

KEY POINTS OF THE SPEECH

**OF THE PRESIDENT OF THE HELLENIC REPUBLIC
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AT THE EUROPEAN UNIVERSITY INSTITUTE**

SOLIDARITY IN EUROPE

**The guarantees established by the treaty on
European Union and
the treaty for the functioning of the
European Union**

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INTRODUCTION

THE legal nature of the European Union has highlighted, already from an early stage since its foundation and all the way throughout its dynamic evolution since then, the importance of fundamental legal principles, which mostly originate from the common Constitutional and legal traditions of the Member States.

A. The principles of democracy, rule of law, welfare state, the principle of the legality of administrative action, as well as the ones of the legal certainty, the protection of legitimate expectations¹ and of the constitutionally guaranteed human rights, not only were at the foundation of the European legal culture², but also shaped the joint legal basis upon which the Union and the overall democratic legitimacy of its operation are based (*Legitimation, Légitimation*). In fact, primary EU Law explicitly refers, in the first place, with the provisions of Article 2 of the Treaty on European Union³, to the common legal principles and values, as these are known from the constitutional traditions of the Member States. Moreover, the Charter of Fundamental Rights of the European Union (CFREU), which has now specifically the legal force of primary European Law⁴, in the provisions of its Article 52 para. 4, directly refers to the common principles of the Member States⁵.

¹ For a detailed account of the general principles in the context of the European legal order, see, among others, P. PAVLOPOULOS, *Guarantees of the right of judicial protection in European Community Law*, 1993, p. 56 *et seq.* with extensive citations on relevant literature and case-law, particularly from the ECJ.

² See, among others, G. HELLERINGER / K. PURNHAGEN, *Towards a European Legal Culture*, 2014.

³ See the provisions of TEU Art. 2, according to which “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*”

⁴ See the provisions of TEU Article 6 para. 1, according to which: “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*”. See, in this respect, P.

B. These common general principles, which were from their legal nature already known in the individual national legal orders of the Member States, were deeply rooted in the traditions of the European legal civilisation, as it evolved from its ancient Greek theoretical origins and the institutional Roman Law components⁶, as the historic continuity of the European Enlightenment. Apart from the existence of these common principles themselves, the *sui generis* structure of the European Union also highlighted the necessity of their adaptation to the realities of the coexistence and cooperation of the Member States within a common normative framework as well as of the need of combining these principles with new, more specific, legal ones derived exactly from the inherent characteristics of this structure. As such principles, we here refer in particular to the ones of subsidiarity and co-operation: the principle of subsidiarity directly refers to the multi-level, quasi confederal, structure of the European Union's organisation, virtually requiring that the decisions are taken as proximately to the citizen as possible⁷. The principle of cooperation⁸ naturally derives from the absence of hierarchical structure within the organisation of the European Union, as well as from the multitude of institutions that compose its fabric and the *de jure* equality between them. This results to the concept of "EU structure" effectively translating into a structure of quasi cooperative federalism⁹. The theoretical foundation of the principle of cooperation has been, already since 1950, *the principle - but also the "ideology" - of solidarity*.

I. THE ORIGIN OF THE PRINCIPLE OF SOLIDARITY IN THE FIELD OF THE EUROPEAN LEGAL ORDER

The Schumann Declaration expressly stated that "*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.*"

A. The First Appearances of the Principle of Solidarity in Early European Texts

That phrase was incorporated into the preamble of the Treaty establishing the European Coal and Steel Community (ECSC), as it was signed in Paris on 18 April 1951. Especially after the explicit reference to the concept of solidarity in the preamble

PAVLOPOULOS, *Public Law in the constellation of the economic crisis, the economic "Labyrinth", the neoliberal "Minotaur" and the institutional "Theseus"*, 2nd edition, 2014, p. 504 *et seq.*

⁵ These rules provide: "*In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions*".

⁶ See H. HOFMANN, *Das antike Erbe im europäischen Rechtsdenken. Römische Jurisprudenz und griechische Rechtsphilosophie*, in: W. JENS / B. SEIDENSTICKER, *Ferne und Nähe der Antike*, 2003, 33 *et seq.*

⁷ See the provisions of Article 5 para. 3 TEU: "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*"

⁸ See the provisions of Art. 4 para. 3 TEU.

⁹ See, indicatively, R. SCHÜTZE, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, Oxford University Press, 2009.

of the Single European Act¹⁰, solidarity progressively acquired a positive legal effect in the framework of the Treaty on European Union, which was signed in Maastricht on 7 February 1992¹¹. Beyond the preamble of this Treaty, solidarity is explicitly mentioned in the actual text of Articles of legally binding Treaties, as the basic mission of both the newly established Union¹² and the European Community¹³. After the signing of the Lisbon Treaty, solidarity is considered to be a fundamental legal principle of primary European Law: In addition to the Contracting States' desire to "*deepen the solidarity between their peoples while respecting their history, their culture and their traditions,*" solidarity is mentioned in the TEU as a common value and as the mission of the European Union in what regards the mutual relations of the Member States, their relations with third states and the relations between all citizens of the Member States. Furthermore, solidarity is specified with a multitude of norms of primary European Law, setting specific guarantees and establishing plain rights, as well as, equally plain obligations. This means that the principle of solidarity, henceforth as a positive legal principle, is a common value and a basic cohesive bond between the Member States themselves, as well as between the citizens of the Member States between each other¹⁴. It acquires, in this way, structural importance for the institutional architecture of the European Union, its unity and its sustainability.

B. The Principle of Solidarity as an Institutional and Political Condition for the Unity and Sustainability of the European Union

Despite its multi-level structure, the European Union is not based on the principle of hierarchical organisation and control¹⁵. The hierarchical principle, which is well-established within the national constitutional orders, is based on the premise that each level of organisation is legally superior to the other, while the superior's acts and decisions automatically prevail over the acts and decisions of the hierarchically inferior bodies. It aims at preserving the unity and effectiveness of administrative

¹⁰ "Aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter."

¹¹ The principle of solidarity remains in the preamble of the Treaty on European Union: "*Desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions.*"

¹² See the provisions of Art. A para. 3, of the Treaty on European Union "*The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.*"

¹³ See the provisions of Art. 2 of the Treaty on European Union: "*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3A, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.*"

¹⁴ A. SANGIOVANNI, Solidarity in the European Union, *Oxford Journal of Legal Studies* 2013, 1 (2).

¹⁵ P. D. DAGTOGLOU, *General Administrative Law*, no. 965 *et seq.*

action as well as the pursuit of the public interest as fundamental goals of public institutions in the context of the nation-states.

1. In contrast to the hierarchical model, the European Union has a horizontal model of organisation¹⁶. This signifies that EU institutions, as individual legal subjects, are *de jure* equal - in principle - with Member States¹⁷, with their internal organs and their administrations. Of course, by virtue of Article 4.2 TEU, the same principle applies with respect to the Member States between each other. The origins of this diffused principle of equality directly derive from the principle of equality of States as individual subjects of Law¹⁸, which is inherent in international law and, unless otherwise expressly specified, applies to primary European Law as well.
2. In order to ensure, on the one hand, the effective implementation of European Law, which is a basic legal principle of European Law, according to the consistent jurisprudence of the Court of Justice of the European Union (CJEU) (*effet utile*) and on the other the smooth and effective cooperation between EU institutions and Member States, and between the Member States themselves, towards the pursuit of common objectives and values within the European Union, the principle of solidarity of Article 3 as well as the principle of composite and sincere cooperation of Article 4.3 TEU, are the legal and institutional counterbalance on the lack of hierarchical structure towards the achievement of unity. In other words, they compose the necessary institutional “cement” within the structure of the European Union, which allows the Member States, as its components - despite their *de jure* equality - not only to seek the realisation of exclusively their own national goals within the European Union, but also - aiming at the realisation of their planned common objectives and their common public interest - to take into account the individual particularities and difficulties of their partners and, in any event, to avoid pursuing objectives that are in contrast to the common public interest of the European Union.
3. This negative aspect was highlighted by the CJEU’s jurisprudence already from the first years of the Community’s operation and, in any event, many decades before the explicit introduction of the principle of solidarity in the Treaties. In particular, by explicitly referring to the “*legal duty of solidarity*” and by linking it directly with the equality of Member States and the prohibition of a Member State’s pursuing national interests that are to the detriment of the others, the Court held that: “*In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States*

¹⁶ See, among others, N. SIMANTIRAS, *Netzwerke im Europäischen Verwaltungsverbund*, 2016, 76 *et seq.*

¹⁷ It is highlighted, here, that, pursuant to the explicit provision of Art. 47 TEU, the European Union has its own, distinct, legal personality.

¹⁸ For the principle of equality between states in International Law, see, indicatively, J. KOKOTT, *Souveräne Gleichheit und Demokratie im Völkerrecht*, *ZaöRV* 64 (2004), 517 (518 f.).

before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the State itself which places itself outside the Community rules. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order.”¹⁹

C. Individual Legal Implications of the Principle of Solidarity with regard to the Respective Obligations of the EU Member States

However, the principle of solidarity, as it is now enshrined in primary EU Law, is not only limited to the mere obligation to omit actions and practices that are contrary to the common public interest of the Member States and the European Union and to the duty of sincere cooperation with the institutions and partners. Further than that, it also provides for features or, even obligations, to adopt positive solidarity measures towards the other Member States and their citizens.

1. Besides, this is inherent to the very concept of solidarity as a theoretical notion, which is generally understood “*as a readiness to identify cases and problems of other subjects as our own, because of common goals and interests. Furthermore, as a matter of principle, usually - and certainly not necessarily - it is associated with the voluntary tolerance of disadvantages or with the waiving benefits to third parties, and aims at serving the common interest, based on the perception that the then beneficiaries will behave in the future in a similar manner*”²⁰. This is because, from the perspective of social philosophy²¹, the obligations associated with solidarity are placed between morally imposed and voluntary acts: at least in principle, an obligation of assistance is bestowed to someone who has caused himself the state of emergency of the other. In contrast, if someone has caused himself the state of emergency that he now faces, assistance is - again in principle at least - voluntary instead of mandatory, in analogy to the common legal principle that provides that “*the one who has been damaged by his own actions, does not hold recovery rights*”. Finally, in case that the situation of emergency has been caused by an accident or by a third party, the obligation of assistance derives from the principle of solidarity.
2. Consequentially, from the moral side of things, it is accepted that the obligations of solidarity derive from a sense of “*we are all in the same boat*”²², a sense of unity and community of interests and purposes, which are not to be meaningfully achieved by each one of the team members individually, but only by all of them acting together. Therefore, two types of solidarity obligations arise, always on a philosophical level: one is negative and the other is positive. On the one hand, an obligation of prioritisation of the general, public, interest

¹⁹ ECJ, Case 39/72, *Commission of the European Communities v Italian Republic*, Grounds of Judgement 24 and 25.

²⁰ See C. CALLIESS, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union*, 21999, 187.

²¹ On the subject of considerations of the principle of solidarity from the perspective of political philosophy, see, among others, C. CALLIESS, *Forum Constitutionis Europae* 1/2011, 11-12.

²² See O. HÖFFE, *Gerechtigkeit: eine philosophische Einführung*, 2007, 90.

over the individual goals and, on the other hand, an obligation to provide support to members of the community of interests when they are in need.

3. It is in this light that we can explain the well-known position of the philosopher Jürgen Habermas, according to which the concepts of justice and solidarity are two sides of the same coin²³. Even more, solidarity among members of a set aimed at ensuring the sustainability and prosperity of the whole in general can be a precondition of justice, as a real possibility of equal exercise of the individual freedom of each one of the members of the set. In any case, the primary European Law does not expressly contain a general definition of the principle of solidarity, which means that its notional content derives from the individual provisions and their interpretation through the well-established methods of interpretation of legal norms. This is especially the case with the teleological interpretation, which is central to European Law, and it is inseparably connected with the intended purpose of each provision applied.

II. THE LEGAL CONTENT OF THE PRINCIPLE OF SOLIDARITY IN PRIMARY EUROPEAN LAW

As we may derive from the interpretation of the provisions of the TEU and the TFEU - where the term solidarity is mentioned fifteen times - the principle of solidarity has a triple nature in primary European Law: *Firstly*, as we analysed above, it is a fundamental principle of European Law, and it has a structural significance for the European Union. *Secondly* - as social solidarity - it contains guarantees for citizens of the Member States. *Thirdly*, solidarity synthesises complex negative and positive obligations for the Member States among each other, as well as between them and the European Union.

A. The Principle of Social Solidarity in Primary European Law

The principle of social solidarity is based both on the general provisions of Articles 2 TEU (solidarity as a value of the European Union), 3 TEU (solidarity between generations) and the specific provisions of Articles 27 *et seq.* of the no. IV 'Solidarity' title of the CFREU. The individual guarantees concern the right of workers to information and consultation within the undertaking (Article 27), the bargaining rights and collective action (Article 28), the right of access to placement services (Article 29), the protection in the event of unjustified dismissal (Article 30), the right of every worker to working conditions that respect health, safety and dignity, the right to limitation of maximum working hours and period of paid leave (Article 31), the prohibition of child labour and the protection of young people at work (Article 32), the legal, economic and social protection of the family and the right to protection from dismissal for maternity-related reasons and the right to parental leave (Article 33), the right of access to preventive health and medical care (Article 35), the recognition and

²³ J. HABERMAS, *Erläuterungen zur Diskursethik*, 1991, 70 *et seq.*: "Solidarität als das Andere der Gerechtigkeit" and J. HABERMAS, *Gerechtigkeit und Solidarität*, in: W. EDELSTEIN / G. NUNNER-WINKLER (eds), *Zur Bestimmung der Moral Solidarität als die Kehrseite von Gerechtigkeit*, 1986, 314: "Solidarität als die Kehrseite von Gerechtigkeit."

respect of access to services of general economic interest (Article 38), the protection of the environment (Article 37) and the consumer protection (Article 38).

1. The above guarantees provided by CFREU also include a series of rights relating to social security, which - by means of a well-established jurisprudential stance of the Court - is directly connected to the legal principle of solidarity. Specifically, pursuant to CFREU Article 34 para. 1, the Union recognises and respects the entitlement to social security benefits and social services, which provide protection in such cases as maternity, illness, industrial accidents, dependency or old age, and in case of loss of employment, in accordance with the norms laid down by the European Union Law as well as the national legislation and practices. Furthermore, according to the provisions of Article 34 para. 2 of the CFREU, everyone who resides and legally moves within the European Union is entitled to social security benefits and social benefits in accordance with the European Union Law and national legislation and practices. At the same time, according to CFREU Article 34 para. 3, the European Union - in order to combat social exclusion and poverty - recognises and respects the right to social and housing assistance to ensure a decent life for all those who lack sufficient resources, in accordance with the rules laid down in the European Union Law and national laws and practices.
2. According to CJEU case-law, the principle of solidarity is a fundamental principle of the social security systems of the Member States²⁴ and it is the basis underlying the activity of the health insurance funds and social security organisations²⁵. More than that, the Court proceeded into construing the scheme of compulsory registration to social insurance, by accepting that the scheme is necessary for the implementation of the principle of solidarity, which has a different content depending on the insurance type. Thus, with regard to the health insurance and maternity system *“the principle of solidarity is, in the sickness and maternity scheme, embodied in the fact that the scheme is financed by contributions proportional to the income from the occupation and to the retirement pensions of the persons making them; only recipients of an invalidity pension and retired insured members with very modest resources are exempted from the payment of contributions, whereas the benefits are identical for all those who receive them. Furthermore, persons no longer covered by the scheme retain their entitlement to benefits for a year, free of charge. Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.”*²⁶ From the other side, with respect to the system of insurance for old age *“In the old-age insurance scheme, solidarity is embodied in the fact that the contributions paid by active workers serve to finance the pensions of retired workers. It is also reflected by the grant of pension rights where no contributions*

²⁴ ECJ, Judgement of the 17th of February 1993, Case C-159/91 (*Poucet and Pistre/AGF and Cancava*), ground 8.

²⁵ ECJ, Judgement of the 17th of February 1993, Case C-159/91 (*Poucet and Pistre/AGF and Cancava*), ground 18.

²⁶ ECJ, Judgement of the 17th of February 1993, Case C-159/91 (*Poucet and Pistre/AGF and Cancava*), ground 10.

have been made and of pension rights that are not proportional to the contributions paid.”²⁷

3. In effect, the Court held that the principle of solidarity may justify that organisations managing social security funds are exempt from the application of the law of free competition, which is a basic pillar of the primary European Law and the internal market. The reasons that were provided were that these organisations are not undertakings within the meaning of European competition law, precisely because they fulfil a mission of exclusively social nature and their activity is based on the principle of solidarity. The importance of the criterion of the minimum degree of solidarity governing the respective activity not only was confirmed in subsequent case-law²⁸, but it was also extended to the hospitals of the national health system (in this particular case, the hospitals in Spain). These were determined by the Court not to act as undertakings, on the grounds that they operate in accordance to the principle of solidarity by means of their funding system that is based on social security contributions and other State resources and by means of the free provision of services to the insured citizens on the basis of universal coverage. Moreover, the hospitals were determined not to act as undertakings not only towards the insured citizens, but also towards the medical supplies market, aiming to the provision of free health services²⁹.
4. However, the European Law faces major challenges with respect to the precise determination of the legal content and, primarily, of the limits of the principle of social solidarity. A particularly indicative instance is the recent decision of the Court in relation to rights of access to social benefits that are recognised for citizens of a Member State who reside in another Member State.
 - a) The Court has recognised, as we explained above, that the principle of social solidarity may give rise even to an exemption from the application of the law of free competition that is a basic pillar of the internal market. However, the Court construed the second pillar of the Union (namely the basic freedoms of the European Union and in particular the right to equal treatment) following a restrictive interpretation, so that limits are recognised for the principle of social solidarity in cases where there are elements of transnationality. It considered, in particular, that access to social benefits

²⁷ ECJ, Judgement of the 17th of February 1993, Case C-159/91 (*Poucet and Pistre/AGF and Cancava*), ground 11.

²⁸ ECJ, Judgement of the 16th of November 1995, Case C-244/94 (*Fédération française des sociétés d'assurances etc.*), grounds 15 and 16 (reaching an opposite conclusion in this instance), ECJ, Judgement of the 21st of September 1999, Case C-67/96 (*Albany*) ground 78.

²⁹ Judgement of the Court of First Instance (First Chamber, extended composition) of 4 March 2003, case T-319/99 (*Fenin v. Commission*), grounds 39 and 40. See also decision of the Court on the appeal in Judgement of the Court (Grand Chamber) of the 11th of July 2006 (*Fenin v. Commission*), case C-205/03 P. The Court noted on the 26th ground that “*rightly [...] there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.*”

for citizens of other Member States is subject to strict restrictions, which are imposed by the secondary EU Law, and that these citizens may not, in principle, seek the recognition of rights of access to social benefits under the same conditions as those of qualified nationals. If that was to be permitted, according to the rationale of the Court, the resulting picture would be contrary to the purpose of preventing the eventuality that the incoming citizens would be an unreasonable burden on the welfare system of the host Member State³⁰.

- b) The Court concluded, therefore, that it is legitimate and it is not contrary to primary European Law - including the principle of social solidarity as well as the right of equal treatment of Member States' citizens, which is inherent to the European citizenship - that a Member State refuses to grant social benefits to certain European Union citizens. These are the citizens who, without exercising an economic activity, they exercise their freedom of movement with the sole purpose of receiving social benefits that are granted by another Member State, even though they do not have sufficient resources to request a recognition of their right of residence³¹. Furthermore, the Court recognised that the European Law does not preclude a Member State from providing - by means of regulation - that EU citizens who enter its territory to seek for employment, are excluded from the granting of certain social benefits, otherwise available for Member State nationals in the same situation³².
- c) Thus, while the Court's case-law has expressly acknowledged that European Law accepts in principle the existence of "*a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary*"³³ and that "*although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.*"³⁴

³⁰ ECJ, Judgement of the 15th of September 2015, Case C-67/14 (*Jobcenter Berlin Neukölln/Alimanovic*), ground 50 and Judgement of the 11th of November 2014, Case C-333/13 (*Dano/Jobcenter Leipzig*), ground 74.

³¹ ECJ, Judgement of the 11th of November 2014, Case C-333/13 (*Dano/Jobcenter Leipzig*), ground 78.

³² ECJ, Judgement of the 15th of September 2015, Case C-67/14 (*Jobcenter Berlin Neukölln/Alimanovic*), ground 63.

³³ ECJ, Judgement of the 20th of September 2001, Case C-184/99 (*Grzelczyk*), ground 44.

³⁴ ECJ, Judgement of the 15th of March 2005, Case C-209/03 (*Bidar/London Borough of Ealing*), ground 56.

B. Obligations of the Member States in their Relations between Each Other and in Their Relations with the European Union

The general principle of solidarity with respect to the relations among Member States is based on the provisions of TEU Article 3 para. 3(3)³⁵. In addition to that, pursuant to TEU Article 3 para. 5 and 21 para. 1³⁶, solidarity among the peoples of the Union acts both as an objective and a criterion of action in external relations. More specific cases of solidarity with respect to external relations of the European Union are provided for by TEU Article 24 paras. 2 and 3³⁷, in conjunction with the provisions of TEU Articles 31 para. 1(2)³⁸ and 32 para. 1³⁹ (solidarity in relation to the Common Foreign and Security Policy). With regard to the relations between the Member States within the European Union, specific solidarity guarantees are provided for in TFEU Articles 67 para. 2⁴⁰ (solidarity between Member States as the foundation of freedom,

³⁵ TEU Article 3 para. 3(3): “[The Union] shall promote economic, social and territorial cohesion, and solidarity among Member States.”

³⁶ TEU Article 3 para. 5: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.” TEU Article 21 para. 1 “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”

³⁷ TEU Article 24 paras. 2 and 3: “2. Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States’ actions. 3. The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”

³⁸ TEU Article 31 para. 1(2): “When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position.”

³⁹ TEU 32 para. 1: “Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union’s interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.”

⁴⁰ TFEU Article 67 paras. 1 and 2: “1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.”

security and justice), 80⁴¹ (solidarity in the areas of asylum and migration), 122⁴² (solidarity in economic policy), 194⁴³ (solidarity in energy policy) and, predominantly, in the solidarity clause of TFEU Article 222⁴⁴, in which the EU and its Member States act jointly in a spirit of solidarity and mobilise all instruments at its disposal, in case that a Member State becomes a victim of terrorist attack or a natural or man-made disaster.

III. THE PRINCIPLE OF SOLIDARITY WITH RESPECT TO THE MANAGEMENT OF CRISES WITHIN THE EUROPEAN UNION

The objective inability to effectively tackle problems that appear within the European Union is an essential reason for the activation of the principle of solidarity. The principle of solidarity under primary European Law is of particular importance in addressing and managing serious problems and crises, whether they are limited to individual Member States or they affect the whole Union. This is because, as we

⁴¹ TFEU Article 80: “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”

⁴² TFEU Article 122: “1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy. 2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.”

⁴³ TFEU Article 194 para. 1: “1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.”

⁴⁴ TFEU Article 222: “1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) - prevent the terrorist threat in the territory of the Member States; - protect democratic institutions and the civilian population from any terrorist attack; - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster. 2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council. 3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed. For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions. 4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.”

analysed earlier, the principle of solidarity requires, in every case: *Firstly*, that there is a *common*, co-ordinated, response to a problem, irrespective of whether one or more Member States are primarily affected. *Secondly*, solidarity requires, in principle, that the co-ordinated response stands, independently of any possible collective or individual responsibility of one or more of the Member States. This signifies that the question of responsibility is not immediately associated with the legal principle of solidarity. More than that, it signifies that potentialities or even obligations of horizontal cooperation, assistance or support among Member States or citizens, may arise not only in cases of *force majeure* or unforeseen changes of circumstances. They may also arise even if the social, political, geographical, historical or economic conditions of the Member State that was affected and is in need of support, have played a role in exacerbating the problem. The crucial element for the activation of the principle of solidarity is primarily, here, the objective impossibility of effectively tackling an important problem without outside assistance. There are some examples of such crises in which the principle of solidarity is the legal basis of the pooling of Member States' joint action within the institutional and legal framework of the European Union. Two contemporary cases, are, first, the European debt crisis, as a consequence of the international financial crisis, and, second, the serious problem of mobilising significant numbers of people originating from war zones of the Middle East to the European Union. More specifically:

A. The Debt Crisis of Member States of the Eurozone

Towards the determination of an appropriate response to the debt crisis of Member States of the Economic and Monetary Union, and under the risk of a potential breakdown, it became necessary to provide financial support to those Member States that are facing difficulties of receiving credit by the markets.

1. The foundation of new mechanisms, towards the achievement of this goal, became necessary, primarily, for two reasons:
 - a) *Firstly*, it did not seem, at least in principle, that it was possible to proceed into direct financing either by other Member States or by the European Union institutions themselves. This is because of the no bailout clause provided by Article 125 TFEU.
 - b) *Secondly*, when the financing problems initially appeared, there was not, at the time, adequate legal basis for the adoption of measures for their resolution at a collective European level. The reason for that was that the competence for issues of economic policy had remained bestowed solely on the Member States, by virtue of the principle of conferral in the determination of EU powers and by virtue of the provisions of Articles 4 and 5 TEU. For this same reason, it became ultimately necessary to amend⁴⁵ TFEU in order to provide for the possibility of establishing a permanent

⁴⁵ The purpose of the amendment was to introduce the European Council Decision 2011/199/EU as para. 3 of Article 136 TFEU, and it provides that: "*The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.*"

stability mechanism for the Member States whose currency is the euro, as well as to adopt a new international Treaty aiming to the setting up of the permanent European Stability Mechanism⁴⁶.

2. However, in the first, urgent, step to tackle the crisis, the establishment, on the one hand, of - even - a temporary financial stability fund ("*European Financial Stability Facility*" - "*ESF*") with the participation of all EU Member States and, on the other hand, of the "*European Financial Stabilisation Mechanism*" ("*EFSM*") by the EU itself was necessary. The legal basis for proceeding into these immediate steps, was notably the *principle of solidarity* that we have analysed, as it is provided for by TFEU Article 122. Thus, Regulation 407/2010⁴⁷ was based on the understanding that the borrowing conditions of several Member States of the euro area could not be explained in terms of the mainstream economic measures; these conditions had significantly deteriorated, as a result of an unprecedented global financial crisis, which had seriously impacted on the economic development and financial stability and which had provoked a strong deterioration in the Member States' debt deficit. Consequentially, this extraordinary situation was outside the control of the Member States, while it could also pose a serious threat on the stability, unity and integrity of the euro area as a whole⁴⁸. In this way, the activation of the institutional framework of the entire European system to deal with the crisis was based, in effect, on the principle of solidarity.

B. The Principle of Solidarity as an Institutional Basis for Implementing the Immigration and Refugee Policy and the Treatment of the Respective Crises

The principle of solidarity is also fundamental for dealing with the major problems that arise from moving large populations that originate from outside the European Union to Member States.

1. The principle of solidarity emerges, by logical necessity, as a vital mechanism for the effective implementation of the European Pact on Immigration and Asylum, which came into force in October 2008, and which has known little success, however, as the current European situation shows. As the European Commission itself characteristically indicates⁴⁹, the issue is in effect a weighting challenge between, on the one hand, assuming the necessary responsibility and ensuring

⁴⁶ Based on this amended provision, the international treaty of 2/2/2012 was signed between the Member States whose currency is the euro. Through this treaty the *European Stability Mechanism (ESM)* was established.

⁴⁷ Regulation (EU) No 407/2010 of the Council, of 11 May 2010, establishing a European Financial Stabilisation Mechanism, OJL 118, 12.5.2010, 1-4.

⁴⁸ See sections (1) to (5) of the Preamble of the Regulation (EU) No 407/2010 of the Council, of 11 May 2010, establishing a European Financial Stabilisation Mechanism.

⁴⁹ "In managing asylum and migration policy comprehensively, responsibility and solidarity must go hand in hand. The European Commission has a number of immediate and long-term actions to strike the necessary balance between taking responsibility and ensuring solidarity of Member States". See European Commission, official website <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration>.

solidarity between Member States in the framework of their joint action on the other.

2. Thus, according to the provisions of TFEU Article 80 that we analysed above, the Council's Decisions that relate to the treatment of crisis and the distribution of specific numbers of asylum seekers among the Member States are explicitly based on the principle of solidarity between them in the context of a shared responsibility for addressing the crisis⁵⁰. Moreover, the Commission stresses the principle of solidarity as the basis for EU immigration policy⁵¹ in its - already - tabled proposal⁵² for a Regulation establishing a common international protection procedure within the meaning of Directive 2013/32/EU⁵³. This, according to the Commission, should take specifically into account the economic dimension of the implementation of this principle, as well as any financial consequences for the Member States⁵⁴.

CONCLUSIONS

From what we have already briefly exposed and analysed, it may be concluded that the principle of solidarity becomes a key legal principle of the European Union and, even more, a principle that carries a fundamental importance for its consistency and, consequentially, for its viability.

- A. This is because the application of the principle of solidarity allows the European Union to overcome, at least partially, some of the difficulties that are caused by the peculiarities of its structure and to contribute to the unity and effectiveness of its function, for the benefit of all Member States, and, primarily, the European citizens. This signifies that the European Union does not conceptually qualify as an entity with a constitutional status comparable to the one of a state under the existing legal and factual framework in the absence of the necessary characteristics in this respect; furthermore, the Union does not have the same sovereignty that Articles 4 and 5 TEU confer to States, its powers being limited to those conferred to it by the Member States. However, despite all these institutional caveats, the foundation of the principle of solidarity in terms of primary European Law makes it possible for the Union to notionally overcome - at least partially - the theoretical and practical problems that may arise from its - *sui generis* - nature.

⁵⁰ See, indicatively, the Council's decision of the 22nd of September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The decision focused on the relocation of 120,000 asylum applicants from Italy and Greece to other Member States.

⁵¹ See para. 1 of the memorandum explaining the proposal, according to which: "*The European Union is working towards an integrated, sustainable and holistic EU migration policy based on solidarity and fair sharing of responsibilities and which can function effectively both in times of calm and crisis*".

⁵² Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final 2016/0224 (COD).

⁵³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, 60-95.

⁵⁴ See para. 2 of the preamble to the proposed Regulation, according to which: "*Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States*".

B. This is because the principle of solidarity, being structured around the characteristics that we determined in our analysis, is in the position to activate each Member State *in concreto*: each one of them and its people - without compromising their sovereignty through participation in the European Union - are to operate in this context aiming not only to their peaceful and purposeful coexistence; moreover, they aim to actively contribute to the common protection from external or unforeseeable risks. The principle of solidarity contributes, consequently, to the materialisation of the maxim that provides that “the power is in unity”. It does so to such an extent that it can be validly considered as a *sine qua non* precondition of the Union. However, the above also suggests that we are facing a serious challenge that is the simultaneous respect of all the individual aspects and guarantees of the principle of solidarity. It is the aspects and guarantees of the principle of *social solidarity*, which receives most of the pressure today. In view of this, it is necessary, and -what is more - legally imperative that the principle of social solidarity is to be respected also when joint action by Member States is undertaken based on solidarity between them, so that the respective political choices do not result to the detriment of the welfare state and the social cohesion. This is because the interpretation of the primary European Law illustrates that the purpose of all the individual guarantees of the principle of solidarity - regardless of the subject of the obligations *in concreto* that arise - aims at the *protection of the Human*, namely the *European Citizen*, as the primary foundation of the European legal order. And this protection is a shared responsibility of all, transcending into an existential for the European Union “*obligatio in solidum*”.

ABSTRACTS / RÉSUMÉS

The principle of solidarity is a key legal instrument carrying fundamental importance within the European Union. Highlighted by primary European Law as well as by the Court of Justice of the European Union’s jurisprudence, solidarity as a common value and a basic cohesive bond between the Member States and their citizens acquires a structural importance for the institutional architecture of the EU. However, European Law faces major challenges with respect to the precise determination of the limits of the principle of social solidarity, with particular regard to a series of rights relating to social security benefits and social services. Despite these obstacles, solidarity has emerged as a vital mechanism for addressing and managing serious crises, including the European debt crisis and immigration and refugee policy.

Le principe de solidarité est un principal instrument juridique d’importance fondamentale au sein de l’Union européenne. Mise en exergue par le droit communautaire primaire ainsi que par la jurisprudence de la Cour de justice de l’Union européenne, la solidarité en tant que valeur commune et lien fondamental de cohésion entre les Etats membres et leurs citoyens acquiert une importance structurale pour l’architecture institutionnelle de l’UE. Cependant, le droit communautaire est confronté à des défis majeurs en ce qui concerne la détermination précise des limites du principe de solidarité sociale, particulièrement par rapport à une série de droits relatifs aux prestations sociales et aux services sociaux. Malgré ces obstacles, la solidarité constitue un mécanisme essentiel pour faire face à et gérer des

crises graves, y compris la crise de la dette en Europe et la politique en matière d'immigration et de réfugiés.