**The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity**

**Prof. Dr. Iris Goldner Lang\***

**In A. Biondi, E. Dagilyte & E. Küçük (eds.), Solidarity in EU Law: Legal Principle in the Making, Edward Elgar Publishing, 2018. pp. 133-160.**

**1. Introduction**

The EU is currently undergoing two major crises: the financial crisis and the migration and asylum crisis. Both crises have in common the need for solidarity among all EU Member States. Within the framework of both crises Member States are expected to help each other by financial and other means, thus alleviating the burden from the most pressured Member States and sharing the burden and responsibility collectively. This contribution aims to compare the financial and migration crises from the perspective of solidarity and tries to answer the question whether there is solidarity in these areas and, if so, in what way and to what degree. The answer is reached by establishing the meaning of solidarity and the motivations behind it. This is done by identifying the following four crucial facets of solidarity: loyalty, fairness, trust and necessity, whereas the word “facet” embraces both the motivating factors behind solidarity, and its true meaning and content. Each facet is analysed through practical examples in the area of financial and migration crises rules and instruments. The article displays that EU solidarity is a complex term which embraces a number of different motives and which may have diverse meanings, depending on the context. It argues that the predominant facet of solidarity, both in the context of the EU financial and migration crises, is necessity. On the other hand, in case one identifies solidarity to mutual trust, it is currently lacking. The lack of mutual trust between EU Member States, as well as between Member States and EU institutions is a common denominator of a number of problems encountered by the EU today. For this reason, the lack of mutual trust is an EU crisis of its own and should be seriously addressed for the sake of the Union’s future. The article argues that financial assistance, as the predominant solidarity mechanism - even though highly important in terms of its magnitude and capability of healing the wounds of the troubled Member States – does little to promote mutual trust. The article concludes that EU solidarity coincides with national border. The adoption of other, more supranational solidarity mechanisms would require further EU integration and a Treaty amendment for which there is currently no political will.

**2. The Background of the Two Crises**

Due to its impact on the everyday life of a high number of EU citizens, the EU financial crisis is more palpable in everyday life in the EU than the migration crisis. Owing to its magnitude and consequences, the financial crisis taken the central place in the political, economic and legal discourse in all the twenty-eight EU Member States. It started in Greece in spring 2010 and immediately threatened contagion to other euro area members. The crisis has its roots in the establishment of the monetary union and the introduction of the euro in 1999. Upon the establishment of the common currency, euro area sovereign borrowing rates converged. Capital markets lowered risk differentiation between states as the exchange rate risk - which implicitly included the sovereign risk - was removed from calculation. Lower financing costs stimulated an increase in borrowing and running up of national debts. This fuelled economic expansion, as there was more investment and higher private and public consumption. Excess demand led to an increase in salaries and prices, which lowered (export) competitiveness of those countries. Economic expansion and lower competitiveness resulted in the rise of imbalances and a growth problem, with fewer exports and higher indebtedness. In economic terms, the euro area seemed not to be an optimum currency area, as it was subject to asymmetric shocks, and channels of labour mobility and fiscal transfers were not developed. At this point capital markets started having doubts about the credibility of certain national debtors. Risk aversion increased together with a better understanding of risk differentiations within the euro area. Consequently, sovereign borrowing costs started increasing. On the other hand, the troubled Member States could no longer use the tools of monetary policy in order to address their economic situation, as monetary policy was no longer national, but the Union’s exclusive competence. The whole situation led to recession and, consequently, to a sovereign debt crisis in some Member States.[[1]](#footnote-1) As recession continues, one wonders whether the EMU structure – with the EU competence in monetary policy and national economic policies only coordinated at the EU level – is suitable for overcoming the crisis. One also wonders whether austerity measures, in place in a number of Member States, are the right response to the crisis.

At the same time, the migratory and asylum-related pressures in many EU Member States justify the labelling of the challenges the EU is facing as a result of increased asylum and migratory flows from third countries, as yet another EU “crisis”.[[2]](#footnote-2) The EU migration crisis is closely linked to two developments. First, the turmoils in Africa and the Middle East are bringing more and more migrants to the EU territory. At the same time, a combination of the EU internal market rules - which involve the removal of Member States’ internal border controls for persons,[[3]](#footnote-3) the Dublin “state of first entry” rule, and different geographic positions of EU Member States, whereas those creating the external borders are exposed to more migrants - has led to the inability of certain Member States to effectively handle immigrants, refugees and asylum seekers, while simultaneously preserving adequate human rights standards. The problem was further accentuated due to the financial crisis. However, challenges stemming from high migration flows did not halt within the most pressured Member States, but spilled over into the neighbouring Member States, as was vividly shown in the case of the Franco-Italian affair of spring 2011 when hundreds of North African immigrants from Tunisia came to Italy and were issued with resident permits for humanitarian reasons, allowing them to exercise an automatic right of freedom of movement to other Member States. The French authorities reacted by reintroducing border controls on the Franco-Italian border, by blocking trains and sending the incoming immigrants back to the Italian territory.[[4]](#footnote-4) As migratory pressure continues, it calls for better and faster legal and practical responses to the ongoing crisis.

**3. Solidarity in EU Law**

The term “solidarity” among EU Member States does not have a single, uniform meaning in EU law, but can refer to a number of different legal contexts.[[5]](#footnote-5) Solidarity among EU Member States is mentioned in the Treaties in a number of instances and within different policy areas. It is referred to as one of the values the European Union is founded on[[6]](#footnote-6) and as one of its principles which guides the Union’s action on the international scene.[[7]](#footnote-7) It is also mentioned in the context of the Union’s external action as ‘mutual political solidarity among Member States’[[8]](#footnote-8) and ‘a spirit of mutual solidarity’.[[9]](#footnote-9) Furthermore, the ‘spirit of solidarity between Member States’ is addressed in the case of a shortage of supply of certain products, notably energy.[[10]](#footnote-10) In the context of energy, ‘a spirit of solidarity between Member States’ is invoked as regards the need to preserve and improve the environment in the internal market.[[11]](#footnote-11) The principle of solidarity has its strongest expression in the ‘solidarity clause’ which creates the legal basis for the Union and its Member States to ‘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’.[[12]](#footnote-12) However, apart from being one of the guiding principles in relations between EU Member States, the need for solidarity is also emphasised between generations[[13]](#footnote-13) and in a number of rulings of the Court of Justice.[[14]](#footnote-14) Clearly, Member States have recognised the importance of solidarity in a number of Union policies and have decided to invoke solidarity in a number of Treaty articles. None of the articles mentioned above provides the definition of solidarity which leaves room for diverse visions of solidarity and different interpretations of its meaning.

**3.1. Solidarity and Responsibility-Sharing in EU Migration and Asylum Law**

In the area of asylum, migration and border controls, Treaty articles explicitly rely on the principle of solidarity and responsibility-sharing. However, solidarity has been referred to in a number of other EU documents, some preceding the Lisbon Treaty, such as the 1999 Tampere Conclusions,[[15]](#footnote-15) the 2004 Hague Programme,[[16]](#footnote-16) the 2008 European Pact on Immigration and Asylum[[17]](#footnote-17) and the 2010 Stockholm Programme.[[18]](#footnote-18) It has also been emphasised by the leading EU politicians.[[19]](#footnote-19) Article 80 TFEU is the most explicit formulation of the principle of solidarity. However, the ‘principle of sincere cooperation’ laid out in Article 4(3) TEU and invoked by the Court of Justice on a number of occasions[[20]](#footnote-20) also has important implications in the area of asylum, immigration and border control, as it obliges EU Member States to ‘assist each other in carrying out tasks which flow from the Treaties’. This means that the EU and its Member States are obliged to help and support each other in matters related to asylum, migration and border controls.

In Title V of the TFEU on the Area of Freedom, Security and Justice, solidarity is first mentioned in Article 67 as the opening provision. Article 67(2) TFEU invokes ‘solidarity between Member States, which is fair towards third-country nationals’, as the basis for framing a common policy on asylum, immigration and external border control. Article 80 TFEU, as the central and most specific call for solidarity in Title V, stipulates:

“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.”

Explicit reference to ‘solidarity’ and ‘fair sharing of responsibility’ in Article 80 TFEU covers all policies on border checks, asylum and immigration. Article 80 TFEU has thus extended the application of these principles from asylum only, as first stipulated by the Amsterdam Treaty in Article 63(2)(b)TEC, to border policy and migration. Therefore, solidarity should be the guiding principle throughout all the policy areas covered by Chapter II of the TFEU. Furthermore, reference to solidarity when drafting and implementing all the policies on border checks, asylum and immigration shows the intention to apply this principle not only in emergency situations, such as a mass inflow of refugees, but also when shaping these policies. However, it is questionable whether Article 80 TFEU has direct effect, as it can only become effective once certain legislative and policy measures have been taken.[[21]](#footnote-21)

**3.2. Solidarity and Responsibility-Sharing in EU Financial Crisis Rules**

EU financial crisis rules and instruments mostly do not mention the word “solidarity”. Neither “solidarity” nor burden- or responsibility-sharing is mentioned anywhere in Title VIII of the TFEU on Monetary and Economic Policy. On the contrary, Article 125 TFEU, the famous “no bail-out” rule, excludes Union’s or Member States’ liability for debts of, and prohibits them from giving financial assistance to each other by providing that neither the Union nor the Member States “shall be liable for or assume the commitments” of any other Member State. One could argue that such a prohibition prevents moral hazard as it provides an incentive to Member States to pursue a sound fiscal policy. Furthermore, without mentioning “solidarity”, Article 122(2) TFEU limits Union financial assistance to instances where a Member State is “in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”. Nevertheless, Article 122(2) TFEU was used as the legal basis for the creation of the European Financial Stabilisation Mechanism (EFSM) in 2010.[[22]](#footnote-22) The choice of the wording of Article 122(2) TFEU, which limits Union financial assistance to “exceptional occurrences beyond a Member State’s control”, raises questions as to its appropriateness as the legal basis for the EFSM and shows the true nature of the Union’s constitutional limitations for the adoption of the EU financial assistance instruments. One wonders whether the events that had taken place in certain EU Member States were entirely beyond their control or whether their governments had partly contributed to the emergence of the sovereign debt crisis.[[23]](#footnote-23)

The contestable legal basis of the EFSM and the temporary nature of both the EFSM and the European Financial Stability Facility (EFSF) led to a Treaty amendment pushed forward by Germany. The amendment carried through by a simplified revision procedure based on Article 38(4) TEU and led to the insertion of a third paragraph into Article 136 TFEU via a European Council Decision 2011/199.[[24]](#footnote-24) However, the reasoning behind the granting of financial assistance based on the new Article 136(3) TFEU again cannot be directly associated with solidarity. Here, financial assistance is rather vaguely linked to the “stability of the euro area of the whole”. The new Treaty provision 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”. Furthermore, financial assistance is made “subject to strict conditionality”. Such wording, as will be discussed later in the text, can be associated to solidarity only in case we identify solidarity to economic and practical necessity or Member States’ interest to help each other in order to secure a more stable and prosperous EU as a whole and, consequently foster their own prosperity. Helping the beneficiary Member State get out of trouble is not in the centre of the equation.

The Treaty amendment entered into force only on 1 May 2013. However, due to the ongoing crisis, Member States could not wait that long so they decided, paradoxically, to create the European Stability Mechanism (ESM) outside the EU law framework, as an intergovernmental organisation under public international law. The ESM Treaty[[25]](#footnote-25) was signed by the then 17 euro area states on 2 February 2012 and entered into force on 27 September 2012, the same day Germany deposited its instruments of ratification, after having received the green light from the *Bundesverfassungsgericht*. Interestingly, apart from Article 122(2) TFEU which mentions solidarity by linking it to difficulties in the supply of certain products in the area of energy, the Preamble to the ESM Treaty is the only financial crisis instrument which explicitly mentions solidarity. The fifth recital of the ESM Treaty Preamble provides:

“This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article.”

The wording which, in the same recital, combines fiscal responsibility, solidarity and conditionality, indicates Member States’ readiness to grant financial assistance to each other only under condition the recipient Member States proves fiscal responsibility by having ratified the Treaty on Stability, Coordination and Governance (further in text: TSCG) and by having implemented the balanced budget rule. On the other hand, the TSCG does not mention solidarity. However, the need for financial solidarity - or the fact that there is none - has been present in the political discourse and brought up in a number of political speeches in the context of the EU financial crisis.[[26]](#footnote-26)

**4. How to Define and Measure Solidarity?**

Solidarity applies both to EU institutions and the Member States. However, measuring solidarity and fair sharing of responsibility is not an easy task. Even though the Treaty explicitly mentions solidarity in the context of migration, asylum and border controls, it provides no specification to help determine what constitutes these terms. Their goals or the benchmarks to measure their fulfilment are undefined. On the other hand, responsibility-sharing can be seen as one of the manifestations of the principle of solidarity, implying a fair distribution of burdens, consequent to EU borders, immigration and asylum policies, among EU Member States. The fact that Article 80 TFEU explicitly refers to the financial implications of solidarity, but does not limit itself only to this manifestation of burden-sharing (as implied by the phrase “including its financial implications”), suggests the importance of financial burden-sharing, but also calls for other forms of cooperation among Member States that could lead to burden-shifting to Member States under less pressure.[[27]](#footnote-27)

On the other hand, Treaty rules on the economic and monetary policy do not explicitly mention solidarity at all. However, upon the entry into force of the amendment of Article 136 TFEU on 1 May 2013, they now enable financial assistance as one manifestation of the principle of solidarity. Significantly, according to the wording of Article 136(3) TFEU, such financial assistance is not aimed at helping the Member State in trouble, but at “safeguarding the stability of the euro area as a whole”. One can, therefore, infer that the Treaty explicitly recognises only the financial aspect of solidarity in the area of EU financial crisis rules and links its application to saving the euro, while saving the Member State in trouble is not its primary motif. Furthermore, as explained above, the ESM Treaty relies on conditional solidarity, based on Member States’ fiscal responsibility.

Solidarity is a complex term which embraces a number of different motives. Mentioning solidarity without defining its meaning, or not mentioning it at all, leaves room for different interpretations. In this respect, the interests of EU institutions do not necessarily match those of EU Member States, while the interests of Member States also frequently diverge. It is possible to discern many possible motivating factors of solidarity in EU law, and not all of them are applicable to EU migration and financial crises rules. In this respect, the author has identified four key driving forces of solidarity which are crucial for determining its meaning in the area of the EU financial and migratory crises. The author refers to these driving forces as solidarity “facets”, thus implying that they both motivate EU actors to solidarity, and become its integral parts, as the term “solidarity” is sometimes used as a synonym for some of these “facets”. The four identified facets of solidarity are: loyalty, fairness, trust and necessity. Each of them will now be analysed separately through practical examples in the area of migration and financial crises rules.

**4.1. Loyalty**

Unlike the other three facets of solidarity, loyalty is the only facet which sets commitments on the troubled Member State and not just the Member States which are potentially expected to help the troubled one. This facet sets a requirement on the Member State which is encountering migratory or fiscal problems to remain loyal to its EU obligations by respecting EU law. It has its legal basis in the principle of loyal or sincere cooperation as stipulated by Article 4(3) TEU. Based on this principle, all Member States have committed themselves to adhere to EU primary and secondary law, facilitate the achievement of the Union’s tasks and refrain from any measures which could jeopardise the attainment of the Union’s objectives. This chapter will try to tackle the questions whether Member States remain loyal to their obligations stemming from EU migration and monetary policy rules and whether loyalty is practically achievable under the current rules.

**4.1.1. Loyalty to EU Migration and Asylum Rules**

The obligations of EU Member States towards migrants, refugees and asylum seekers stem both from EU law and a number of international conventions which have been signed by all the Member States – primarily the 1951 Convention Relating to the Status of Refugees, as the most important international document relevant for refugee law;[[28]](#footnote-28) the Convention against Torture; [[29]](#footnote-29) the International Covenant on Civil and Political Rights; [[30]](#footnote-30) and, implicitly, from the European Convention on Human Rights. Within the framework of EU law, EU Member States decided to create a Common European Asylum System (further in text: CEAS) that would reduce large differences between their asylum systems and practices and establish common standards for asylum. By 2005, a number of legislative acts were adopted within CEAS, the most important being three directives and a regulation, which have been revised recently in order to provide higher common standards and stronger cooperation between Member States: the Reception Conditions Directive,[[31]](#footnote-31) the Qualification Directive,[[32]](#footnote-32) the Asylum Procedures Directive,[[33]](#footnote-33) and the Dublin Regulation.[[34]](#footnote-34)

However, past experiences, culminating with the *MSS*[[35]](#footnote-35) judgment of the ECHtR and the *NS*[[36]](#footnote-36) judgement of the CJEU, have revealed the inaccuracy of the premise that all EU Member States provide an adequate level of quality and efficiency and ensure a satisfactory level of protection of asylum seekers’ fundamental rights. These judgments testified serious deficiencies of the system, which Member States previously chose to ignore by continuing transfers to Greece, and emphasised that asylum seekers must not be transferred to a Member State whose asylum system manifests systematic deficiencies. They showed that CEAS rules did not respond to reality by sufficiently taking into consideration inadequate conditions in certain Member States and their current financial and other limitations. They testified that the Dublin II mechanism could not properly function in the event of an unfair or incomplete examination of asylum applications in some Member States, inadequate access to legal remedies and legal representation, and inappropriate detention conditions.

However, the response to such problems should not be achieved by lowering EU standards, in order to make the fulfilment of the loyalty requirement feasible for all Member States, but by tackling another facet of solidarity to be analysed further in text – fairness – thus creating a stronger burden-sharing, rather than a burden-shifting, mechanism which would enable the pressured Member States to adhere to the principle of loyal cooperation in asylum matters. The above-mentioned recently revised directives and regulation go in this direction (but still not enough) by aiming at a fairer, quicker and more fundamental-rights-compliant system. The Dublin III Regulation improves the system, primarily by providing an early warning, preparedness and crisis management mechanism which is supposed to detect problems in national asylum systems. Based on Dublin III, the Member State responsible for examining an asylum application is detected on the basis of family links and the criterion of the state of the applicant’s first entry into the territory of the EU. In this respect, it is a misfortune that the underlying rationale of the Dublin II Regulation has not changed, as it can be expected that the highest pressure will continue to remain on the Member States creating the external Union borders. As the Dublin III Regulation became applicable only from 1 January 2014, its effects in practice still remain to be seen.

**4.1.2. Loyalty to EMU Rules**

The obligations of EU Member State in the area of the EMU are based on Treaty provisions, a number of EU secondary law instruments and intergovernmental treaties. They require EU Member States to act in a fiscally responsible way. The EU rules on economic and fiscal surveillance are the Stability and Growth Pact (further in text: SGP); “Six-Pack” which further strengthens the SGP; “Two-Pack”; “Euro-Plus Pact” (which are, unlike the first three non-legally binding documents on economic convergence); and the TSCG, which is a combination of balanced-budget rules and economic coordination and convergence rules. All these instruments, apart from the “Euro-Plus Pact”, set legally binding requirements on EU Member States in order to enhance coordination and fiscal and macroeconomic surveillance of budgetary processes, particularly of those Member States which have excessive deficits. Furthermore, the ESM Treaty is closely linked with the TSCG, as financial assistance to a Member State in financial difficulties under the ESM is conditional on its ratification of the TSCG and on the implementation of the balanced-budget rule into national law. It can be ascertained that, once the EU manages to get out of the crisis, the mechanism that has been created, partly prior to the financial crisis and partly as a response to the crisis, will be effective to prevent a similar crisis, provided the rules are respected. However, it remains, questionable whether this mechanism will (or can) be respected by all EU Member States. Rules had already been circumvented in the past by Germany and France, while the current position of France and Italy, which are falling behind in reducing their deficits to meet EU rules, remains uncertain. It remains to be seen whether EU institutions will respond with sanctions or turn a blind eye, thus sending a signal to other Member States that EU financial crisis rules can be bent, yet again. The statement of the French finance minister Michel Sapin to Le Monde that the EU must adapt its deficit rules to the exceptional situation of the eurozone’s weak economy, invites for an amendment of EU rules in order to achieve loyalty. It suggests that, in the current critical situation, EU Member States cannot be loyal to the EU financial crisis rules, as they stand today, but that the rules need to be changed in order to become more flexible and enable more investment.[[37]](#footnote-37) Mr Sapin’s statement calls into question the current austerity measures, as the right response to the financial crisis and serves as an invitation to consider other methods.

In this respect, labour mobility could be employed as an alternative method to prevent/respond to the EU crisis. Stronger labour mobility could alleviate pressure on the Member States with the highest unemployment rates and high deficits. However, unfortunately EU free movement rules are far from sufficiently employed to enhance labour mobility. The current data show that only 3% of working-age EU citizens live in a different EU country and annual cross-border mobility within the EU stands at an average annual rate of only 0.29%.[[38]](#footnote-38) On the other hand, it seems most likely that the EU will be heading towards further economic policy coordination and integration which will, at a certain point, require another Treaty change, given the current limited role of the Union in the area of economic policy.

**4.2. Fairness**

Solidarity can be motivated by fair burden-sharing of all EU Member States. In this context, the meaning of solidarity could be associated to “fairness”, “equity” or “justice”.[[39]](#footnote-39) Fairness, as another important facet of solidarity, is based on the underlying premise that the Union is a whole and that the burdens experienced by one Member State should be shared by other Member States. Fairness is a subjective concept: what might be considered fair by one might not be viewed as fair by another. However, when associating solidarity to fairness, one might argue that migratory and financial problems experienced by certain Member States are at least partly the consequence of EU rules and the limitations they set to Member States’ actions. In this respect, it could be stated that the wellbeing of one EU Member State is at least partly connected to the burdens taken by another Member State. Provided this presumption is true, it seems only fair that Member States try to share the burden equally both in the context of the financial and migration crises.

**4.2.1. Fairness in the EU Migration and Asylum Crisis**

In the area of EU migration and asylum law, Article 80 TFEU explicitly mentions “fairness” by stating that EU policies on border checks, asylum and immigration “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”. Fair responsibility-sharing and burden-sharing would imply assistance of Member States exposed to a lower number of migrants, refugees and asylum seekers to the Member States exposed to higher migratory and asylum pressures, primarily as the result of their geographical position of the external Union borders and the Dublin state-of-first-entry rule. This rule has been heavily criticised as creating a burden-shifting rather than a burden-sharing mechanism.[[40]](#footnote-40) It increases the uneven ‘distribution’ of asylum seekers, as it creates much more pressure on the Union’s external borders[[41]](#footnote-41). The fact that the Dublin III Regulation maintains the underlying principles of Dublin II, which has proven to have “extensive detrimental effects to Member States and asylum seekers”, has been heavily criticised by ECRE as “not defensible”. ECRE has further contended that “an alternate system based on integration accompanied by substantial solidarity measures is the only way to ensure a fair, efficient and humane CEAS”.[[42]](#footnote-42) Despite this, the Dublin III Regulation, just like its predecessor, remains closer to an administrative tool for establishing Member States’ responsibility for examining asylum applications rather than a burden-sharing instrument.[[43]](#footnote-43) For this reason it can be stated that the current system, despite its improvements, does not effectively facilitate burden-sharing and promote fairness and equity.

**4.2.2. Fairness in the EU Financial Crisis**

On the other hand, establishing what is fair in the context of the EU financial crisis is even more complex and needs to be discussed against the background of all the events that preceded the crisis. The brief overview of the historical background of the EU financial crisis in chapter 2 of this text is intended to show its complexity and uncertainty as to what the right response to the crisis is. This text is not intended to point the finger in order to blame anyone as it is difficult to assess responsibility and there are highly opposing views on this both in the area of EU financial and migration crises rules. For this reason, determining what is and what is not fair in the context of the EU financial crisis depends on who answers the question. Defining fairness in this context lies primarily in the eye of the beholder. As shown before, a number of financial assistance mechanisms have been created to deal with the crisis, the most significant one being the ESM. They testify an understanding between EU Member States that the financial burden should be divided or at least partly born together. However, it is difficult to assess whether the underlying motive for the creation of such mechanisms lies exclusively in economic necessity – i.e. the desire to save the common currency and prevent contagion - or also in the feeling that helping Member States in trouble would be fair towards them, due to the EMU rules and the events that preceded the crisis.

Both the views of the political elites and EU citizens in different Member States diverge on the point as to whether their Member States should help each other. The Eurobarometer Qualitative Study “The Promise of the EU” from September 2014 has, for example, found out that: “the idea of solidarity also provoked a mixed response, especially in relation to financial assistance and whether the EU should help Member States that are facing financial difficulties. Respondents in Portugal, Poland and Italy felt that countries facing such difficulties should be helped as a matter of principle, since solidarity between Member States is one of the EU’s core values. In Denmark, some pro-EU and neutral respondents agreed with this, but most Danish and Finnish respondents felt that their country should not be responsible for others and should therefore not be obliged to help them. While similar sentiments were expressed in Germany, there were respondents who were in favour of providing financial assistance. However, they always felt that such assistance should be conditional.”[[44]](#footnote-44) Different views on financial assistance as an expression of solidarity in six EU Member States show the high level of divergence of citizens’ views what is fair in the context of the EU financial crisis.

Finally, as stated previously, the fifth recital of the ESM Treaty Preamble is the only explicit mention of solidarity, apart from Article 122(2) TFEU. The drafters of the recital viewed fairness as similar to conditionality, by having directly linked financial assistance to the Member State in trouble to its own fiscal responsibility. The wording - that both the ESM Treaty and the TSCG “are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union” - suggests that it is fair that a Member State is granted financial assistance only when it is conducting a sound monetary policy.

**4.3. Trust**

Solidarity can also be understood as the expression of trust between EU Member States, which have entered into a union and agreed to mutual rights and obligations specified in Treaty provisions. The (non)existence of mutual trust between Member States can be analysed at two levels: first, at the level of implementation and application of EU law in regular circumstances and, second, at the time of crisis, which also includes trust into each other’s system when providing financial and other assistance to overcome the crisis. In this context, trust can be understood as a feeling of confidence in Member States’ relations which includes inter-state confidence into the functioning of each other’s system and into each other’s intentions to improve potential deficiencies of their systems and respect their obligations stemming from EU law and mutual agreement.

**4.3.1. Mutual Trust in Asylum and Migration Matters**

Inter-state mutual trust is the underlying idea for the functioning of an area of freedom, security and justice with no internal borders.[[45]](#footnote-45) The abolishment of internal borders starts from the premise of mutual trust. The Dublin criteria and the mechanism for determining the Member State responsible for examining an asylum application are based on the establishment of equal standards in all Member States and their mutual trust in an adequate level of quality and efficiency of each other’s asylum system. They start from the premise that Member States have confidence that each other’s asylum procedures and treatment of asylum seekers comply with EU and international legal rules and human rights standards.[[46]](#footnote-46) Mutual trust in the context of asylum is based on the premise that all Member States respect the principle of *non-refoulement* and are safe countries for third-country nationals.[[47]](#footnote-47) The only exception to the principle of mutual trust in the Dublin system was a discretionary clause contained in Article 3(2) of Dublin II Regulation which enabled each Member State to examine an asylum application even if such examination was not its responsibility according to the criteria contained in the Regulation. However, despite the existence of such an “emergency exit”, prior to the *MSS* and the *NS* judgments, Member States chose not to use the discretionary clause. Their practice changed significantly after the judgments, while the same wording of the discretionary clause has been preserved in Article 17 of the Dublin III Regulation. Further, several studies, including the UNHCR one, have highlighted divergent practices among Member States and revealed highly different recognition rates for the same profile of asylum seekers.[[48]](#footnote-48)

The Dublin III Regulation takes into account the problems highlighted in the *MSS* and *NS* judgments and its Article 33 establishes a “safety net” in the form of a mechanism of early warning, preparedness and crisis management. However, it seems that the level of mutual trust inherent in Dublin III remains the same in comparison to Dublin II as the responsibility of initiating the “safety net” mechanism outlined in Article 33 remains with the Member State undergoing the crisis.

Despite the fact that EU legislation in the area of migration and asylum presupposes and takes as its basis the existence of mutual trust between EU Member States, the reality looks much different. Member States’ unwillingness to apply some of the existing and explore new mechanisms which could enhance mutual trust and fairness, through burden-sharing and different joint activities such as joint processing, is the result of a lack of confidence and of fear in the negative impact of a mass influx of economic migrants, asylum seekers and refugees. As a consequence of a low level of trust, solidarity measures are scarcer, both in terms of their quantity and variety, than had there been more solidarity between Member States. The following paragraphs will address some of the existing and potential mechanism put on the EU table, which could enhance mutual trust and burden-sharing in the area of the EU migration and asylum crisis.

The first two mechanisms mentioned below already exist, but they have either not been applied at all or their application has been rather weak, while the third mechanism is still on the discussion table. First, the existing Directive on Temporary Protection enables EU Member States to provide displaced third-country nationals with immediate and short-term protection in situations when there is a risk that their existing asylum systems could not cope with an influx of displaced persons in an efficient and timely manner.[[49]](#footnote-49) The Directive relies on solidarity as it allows for transfers of displaced persons from one Member State to another which is willing, on a voluntary basis, to participate in such a burden-sharing mechanism. However, the Directive has not yet ever been applied, including during the 2011 conflict and boat arrivals from Libya. Its non-application questions Member States’ intentions and will to put solidarity in practice.

Second, intra-EU relocation is another method of assisting Member States exposed to disproportionate external migratory pressures. However, previous practice has shown that, despite its generally positive impact, intra-EU relocation is highly limited in scope and based on a political, voluntary decision. Its impact is restricted to emergency situations and cases of Member States’ exposure to a disproportionate number of refugees exceeding their capacities. It is primarily aimed at refugees and persons under subsidiary protection and not at asylum seekers. Relocation should, therefore, not be considered as an improvement or compensation of the Dublin Regulation. The European Commission’s study of relocation has shown that a number of EU Member States preferred other burden-sharing tools, such as policy harmonisation as well as technical and financial assistance, to relocation.[[50]](#footnote-50) Furthermore, half of the Member States in the study were against relocating asylum seekers. This view corresponds with the Dublin ‘state of first entry’ rule which sets limits to relocation. So far, intra-EU relocation has been taking place from Malta within the framework of a European Refugee Fund-funded pilot project EUREMA (phases I and II). Malta, being the smallest EU Member State, has been exposed to a disproportionate number of refugees. On the other hand, its reception conditions have been reported as poor, as has its progress with the local integration of newly arrived third-country nationals. Given this situation, the EU Home Affairs Commissioner appealed to other Member States’ solidarity which resulted in the decision of twelve Member States to participate in the EUREMA pilot project, while eight Member States and associated countries decided to make bilateral arrangements with Malta. The objective was to show solidarity with Malta by relocating 255 individuals in need. Despite the project’s general success, evaluation has shown that the selection criteria were sometimes too demanding, while there was a lack of harmonisation as regards the status granted by the participating states.[[51]](#footnote-51)

Finally, joint processing of asylum claims could be a new way of promoting mutual trust. However, it has not yet been employed in practice. Despite the fact that there is (still) no consensus as to what joint processing should be, in its March 2012 Conclusions, the Council invited the Commission to prepare a study on the feasibility of joint processing of asylum claims and to report its finding to the Member States.[[52]](#footnote-52) On 13 February 2013 the European Commission published its “Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU”.[[53]](#footnote-53) The Study highlighted the lack of consensus as to the meaning of joint processing, coming to the conclusion that there is a distinction between the concepts of “supported” and “joint” processing. One of the questions posed in the Study was whether joint processing could be a way towards increased harmonization and trust between asylum authorities. However, due to the lack of an agreement on the meaning of joint processing, it is not clear what would be its added benefit. Paradoxically, the Study suggests that the main reason for not establishing joint processing appears to be a lack of trust between Member States in the efficiency and effectiveness of each other’s system and this problem seems only to be deteriorating with the economic crisis.

The lack of mutual trust and the will for burden-sharing as the reasons for the non-application of joint processing and of the Directive on Temporary protection, and for a weak application of relocation, could be characterised as a vicious circle as it is difficult to improve the situation without introducing new mechanisms. On the other hand, there is no political will for the establishment of a centralised EU decision-making system. The creation of such a system would need to have an adequate legal basis and would, therefore, require a Treaty amendment.

The most palpable and successful mechanism of EU solidarity in the area of the EU migration and asylum rules is financial assistance. In this context, the existing funds available for Member States exposed to migratory problems testify a certain level of solidarity in the EU. In this respect, in the area of migration and asylum, under the framework programme “Solidarity and Management of Migration Flows” (SOLID) EUR 4 billion was allocated for the period 2007-2013 for the management of the Union’s external borders and for the implementation of common asylum and immigration policies. The programme consisted of four funds: European Refugee Fund, European Borders Fund, European Return Fund and European Fund for the Integration of Third-Country Nationals. However, all funds seemed to have in common the lack of adequate resources and too bureaucratic procedures. They were, therefore, more motivational than compensatory.[[54]](#footnote-54) On the other hand, the new Multiannual Financial Framework for 2014–2020 has reduced the number of programmes to two funds: the Asylum and Migration Fund (EUR 3,137 billion) and the Internal Security Fund (EUR 3,8 billion). It has, further, increased the flexibility in the implementation of these funds and the overall home affairs budget. With an overall budget of EUR 9,26 billion, the total home affairs budget for the 2014–2020 period exceeds the 2007–2013 period, but its share is still less than 1% of the EU budget. The Framework creates an improvement of the previous system as it increases and simplifies the funding and increases its flexibility, but its functioning in practice still remains to be seen.[[55]](#footnote-55)

**4.3.2. Mutual Trust in the EMU Matters**

In the area of the EMU rules, the “no-bailout” rule entailed in Article 125 TFEU seems to put into words the lack of mutual trust among Member States as it excludes the Union’s and Member States’ liability for debts of other Member States and prohibits them from giving financial assistance to each other. Despite a rationally justifiable reasoning behind this Treaty provision of preventing moral hazard and encouraging Member States to play by the rules, this provision leaves an aftertaste of separateness. The subsequent insertion of Article 136(3) TFEU, even though it enables financial assistance, has other reasons and objectives instead of trust. The fact that its goal is “to safeguard the stability of the euro area *as a whole*” (emphasis added) and that it is made subject to strict conditionality confirm this statement. One can, therefore, conclude that EU provisions in the area of the EMU were not drafted in the spirit of mutual trust, neither were they intended to promote such trust. This is further testified by the total silence on the issue of solidarity by the Court of Justice in *Pringle*.[[56]](#footnote-56)

However, despite the existence of the “no-bailout” rule embodied in Article 125 TFEU, one could state there is a duty of solidarity between Member States, which is linked to mutual trust and which stems from the general spirit of the Treaty and, more particularly, from Article 3(3) TEU, which obliges the Union to promote solidarity among Member States. Even though the Court of Justice did not mention solidarity to argue its judgment in *Pringle*, in her Opinion in this case, AG Kokott invokes solidarity, it seems, as a synonym to mutual trust between Member States and their peoples. She calls for a narrow interpretation of Article 125 TFEU by suggesting that its broad interpretation would be incompatible with the concept of solidarity.[[57]](#footnote-57) AG Kokott, thus, implies there is a duty among EU Member States to help each other in cases of emergency in order to prevent serious economic and social effects of state bankruptcy. Even though she does not openly state whether this duty should be associated to fairness, mutual trust, economic necessity or something else, AG Kokott’s reference to a number of Treaty provisions including the wording of the Treaty preamble, pursuing the desire “to deepen the solidarity between their peoples”, suggests there is more to solidarity than pure economic necessity. It focuses on the ‘human face’ of solidarity and its effects of building trust and bonds between EU nations.

The fact that a highly conditional financial assistance is the dominant solidarity response to the EU financial crisis can also be interpreted as a manifestation of a low level of mutual trust in the EU. This is testified by the difficult negotiations between the January 2015 Greek government and Eurozone Member States assisted by the European Commission, the ECB and the IMF, and the conditioning of further financial aid to Greece on its enforcement of a number of structural reforms (February and March 2015). However, the importance and magnitude of financial assistance as a solidarity response to the EU financial crisis should not be underestimated, as it is significantly higher in comparison to financial assistance in the area of the migration crisis. The initial response to the financial crisis in 2010 were bilateral loans of Eurozone countries to help Greece. This was further strengthened by the establishment of two temporary crisis mechanisms – the EFSF, with a lending capacity of EUR 60 billion, and the EFSM, with a lending capacity of EUR 440 billion. Finally, the ESM was created with a lending capacity of EUR 500 billion. The ESM is currently financing the Cyprus programme with a total commitment of up to EUR 9 billion, and the Spanish banks recapitalisation programme with EUR 41.3 billion disbursed. It still holds a reserve of nearly EUR 450 billion.

These numbers show that, if one identifies solidarity to financial assistance, one could claim there is a considerable degree of solidarity. However, the existence of financial assistance does not mean that all aspects and expectations of solidarity have been addressed. Even though financial assistance heals the fiscal wounds of the troubled Member States, it does not improve the low level of mutual trust in the EU, especially due to the fact that it is predominantly based on economic necessity and political reality. For this reason, a number of other solidarity mechanisms could be used in addition to financial assistance. Their effect would be not only to help the pressured Member State, but also, and equally important, to promote mutual trust and fairness in the EU. However, some of these solidarity mechanisms, such as the establishment of a common unemployment fund and stronger mutualisation of debts would require further EU integration and, therefore, mutual agreement of EU Member States and a Treaty amendment.

**4.4 Necessity**

By helping Member States in need, other Member States work towards a more secure and stable Union in general, and towards more security and stability within their own territorial borders, in particular. Therefore, one could associate solidarity to pure rational necessity and claim that the role of solidarity is to act as a joint insurance policy mechanism, which increases the stability of the EU as a whole and of each particular Member State.[[58]](#footnote-58) In this context, solidarity is closely linked to Member States’ self-interest which encourages them to assist each other and participate in burden-sharing mechanisms.

**4.4.1. Necessity in the Migration and Asylum Crisis**

In the context of asylum and migratory pressures, necessity stems from the fact that Member States have voluntarily abolished internal borders thus enabling free flow of persons in-between their territories and, consequently, exposing themselves to any migratory and asylum pressures experienced by their neighbours. It can, therefore, be rationally expected that Member States, for their own sake, want to ensure functioning migratory and asylum systems in other Member States with whom they have lifted any internal borders, but share a common external border and harmonized rules and procedures. The inability of one Member State to effectively handle immigrants, refugees and asylum seekers, while preserving human rights standards, might have serious negative consequences for all the other Member States, as it increases irregular migration and reduces internal security. Further, the inability of a pressured Member State to handle a high number of migrants and asylum seekers can lead to harmful unilateral actions which have serious consequences for the Union as a whole, as shown in the case of the Franco-Italian affair of spring 2011 mentioned previously in the text. In this context, necessity can be understood as the driving force which increases stability and security, and reduces the possibility of unexpected calamities and harmful unilateral actions of those Member States primarily affected by migrants and asylum seekers.[[59]](#footnote-59) Finally, the potential of unexpected increases in the number of refugees and asylum seekers in one Member State, induced by external factors, can encourage Member States to see the advantages of burden-sharing mechanisms and agree to them.[[60]](#footnote-60) A Member State exposed to a lower number of migrants and asylum seekers today might become exposed to much higher numbers tomorrow. For this reason it is rational that Member States help each other and consequently partly reduce the transfer of migratory and asylum pressure to their territory.[[61]](#footnote-61)

**4.4.2. Necessity in the EU Financial Crisis**

In the context of the EU financial crisis, recession leading to the sovereign debt crisis in one Member State has serious consequences for the Union as a whole and for each individual Member State. It affects the functioning of the common currency and the credibility of the euro, as it deters investment in the euro area as a whole and not only in the defaulting Member State. The experience of the past several years of the EU financial crisis has materialised the risk of contagion, illustrated by the phrase: Greece sneezed, and now most of Europe has a cold.”[[62]](#footnote-62) For this reason, the fastest and most efficient way to save the common currency and try to prevent or reduce contagion was to assist the defaulting Member States financially. All the financial mechanisms, culminating with the ESM as the most important one, have been established predominantly for the reason of economic necessity.

**5. Conclusion**

The underlying idea of EU solidarity is to provide a commonly agreed, sustainable and fundamental-rights-compliant mechanism which is able to respond to all the migratory and fiscal challenges, also at times of global crises. The preceding discussion has displayed EU solidarity as a complex term which embraces a number of different facets. The four facets chosen in this text have been identified as crucial for determining the driving forces of solidarity and its overall meaning. The lack of consideration of any of these facets in policy-making and legal practice might have serious consequences for the functioning of solidarity in practice and, more broadly, for the functioning of the European Union as a whole. The analysis has shown that some of these facets are strongly present in the EU migration and financial crises, while others are seriously lacking. Generally speaking, the predominant facet of solidarity today is economic necessity and political reality. On the other hand, in case one defines solidarity as mutual trust, it is currently lacking. The lack of mutual trust between EU Member States, as well as between Member States and EU institutions is a serious problem, the implications of which should not be underestimated. This lack is visible in a number of areas and phases of the decision-making process in the EU. This lack can be viewed as the common denominator of a number of problems encountered by the EU today. For this reason, the lack of mutual trust is an EU crisis of its own and should be seriously addressed for the sake of the Union’s future.

EU solidarity mechanisms coincide with national borders. They take as their starting point a nation state and are, therefore confined to inter-state assistance. There is no willingness to contemplate and apply solidarity in a more supranational way. This includes the functioning of assistance funds where both contributions and allocation of funds is nation-based. Such a nation-based approach to solidarity is an obstacle to certain solidarity mechanisms which would head towards further EU integration. Apart from financial assistance, as the predominant solidarity mechanism based on economic necessity and political reality, a number of other solidarity mechanisms could be introduced, such as the establishment of a common unemployment fund, stronger mutualisation of debts and joint processing of asylum claims. These mechanisms might enhance mutual trust and could be perceived as “fair”, at least in some Member States, but they would require further EU integration and, therefore, mutual agreement of EU Member States and a Treaty amendment, for which there is currently no political will.

1. A Mody, & D Sandri, ’The eurozone crisis: how banks and sovereigns came to be joined at the hip’ (2012) 27(70) Economic Policy, 199-230; C Lapavitsas, ’Crisis in the Eurozone’ (2012) Verso Books; B Eichengreen, N Jung, S Moch & A Mody, ’The eurozone crisis: phoenix miracle or lost decade?’ (2014) 39 Journal of Macroeconomics, 288-308, Chicago; J Bilbao-Ubillos, (ed.), 'The Economic Crisis and Governance in the European Union: A Critical Assessment' (2013) Vol. 28 Routledge. [↑](#footnote-ref-1)
2. See e.g. New York Times Editorial dated 31 August 2014 entitled “Europe’s Migration Crisis”: <http://www.nytimes.com/2014/09/01/opinion/europes-migration-crisis.html?_r=0> (last accessed on 1 November 2014); The Council on Foreign Relations articled dated 28 April 2014 entitled “Europe’s Migration Crisis”: <http://www.cfr.org/migration/europes-migration-crisis/p32874> (last accessed on 1 November 2014); The Guarding briefing dated 18 September 2014 dated “Europe’s worsening migrant crisis – the Guardian briefing” (<http://www.theguardian.com/uk-news/2014/sep/18/-sp-world-briefing-europe-worsening-migrant-crisis> (last accessed on 1 November 2014); the Euractiv article dated 7 July 2014 entitled “Italy pushes Frontex Pus to tackle migration crisis”: <http://www.euractiv.com/sections/eu-priorities-2020/italy-pushes-frontex-plus-tackle-migration-crisis-303318>(last accessed on 1 November 2014). [↑](#footnote-ref-2)
3. See Art 26 TFEU. [↑](#footnote-ref-3)
4. For an account of the whole affair, which was characterised as a ‘race to the bottom on European principles of solidarity, loyalty and fundamental rights’, see Sergio Carrera and others, ‘A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair’ (2011) CEPS Liberty and Security in Europe Working Paper, April 2011, 1; Sergio Carrera, ‘An Assessment of the Commission’s 2011 Schengen Governance Package: Preventing Abuse by EU Member States of Freedom of Movement?’ (2012) CEPS Liberty and Security in Europe Working Paper March 2012, 1. [↑](#footnote-ref-4)
5. For identifying the role of solidarity in different areas of EU law, see Malcolm Ross, ‘Solidarity: A New Constitutional Paradigm for the EU?’ in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press, 2010) 23-45. [↑](#footnote-ref-5)
6. Art 2 TEU. [↑](#footnote-ref-6)
7. Art 21 TEU. [↑](#footnote-ref-7)
8. Art 24(2) TEU. [↑](#footnote-ref-8)
9. Art 31 TEU. [↑](#footnote-ref-9)
10. Art. 122(1) TFEU. [↑](#footnote-ref-10)
11. Art. 194 TFEU. [↑](#footnote-ref-11)
12. Art 222 TFEU. [↑](#footnote-ref-12)
13. Art 3(3) TEU. [↑](#footnote-ref-13)
14. For example, Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, para 44. [↑](#footnote-ref-14)
15. Council, ‘Presidency Conclusions’ (Tampere, 15-16 October 1999). [↑](#footnote-ref-15)
16. Council, ‘Presidency Conclusions: The Hague Programme for Strengthening Freedom, Security and Justice in the European Union’ (Brussels, 4-5 November 2004). [↑](#footnote-ref-16)
17. Council, ‘European Pact on Immigration and Asylum’ (Brussels, 24 September 2008). [↑](#footnote-ref-17)
18. Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, European Council’ [2010] OJ C-115/1. [↑](#footnote-ref-18)
19. See e.g. the text “Towards a New Policy on Migration” among the ten priorities of the Juncker Commission: <http://ec.europa.eu/about/juncker-commission/priorities/08/index_en.htm> (last accessed on 1 October 2014). See also Juncker’s campaign highlights “Europe needs more solidarity to cope with the challenge of immigration”, 2 May 2014: <http://juncker.epp.eu/news/europe-needs-more-solidarity-cope-challenge-immigration> (last accessed on 1 October 2014). [↑](#footnote-ref-19)
20. See, for example, Case C‑61/11 *PPU* *Hassen El Dridi, alias Karim Soufi* [2011] ECR I-03015. [↑](#footnote-ref-20)
21. Case C-378/97 *Florus AriëlWijsenbeek* [1999] ECR I-6207,para 40 where the Court of Justice stated that then art 7a TEC [now art 26 TFEU] does not have direct effect as it ‘presupposes harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions’. [↑](#footnote-ref-21)
22. Council Regulation (EU) 407/2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1. [↑](#footnote-ref-22)
23. See e.g. B de Witte, ‘The European Treaty Amendment for the Creation of a Financial Stability Mechanism’ (SIEPS European Policy Analysis 6 2011), 6; P-A Van Malleghem, ‘Pringle: A Paradigm Shift in the European Union’s Monetary Constitution’ (2013) 14 German Law Journal Vol. 14 No. 01, p. 144. [↑](#footnote-ref-23)
24. European Council Decision 2011/199 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L 91/1. [↑](#footnote-ref-24)
25. Treaty Establishing the European Stability Mechanism, D/12/3 Brussels, 1st February 2012. [↑](#footnote-ref-25)
26. See for example, German Chancellor Angela Merkel’s speech on the establishment of the eurozone “solidarity fund”: <http://www.eubusiness.com/news-eu/germany-finance.pgt> (last accessed on 1 October 2014); Sara Eisen, Interview with Jose Manuel Barosso, European Commission President, 12 April 2013 <http://www.bloomberg.com/video/-more-solidarity-for-cyprus-needed-barroso-says-bJq0~hQmRjWpqTZhHcMcqw.html> accessed 15 April 2012; Angela Merkel’s speech at the Davos World Economic Forum Annual Meeting, 28 January 2011: <http://www.beersandpolitics.com/discursos/angela-merkel/davos-world-economic-forum-annual-meeting/997> (last accessed on 1 October 2014). [↑](#footnote-ref-26)
27. For burden-sharing, see E Thielemann, ‘Between Interests and Norms: Explaining Burden-Sharing in the European Union’ (2003) 16(3) Journal of Refugee Studies 253; E Thielemann, ‘Towards Refugee Burden-Sharing in the European Union State Interests and Policy Options’ (Ninth Biennial International Conference of the European Union Studies Association, Austin, 31 March-2 April 2005); R Byrne, ‘Harmonization and Burden Redistribution in the Two Europes’ (2003) 16(3) Journal of Refugee Studies 336. [↑](#footnote-ref-27)
28. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention); Protocol Relating to the Status of Refugees (adopted 31 November 1967, entered into force 4 October 1967) 606 UNTS 267. [↑](#footnote-ref-28)
29. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), Art 3(1). [↑](#footnote-ref-29)
30. International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 7. [↑](#footnote-ref-30)
31. Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection [2003] OJ L 180/13 will be applicable from 21 July 2015. Up until then remains applicable Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18. [↑](#footnote-ref-31)
32. Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/2011 is applicable from 21 December 2013. It has replaced Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12. [↑](#footnote-ref-32)
33. Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection [2013] OJ L 180/13 will be applicable from 21 July 2015. Up until then remains applicable the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13. [↑](#footnote-ref-33)
34. Regulation 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/13 is applicable from 1 January 2014 [Hereinafter Dublin III Regulation]. It has replaced Council Regulation (EC) 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national [2003] OJ L50 [Hereinafter Dublin II Regulation]. [↑](#footnote-ref-34)
35. *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011). [↑](#footnote-ref-35)
36. Joined cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law* [2011] ECR I- 13905. [↑](#footnote-ref-36)
37. See <http://www.ft.com/intl/cms/s/0/44697a5a-2379-11e4-8e29-00144feabdc0.html#axzz3G7if3Dmq> and <http://uk.reuters.com/article/2014/08/14/uk-eurozone-economy-france-finmin-idUKKBN0GE0C520140814> (last accessed on 1 October 2014). [↑](#footnote-ref-37)
38. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ”EU Citizenship Report 2013: EU Citizens: Your Rights, Your Future”, COM (2013) 269 final, 8 May 2013, p. 6 [↑](#footnote-ref-38)
39. This text is not intended to discuss the ideas about justice expressed by famous political philosophers such as Aristotle, Immanuel Kant, John Stuart Mill, Plato or John Rawls in their ethical theories. [↑](#footnote-ref-39)
40. ECRE Report on the Application of the Dublin II Regulation in Europe, AD2/3/2006/EXT/MH, 2006; Amnesty International, The Dublin II Trap: Transfers of Asylum-Seekers to Greece, 2010. [↑](#footnote-ref-40)
41. For example, as provided by Eurostat, in 2012 there were high disparities between EU Member States of incoming Dublin requests (requests received by one EU Member States from other EU Member States, requesting that Member State to accept responsibility of an asylum application based on the Dublin rules), with Italy receiving by far the most incoming requests (12358, and followed by Poland with 4725 request). On the other hand, asylum seekers seem to prefer applying for asylum in certain Member States which are not necessarily at the EU external borders. In 2013 five EU Member States (Germany, Sweden, France, UK and Italy received 70% of all asylum applications. The picture was, however, different in relative terms, with Malta having received the highes number when compared to its national population (20.2 asylum seekers per 1,000 inhabitants) (UNHCR statistics). [↑](#footnote-ref-41)
42. European Council on Refugees and Exiles, ’Comment from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation’ (April 2009). [↑](#footnote-ref-42)
43. S Velluti, ’Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of European Courts’ (2014), Springer, p. 9.

    Hemme Battjes, ‘Mutual trust in asylum matters: the Dublin system’, in: Meijers Committee (Standing Committee of Experts on International Immigration, Refugee and Criminal Law), ‘The Principle of Mutual Trust in European Asylum, Migration and Criminal Law’ (2011). FORUM, Institute for Multicultural Affairs, Utrecht, p. 9. [↑](#footnote-ref-43)
44. Eurobarometer Qualitative Study: “The Promise of the EU”, Aggregate Report, September 2014, p. 6. The Study has further found out that in Germany” as with Denmark and Finland, solidarity was seen as “helping people to help themselves” rather than purely as financial assistance. In Denmark ”economic solidarity was viewed as problematic and revealed clear divisions for Danish respondents between Northern and Southern Europe. There was a feeling that financial assistance to struggling Member States has to be linked to responsible behaviour, and that such assistance was not the solution to structural problems or reckless financial behaviour in these Member States.” On the other hand, in Portugal “it was felt that Member States in financial difficulties should be helped without question.” [↑](#footnote-ref-44)
45. See e.g. “The Hague Programme: strengthening freedom, security and justice in the European Union”, Annex I to the Presidency Conclusions of the European Council, 4/5 November 2004; p. 5 of “The Stockholm Programme: an open and secure Europe serving and protecting citizens” (2010/C 115/01); and the most recent strategic guidelines of the European Council meeting on 26/27 June 2014 (EUCO 79/14).

    See also the emphasis “an area of justice and fundamental rights based on mutual trust” in Jean-Claude Juncker’s opening statement at the European Parliament’s plenary session in Strasbourg, 15 July 2014, entitled “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission”. [↑](#footnote-ref-45)
46. According to Battjes, mutual trust in the Dublin system is “the assumption that each Member State will treat asylum-seekers and examine their claims in accordance with the relevant rules of national, European and International Law” (Hemme Battjes, ‘Mutual trust in asylum matters: the Dublin system’, in: Meijers Committee (Standing Committee of Experts on International Immigration, Refugee and Criminal Law), ‘The Principle of Mutual Trust in European Asylum, Migration and Criminal Law’ (2011). FORUM, Institute for Multicultural Affairs, Utrecht, p. 9.). [↑](#footnote-ref-46)
47. See Recital 2 of the Dublin II Regulation and Recital 3 of the Dublin III Regulation. [↑](#footnote-ref-47)
48. See UNCHR, ‘The Dublin II Regulation – A UNHCR Discussion Paper’ (April 2006). [↑](#footnote-ref-48)
49. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001], OJ 212/12. [↑](#footnote-ref-49)
50. European Commission, ‘Study on the Feasibility of Establishing a Mechanism for the Relocation of Beneficiaries of International Protection’, July 2010, JLS/2009/ERFX/PR/1005 2010-70092056. [↑](#footnote-ref-50)
51. European Asylum Support Office, ‘EASO Fact Finding on Intra-EU Relocation Activities from Malta’ (July 2012) <http://easo.europa.eu/wp-content/uploads/EUREMA-fact-finding-report-EASO11.pdf> accessed 26 October 2013. [↑](#footnote-ref-51)
52. See Council, ‘Council Conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows’, Brussels, 8 March 2012; Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum – An EU Agenda for better responsibility-sharing and more mutual trust’ COM (2011) 835 final. [↑](#footnote-ref-52)
53. HOME/2011/EFRX/FW/O4. [↑](#footnote-ref-53)
54. European Parliament Study, ‘What System of Burden-sharing Between Member States for the Reception of Asylum Seekers?’ January 2010, PE 419.620. [↑](#footnote-ref-54)
55. For the UNHCR comments on the migration and asylum funding see <http://www.unhcr.org/50e6e0099.pdf> (last accessed on 3 November 2014) and for the ECRE comments see <http://www.ecre.org/component/news/news/2-focus/204-the-future-of-eu-funding.html> (last accessed on 3 November 2014). [↑](#footnote-ref-55)
56. Case C-370/12 *Pringle*[2012], judgment of 27 November 2012, nyr. [↑](#footnote-ref-56)
57. See, Opinion of AG Kokott in Case C-370/12 *Pringle*[2012] nyr, paras 142-145. [↑](#footnote-ref-57)
58. For the discussion of solidarity as a self-interest mechanism see, e.g. A Raspotnik, M Jacob and L Ventura, TEPSA Brief: ’The issue of solidarity in the European Union’, 2012. [↑](#footnote-ref-58)
59. See Astri Suhrke, ‘Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action’ (1998) 11(4) Journal of Refugee Studies 396. [↑](#footnote-ref-59)
60. This is well illustrated by the example of Austria which had 6,724 asylum applications in 1985, compared to 27,306 asylum applications in 1991 – 7,506 of those coming from Romania and 6,436 from former Yugoslavia (due to the armed conflict there). The number again fell drastically to 4,745 in 1993, again rising to 39,355 in 2002 (see Eurostat asylum statistics, ‘Asylum Applications’ <http://epp.eurostat.ec.europa.eu/statistics\_explained/index.php/asylum\_statistics > accessed 3 November 2014. [↑](#footnote-ref-60)
61. Self-interest is, though, not that apparent in states like e.g. Portugal which neither have a ”pull factor” nor are geographically located in such a way to receive a high number of refugees. [↑](#footnote-ref-61)
62. For the discussion and literature on contagion see e.g: G Corsetti, M Pericoli and M Sbracia, ‘Correlation Analysis of Financial Contagion, in *Financial Contagion: The Viral Threat to the Wealth of Nations* (ed. R. W. Kolb), John Wiley & Sons, Inc., Hoboken, (2011); O de Bandt and P Hartmann, ‘Systematic Risk: A Survery’, ECB Working Paper Series, No. 35, November 2000; ECB, ‘Financial market contagion’, Financial Stability Review, December 2005; ECB, ’The concept of systemic risk’, Financial Stability Review, December 2009; Marcello Pericoli & Massimo Sbraci, ‘A Primer on Financial Contagion’, (2003) 17 Journal of Economic Surveys, (Page number?) [↑](#footnote-ref-62)