that the Act Ratifying the EU Own Resources Decision violated the right to democratic self-determination under the Basic Law, but the complaint was rejected by the Constitutional Court (BVerfG, Judgment of the Second Senate of 6 December 2022, 2 BvR 547/21).

101. V. Borger, ‘EU Financial Assistance’, in F. Amtenbrink, C. Herrmann and R. Repasi (eds.), *The EU Law of Economic and Monetary Union* (OUP, 2020), para. 32.11–32.12.

102. P. Leino-Sandberg and M. Ruffert, 59 *CML Rev.* (2022), p. 445, referring to Case C-370/12 Thomas Pringle v. Ireland, para. 116.

103. P. Leino-Sandberg and M. Ruffert, 59 *CML Rev.* (2022), p. 446; A.-M. Porras-Gómez, ‘The EU Recovery Instrument and the Constitutional Implications of its Expenditure’, 19(1) *EuConst* (2023), pp. 13–14.

104. See n. 99.

105. B. de Witte, 58 *CML Rev.* (2021), p. 654–55.

106. P. Leino-Sandberg and M. Ruffert, 59 *CML Rev.* (2022), p. 445 (see particularly footnote 64 in that article).

107. RRF Regulation, recital 37, Article 11, and Annex I. See also recital 6, which emphasizes the asymmetrical effects of COVID-19 for the Member States and the need to address structural weaknesses in Member State economies.

108. To be more precise, the legal basis of the RRF Regulation is Article 175(3), which empowers the Union to take ‘specific actions [that] prove necessary outside the [Structural] Funds’ to strengthen its economic, social and territorial cohesion.

While the redistributive nature of the NGEU package is more pronounced than that of the rescue measures adopted in response to the Eurozone crisis, the instrumental logic of cohesion policy applies similarly here. Exogenous shocks, be they in the form of a financial crisis or a pandemic, place considerable stress on an economic or monetary union if their impact on the economies or societies of its members is highly asymmetric. This was the case with both the Eurozone crisis and COVID-19, and it motivated the measures discussed in this section.¹⁰⁹ It thus seems unconvincing to regard the NGEU package as an example of ‘real solidarity’¹¹⁰ any more than cohesion policy.

5. Conclusion

Solidarity in Economic and Monetary Union has a distinctly instrumental meaning. Traditionally, its function was to constrain the Member States’ regulatory options, with a view either to strengthening competition in the internal market or to pursuing other objectives deemed to be in the common interest of the Union.¹¹¹ In its internal market case law, the Court used references to solidarity to justify measures that sought to protect the allocative efficiency of the internal market (notably, by prohibiting state aid, unless exceptions were satisfied) or the viability of certain industries (for example, by imposing minimum prices or production quotas in the coal and steel or agricultural sectors), while negatively affecting the competitive position of some firms or Member States in the relevant market. More recent measures, adopted in response to the Eurozone and COVID-19 crises, had equally differential effects on the Member States, benefitting some states more than others. Despite different legal and economic contexts and stages of European integration, the goal of these measures has been the same: to ensure that the EU’s internal market and monetary union are viable in the long run, which requires that they are structured in a way that is both functional and acceptable to all Member States.

The key challenge here is that states constrain their ability to compete effectively with one another when they join an internal market or a monetary union. For example, they (partially) lose the ability to provide domestic enterprises with a competitive advantage over foreign enterprises through regulatory differentiation, subsidies or currency devaluation reducing domestic production costs. Everything that has been called solidaristic in Economic and Monetary Union, starting with early case law from the 1960s and 1970s on state intervention in the markets for coal and steel and agricultural products, and culminating most recently in the mobilization of enormous COVID-19 recovery funds, can be interpreted as efforts that oscillate between, on the one hand, operationalizing and, on the other, counterbalancing this loss in the ability to compete. The measures discussed in section 2 pursue the former function and the measures discussed in sections 3 and 4.B (NGEU) the latter, while Eurozone financial assistance sits between operationalizing

109. The seriousness of both cases is illustrated by concerns expressed by policy makers and in scholarly contributions that each crisis might lead to the disintegration of Economic and Monetary Union without the adoption of concerted countermeasures. For an overview of the literature, see D.G. Dimitrakopoulos and Georgette Lalis, ‘The EU’s Initial Response to the COVID-19 Pandemic: Disintegration or “Failing Forward”?’ 29 *Journal of European Public Policy* (2022), p. 1395.

110. See the reference in n. 3.

111. For example, the EU’s agricultural policy seeks to enhance technical progress, ensure a fair standard of living for the agricultural community, and assure the availability of supplies, among other objectives (Article 39(1) TFEU).

monetary union and redistributing resources.¹¹² Viewed in this manner, solidarity in Economic and Monetary Union is instrumental and ultimately grounded in the self-interest of the Member States, who appreciate that joining an internal market and a monetary union will benefit them, while those who are likely to lose most from their resulting inability to compete must be compensated for this loss.

This, of course, does not say anything about the legality of NGEU or measures granting Eurozone members financial assistance, which is not the topic of this article. However, it implies that ‘real solidarity’, reflected in altruistic actions motivated, for example by ‘a strong national sense of common purpose and an intense feeling of belonging to the same nation’,¹¹³ does not (yet) play a prominent role at the supranational level in the EU, at least not in Economic and Monetary Union.

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112. The financial assistance and unconventional monetary policy measures adopted by the ECB and the Member States operationalize monetary union by reducing the risk that asymmetric shocks result in a liquidity crisis of a Member State that has lost control over its currency, but they also have redistributive effects by leading to risk sharing and debt mutualization.

113. P. De Grauwe, *Economics of Monetary Union*, p. 137.