# Part II:

# Solidarity as a Legal Principle within the European Union's Legal System

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# Solidarity in the European Union in Times of Crisis: Towards "European Solidarity"?

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## *Introduction*

This chapter presents legal principles and provisions and policies adopted within the European Union, and also considers the commitments undertaken by member states, derived from both customary rules and treaties. Special attention will be devoted to solidarity as it is addressed by the founding treaties, as they developed within the framework of international and human rights law. It also explores the relevant case law of the Court of Justice of the European Union (CJEU) – which is endowed with the power to ensure the correct and uniform interpretation of EU law and to assess member states' compliance with EU obligations.

Following the paths of European integration, member states are increasingly called to share responsibility and to handle issues with a solidarity-inspired approach when dealing with economic, financial, social, and humanitarian challenges affecting Europe since early 2008.

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1 Paragraphs 1 (*Introduction*) and 5 (*Towards a model of "European Solidarity"? Concluding remarks*) are the result of a joint reflection by the Authors. Paragraphs 2 (*The context of European solidarity: social, economic and political challenges*), 3 (*Solidarity in the European Union; Horizontal solidarity; Horizontal solidarity in the Treaties; Vertical solidarity; Vertical solidarity and the EU in the human rights perspective; Solidarity via 'minimum harmonisation'?*) and 4 (*Unemployment*; *Social protection of workers and inactive citizens between national and European solidarity; EU strategy to contrast unemployment*) have been written by Ester di Napoli. Paragraph 4 (*Disability; Equal treatment and Immigration/Asylum; Article 80 TFEU: scope and implications; The critical aspects of the system of Dublin; Solidarity in asylum seeking*) by Deborah Russo.



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*The Context of European Solidarity: Social, Economic and Political Challenges*

In the last decade, the European Union has faced a series of events that have put the idea of European solidarity under considerable strain. In particular, its member states and populations had to first face a deep financial and economic crisis, followed by rounds of austerity policies, compounded by massive influxes of migrants forced to flee from the Syrian war and geo-political instability in the Middle-East. These events have afforded opportunities to European institutions and member states, as well as to the European demos, to commit to fiscal and economic solidarity and/or to take joint responsibility for the many refugees and migrants. However, this series of events has also provided an opportunity to challenge the idea of European solidarity as announced in European principles, norms and attached values.

On the one hand, since late 2008, after the banking crisis was triggered by Lehman Brothers' bankruptcy, a global recession has affected the whole European Union, albeit unevenly, with some countries suffering more than others. Looking at growth in gross domestic product (GDP) between 2007 and 2011[2], the crisis has just slightly affected countries such as Austria, Germany and Poland, as well as Sweden (and Norway – outside the EU), Belgium, Slovakia and Malta. The crisis had a stronger impact on countries such as Denmark, Hungary, Italy, Slovenia and the UK. Some Southern European countries and the Baltic ones have been severely hit by the economic and financial crisis, which has been combined in some cases, namely in Greece, Italy and Spain, with dramatic public debt exposure.

On the other hand, large migration flows of both asylum seekers and economic migrants have contributed, increasing the challenge to the solidarity capacity of European societies and institutions. In fact, since 2014, Europe has experienced the greatest mass movement of people since the Second World War.[3] More than a million refugees and migrants have arrived in the European Union, the large majority of whom were fleeing war and terror in Syria.

2 See https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/impact-of-the-crisis-on-working-conditions-in-europe.

3 See https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports/nationalreports_en.



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These crises have severely challenged the EU. They have required an extraordinary effort from EU institutions and member states in both economic-financial and infrastructural levels. Moreover, the collective financial support to countries most severely hit by the economic and public debt crunches unleashed political tensions among member states, ensued by harsh debate between some countries and the EU as institutions, as well as among its peoples. Such tensions and conflict questioned the capacity of European governments and of EU institutions to effectively address issues in a solidarity manner, leading to a corrosion of the EU legitimacy in the public sphere.

Indeed, the economic stress, and the increased social fragility provoked by the crisis and by the austerity policies have deeply impacted euro-optimism and trust in the EU in both political and identity terms. Available data confirms that the EU has suffered in regard to public support. For example, Eurobarometer data show that the crisis has negatively affected attitudes towards EU membership among European citizens. Between 2007 (before the start of the crisis) and 2013, the percentage of European citizens that felt their country's EU membership was a good thing declined respectively from 72.6% to 50%. Such a sharp decrease in the positive appreciation of EU membership occurred especially in those countries most affected by the economic crisis such as Spain (that lost 26 percentage points), Greece (-21%) and Portugal (-19%).[4] In a similar vein, the percentage of people having an overall positive consideration of the EU declined in the post-crisis period: before the crisis, approximately 50% of Europeans had a positive opinion of the EU (see Figure 2). Since then, there has been a significant increase in the percentage of those having a fairly (and also very) negative image of the EU. In fact, in 2013 and in 2016 less than a third of European respondents had a positive image of the EU.

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4 See "Eurobarometer 40 years", http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Archive/index.



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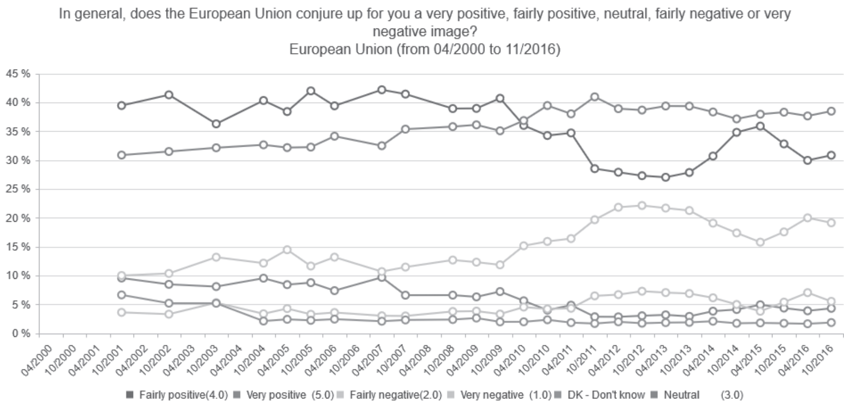
*Figure 1. Opinions on EU membership (Source: Eurobarometer)*

*Figure 2. EU image (Source: Eurobarometer)*




Consistent with earlier figures, optimism too has declined since 2007 when 69% of European citizens declared being optimistic about the future of the EU. In the autumn of 2013, the percentage of those having optimistic views about the EU's future had fallen to 51% (with a significant portion of interviewees saying they were actually pessimistic (43%). Again, the decline in the number of those being optimistic was stronger in the countries most severely hit by the different crises such as Cyprus (-41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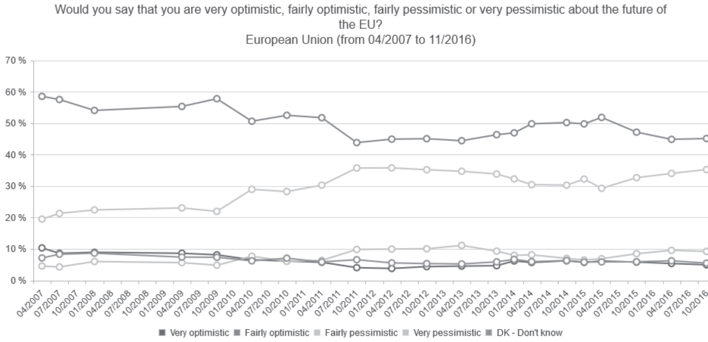
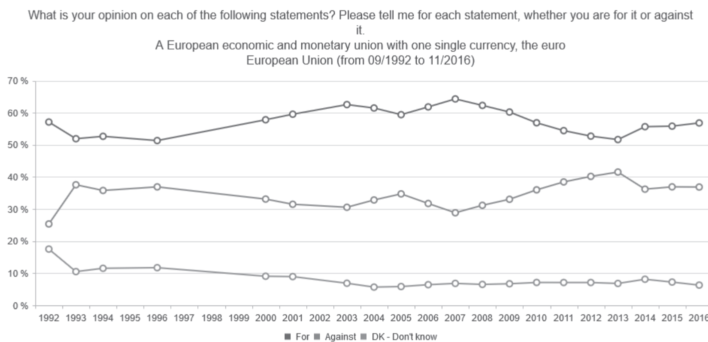
percentage points), Greece (-38), Italy (-28), Portugal (-26), Spain (-26) and Slovenia (-26)[5] (see Figure 3).

*Figure 3. Optimism about the future of the EU (Source: Eurobarometer)*




Finally, the impact of the crises was also felt also on a key aspect of the EU institution-building: the common market and its common currency. If we consider people's appreciation of the "European economic and monetary union with one single currency, the euro" we can see that since autumn 2009, such appreciation started to decrease, most likely because of the sovereign debt crisis in the euro area and the EU's response to that (see Figure 4).

*Figure 4. Opinions on the euro (Source: Eurobarometer)*




5 See "Eurobarometer 40 years", http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Archive/index.

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This trend of disaffection with the EU, a culmination point of the various crises Europe has faced in the last decade, peaked with Brexit, a paradigmatic example of decline in infra-European solidarity. In fact, transnational solidarity in the form enshrined by the UK membership of the European Union has dissolved following the country's decision, through a referendum held in June 2016, to leave. Although somewhat perennially regarded as 'reluctant Europeans', the vote by the UK electorate to end EU membership exposed the fragility of the European Union in a context of crisis and austerity.

More specifically, however, the actual tenor of the campaign which took place during the referendum revealed not only divisions within the UK in relation to age (older voters were more likely to vote for Brexit) and constituent nation (Scotland and Northern Ireland voted to remain in the EU) but also the so called 'winners and losers' of globalisation (Hobolt, 2016), a polarising factor mirrored across parts of Europe and the United States. Furthermore, the focus of the leave campaign in the UK on immigration, a salient issue for other EU countries, undermined one of the fundamental freedoms of the EU, the freedom of movement, by amplifying some of the most negative tropes on migration and asylum and which may have contributed to a 41% spike in the number of racially or religiously aggravated offences in July 2016 compared to July 2015 (Corcoran and Smith, 2016). In such a polarised and shifting political landscape, the UK is reconfiguring its relations with its European neighbours, and the triggering of Article 50 of the TFEU (which allows member states to withdraw from the European Union) begins a two-year process of negotiations over a wide range of policy areas which will undoubtedly test the solidarity between the UK and the European Union to the maximum.

Since the Europe of 27 shall shape its future, the discussion on the social dimension of the European Union is timely and essential: on 25 March 2017 – on the sixtieth anniversary of the European Treaties – the member states' leaders signed the "Rome Declaration", a reflection paper to prepare the way for a full and open discussion on the strengthening of the EU social dimension, in order to achieve a safe and secure, prosperous, competitive, sustainable and socially responsible Union, capable of "shaping globalisation". The Rome Declaration endorsed the European Pillar of Social Rights, announced by Mr. Juncker in September 2015, and intervening in three areas: equal opportunities and access to the labour market; fair working conditions; adequate and sustainable social protection.


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The following section of this chapter discusses how solidarity is conceptualised within the EU political-institutional legal framework. In particular, it investigates whether an obligation of solidarity – and, therefore, of shared responsibility – among Member States arises from the EU Treaties and from the secondary law adopted in the fields of unemployment, immigration, asylum and disability. In presenting the legal instruments adopted by the EU in these sectors, it focuses on both soft (e.g. the Open Method of Coordination) and hard law.

By re-contextualsing European solidarity, the chapter studies the emergence – and the feasibility – of genuine measures to promote solidarity, ones that go beyond the mere coordination of 'solidarity' among different national systems.

## *Solidarity in the European Union*

The European Union legal framework has not been established (nor has it developed) in a vacuum; it draws some of its key principles from International Law. This also applies to solidarity, which – according to the UN General Assembly's 2001 and 2002 resolutions – is "a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burden fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit at least receive help from those who benefit the most"[6] (Campanelli, 2012). Such resolutions, which do not have legal binding force, have, however, a programmatic content and a human rights-based approach. At the international level, the UN promotes an equitable and cohesive international community, where solidarity entails a form of "help" offered by some actors towards others, in order to achieve common goals or to recover from critical situations. European Union Law has evolved to include two types of relationship: firstly, the relationship among states, and secondly, the relationship between States and individuals. These two forms of solidarity – that can be referred to, respectively, as "horizontal" and "vertical" solidarity –

6 UN General Assembly, resolutions 56/151 of 19 December 2001 and 57/213 of 18 December 2002, both entitled "Promotion of a democratic and equitable international order", available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/2bbae3bc55f36b86c1256b80003f2f81?Opendocument and here: http://www.refworld.org/docid/3f49d46a4.html.



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have different political roots and legal implications, so therefore they will be treated separately in the following sections. To give an example about such a diversity of meaning between horizontal and vertical solidarity, one may consider that evidence of solidarity between states does not necessarily emanate from the fact that strong solidarity ties exist within those countries' populations or among them. However, solidarity among people in the long run contributes to forging a stronger sense of solidarity within the populations, at the benefit of the overall societal cohesion in Europe.

### *Horizontal Solidarity*

Solidarity, and in particular horizontal solidarity, has been part of the European Union establishment and development since its inception. On 9 May 1950, the French Minister Robert Schuman, proposing the creation of a European Coal and Steel Community, famously declared 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".

Solidarity became a crucial value to be supported by a supranational organisation whose primary goal was to develop a common market, a common commercial space implying competition and therefore potential contentiousness among its participants (the member states). Therefore, solidarity was a value to be nurtured for mitigating the potentially divisive effects of the common market, and its associated freedom of movement of persons, goods, services and capital. We could also consider that solidarity has been a key factor in the establishment of European integration as a stepwise process of resource-sharing and mutual policy learning. In fact, European integration, built on an *ad hoc* established system of norms and mutual obligations, required a sense of solidarity among participants to be successful in the long term. In the following section, we briefly discuss how such solidarity provisions have been addressed by the Union since its inception, drawing on examples from its founding Treaties.

### *Horizontal Solidarity in the Treaties*

Horizontal solidarity is already evoked in the EU Treaties. For example, Article 3 of the TEU, enunciating the objectives of the Union, declares that the Union "shall promote economic, social and territorial cohesion,


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and solidarity among Member States". This formulation unveils the programmatic nature of this principle. In fact, when specific strategic policies are at stake, still in the treaties, we find evidence of the need for infra-state solidarity. For example, according to Article 80 of the TFEU, "The policies of the Union set out in this Chapter [V, devoted to EU policies on border checks, asylum and immigration ] 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" [emphasis added]. Notwithstanding the unsatisfactory level of compliance with such a provision – which will be discussed in the section devoted to "Immigration and asylum", the provision clearly offers the legal basis for measures aimed at sharing burdens and duties of member states and in contributing towards shaping a common European policy in the field of immigration.

Another of such examples is offered by Articles 122 and 194 of the TFEU which establish a principle of solidarity in the field of economic policy, and, in particular, with reference to energy policy ("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").

In the same vein, Article 222 of the TFEU, states that "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" [emphasis added]. And it is in fact on that article's basis that Regulation (EU) n. 661/2014 of 15 May 2014 amending Council Regulation (EC) n. 2012/2002 establishing the European Union Solidarity Fund, was adopted[7]. The EU Solidarity Fund is a sound and flexible element at the disposal of the European Union that allows it "to show solidarity, send a clear political signal and provide genuine assistance to citizens affected by major natural disasters that have serious repercussions on economic and social development". The regulation was adopted to provide the Union with a systematic, regular and equitable method of granting financial support involving all member states according to their capacity,

7 OJ L 189 of 27.6.2014, p. 143 ff.



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rather than such support being provided on an ad hoc basis. Moreover, the same regulation n. 661/2014 improves and speeds up the procedure of granting financial contributions to States which have been hit by a "terrorist attack" or "natural or man-made disaster" (where such expressions shall be given an autonomous and "unambiguous interpretation, as outlined in the Regulation's Preamble) by establishing, in Article 4, that "As soon as possible and no later than 12 weeks after the first occurrence of damage as a consequence of a natural disaster, the responsible national authorities of an eligible State may submit an application for a financial contribution from the Fund to the Commission".

However, horizontal solidarity is invoked in the EU Treaties also when foreign policy is at stake. In fact, Article 24 TFEU (to which Articles 31, par. 1, and 32 are linked) underlines that the EU's external action shall be based on "the development of mutual political solidarity among Member States" (paragraph 2) and that "Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity" (paragraph 3).

In sum, horizontal solidarity, that is infra-state solidarity, finds a sound legal basis in the EU Treaties, as both a general principle to guide infra-state collaboration to achieve the overall goal of the Union, as well as a specific provision in strategic policy areas or in paradigmatic situations, such as, asylum, immigration, energy, foreign policy, and natural or man-made disasters.

### *Vertical Solidarity*

The vertical dimension of solidarity is solidarity focused on relationships, on the one hand, between the EU and its member states, and, on the other, between the EU and individuals. The latter also entails an infra-individual form of solidarity, addressed by EU Law. Vertical solidarity as a whole has been developed through European instruments for the protection of human rights, based on member states' common constitutional traditions, the European Convention on Human Rights (ECHR) and, ultimately, the EU Charter on fundamental rights (hereinafter also the "EU Charter").


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*Vertical Solidarityin the Treaties*

The infra-individual dimension of vertical solidarity appears in the Preamble of the TEU stating that the Union aims to "deepen the solidarity between their peoples while respecting their history, their culture and their traditions". Again, solidarity is also mentioned in Article 2 of the TEU, which enunciates the principles that have to inspire the EU's policy action: "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 where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Furthermore, vertical solidarity takes an intergenerational meaning in Article 3 of the TFEU, stating that the EU "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

*Vertical Solidarity and the EU in the Human Rights Perspective*

The European vertical dimension of solidarity has been progressively based on the Union's promotion and adherence to human rights' principles. In this sense, one of the most salient instruments to promote vertical solidarity in the European society is the European Charter. The Charter is binding only with respect to acts undertaken by EU institutions, or by member states in implementing EU Law. The EU Charter makes significant reference to the principle of solidarity, in its Preamble, which establishes that: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity". Moreover, the entire Title IV of the Charter (Articles 27-38) is devoted to (as its title suggests) solidarity. Such Title includes provisions related to the fundamental rights of workers such as the workers' right to information and consultation within the undertaking (Article 27); the rights of collective bargaining and action (Article 28); access to placement services (Article 29); the protection in the event of unjustified dismissal (Article 30); the right to fair and just working conditions (Article 31); the prohibition of child labour and the protection of young people at work (Article 32); the right to a family and professional life (Ar-



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ticle 33); the right to social security and social assistance (Article 34). Some provisions entail a principle of accessibility to services which are an essential precondition for the dignity and the development of the person, such as the right to health care (Article 35); the right of access to services of general economic interest (Article 36); the rights to environmental and consumer protection (Articles 37 and 38).

According to certain democratic constitutions, solidarity is also promoted through respect and protection of cognate principles, such as the principles of equality and non-discrimination. According to such a broad understanding of solidarity as a principle strictly intertwined with equality and non-discrimination, the state has the duty to remove barriers and contrast disadvantages that preclude equality. Such principles are incorporated into the EU Charter, whose Articles 20 and 21 establish, respectively, the right to equality before the law and the prohibition of discrimination. The Charter also includes the recognition of positive obligations to avoid discrimination as established, for example, by Article 26*,* which states that persons with disabilities will be entitled to "benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". As we discuss in the section devoted to disability, this provision – interpreted in accordance to the UN Convention on the rights of persons with disabilities (UNCRPD) – requires the EU and its member states to elaborate on specific policies to grant disabled people full participation in society's life, and to remove obstacles causing discrimination and exclusion. Unfortunately, the Court of Justice of the European Union (CJEU) case law has suggested that Article 26 enshrines a mere principle rather than a proper right, and as a principle, it requires a normative specification in European Union or national law to confer a subjective right that individuals can invoke as such (see, to that effect, Article 27 of the Charter, Case C 176/12 *Association de mediation sociale*, paragraphs 45 and 47). Such an interpretation of the notion of "principles" contained in Article 52, para. 5, of the Charter introduces uncertainty in the field of protection of rights, and in particular social rights, since the Charter does not clearly distinguish between provisions affirming rights and those providing for principles.

In general, the existence of positive obligations might be inferred by Article 52 of the Charter. According to this provision, in so far as the EU Charter rights correspond to rights guaranteed by the European Convention on Human Rights, these must be interpreted according to the meaning and scope of the latter (and in accordance with the jurisprudence of the



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European Court of Human Rights – ECtHR), except for the possibility of according a more extensive protection.

Regretfully, this provision does not mention (but it certainly does not exclude) the need to interpret the Charter in accordance with the European Social Charter of the Council of Europe. The latter treaty complements the ECHR as far as social rights are concerned. Its monitoring body, the European Social Committee, receives communications from victims of violations and, through its concluding observations, plays a fundamental interpretative role.

Both the European Court of Human Rights and the European Social Committee have consistently affirmed that when the EU member states have to act in compliance with obligations stemming from EU Law, they must respect the standards of protection of human rights provided by those treaties. This is an important principle which grants effectiveness to the international protection of human rights and, particularly, to the case law imposing positive obligations on contracting state.

In addition of giving binding force to the EU Charter, Article 6, para. 2, of the TEU imposed an obligation on the European Union to accede to the ECHR: that development will lead to the scrutiny of EU Law by the ECtHR. Nevertheless, eight years since the entry into force of this provision of the TEU, ratification is yet to be finalised. The CJEU gives the ECHR "special significance" as a "guiding principle" in its case law (Polakiewicz, 2013). Yet, on 18 December 2014, the CJEU found the final text of the accession agreement between the Council of Europe and the EU of April 2013 not in accordance with EU Law[8]. The EU accession to the ECHR has, therefore, been postponed to an unknown time in the future. In a note of 2 October 2015, the Presidency of the Council of Europe outlined the state of play on the accession of the EU to the ECHR following the CJEU's opinion: the Presidency considered that the accession remains of paramount importance[9]. The commitment to continue working on the ECHR accession was expressed on 20 April 2016, and again reiterated on 9 November 2016 by Parliament's Committee on Constitutional Affairs (AFCO) in its opinion for the Committee on Civil Liberties, Justice and Home Affairs (LIBE) on the situation of fundamental rights in the

8 CJEU Opinion 2/13, 18 December 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst &dir=&occ=first&part=1&cid=40247.

9 http://data.consilium.europa.eu/doc/document/ST-12528-2015-INIT/en/pdf..



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European Union in 2015, where it invited the Commission to identify the steps necessary for the accession.

A restriction to the vertical dimension of solidarity and to its human rights based approach, relates to its limited scope of application, due to the principle of attribution of EU competences. In fact, the rights based on solidarity apply in the areas of EU competence. However, as we shall discuss in the following sections, the Union has de facto forged a cross-policy area of action where solidarity has a role to play.

### *Solidarity via 'Minimum Harmonisation'?*

While policy harmonisation has been extensively achieved in many areas related to market regulation, in domains where the European Union does not have a direct competence, such as in the field of social policy and more broadly welfare state services that are relevant to promoting vertical and horizontal solidarity, its actions have been softer (but not to be neglected). Social policy, in the European Union, as provided by Article 151 and subsequent of TFEU – better dealt with in the section dedicated to unemployment – is primarily developed by minimum harmonization goals, that is through rules aimed at minimising the different levels of provisions existing among member states rather than through the promotion of a common general standard system. This means that the European legislator has the power to adopt minimum standards of social protection, which prevent those member states with particularly inclusive welfare state provisions, to have to lower their standards (Shanks 1977; Ronchi 2013). Such a policy framework has not affected the heterogeneity in national policy and legal systems with reference to social – and welfare state – provision, *de facto* allowing the existence of a differentiated, unequal, system of (a plurality of) solidarities among EU citizens and among member states. The consequence of the distinct attitudes that member states show towards solidarity is that it is not possible to identify one single "European social model".

As has been partially highlighted, European social provisions have taken shape through the treaties (and secondary legislation) and the case law of the CJEU. In the seventies, several European directives were adopted against a background of economic recession and mobilisation by militants at a national level. In 1974, Europe adopted its first Social Action Programme, under pressure from the trade unions. The programme provided



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for some 40-priority actions, designed to achieve three main objectives: full employment and better jobs, employment policy, and improvements in living and working conditions. Between 1989 and 1997, a strategy defining minimum social standards was launched, the 1989 Community Social Charter of the Fundamental Social Rights of Workers: throughout its historical process of European social integration, progress has been made, albeit slowly, towards a more proactive, all-embracing approach to employment policy (Tilly 2016).

Several methods have been used to build social Europe, among them, a soft-law approach. A paradigmatic example of a 'soft' policy instrument as a way towards an EU social policy is a policy instrument used as a reference point in social policy. The European strategy established in the Treaty of Amsterdam in the field of social policy set forth the premises of the enhancement of the "open-method of co-ordination" (OMC) as an emerging form of European social governance (Sciarra 2000)[10]. The OMC has been defined as "a process, in which clear and mutually agreed objectives are defined, after which peer review, on the basis of national action plans, enables EU Member States to compare practices and learn from each other" (Vandenbroucke 2002): in its intentions, the OMC aims to be a "creative" and flexible instrument that respects local diversity, a pragmatic approach which can effectively foster social progress. Through OMC States should jointly define their objectives (adopted by the Council) in the field of employment and social policy, establish measuring instruments (statistics, indicators, guidelines) and benchmarking by comparing EU

10 Article 127 of the TEC established that "The Community shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected. 2. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities", while Article 128 states that "1. The European Council shall each year consider the employment situation in the Community and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission. 2. On the basis of the conclusions of the European Council, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee referred to in Article 130, shall each year draw up guidelines which the Member States shall take into account in their employment policies. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article 99(2). […]".

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countries' performances and exchange of best practices (monitored by the Commission).

The OMC has provided a new framework for cooperation between EU countries, whose national policies can thus be directed towards certain common objectives. After some initial enthusiasm (Prpic 2014), the OMC has been increasingly criticised for the lack of democratic legitimacy and effectiveness due to its political irrelevance at national level and the absence of control mechanisms (Frazer and Marlier 2008). The European Parliament, in a 2003 resolution on the application of the Open Method of Coordination, called for it to be introduced into more fields, but warned against its becoming a "non-transparent and subversive parallel procedure in the EU"[11]; in a 2007 resolution on the use of soft law, and in one of 2010 on economic governance, EU Parliament called the OMC "legally dubious", and demanded an end to reliance on it in economic policy[12]. However, more recently, it positively viewed the application of OMC in the European Voluntary Quality Framework (2011 resolution on social services of general interest[13]), and likewise, the EU Regulation n. 1380/2013 on common fisheries policy.

However, as the Commission itself has noted in its *Reflection paper on the social dimension of Europe*, the 'soft' policy methods adopted to promote social policy at European level via harmonisation and progressive convergence, has not resisted the blows of the economic and financial crisis that has left European societies even more unequal than they were in terms of unemployment, deprivation, and social exclusion. In sum, the European policy on social and employment fields has not been successful in realising the goals established in 2010, when EU leaders committed to reducing the number of people at risk of poverty by some 20 million by 2020. Actually, the Union is still far from achieving these objectives and the crisis further impeded reaching them.

## *Preliminary Concluding Remarks*

To sum up our earlier sections we can say that although the European Union is challenged by its capacity to deal with several phenomena, such

11 P5_TA(2003)0268.
12 P6_TA(2007)0366 and P7_TA(2010)0224.
13 P7_TA(2011)0319.


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as the economic and financial crisis, and geo-political instability leading to massive fluxes of migrants and asylum seekers, it possesses the legal and policy instruments to allow it to deal with such challenges in a more explicit solidaristic manner.

Solidarity is the EU's intimate component: it is indicated as a key-value in its founding treaties both as a general principle and as a norm guiding mutual support among member states and peoples during specific circumstances such as natural or man-made calamities. In addition, in fact, solidarity was evoked as a guiding idea by the inspired political leaders who forged the very idea of a united Europe.

What is left to be done is a thorough implementation of such a principle, and although the road towards such an implementation seems to be long, progress has been made already: in the following sections we discuss how the European Union has developed (or in some cases failed to do so) solidarity as a policy principle in three areas: disability, unemployment, and migration/asylum.

## *EU Policies and Case Law in the Areas of Disability, Unemployment, and Immigration/Asylum: An Overview*

### *Disability*

The European Commission expects the number of EU citizens living with a disability to reach 120 million by 2020 (EC 2017, 4). Disability therefore, and the policies aimed to address it, represent very salient issues for European solidarity to be tested. In fact, disabled people show much lower employment rates (48.7%) than people without disabilities (78.5%). They also score worse on education parameters (22.5% of young people with disabilities are early-education and training leavers versus 11% of young pupils without disabilities), not to mention the higher proportion of people with disabilities among those who live in poverty (30%) compared to people without disability (21.5%) (EC 2017, 4). Therefore, action is required at European level to address such issues in a solidaristic way aimed at making Europe an environment where opportunities are made equal among its citizens regardless of their status. In this section, we present an overview of how the EU has addressed challenges related to persons with disability through both its key policies and through ECJ case law.



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In the field of disability, the EU's policy is rooted in international legal/policy provisions, such as the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted by the UN General Assembly in 1993[14]. Although not a legally binding instrument, the Standard Rules represent a strong moral and political commitment for Governments to take action to attain equalisation of opportunities for persons with disabilities. The Standard Rules serve as an instrument for policy-making and as a basis for technical and economic co-operation, and consist of twenty-two articles, organised into four chapters – preconditions for equal participation, target areas for equal participation, implementation measures, and the monitoring mechanism – covering all aspects of the lives of people with disabilities. Furthermore, the Standard Rules provide for the appointment of a Special Rapporteur to monitor their implementation.

However, the cornerstone of EU policy and legal framework in this area is the 2006 UN Convention on the Rights of Persons with Disabilities (CPRD) that the EU ratified in 2010. The Convention was the first Convention on human rights to be ratified by a regional integration organisation. All (still) 28 EU member states signed it, and 25 ratified it. The Convention represents a watershed in the political conceptualisation of disability, one that shifts disability from a medical to a social and legal condition, meanwhile increasing the social and political empowerment of people with disabilities.

The CPRD is intended as a human rights instrument with an explicit, social development dimension: it adopts a broad categorisation of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities, and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced. This implies the imposition of positive obligations on contracting parties (included the EU) in order to adopt all those measures essential for rendering effective the rights of disabled persons[15].

As far as the EU policy and legal framework on disability are concerned, the CRPD provides what is a particularly useful provision when it

14 http://www.un.org/esa/socdev/enable/dissre00.htm.

15 The standard of reasonableness though implies a measure of flexibility, which is particularly sensitive to the economic crisis.



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sets a definition of "Discrimination on the basis of disability". The EU, in fact, could make use of its policy competence on anti-discrimination issues to promote an EU-wide disability policy, as we discuss in the following sections. The CRPD defines discrimination as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation".

To monitor its implementation, the CRPD has established the Committee on the Rights of Persons with Disabilities, to which all state parties have to submit regular reports concerning the implementation within their countries. The Committee examines each report and makes suggestions and general recommendations on them, that are then communicated, in the form of concluding observations, to the state party concerned. The reports and the Committee's observations are collected in a web portal[16].

Finally, the Convention is an essential component of EU Law and constitutes a standard of validity for all European legislative acts, which, therefore, must comply with it and have to be interpreted in line with its provisions.

In consistency with such an adherence to the CRPD, the European Union has progressed in acquiring competence on disability issues via its action on anti-discrimination policy but also by developing its own disability strategy. In fact, the requirement for positive obligations of the earlier discussed Directive 2000/78/EC highlights that the prohibition of discrimination based on disability does not forbid only unjustified disparities of treatment, but also needs the implementation of a general policy for granting equal opportunities to people with disabilities, particularly in the field of education and occupation, as a precondition of participation in society. For this reason, with a Communication of 15 November 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, the Commission launched the European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe[17]. The Communication aims at eliminating barriers,

16 http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx.
17 COM(2010) 636 final.


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with actions in eight priority areas: accessibility, participation, equality, employment, education and training, social protection, health and external action. The initial list of actions covered the period 2010-2015. Their implementation is underpinned by instruments such as awareness-raising, financial support, statistics, data collection and monitoring as well as the governance mechanisms required by the CRPD. In addition, it is also worth mentioning the adoption of Regulation (EU) n. 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020[18]. Its brief is financing actions with European added value aimed at promoting the implementation of the principle of non-discrimination on the grounds, among others, of disability and, in general, of contributing, in accordance with Article 4.

In February 2017, the Commission published the evaluation report of the European Disability Strategy that shows significant progress made in all its actions, and reaffirms its commitment to continuing working towards the fulfillment of all the strategies' goals (EC 2017).

### *Equal Treatment*

EU legal and policy provisions converge with those of the CRPD in particular when equal treatment of citizens with respect to work is at stake. The normative reference is Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (so-called "Employment Equality Directive") which protects disabled people from discrimination at work. It provides for prohibition of direct and indirect discrimination in all aspects of employment, including access to work, working conditions (dismissal and retribution) etc. Indirect discrimination occurs when an apparently neutral provision, criterion or practice puts a disabled person at a particular disadvantage in comparison with other persons.

To increase its normative saliency, Article 5 of the directive imposes positive obligations on Member States in order to accommodate the needs of disabled persons and realise their human and social rights in employment. According to this provision: "In order to guarantee compliance with

18 OJ L 354 of 28.12.2013, p. 62 ff.


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the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned".

The strength of the principle of non-discrimination applied to disability was restated in 2006 by the Court of Justice, which ruled that "the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post" (judgement of 11 July 2006, Case C-13/05, *Sonia Chacón Navas*). Moreover, in the same judgement, the Court went on to promote an understanding of disability as something different from a purely medical condition (in that sense, in accordance with CRPD 'social model' understanding of disability). In fact, while rejecting the claimant's reasons, the Court stated that the concept of "disability" is not defined by the directive itself, nor does it refer to the laws of the Member States for the definition of that concept. Therefore, considering the context of the provision and the objective pursued by the legislation in question, the EU legislator, by using the word "disability" in Article 1, deliberately chose a term which differed from "sickness": therefore, the two concepts cannot be treated equally.

The Court has further refined its understanding of disability continuing in its 'social model' interpretation, in a judgement of 18 March 2014 (Case C-363/12, *Z.*), affirming that the concept of disability "must be understood as referring not only to the impossibility of exercising a professional activity, *but also to a hindrance to the exercise of such an activity*. Any other interpretation would be incompatible with the objective of that directive, which aims in particular to enable a person with a disability to have access to or participate in employment" [emphasis added].

Other rulings of the CJEU move the EU understanding of disability even closer to the 'social' rather than to the 'medical' model, with the former considering disability as the results of environmental barriers rather



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than individuals' impairments, while the latter focuses on disabled people's physical or mental issues. Hence, the CJEU, in a case concerning the lawfulness of a worker's dismissal, allegedly on the basis of his obesity, included obesity within the notion of disability. In this case, it argued that disability has to be understood as "a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" (judgement of 18 December 2014, Case C-354/13, *Fag og Arbejde (FOA)*). Such a ruling unveils how the CJEU has relied on the CRPD and acknowledged disability as an evolving concept, specifying that in the area of employment and occupation, EU Law does not lay down a general principle of non-discrimination on the grounds of obesity as such. However, the Court found, for example, that if under given circumstances, the obesity of the worker entails a limitation which results, in particular, from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, such obesity can be covered by the concept of "disability" within the meaning of the directive. It also stressed that the concept of "disability" within the meaning of Directive 2000/78/EC does not depend on the extent to which the person may or may not have contributed to the onset of their disability (*inter alia*, see judgement of 11 April 2013, Cases C-335/11 and C-337/11, *HK Danmark*).

## *Conclusions*

In the field of disability, the EU has developed a robust policy and legal system enrooted in international progressive understanding of disability such as the UNCRPD, which is considered, also by Disabled People's Organisations (DPOs), a policy cornerstone towards an understanding of disability departing from purely medical-based definitions. As such, solidarity towards disabled people has taken the form of a legal-policy framework protecting and promoting equality among people, regardless of their physical and/or mental conditions. In particular, the focus of EU institutions' actions, *in primis* the EU Commission and the CJEU, has been to secure an effective implementation of anti-discrimination policies in employment, which still remain a challenge for disabled persons, other spheres of



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life like education. Moreover, to monitor and promote an effective cross-policy field action supporting people with disabilities, the Commission has established a proper 'strategy' endowed with implementing bodies and mechanisms, whose evaluation reports unveil significant progress in its implementation (EC 2017).

Despite such a policy and legal framework effort, European institutions, urged by DPOs, are aware that there is still a long way toward full implementation of the UN Convention, which requires an overall human rights-based disability strategy aimed at granting equal opportunities and social inclusion for people with disabilities, but which also requires an effective implementation at member-state level.

At the political level, the Commission should make all possible efforts to disseminate awareness of the rights of people with disabilities, to collect data and statistics to monitor the situation and to allocate funds for furthering actions from the EU and its member states.

In particular, we would like to point out two actions on which the Commission should focus its efforts over the coming years:

Promoting the full implementation of the "Employment Equality Directive", by supporting understanding and correct interpretation of the required reasonable measures to be adopted by employers, such as the elaboration and dissemination of guidelines on the proper interpretation of the notions of "disability" and "reasonable accommodation". This is particularly important to avoid economic difficulties of enterprises and public entities in times of crisis overcoming the application of core rights.

Striving for the adoption of the 2008 proposal for an Equal Treatment Directive to fight discrimination not only in the field of occupation but in further key areas such as social protection, education, and access to goods and services, and integrating in this proposal the "accessibility approach" which has also been forwarded by the Proposal for the "European Accessibility Act" (COM(2015)0615 final).

*Unemployment*

Employment has been severely hit by the economic and financial crisis, although unevenly across Europe (Guerrieri 2016). While some member states have seen a dramatic increase in their unemployment rates, and, in particular of youth unemployment, others have proved themselves more capable of dealing with the crisis. Only three countries (Austria, Belgium



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and Germany) had a lower unemployment rate in 2011 than in pre-crisis 2007. Six countries (Estonia, Greece, Ireland, Latvia, Lithuania and Spain) saw an increase of more than 8% in their unemployment rates over this period (Eurostat 2017).

In addition, the crisis has had a tremendous impact on youth unemployment (that is, people under 25), with a rise in this field in 2009 for all countries except Germany. Post 2009, part of Europe experienced a decline in youth unemployment, together with economic recovery in 2010 and 2011. Still, youth unemployment remained above the pre-crisis level in all EU countries with the exception of Austria, Belgium, Germany and Malta. In other countries, mostly in the South-East and Southern Europe, the rising trend also continued after 2011.

Rates concerning the so-called ‘NEET’ (i.e. young people “Not in Education, Employment, or Training”) increased significantly between 2010 and 2015 in the countries most strongly hit by the crisis like Greece (from 18.6% to 24.1%) and Italy (from 22% to 25.7%). Today, the number of young people not in employment, education or training across the EU is estimated at 14 million. However, similar to youth unemployment, NEET’s rates vary widely across Europe, ranging from around 5.5% in the Netherlands to 22.7% in Italy.[19]

In sum, despite some variance, the economic and financial crisis has heavily impacted on the (quantitative and qualitative) level of employment in the large majority of European member states. This puts heavy responsibility on European institutions’ capacity, given that Article 145 of the TFEU, states that “the Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action”. However, as mentioned earlier with reference to social policy, EU competence in this field relies primarily on coordination of national policies and legislation.

However, solidarity-wise, employment policies are connected to two salient issues: the social protection of workers and social rights. The section below discusses these two aspects with reference to unemployment, focusing on freedom of movement and of residence of inactive EU citizens. We are aware that employment policies and labour law have reached a certain level of complexity in the EU, therefore our interest in this sec-

19 For further background information see the Eurofound report, ‘Young people not in employment, education or training: Characteristics, costs and policy responses in Europe’.


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tion is to discuss solidarity issues with a “narrow” focus on legal and policy provisions referring explicitly to unemployment.

*Social Protection of Workers and Inactive Citizens between National and European Solidarity*

As is the case for disability, as well as unemployment, the EU has developed a policy competence by building, not only, but primarily, on anti-discrimination principles, which, in this case, represent a key-value to correctly implementing the freedom of movement of workers across the EU. The pursuit of freedom of movement as a key condition for the common market to succeed has pushed member states, under EU guidance, and sometimes under EU mandatory decisions through its Courts, to agree on some sharing of (un)employment related social security provisions. Article 45 of the TFEU provides for the abolition of any discrimination based on nationality between workers of the member states concerning employment, remuneration and other conditions of work and employment. A relevant piece of legislation concerning the freedom of movement of workers is regulation (EU) n. 492/2011 of 5 April 2011 on freedom of movement for workers within the Union[20]. According to the extensive CJEU jurisprudence, the prohibition of discrimination has progressively covered all elements of the contractual relationship between employees and employers, including the protection of those European citizens who are looking for occupation abroad.

Again, similar to policy development in the disability field, as well as on (un)employment related issues, EU policy has taken inspiration from existing international regulations. For the matter under discussion here, it is particularly interesting to recall the International Labour Organisation (ILO) 1919 Unemployment Convention, which was ratified by all EU member states, except Croatia, Portugal and Slovakia. The convention establishes, according to its Article 3, that those contracting states which have established systems of insurance against unemployment shall “make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of

20 OJ L 141 of 27.5.2011, p. 1 ff.



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such insurance as those which obtain for the workers belonging to the latter".

In this sense, a relevant EU piece of legislation is Regulation (EC) n. 883/2004 on the coordination of social security systems[21], which allows employed/unemployed people (as well as people receiving a pension, etc.) to benefit from the same (or a better) social security system as their member state of origin. In 2009, its implementing regulation was adopted (Regulation (EC) n. 987/2009): the two regulations are commonly referred to as "EU Law on social security coordination". The regulation does not set up a common scheme of social security, but allows different national social security schemes to co-exist, and its sole objective is to ensure the coordination of those schemes so that workers can benefit from them according to where their employment place is rather than according to their nationality. In fact, the preamble of Regulation n. 883/2004 contemplates that "within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account".

Moreover, to constrain the capacities of member states to jeopardise these norms with their own interpretation, according to its recital 37, Regulation 883/2004 states that: "provisions which derogate from the principle of the *exportability of social security benefits* must be interpreted strictly" [emphasis added]. Moreover, Article 3 delimits the matters covered by the regulation, which clearly includes unemployment benefits (along with sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits with respect to accidents at work and occupational diseases; death grants; pre-retirement benefits; family benefits).

The regulation is built on the principle of equality of treatment, as people moving cross borders shall "enjoy the same benefits and be subject to the same obligations under the legislation of any member state as the nationals thereof", at the same time preventing the overlapping of benefits (it expressly establishes that a person shall be subject to the legislation "of a single Member State only"). When crafting such a principle of exportability of social rights as a fundamental complement to the freedom of move-

21 OJ L166 of 30.4.2004, p. 1 ff.



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ment of EU workers, EU institutions had to combine it with some of the member states' reluctance to make their social security provisions the sole attraction for the establishment in their territory of non-national workers or would-be workers. Therefore, the same Directive 2004/38/EC states that "all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State".

The jurisprudence in this field is vast, space reasons oblige us to mention a few cases only, related to the freedom of circulation of inactive individuals or, to phrase it in EU terminology, of non-economically active citizens. In this framework, the discourse around two different ideas of social justice – i.e. social justice with a commutative nature and strictly solidarity-based – gains importance (de Witte 2015). Commutative social justice concerns the rights of the individual to be entitled to certain social benefits as "compensation" for having worked, that is for having contributed to social welfare. Solidarity-based social justice comes into play in relation to the freedom of movement of inactive nationals (Strazzari 2016). However, the question on the model of social justice that needs to be applied in transnational mobility – mainly to inactive individuals – underlies also the CJEU case law. In fact, when leveraging European citizenship, the Court seemed to incline towards a universal and solidarity-based perspective; today, however, such an approach is less evident.

Within the solidarity-based perspective, in the *Martínez Sala* case of 12 May 1998 (Case C-85/1996), the Court restored a Spanish national's social benefits granted by the host state after they had been denied. The Spanish national was unemployed and residing in Germany at the time. The Court rendered its judgement on the basis of the exercise of her freedom of movement and establishment, in the light of the principle of non-discrimination on the grounds of nationality (similarly, see also the *Trojani* case of 7 September 2004, Case C-456/02). In the *Grzelczyk* case of 20 September 2001 (C-184/99), the Court established that access to social benefits of a non-economically active individual (in this case, a student in the last year of school) can be seen by the host state as an indicator of the individual's lack of sufficient resources and, therefore, be removed. How-

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ever, the host state should have a case-by-case approach, as recourse to assistance cannot automatically be considered as a condition for removal.

Directive 2004/38/EU on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states was adopted after the aforementioned CJEU's solidarity phase. The directive identifies different types of residence, depending on their duration. Concerning the issue of making the access to social benefits contingent to a real connection with the territory, in the *Collins'* case (Case C-138/02), the Court established that the requirement of a prior period of residence in the host state can in principle be considered as legitimate, as it can demonstrate that the person is effectively job searching.

In a judgement of 19 September 2013 (Case C-140/12, *Brey*), the Court was called to evaluate a state's discretionary capacity to assess whether the granting of social security benefit to a non-national EU citizen was a burden or not. It stated that the Directive 2004/38 recognises: "*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" [emphasis added]. However, the shift towards a CJEU's less solidarity approach with a clear change in orientation is witnessed in the following judgements. The Court delivered its decision in the *Dano* case (Case C-333/13) concerning a paradigmatic case of so-called social tourism, a phenomenon occurring when EU citizens who are not economically active move into another country to take advantage of its welfare state benefits supposed to be better than those available to them in their state of nationality (McCabe and Minnaert 2011).

Some member states, especially those with more generous welfare systems, believe that this phenomenon may present a risk to the financial sustainability of their systems of social protection, and should be tackled through restrictive interpretations of EU rules on free movement of European citizens. Overall, the phenomenon of the so-called social tourism can be considered an outcome of the tension existing between, on the one hand, the logic of opening borders that characterises es the process of European market integration and, on the other hand, the opposed logic of closing borders on which the national welfare systems rely. Welfare systems remain strongly national-based in their organisation but also in their zeitgeist: they require the belonging to a "community" of people having adhered to a principle of redistribution of resources to address common risks and needs: An agreement based on an equal contribution towards the


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funding of such a redistribution mechanism guaranteed by a mutual pact of loyalty and support between the community and its supreme political authority (the state) (Ferrera 2005).

In *Dano,* the referring court asked the CJEU whether Articles 18 and 20(2) of the TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation n. 883/2004 must be interpreted as precluding legislation of a member state under which nationals of other member states who are not economically active are excluded, in full or in part, from entitlement to certain "special non-contributory cash benefits" within the meaning of Regulation n. 883/2004 although those benefits are granted to nationals of the member state concerned who are in the same situation (Article 7(1)(b) of the directive). The Court considered that the dispositions at stake "must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State". The judgement confines itself to the definition of the substantive scope of "the financial solidarity" of which also the economically inactive citizens should benefit, excluding those who are not even potentially capable of contributing to the financing of the social protection system of the host country, but leaving intact the possibility that it operates for other categories. A solution which, although certainly not satisfactory for the creation of a genuine European social citizenship, it is in line with the objectives of a regulatory framework that, despite the undeniable progress that has been made, still shows in a clear manner its "commercial" origins. The decision delivered in the case *Dano* has subsequently been confirmed in the judgement of 15 September 2015, Case C-67/14, *Alimanovic*.

The judgements rendered by CJEU in the cases *Brey* and *Dano* show how EU case law fluctuates between two "visions" of solidarity: the conception in *Brey* is based on territorial presence, while the one in *Dano* (and *Alimanovic*) promotes social cohesion (Thym 2015).

On 14 June 2016 – a few days before Brexit became reality – the CJEU rendered a judgement repealing the infringement procedure against the United Kingdom concerning the violation of Article 4 (Equal treatment as regards access to social security benefits) of Regulation n. 883/2004 (Case C-308/14). UK legislation required nationals of other Member States to



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have a right of lawful residence in order to be granted child benefit and child tax credit. The Commission, relying on the Advocate General's Opinion in the case which gave rise to the judgement of 13 April 2010 (Case C-73/08, *Bressol and Others*), submitted that the right to reside test constitutes direct discrimination based on nationality, given that it involves a condition that applies only to foreign nationals (UK nationals who are resident in the United Kingdom, in fact, satisfy it automatically). The Commission also submitted that the UK legislation, instead of encouraging free movement of EU citizens (which is the underlying purpose of regulation n. 883/2004), impedes it by introducing a barrier. The CJEU found that the need to protect the finances of the host member state "justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State" (see *Brey*, para. 61, and *Dano*, para. 6). The CJEU, which had once suggested that citizenship is "destined to be our fundamental status", and provides the basis for a "degree of financial solidarity" (*Grzelczyk*), has ultimately shifted away from the notion of EU citizenship (O'Brien 2016; Montaldo 2017).

Subsequently, on 31 December 2016, the Commission adopted a proposal for a regulation amending regulations n. 883/2004 and n. 987/2009 (COM(2016) 815 final): such a proposal shall be seen as an expression of a change of gear in the scenario of EU integration and social inclusion. In fact, it lays down a very debatable derogation to the equal treatment principle enshrined in Article 4, with the view of codifying the above-mentioned CJEU case law, by establishing strict limits to inactive EU mobile citizens to have access to social assistance in the host member state[22]. Other proposed amendments are also aimed at redefining the distribution of financial costs between sending and receiving countries, especially in the domain of unemployment benefits. While the objective of the proposal is deemed to be the "modernisation of the EU law on social security coordination", it is of concern that such a process does not follow the paths of solidarity. The proposal, in fact, seems to be biased towards permitting

22 See the Study for the EMPL Committee of the European Parliament, Coordination of Social Security Systems in Europe, November 2017, available here: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/614185/IPOL_STU(2017)614185_EN.pdf.



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host (Northern) countries to further protect their welfare systems from pressures coming from the free movers from the South to the East (Giubboni et al. 2017).

*EU Strategy to Combat Unemployment*

Article 151 of the TFEU requires that "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion". On this legal basis, the Union may adopt minimum prescriptions, in order to minimise the different standard of social protection in the legal systems of member states and to prevent "social dumping" inside the EU.

However, the European policy has not always been consistent with those objectives.

The economic crisis has favoured the European strategy aimed at improving occupation through more flexible employment relations, called "flexicurity". The Commission defined flexicurity as an "an integrated strategy for enhancing, at the same time, *flexibility and security* in the labour market"[23] (emphasis added; Adinolfi 2015).

23 Brussels, 27 June 2007 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards Common Principles of Flexicurity: More and better jobs through flexibility and security {SEC(2007) 861} {SEC(2007) 862}, COM(2007) 359 final. Under the initiative "Mission for Flexicurity", EU representatives, together with the social partners visited five EU countries and discussed with them how they have been setting up and implementing flexicurity policies. The results of the survey are available at: http://ec.europa.eu/social/search.jsp?pager.offset=0&langId=en&searchType=events&mode=advancedSubmit&order=&mainCat=0&subCat=0&subCat=0&year=0&country=0&city=0&advSearchKey=Mission for Flexicurity.



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It was introduced by the Commission in the Green Paper Modernising labour law to meet the challenges of the 21st century[24]: the Commission explained that a "flexicurity" approach includes "life-long learning enabling people to keep pace with the new skill needs; active labour market policies encouraging unemployed or inactive people to have a new chance in the labour market; and more flexible social security rules catering for the needs of those switching between jobs or temporarily leaving the labour market".

In its Recommendation, adopted in October 2008, on the active inclusion of people excluded from the labour market[25], the Commission called upon EU member states to establish an integrated strategy based on three social policy pillars, namely adequate income support, inclusive labour markets, and access to quality services. Having regard for the respect for human dignity as a founding principle in the EU, as well as for Article 34 of the EU Charter, which provides for the right of social inclusion and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, the Commission called upon member states to design and implement an integrated comprehensive strategy for the active inclusion of people excluded from the labour market "combining adequate income support, inclusive labour markets and access to quality services". In fact, in the Commission's words, "active inclusion policies should facilitate the integration into sustainable, quality employment for those who can work and provide resources which are sufficient to live in dignity, together with support for social participation, for those who cannot". It further upheld the necessity to implement the common criteria contained in Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems[26]. The latter, in the Commission's understanding, is still to be considered a reference instrument for the (then) Community policy in relation to poverty and social exclusion, which "has lost none of its relevance, although more needs to be done to implement it fully".

The EU coordination of national employment policies in times of crisis should always prove to be compliant with fundamental rights, which play a key role. While the approach based on flexicurity may justify a lowering of social guarantees, all actions of EU institutions shall comply with hu-

24 COM (2006) 708.
25 OJ L 307 of 18.11.2008, p. 11 ff.
26 OJ L 245 of 26.8.1992, p. 46 ff.


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man rights. From this perspective, the potential role of European Institutions is still undeveloped, as well as the awareness of the importance of another international instrument that should integrate and supplement the Charter of fundamental rights: the European Social Charter of the Council of Europe.

Since 1992, new policy instruments have emerged, as i) the prior mentioned EU Open Method of coordination on social protection and social inclusion (OMC), and ii) the European Employment Strategy (EES).

The European Employment Strategy emerged in the early 1990s within a context of rising unemployment and the establishment of the Economic and Monetary Union. The purpose of the EES was to foster convergence of national priorities towards lower unemployment and higher employment (Serrano Pascual 2009; Van Rie and Marx 2012) by increasing the internal and external flexibility of work, enhancing the human capital of workers and bringing the economically *inactive into* employment. This overall purpose (broken down into Employment Guidelines) was aligned with a monetarist approach to controlling inflation, the promotion of supply-side economics (deregulation) and a reduced role for the State (Salais 2004; Raveaud 2007).

Since its emergence, the EES has been linked to three European overarching strategies namely, the Lisbon Strategy (2000-2004), the Growth and Employment Strategy (2005-2010) and, more recently, the Europe 2020 strategy. Interestingly, throughout the years, the EES developed not only as a policy-oriented strategy but also as a procedural method. It gave rise to a flexible method of governance involving coordination at EU level, cooperation among EU Member States, and convergence of national policies towards certain common objectives in areas subject to subsidiarity. This flexible, soft (voluntary, not binding by hard law) method of cooperation, which was later placed at the heart of the Lisbon Strategy in the form of the 'Open Method of Coordination' and extended to other subsidiarity-driven policy areas such as pensions, social inclusion, healthcare and education (Zeitlin 2007 2010) has been faced with mixed criticism over its (in-)effectiveness and concrete policy outcomes at the country level (see, for example, Amable et al. 2009; Natali 2009; Heidenreich and Zeitlin 2009; Barbier 2011; Conter 2012; Van Rie and Marx 2012).

The policy objectives and procedural aspects of the EES, as part of the Europe 2020 strategy, were largely affected by economic development at the European and global levels. In a context of economic crisis and budgetary austerity, the EES required a significant adaptation in its orienta-



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tion. Though the EES has not retained a distinctive role in Europe 2020 strategy, its basic principles play a key role, albeit in different settings. The Europe 2020 strategy, adopted at the European Council of June 2010, brought forward a new agenda: to turn the EU into a 'smart, sustainable and inclusive economy, delivering high levels of employment, productivity and social cohesion, and setting out a vision of Europe's social market economy for the 21st century' (European Commission 2010). The flagship initiatives 'An Agenda for New Skills and Jobs' and 'Youth on the Move' are those most explicitly related to employment. They are also the 'Employment Package' and a 'Social Investment Package', both of which were developed to support the flagship initiatives relating to employment and social inclusion. The 'evolution' of the EES into the Europe 2020 strategy has been seen with skepticism. The European Parliament and the social partners have strongly voiced their criticism over the subordination of employment (and social) policies to budgetary and monetary objectives. They have expressed their desire to be more closely and visibly involved in the Europe 2020 process (ETUC 2013; European Parliament 2013) and give the EES more prominence within the new European governance system.

Finally, a special mention should be made of the recent discussions surrounding the proposal – very much pushed by Pier Carlo Padoan, Italy's finance Minister – of a supranational European unemployment insurance scheme (EUBS) (Beblavý, Marconi, Maselli 2015; Beblavý, Lenaerts and Maselli 2017), a "panEuropean jobless scheme" (*Financial Times* 5 October 2015), "a Union with a human face" (Fattibene 2015). The EUBS would represent progress of utmost importance towards solidarity and shared risk among member states, an attempt to increase EU citizens' trust in European institutions showing them that there is "a solidarity net" at the European level, and that the European Union is part of the solution, not of the problem. The proposal of a binding European instrument of common solidarity would tackle unemployment and restore growth following the recent economic crisis, by recurring to automatic mechanisms that could potentially be the means of stabilising the Eurozone, while at the same time addressing social problems associated with the financial crisis, as shown in a study of the European Parliament published in 2014, which called for a "social dimension" to the Economic and Monetary Union (The Cost of Non-Europe Common unemployment insurance scheme for the euro area).


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*Conclusions*

Human rights play a key role within the EU coordination of national employment policies in times of crisis: all actions of EU Institutions and member states shall comply with them, as well as with the European Social Charter of the Council of Europe. However, the potential role of European Institutions is still undeveloped. The importance of the European Social Charter within EU social policies, which has been previously underlined, is proved by its special mention in Article 151 of the TFEU.

In a scenario where the CJEU interpretation activity is moving away from a solidarity-based perspective, the proposal of a European unemployment insurance scheme (EUBS) shall be taken forward, as it translates a "truly European" solidarity instrument.

*Immigration/Asylum*

In the words of President Juncker, addressing the humanitarian crisis facing refugees has become the first priority of the EU. According to Eurostat figures[27], the total number of asylum applications in Europe in 2015 reached 1.3 million, more than double the number in 2014 and more than triple the number in 2013, setting a record for the last 70 years. In addition to refugees and asylum seekers, Europe – due to its comparatively high living standards and economic outlook – continues to be an attractive destination for economic migrants. According to the European Commission's autumn 2016 economic forecasts[28], 3 million arrivals were expected in the EU during the period between 2015 and 2017 if the level of inflow in 2016 remained at the level of the third quarter of 2015 and assuming a gradual normalisation during 2017. Due to limitations in the availability and reliability of data, these figures should, however, be interpreted with a great deal of caution.

Whether or not this trend continues, all analysts agree that a large share of the incoming migrants and refugees will settle in Europe permanently

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27 Pew Research Centre analysis of Eurostat data, available at: http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/.

28 Available at https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-forecasts_en.



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(in 2015, 52% of total asylum applications resulted in positive outcomes[29], and a standard policy assumption is that at least half of the total number of asylum applicants will stay over the long-term). Therefore, and asylum represent key-issues where European solidarity can demonstrate its robustness.

In fact, the principle of solidarityhas a special role in the common policies of asylum and immigration, set forth respectively in Articles 78 and 79 of the TFEU. This is due to Article 80 of the TFEU, which meaningfully provides that these policies and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the member states.

However, the principle of solidarity in immigration and asylum policies also includes the relationship between the EU and its member states, on the one side, and individuals, especially those escaping persecution and war and looking for asylum in Europe. Indeed, this is the sole interpretation, which is in harmony with the values enshrined by Articles 2 and 3, para. 5 of the TEU, according to which, "In its relations with the wider world...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". According to this interpretation, solidarity should apply both to the relationship among member states and to the relations among peoples inside and outside the European territory. It expresses a model of society that should fight against discrimination, violence and unfairness towards disadvantaged people and should actively promote minimum standards of dignity for all human beings.

Moving from theory to practice, the effectiveness of such fundamental provisions is problematic.

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29 Eurostat, Asylum Statistics (*Data extracted on 2 March 2016 and on 20 April 2016),* available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.



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### *Article 80 TFEU: Scope and Implications*

From a strictly legal point of view, the scope of application and the precise legal implications of Article 80 of the TFEU are still under debate, and even more so after the economic crisis and the increase in migration and asylum flows. According to a critical point of view, the relation between solidarity and fair sharing of responsibility has been misunderstood by certain member states and by the European Institutions (such as in the conclusions of the European Council of Bratislava, 26-27 June 2014). They have subordinated measures of solidarity towards States facing the crisis to the responsibility of the latter in the correct application of EU Law (De Bruycker and Tsourdi 2015). Such interpretation seems to be supported by the literal meaning of Article 80, which refers to two cumulative engagements of the same member States, so that solidarity is a condition for the correct application of EU Law.

In other words, in the field of immigration and asylum, Article 80 of the TFEU requires of the member States something more than what is generally required by the principle of fair cooperation provided by Article 4, para. 3, of the TEU. This is what certain authors have called a "duty to support" as a general element of the asylum policy (Tsourdi 2016). This principle derives from the need of fair burden sharing. Such a principle results from the preamble of the 1951 Convention relating to the Status of Refugees, to which Article 18 of the EU Charter of fundamental rights refers, which reads: "the granting of asylum may place unduly heavy burdens on certain countries…a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation". Given the general value of the principle enshrined by Article 80 of the TFEU, solidarity should constitute a structural component of European immigration and asylum policies, instead of a recipe for emergencies, as it is still considered.

Unfortunately, whether Article 80 of the TFEU provides for an autonomous legal basis for the EU asylum policy is still a debated question (Hailbronner and Thym 2016). In 2011, when the proposal for the regulation on Asylum, Migration and Integration Fund (AMIF) was advanced, (COM/2011/753/FINAL) the Council refused to recognise that Article 80 of the TFEU could work as the proper legal basis. The European Parliament and the Commission strongly disagreed on this point. The different opinions of the three European Institutions were summarised in separate



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declarations within the Annex to the position of the European Parliament adopted by the Council (Document ST89472014ADD1 of the 13 May 2014)[30].

*Financial, Operational and Humanitarian Solidarity*

The practical implementation of the principle of solidarity in the field of migration/asylum can be arranged in three categories: “financial (or economic) solidarity”, “operational solidarity” and “humanitarian solidarity” (among others: Morano-Foadi 2016; De Bruycker 2016). Financial solidarity consists of measures of assistance contemplating the distribution of economic resources to Member States for the management of the migration flows. Operational solidarity relates to actions and measures, adopted by the European Union, aimed at granting direct on-site support, immediately available for national authorities (see below Frontex and EASO). Personal or humanitarian solidarity consists of those measures, which directly intervene on migrants as the relocation measures (Morgese 2014; Mori 2015).

The majority of European measures based on solidarity are financial. Decision n. 573/2007/EC of 23 May 2007 establishing the European Refugee Fund for the period 2008 – 2013 as part of the General Programme ‘Solidarity and Management of Migration Flows’ and repealing Council Decision 2004/904/EC[31] recalls that the implementation of this policy “*should be based on solidarity* between Member States and requires mechanisms to promote *a balance of efforts* between Member States in receiving and bearing the consequences of receiving refugees and displaced persons” (emphasis added). To that end, “a European Refugee Fund was established for the period 2000 to 2004 by Council Decision 2000/596/EC. That decision was replaced by Council Decision 2004/904/EC of 2 December 2004 establishing the European Refugee Fund for the period 2005 – 2010. This ensured continued solidarity between member states in the light of recently adopted Community legislation in the field of asylum, taking into account the experience acquired

30 http://data.consilium.europa.eu/doc/document/ST-8947-2014-ADD-1/fr/pdf).
31 OJ L 144 of 6.6.2007, p. 1 ff.


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when implementing the European Refugee Fund for the period 2000 – 2004. However, the fund has a limited effect on redistribution of financial burdens among member states. One of the reasons is that the method used for distribution, based on the overall amount of asylum seekers and beneficiaries in each state, favours bigger states (Thielemann 2005).

As far as "operational solidarity" is concerned, the EU has established instruments and agencies to deal with the external and internal dimension of immigration. On the one hand, the internal border-free Schengen Area, which currently comprises 26 Member States, calls for stronger cooperation with regard to external border control and surveillance. Council Regulation n. 2007/2004 of 26 October 2004 established Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the so-called "Frontex Regulation")[32]. Frontex became operational in 2005, in order to complement national border security systems by coordinating border management operations such as "Triton" and "Poseidon", as well as return operations: today, it is one of the most highly funded agencies in the EU. Its mandate was significantly revised and expanded in Regulation n. 1168/2011 of 25 October 2011 (the "new Frontex Regulation")[33], to ensure that all measures taken "fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the principle of non-refoulement"[34].

On the other hand, the EU and its member states saw the need to step up coordination between national administrations with regard to asylum matters. Regulation 439 of 2010 helped to create the European Asylum Support Office with the objective, *inter alia*, of providing operational support to member states whose asylum and reception systems face particular pressure. Since 2015, EASO has heavily intensified its presence at ground level through its emergency support for member states at the external borders with high numbers of incoming refugees. Moreover, its mission is to promote cross-national cooperation among national administrations and

32 OJ L 349 of 25.11.2004, p. 1 ff.

33 OJ L304 of 22.11.2011, p. 1 ff.

34 Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, F. Crépeau, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, 8 May 2015, UN Doc. A/HRC/29/36, para. 26.

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harmonise the practical work in order to minimise different legal standards and outcomes (e.g., asylum denial and grant rates). However, due to the discretionary character of its powers and insufficient financial resources, its contribution to the application of the principle of solidarity and to the realisation of a concrete burden sharing among states has been limited. A recent further instrument is represented by the creation of European Border Guard Corps (a special unity within Frontex http://frontex.europa.eu/news/european-border-and-coast-guard-agency-launches-today), which, according to the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, have turned "into reality the principles of shared responsibility and solidarity among the Member States and the Union" [35].

With reference to "humanitarian solidarity", the first directive adopted after the attribution of competencies to the EU in 1999 is 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[36]. Recital 22 establishes that its provision should be made for "a *solidarity mechanism* intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx. The mechanism should consist of two components. The first is financial and the second concerns the actual reception of persons into the Member States. Chapter VI of the directive, entitled "solidarity", calls for Member States to "receive persons who are eligible for temporary protection in a spirit of *Community solidarity*" [emphasis added]. Unfortunately, this directive has never been applied.

In 2012, the EU Pilot Project on Intra-EU Relocation from Malta (EUREMA)[37] was launched. It was centred on a voluntary-solidarity basis. While a number of participating states maintained that voluntary ad hoc relocation measures with Malta were a concrete tool for demonstrating in-

35 The European Border and Coast Guard Agency was officially launched on 6 October 2016.

36 OJ L 212 of 7.8.2001, p. 12 ff.

37 EUREMA is a EU Pilot Project for the relocation of beneficiaries of international protection from Malta, endorsed in the European Council Conclusions of 18-19 June 2009 (doc. 11225/2/09 CONCL 2).



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tra-EU solidarity, and generally assessed them positively, other States feared that regular and protracted use of stand-alone relocation in situations of disproportionate pressure could act as a pull factor for irregular migration and thus exacerbate the pressure rather than reduce it.

Even though many of these instruments and measures had been established before the summer of the immigration crisis, the EU had to step up its efforts in reaction to the recurrent news about humanitarian tragedies. This was the case on the occasion of the extraordinary EU Council of 23 April 2015 which was dismayed by the shipwreck of 18 April 2015 in the Sicilian Canal, where approximately 800 persons lost their lives. Immediate measures in this area were agreed, and four objectives were pointed out: 1) strengthening the presence at sea; 2) combating trafficking in accordance with International law; 3) preventing irregular migration; 4) strengthening solidarity and responsibility among the Member States (Nascimbene, 2015). These decisions anticipated a programme developed by the EU Commission, which was adopted on 13 May 2015 as the European Agenda on Migration.

Such an Agenda develops the political guidelines of the EU Commission into tailored initiatives aimed at managing migration better in all its aspects. The Agenda puts forward concrete actions to react against the immediate crisis and save lives at sea, and proposes structural responses for the medium and long term. The European Commission has been consistently and continuously working towards a coordinated European response on the refugee and migration front. A first implementation package on the European Agenda on Migration was adopted on 27 May. It includes a proposal to trigger for the first time Article 78(3) of the TFEU (according to which "In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the member State(s) concerned. It shall act after consulting the European Parliament") in order to urgently relocate 40,000 asylum seekers for the benefit of Italy and Greece; a Recommendation for a resettlement scheme for 20,000 persons from outside the EU; an Action Plan on Smuggling; and the necessary amendments to the EU Budget to reinforce the Triton and Poseidon operations at sea so that more lives can be saved.

Unfortunately, these efforts did not produce the desired results. Recently the European Commission started an infringement procedure against Hungary, Poland and Czech Republic for refusing to take in their share of

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refugees (see the press release of 14 June 2017 europa.eu/rapid/press-release_IP-17-1607_en.pdf), which has attracted a strong political reaction from the participating states.

## *The Critical Aspects of the System of Dublin*

An appraisal of the so-called "system of Dublin" sheds light on the inefficacy of the current resettlement schemes as effective measures of solidarity. This system, originally based on the Dublin Convention and currently disciplined by Regulation (EU) n. 604/2013 of 26 June 2013, provides 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. The State determined as responsible for the application is also the sole State bound to guarantee the rights to asylum and to provide the refugees with all the benefits and rights granted by the European Union provisions. Arguably, the cause of the unfair sharing of burdens is the criteria established by Dublin regulations and particularly the criteria according to which the state obliged to manage the application is the first country of entry. This criterion, which is residually applicable in the majority of cases, burdens the Member States at the external borders of EU. Hence, the question arises whether the Dublin system is compatible with the principle of solidarity and demonstrates fair sharing of burdens affirmed by primary law.

The Court of Justice of the EU has never dealt with this specific question. However, the Commission has been working for a long time on possible modifications and improvement of the current legislative framework. A novelty introduced in 2013 by the so-called Dublin Regulation III was a mechanism to deal with situations of crisis in the asylum area. This measure establishes a method for determining for a temporary period, which Member State is responsible for examining applications made in a Member State confronted with a crisis situation, with a view to ensuring a fairer distribution of applicants between Member States in such situations and thereby facilitating the functioning of the Dublin system even in times of crisis.

Decisions 2015/1523 and 2015/1601 have established temporary schemes of resettlement beneficial for Italy and Greece, lasting two years, and applying for quotas (of respectively 40,000 and 120,000 refugees). These instruments have proved to be inadequate to correct the unfairness


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of the Dublin system. The majority of the Member States has been reluctant to comply with those decisions and the European Commission has only recently started to react, by opening up the aforementioned infringing procedure against Hungary, Poland and Czech Republic.

More generally, this system would have operated in situations of emergency only, leaving unaltered the unfair foundation of the European policy as reflected in the Dublin system.

The prospects for a consistent application of the principle of solidarity and fair sharing of burdens are not positive. On 13 July 2016, the Commission adopted a proposal for a further modification of the Dublin system (called Dublin IV; Mori 2016). The problem is that it leaves untouched the criterion of the country of first entry for the determination of the State bound to the reception of refugees. This criterion will be corrected by a mechanism of resettlement applicable in situations of emergency in favour of countries that have been burdened by an extraordinary number of applications. The number is extraordinary when it overcomes 150% of the capacity of reception of the country calculated on the basis of its GDP and its overall population. A "buy-out option" is provided by Article 37 of the proposal, providing that a State which does not want to participate must pay 250,000 euros for each resettled refugee. It is evident that this proposal is not sufficient to recalilbrate the system on the principle of solidarity. The system will remain premised on the unfair criterion of the country of first entry and any help from the other member states would operate just when the national systems of the states at the external borders have almost collapsed.

### *Solidarity in Asylum Seeking*

The principle of solidarity towards people escaping from persecutions, wars, natural disasters etc., as enshrined by the above-mentioned articles 2 and 3, para 5, of the TEU, applies to further European acts which regulate the status of asylum seekers and refugees. The status of the asylum seekers, for example, is regulated by directive 2013/33/EU laying down standards for the reception of applicants for international protection[38]. This directive has also codified rules stemming from the case law of the Court of

38 OJ L 180 of 29.6.2013, p. 96 ff.



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Justice. In particular, the Court has established that the standard of protection applies from the moment when the person declares her/his will to seek asylum (therefore even before submitting the application) regardless of the fact the State concerned is the one responsible for the examination of the application according to the Dublin criteria (C-179/11, *Cimade and GISTI*).

The status of asylum seekers is also disciplined by Directive 2013/32/EU on common procedures for granting and withdrawing international protection[39] (the "Asylum Procedures Directive") which requires that asylum seekers be given effective access to the labour market no later than nine months from the date of their application, and introduces new safeguards for vulnerable applicants, including *a duty to put in place a system to identify vulnerable persons*. The Court has recently clarified that this procedure is the sole applicable for asylum seekers and has excluded that the application for a visa with limited territorial validity ex Article 25(1) of the EU Visa Code (regulation n. 810/2009) can offer an alternative to getting to Europe (C-638/16, *X and X*). This interpretation of EU legislation has already attracted criticism for being too restrictive (among others, Zoeteweij-Turhan, Progin-Theuerkauf 2017).

The rights of those who have been recognised as refugees are provided by the directive 2011/95/EU 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. Those legislative acts are really important to guarantee to asylum seekers and refugees a standard of protection of human rights and human dignity and are therefore extremely important for the realisation of the principle of solidarity towards people. Also in this field of law and policy, there are certain limits that could be overcome in future, such as the scarce attention paid to the will of refugees to move to other European countries, different from that responsible for the application. In other words, the European status of refugees paradoxically does not recognise the right to free movement in the EU territory and risks frustrating or diminishing the possibilities of integration of refugees into European society.

39 OJ L 180 of 29.6.2013, p. 60 ff.


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## *Towards a Model of "European Solidarity"? Concluding Remarks*

Despite the European Union's efforts to mitigate challenges to solidarity arising from the tensions between the mantra of economic integration and mechanisms of social protection and decommodification that remain bound to national levels, recent events risk jeopardising those efforts.

The horizontal dimension of solidarity has been dramatically threatened, first, by the economic crisis and, subsequently, by the increase of migration flows and the incapacity of European leaders to agree on a burden-share based asylum policy, which would have provided evidence of infra-state solidarity. More recently, in addition, the Brexit vote has represented a painful wound to the European horizontal dimension of solidarity.

When asylum and migration issues are at stake, the European Commission has shown a timid approach by proposing mechanisms designed to operate mainly in an emergency situation, and has proved to be unable to structurally apply solidarity to the European legislation in the field of asylum. Only in spring 2017 did the Commission open infringement procedures against the Czech Republic, Hungary and Poland for non-compliance with their obligations under the 2015 Council Decisions on relocation following the massive influxes of asylum seekers fleeing from the Syrian conflict. In the sphere of employment and disability, which are intertwined, the economic crisis has critically worsened the living conditions of people, raising concern and mistrust towards the European process of integration, ultimately strengthening populism and nationalism. Although, on disability matters, EU intervention has played a crucial role for the consolidation of a social-model based understanding of disability other than a medical-one. Moreover, solidarity vis-à-vis disabled people has been implemented by the adoption of a progressive, human rights-based, policy framework, endowed with a proper long-term, cross-policy, strategy and monitoring instruments for its implementation.

In general, the crisis has also exacerbated public perceptions about the uneven capacity that member states have to seize the benefits of the European integration process, with some countries appearing more capable of seizing the opportunities offered by the single market, while others struggle to achieve that.

The vertical dimension of European solidarity has also had to face different challenges. A key challenge is represented by the inconsistencies created between the commonalities underpinning the single market and the monetary Union and the still national-based social provisions that usually



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serve the purpose of accompanying the development of a market economy, from both social security and welfare provisions sides. The European system is still made up of “separate” social systems that the EU sometimes forces or attempts to put in communication with efficient – though not sufficient – policy coordination methods.

In the field of immigration and asylum, the unequal distribution of burdens has severely prejudged the system of reception of those States subjected to higher levels of pressure, showing the incapacity of the EU and their member states to respect the principle of solidarity as well as the essential fundamental rights of refugees and asylum seekers.

On the employment side, on 16 November 2016, in its Communication entitled Annual Growth Survey 2017, the Commission outlined the main features of its jobs and growth agenda[40], realising that the European Union’s economy is experiencing a moderate recovery. The Commission affirmed that the economic performance and social conditions, as well as reform implementation, remain uneven across the EU: many economies still face the far-reaching challenges of high long-term, youth unemployment, and that the unprecedented inflow of refugees and asylum seekers over the last year has represented a significant new phenomenon in some Member States. In this context, policies should be directed at consolidating the recovery and fostering convergence towards the best performers. A renewed process of upward economic and social convergence is needed in order to tackle the economic and social disparities between Member States and within European societies.

In the same document, the Commission outlined that member states should continue to modernise and simplify employment protection legislation, ensuring effective protection of workers and the promotion of labour market transitions between different jobs and occupations. More effective social protection systems are needed to confront poverty and social exclusion, while preserving sustainable public finances and incentives to work. Any such development will have to continue to ensure that the design of in-work benefits, unemployment benefits and minimum income schemes constitutes an incentive to enter the job market. Adequate and well-designed income support, such as unemployment benefits and minimum income schemes, allow those out of work to invest in job search and train-

40 COM(2016) 725 final:.



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ing, increasing their chances to find adequate employment that matches their skills.

Finally, comprehensive integration measures are required for those further excluded from the labour market and especially in response to the recent arrival of a large number of migrants and asylum seekers. Integration of migrants, especially refugees, calls for a comprehensive approach to facilitate their access to the labour market and more generally their participation in society. In the 2016 Annual Growth Survey (which launched the 2016 European Semester), the Commission put forward that the EU, in order to overcome its economic and social challenges, needs to act ambitiously and collectively, with a strong focus on job creation and social inclusion.

While promoting social developments at the national level – therefore fostering "bottom-up" solidarity– the EU is simultaneously "imposing" solidarity "top-down". This is particularly evident from the proposals of a supranational European unemployment insurance scheme and, in the field of immigration asylum, from the proposals of 9 September 2015 concerning the relocation of people in need of international protection among EU Member States under extreme pressure and a common EU list of safe countries of origin. These future EU instruments show the progressive construction of a structural "European solidarity net", which goes beyond mere coordination, and beyond the voluntary basis that has been typically characterising solidarity. The so-called – refugee crisis is probably "helping" European solidarity to emerge and grow stronger: today Member States are called upon to act – not just "*in the spirit of* solidarity" [emphasis added] – but rather "according to" the principle of solidarity, which is gaining importance at the supranational level.

The challenge of European solidarity is more a political than a legal one. The current legal framework provides a potential that is still not sufficiently exploited. In the field of immigration, for example, the scope of application of Article 80 of the TFEU should be enhanced in order to overcome the current Dublin system and construct a coherent European policy of reception. Analogously, in the field of unemployment and disability, there are legal bases for harmonising national social policy by taking inspiration from the more inclusive social protection systems, and recognising equal opportunity and full accessibility to work and society to people with disabilities. The European Institutions should encourage member states to negotiate common progress in the social fields and monitor their compliance. The Court of Justice, in particular, which has demon-



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strated courage in improving social protection for the functioning of the market (at least until its more recent rulings, i.e. *Dano* or *Alimanovic*) should enhance the social provisions of the Charter of Fundamental Rights as a driving force in the field of social rights, and for the elaboration of social reforms inspired by solidarity. In the future, the development of European solidarity requires the social constitutional refoundation of Europe (the European Pillar of Social Rights, endorsed in the "Rome Declaration", shall establish the context for discussion): in other words, a political process calling on States to understand- the social aspirations of people and harmonising them with the functioning of the market.

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