

1. Introduction: European solidarity – what now?

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The conflict between economic and social policies brought about by the process of European integration is nothing new. However, the current economic and political malaise that seems to have engulfed the whole continent has added a further, and much more dramatic, dimension because the scale and gravity of the problems are in many respects unprecedented. This has consequently reignited the debate on European solidarity, and called for renewed justifications of the European project.

The old model of European integration, sketched in the original European treaties, was based on a perhaps naïve, but definitively optimistic, attempt to devise an efficient, but also fair, supranational social market economy. This model was to contain checks and balances, between the promotion of economically virtuous policies, and the preservation of certain core national welfare values. In terms of formal rules, the basic provisions of the treaties have never been neutral: from the very beginning they were clearly based on the imperative of promoting ‘steady expansion, balanced trade and fair competition’.¹ The neoliberal wave that swept across Europe in the 1980s made this market dimension even more prominent or, as one would be tempted to say, more difficult to ignore. It resulted in the new formulation of what was then Article 100a of the EC Treaty (now Article 114 Treaty on the Functioning of the European Union (TFEU)), which identified the law-making power of the European institutions to adopt measures ‘which have as their object the establishment and functioning of the internal market’.²

¹ EEC Treaty, Preamble.

² Article 114(1) TFEU.

The emphasis on the supranational dimension was, however, not prompted by any particular vision of a novel European *grandeur*. Instead, it was pragmatically linked to the functional ethics of what was the first truly political manifesto of European integration: the 1950 Schumann Declaration. In that crucial document, the word ‘solidarity’ was key, and it is inserted in probably one of the most important and often cited paragraphs: ‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements, which first create a *de facto* solidarity.’³ This quote, which has been analysed and discussed at length,⁴ contained a clear message: the process of European integration would initially produce results, and on those results will be built a bigger and more stable European house. The results-driven imperative was absolute, and the engine of the functional integration process. It was hoped that prosperity, better wages, more responsive and efficient welfare services, and social mobility would follow swiftly. The ‘processes’ employed varied from judicial empowerment *à la* Weiler,⁵ focusing on the *effet utile* of the Court of Justice of the European Union’s (CJEU) early case law narrative, to a regulation model *à la* Majone,⁶ symbolised by the Lernean Hydra head of the European Commission’s Competition Directorate General, vested with wide executive, administrative and judicial powers. The rationale nonetheless remained the same: *de facto* solidarity.

The unquestionable success of this results-oriented model of European integration could not paper over all the cracks forever. Consequently, apart from the trite nation state versus federation debate,⁷ there has always been an underlying cause for conflicts and tensions. This cause is the strident mismatch between the considerable powers vested in the EU as the supranational actor, to impose on its Member States strict market

³ Robert Schuman Declaration, 9 May 1950.

⁴ See Ben Rosamond, *Theories of European Integration* (Palgrave Macmillan 2000).

⁵ Joseph H.H. Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403; Joseph H.H. Weiler, ‘Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy’ (2014) 12 *International Journal of Constitutional Law* 94.

⁶ Giandomenico Majone, *Regulating Europe* (Routledge 2002).

⁷ It finds resonance in this book, too; see Chapter 6 by Jürgen Bast.

rules, and the lack of equally effective instruments, apt to promote social values⁸ and social justice, to accompany them.⁹

Still, truces of a variable degree of stability have been achieved in the past. The first ‘peace deal’ was to keep economic and social policy areas apart, in relation to allocation of spending, as redistributive policies were left entirely to the Member States. The 2008 financial meltdown and the ensuing economic stagnation, which has been compounded by extreme rigid austerity programmes, has instead meant a drastic reduction in public spending, and budget cuts for public services and social benefits.

While political scientists may offer more in-depth reconstructions of these developments, from the legal perspective these ‘crises’ have, in our view, generated some preposterous reactions. At one extreme, they retreated to a probably misplaced overbearance in the demiurgic healing powers of technocracy, while at the other extreme they resulted in a panicked repatriation of regulation to the safety of national borders. The financial crisis therefore produced a rampant and progressive expansion of EU control on national economic policies, to an extent never witnessed before, and as famously experienced by Greece, Spain, Portugal and Cyprus. New regulatory frameworks for financial services and banks were devised; profound institutional changes (including the ‘legal monstrosity’ of the European Fiscal Compact) were introduced and competences were *de facto* transferred to EU authorities.¹⁰ The impact of the

⁸ The literature on these issues is immense. For an overview of some of the issues see Dragana Damjanovic, ‘The EU Market Rule as Social Market Rules: Why the EU Can Be a Social Market Economy’ (2013) 50 *Common Market Law Review* 1685; and with ample literature Bruno De Witte and Mark Dawson, ‘Welfare Policy and Social Inclusion’ in Anthony Arnall and Damien Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015); Michael P. Smith, *States of Liberalization: Redefining the Public Sector in Integrated Europe* (State University of New York Press 2012).

⁹ Dimitry Kochenov, Graíne De Búrca and Andrew Williams (eds), *Europe’s Justice Deficit?* (Hart Publishing 2015); Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015). See also the recent Commission’s engagement via the series of ‘Future of Europe Debates’ across Europe’s cities and regions and in particular European Commission, ‘White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025’ COM(2017) 2025 final, 1 March 2017; European Commission, ‘Reflection Paper on the Social Dimension of Europe’ COM(2017) 206 final, 26 April 2017.

¹⁰ Philomila Tsoukala, ‘Narratives of the European Crisis and the Future of (Social) Europe’ [2013] Georgetown Public Law Research Paper No. 13-012.

so-called austerity measures on national welfare states is well documented.¹¹ Cases against the Commission, the European Central Bank and the International Monetary Fund, by a number of Cypriot individuals that saw the value of their deposits wiped out, are indicative of the severe clash between preserving economic efficiency at the cost of individual legal rights.¹²

'Core' EU law areas have also felt the impact of the new, and much more complex and gloomy, economic and social European environment. There are several examples of such phenomena, both within the case law of the CJEU, and from EU regulatory policies. The CJEU seems to have moved towards very restrictive new readings of the free movement of workers provisions, in relation to welfare benefits and European citizenship in general.¹³ Furthermore, in reviewing the use of the Member States' derogations from free movement, the CJEU routinely refers to the need to leave Member States a certain margin of discretion on matters involving *inter alia* moral or cultural views.¹⁴ The spirit of such judicial reasoning often seems to imply a definite margin of discretion as a default presumption, rather than an exception from the free movement imperative, indicating a change of trajectory in the Court's approach.

As for the effect on EU law regulatory policies, we could point to, for example, public procurement law and state aid control. These fields of EU law are generally seen as the bastions of the supranational regulatory model. This is because they are based on a very robust transfer of market regulatory competences from the nation state to the European level. This is particularly so in terms of harmonisation for tendering procedures in public contracts, and attribution to the supranational regulator, the European Commission, of the power to determine the legality, or illegality, of market interventions by the state. In the area of state aid, the Commission pushed hard for the new Block Exemption Regulation

¹¹ See Tim Callan and others, 'The Distributional Effects of Austerity Measures: A Comparison of Six EU Countries' [2011] EUROMOD Working Paper Series EM6/11.

¹² See e.g. C-8/15 P *Ledra Advertising Ltd*, judgment of 20 September 2016, nyr.

¹³ See C-333/13 *Dano*, judgment of 11 November 2014, nyr. For recent analysis, see Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017) 54 Common Market Law Review 209.

¹⁴ Case C-137/09 *Josemans* [2010] ECRI-13019 and Case C-42/07 *CA/LPFP (BWIN)* [2009] ECR I-07633.

(GBER),¹⁵ the intention for which was to exempt from state aid control several categories of aid that are ‘good’ *a priori* as they are considered able to achieve ‘worthy’ aims. Astonishingly, the Commission itself esteemed that 90 per cent of aid could fall within the scope of the GBER.¹⁶ Furthermore, the new Public Procurement Directive 24/2014¹⁷ introduced specific rules that allow public procurement to take into account ‘social issues’ such as the impact on society, or parts of society. It also permitted coverage of a range of issues in awarding a public contract including, for instance, equalities issues, training issues, minimum labour standards and the promotion of small and medium-sized enterprises (SMEs). Arguably, this could be considered as an implicit authorisation to localise resources and jobs without greater European scrutiny.

Taking the above developments into consideration, in addition to the ongoing migrant crisis, the result of the 2016 EU referendum in which, albeit by a small majority, the British electorate voted to withdraw from the European Union is not that surprising. Even though the language of solidarity or social rights was not used in the referendum rhetoric, a substantial part of the referendum campaign was devoted to the inadequacy of the EU to provide protection for citizens and their rights, with specific reference to health care, work stability and security,¹⁸ and thus to the need to ‘take back control’. From a legal point of view, the results of the Brexit vote meant starting a process that would end the application of EU law in the UK after the triggering of Article 50 TFEU procedure. The UK’s withdrawal is then an unprecedented chapter in the story of the perilous relationship between the processes of European integration and its Member States. Just a few months after the referendum, Brexit fatigue took its toll from the deluge of articles, blogs, social media posts, radio and TV debates, including on the subjects of European identity, nationalism, national values and democracy. While such discussions are necessary, the fact remains that the Brexit referendum vote is an unmitigated defeat for those believing in a European process of

¹⁵ Commission Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU [2014] OJ L 187/1.

¹⁶ Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No. 651/2014 as regards aid for port and airport infrastructure.

¹⁷ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

¹⁸ See e.g. Vote Leave Campaign, ‘Why Vote Leave’ <http://www.voteleave.takecontrol.org/why_vote_leave.html>, accessed 16 May 2017.

cooperation and solidarity between countries and citizens. To many, this felt like the end of the road: what happens to European solidarity now? Where do we start again? Is it worth starting at all?

The post-Brexit process is, in our view, a strident sign of the powerful impact of the European process on one of its Member States. The simple fact that a national government, whose core mandate is to withdraw from the EU, is finding it extremely difficult to start this process, is evidence of how much European rules and principles have permeated the whole fabric of the UK's legal, political, economic and social life. The EU 'results' have been so varied and so far-reaching that it is impossible to extricate them from their many ramifications. If a thoughtful analysis is carried out on the possible implications on trade, enforcement, human rights protection, customs union, workers, public procurement, private international law, pensions and social security, health care, consumer protections, employment law, non-discrimination, as well as other fields, the only honest conclusion is that the clock cannot simply be turned back. A process of withdrawal can be done both on political and ideological grounds but not on (at least not on reasonable) 'legal' grounds. The strongest evidence of this contention is to be found in the White Paper on the so-called Great Repeal Bill,¹⁹ which is, so far, the only indication of the practical legal solution proffered for the process of the UK's withdrawal from the EU. One should not be misled, however, by the ambitious title: in practice the Government is proposing to introduce what should have been named as the 'Great Confirmation Act', given that the new legislation will simply confirm the validity and the continuous application of EU law in the UK legal order, until it is to be amended post-Brexit.²⁰ In light of this, one is tempted to reassess the merits of the old results-oriented European integration model. After all, it may not, perhaps, have extinguished its propulsive force based around *de facto* solidarity as a constitutional value upon which the EU legal order is based today.²¹

¹⁹ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (White Paper, Cm 9446, March 2017).

²⁰ *Ibid.*, paras 2.4.–2.17. For analysis, see, e.g. Jack Simson Caird, 'Legislating for Brexit: The Great Repeal Bill' (2017) Commons Briefing Paper 7793 11–15, 28–43; Catherine Barnard, 'Law and Brexit' (2017) 33 *Oxford Review of Economic Policy* S4.

²¹ For the call to maintain commitment to the 'constitutional values that distinguishes the EU from other international organisations' during Brexit

Consequently, this collection includes contributions, admittedly all written before the UK referendum, which are somehow ‘traditional’ in the sense that they focus on an output-oriented model. However, while a retrospective look is unavoidable, at the same time the authors advocate specific changes and reforms to some of the most vital questions on European solidarity today.

Before the idea for the book was created, European law scholars, in comparison to researchers in political theory, philosophy, social theory and sociology, were rather slow to respond to considerations on the meaning and importance of solidarity in EU law.²² However, there has recently been an increased interest in this area,²³ mainly focusing in the fields of EU citizenship, health, education, environment, migration, welfare and territorial cohesion. This collection adds to the debate by looking at the less-explored and developing fields, including the European financial crisis, immigration, asylum and border checks and the state, and non-EU investment into the economic services of general interest via the ‘golden shares’. Besides the conversations on the conflicts between national and supranational solidarities that pose a task for the Union institutions (judicial, legislative and executive) and the Member States in resolving these conflicts in the most effective way, the contributions also question the theoretical underpinnings of European solidarity, not only as a political but also as a legal concept. Readers interested in the normative or theoretical considerations of European solidarity will find the chapters by Pieter Van Cleynenbreugel, Esin Küçük, Eglé Dagilyté, Clemens M. Rieder and Iris Goldner Lang stimulating. Those in search of a more doctrinal approach and a discussion of policy implications should first refer to the contributions by Jürgen Bast, Gianni Lo Schiavo and Daniele Gallo. To help our readers make a more informative decision about the content of this book, below we include a quick preview of the key aspects of the EU law solidarity debate to which each author contributes.

Pieter Van Cleynenbreugel distinguishes the liberalising, redistributive, constitutive and administrative categories of solidarity in EU law. He sees the first two categories as being aimed at the promotion of European

negotiations, see Piet Eeckhout and Eleni Frantziou, ‘Brexit and Article 50 TEU: A Constitutionalist Reading’ (2016) 54 *Common Market Law Review* 695.

²² Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010); Gráinne de Búrca (ed.), *EU Law and the Welfare State – In Search of Solidarity* (Oxford University Press 2005).

²³ De Witte (n 9).

integration, not only among EU Member States, but also citizens, while the latter two categories are to be geared towards inter-governmental Member State interaction. Reflecting on how all of these categories played out in the EU financial and sovereign debt crisis, he observes that, in practice, the priority was given to liberalising solidarity, at the expense of a more substantive solidarity framework, in circumstances where European solidarity, as a fundamental legal principle, could have guided and restrained the ad hoc institutional developments aimed at fragmented top-down solutions that created great political discontent in many Member States on the lines of ‘us’ and ‘them’.

Esin Küçük questions whether such a substantive solidarity principle actually exists, especially given that, in contrast to the EU legislature, the CJEU has been increasing its use of solidarity-based arguments. Looking at EU asylum and migration law, Küçük aims to identify a more integrated understanding of European solidarity, by focusing on the reasons behind solidarity induced legal obligations, and their intensity, which can provide substantive content to the principle. In doing so, she investigates solidarity as the alternate results of enlightened self-interest, altruism and justice. Küçük navigates carefully through the political theory and sociology literature, before turning to the EU law context, and in particular, to the following fields: common policy on asylum, immigration, and external borders; security matters; the energy sector; the Common Foreign and Security Policy; and inclusion of immigrant EU citizens in the social welfare systems of host Member States. She observes that the core condition for self-interest solidarity to take shape is economic prosperity, which is to be achieved via common market integration, supported by mutual reciprocity mechanisms, and the principle of loyalty among the Member States. Having looked at how the CJEU has been dealing with solidarity arguments in the past, she goes on to conclude that, even though in the leading cases such as *Pringle*,²⁴ *N.S./M.E.*,²⁵ and *Halaf*²⁶ the CJEU was unwilling to engage with the language of solidarity, either at all or at least more substantively. Nevertheless, European solidarity as a legal concept may have normative legal value in the contexts where its contents can be defined by the legal duties derived from reciprocal relationships, underpinned by enlightened self-interest.

²⁴ Case C-370/12 *Thomas Pringle*, judgment of 27 November 2012, nyr.

²⁵ Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* [2011] ECR I-13905.

²⁶ Case C-528/11 *Zuheyir Frayeh Halaf*, judgment of 30 May 2013, nyr.

Eglė Dagilytė takes the enforceability of EU solidarity via legal obligations further, asking whether this fundamental European value could be considered as a general principle of EU law, thereby generating rights and obligations for EU citizens, private undertakings, Member States and EU institutions. She provides a birds-eye view of the constitutional EU law provisions on solidarity in the post-Lisbon landscape, grouped under the notions of inter-personal solidarity and inter-governmental transnational solidarities, which can mutually enhance each other. She then looks in detail at the concepts of a fundamental ‘value’ and a ‘general principle’ in EU law, concluding that while today solidarity could be considered as a value, it falls short of being defined as a general principle, because in EU law it lacks comprehensive character and cannot be legally enforced.

Clemens M. Rieder’s chapter changes the focus once again, by considering the impact of borders on our understanding of the interaction between European market integration and the tensions it creates for national and supranational solidarities in the field of health care. From the perspective of European human rights, he looks at Directive 2011/24, which consolidates the case law of the CJEU in the field of cross-border movement of patients and lays down the conditions under which EU citizens can move to another Member State in order to obtain health treatment. The focus of Rieder’s enquiry is the extent to which the European Convention on Human Rights and the EU Charter of Fundamental Rights (in particular Articles 4 and 35 of the Charter) could be used, not only to enable people to cross borders because of their health care cost claims, at the expense of national solidarities (i.e. boundary-permeability), but also be seen as the source for supranational solidarity, prescribed by the process of boundary-redrawing. He presents a favourable normative argument, especially applicable in situations where different Member State responsibilities towards protection of the social rights of vulnerable EU citizens fail at the national level of solidarity (the assigned responsibility model), or where harm is caused as a side effect of European integration in multiple national geographic jurisdictions (the no harm principle).

Jürgen Bast follows the path of the possibilities for transnational solidarity to be seen as deepening supranational integration *en route* towards the greater federalisation of the European Union. His analysis focuses on how this principle operates in EU migration law and policies, touching on internal migration in the context of social security, and reflecting more substantively on external migration, specifically the admission of refugees. He focuses on Articles 67(2) and 80 TFEU, informed by the three broad principles of European migration law: free

movement, fairness and solidarity. The latter, Bast argues, has potential to be used as a constitutional principle of EU law in the context of migration law, as part of the pragmatic solution to adjust the costs for producing a European public good in the name of further European integration. Thus, besides the widely discussed quota system for refugees, he considers a more daring alternative for reforming the Dublin System along the lines of the 'compensatory solidarity' model: to grant the approved asylum seekers the freedom of movement within the EU, in order to address the shortcomings of the effects of the Dublin System.

Iris Goldner Lang extends the solidarity debate outside migration law, offering a reflection on its importance in the contexts of both the migration and financial crises. She draws on the commonalities between these two areas of EU law and policy, carefully exploring the various facets of solidarity: loyalty, fairness, trust and necessity. The latter, Lang argues, is currently predominant in both EU financial and migration crises, in the evident absence of mutual trust among EU Member States and also between Member States and the EU institutions. Necessity, she concludes, nevertheless requires pragmatic solutions to complex problems, which are unlikely to be resolved by financial assistance as the prevailing solidarity mechanism alone, unless mutual trust is deliberately enhanced via Treaty amendments for the benefit of a common European future.

Gianni Lo Schiavo explores the question of the financial solidarity in Europe further, in context of the financial crisis that resulted in the European Stability Mechanism (ESM) and the European Banking Union. After careful analysis of these reforms, Lo Schiavo concludes that while the new financial legal landscape may have partially increased organic financial solidarity among the Member States, necessity still remains the driving engine behind all European efforts to keep the single currency functioning; and it is underpinned by temporary self-interest solidarity. This, he observes, is not surprising, given that the core objectives of the ESM are the conditionality and coordination in the name of financial stability; whereas solidarity here plays only a secondary role. Despite this, Lo Schiavo seems to have hope for European solidarity in the Eurozone, especially if the Eurobonds solution or the enhanced cooperation procedure is adopted, allowing faster EU assistance to the Member States in financial distress. However, much like Lang, he concludes that neither of these is likely to be implemented without Treaty changes and a shift in political priorities, especially as most of the ESM procedures and structures are deeply rooted in inter-governmentalism and the separation of financial liability between the ESM and the Member States.

The final chapter by Daniele Gallo looks at the tensions between European solidarity (EU market integration aims) and national solidarities, considering the interventions of Member States in regulating the services of general economic interest (SGEIs) in nationally sensitive economic sectors. In particular, he focuses on the CJEU's case law on the special powers held by the state in formerly public companies (what is known as the 'golden shares') and non-EU public/private investors who tend to invest in companies that provide SGEIs, which are almost unregulated under EU law. In this context, Gallo observes that European solidarity has both economic and social dimensions. However, this seems contradictory to the CJEU's case law on SGEIs and the golden shares that is permeated with internal market reasoning, strengthened by the horizontal direct effect of EU law and the restrictive interpretation of the principle of proportionality. Such reasoning erodes the social/welfare-oriented solidarities at the national level that Member States may wish to protect for valid reasons. Given the ever-blurring lines between the public and private spheres of economy, he argues that one of the reasons for this disconnection between EU and national levels is the absence of the European concept of general interest. As a solution, Gallo proposes looking at extending EU competition law into internal market law, calling for the CJEU to adopt a more flexible interpretation of Article 106(2) TFEU in the context of golden shares. Gallo also criticises the CJEU's ever-shifting approach for inconsistent application of the free movement of capital and establishment provisions to the activities of non-EU public/private investors. Gallo puts forward a number of possible solutions, asking the CJEU to consider giving clear guidance on the 'imperative requirements' as derogations from free movement in this context, allowing for greater certainty on the balance between state regulation, private autonomy and EU economic objectives.

These various perspectives on European solidarity demonstrate that, while the European Union may seem to already have too much solidarity in the eyes of some (as Brexit illustrates), at the same time it is perceived by others as having too little solidarity (consider, for example, the calls for solidarity during the Greek financial crisis, and the refugee crisis). The plurality of views on solidarity in EU law presented in this collection show that in today's uncertain legal and political climate there is no one single solidarity approach. With nationalistic rumblings still being echoed vividly in Poland and Hungary, it may be difficult to see whether solidarity has much hope to re-unite the EU, let alone reignite 'all in it

together' national politics. However, the recent social Europe proposals by the European Commission²⁷ do offer some hope that all is not lost and that future debates on European solidarity are here to stay.

²⁷ European Commission, 'Commission Presents the European Pillar of Social Rights' <http://europa.eu/rapid/press-release_IP-17-1007_en.htm>, accessed 30 April 2017.