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## **The transformation of the euro: law, contract, solidarity**

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## Prologue

When Chancellor Merkel appeared in the *Bundestag* on 27 February 2012, the currency union had been in crisis for almost two years, threatening not just the currency – the euro – but the Union itself. In attempts to stem the crisis, member states had received billions in assistance. Yet, nothing seemed to help. After every rescue operation the markets calmed down temporarily, but then soon doubled their attacks. In fact, it appeared increasingly likely that Greece, the debt-stricken state at the centre of the crisis, that had been the first to receive assistance in May 2010, would have to be helped out a second time. Conscious of the scepticism among Germany’s parliamentarians to once more draw on taxpayers’ money, the chancellor told them:

‘The European sovereign debt crisis shows how closely interwoven the fates of the euro-states, but as well those of all other member states, are nowadays. Every member state bears responsibility for itself, but in the end always also for the currency union as a whole and the European Union. This self- and joint responsibility must be seen alongside unbreakable European solidarity when it comes to averting risks to the currency union at large.’<sup>1</sup>

How to read this statement? Is the appeal to solidarity merely political rhetoric, a calculated move of a political leader seeking parliamentary support for a highly controversial measure? Or is there indeed such a thing as vital and even ‘unbreakable’ solidarity between the member states?

The present study argues that there is. What is more, it argues that solidarity is central to the constitution and to the legal and constitutional changes made to the currency union due to the crisis; to its very development.

This prologue serves as an introduction to this study and to the argument it makes about solidarity and constitutional change. Following that argument requires first of all a basic understanding of the roots of the crisis. Crises, one should say. True, the man in the street may have perceived all economic hardship as just one big crisis. And why blame him? What matters to him

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■ This prologue contains and/or builds on previously published work by the author. See especially Vestert Borger, ‘How the Debt Crisis Exposes the Development of Solidarity in the Euro Area’ (2013) 9 *EuConst* 7.

1 Regierungserklärung von Bundeskanzlerin Merkel zu Finanzhilfen für Griechenland und Europäischer Rat am 1/2 März 2012 in Brüssel (translation by the author).

is that after 2007 the European economy took a dramatic turn for the worse with devastating consequences for economic activity, employment and welfare systems. In fact, Europe was racked by two crises. First, at the end of 2007, it was hit by the global financial crisis in its banking sector. Then, early 2010, it was struck by the debt crisis during which some of the states in the currency union came under heavy attack from the markets which had lost faith in their creditworthiness. Although it is this second crisis that is at the centre of this study, it is inherently linked to the one that tortured banks worldwide. Indeed, had it not been for the crisis in the banking sector, the debt crisis and even the eurocrisis might not have taken on the systemic proportions it did over the ensuing years.

*When the banks stopped dancing ...*

The origin of the banking crisis lay across the Atlantic, in the 'sub-prime' mortgage market.<sup>2</sup> Favourable interest rates, facilitated by a 'loose' monetary policy of the Federal Reserve and capital pouring in from Asia, had boosted credit growth in the United States during the 2000s, in turn causing a huge rise in real estate prices.<sup>3</sup> Captured by the fantasy that this hike in prices would never stop, mortgage brokers became increasingly lenient in granting loans. As Markus Brunnermeier explains, 'they offered teaser rates, no-documentation mortgages, piggyback mortgages (a combination of two mortgages that eliminates the need for a down payment), and NINJA ("no income, no job or assets") loans'.<sup>4</sup> People who up till then had not been able to own real estate due to their doubtful creditworthiness could now also live the American dream.

Another factor behind this wave of optimism was a change in the business model of banks. During the 1990s and 2000s banks had been increasingly resorting to an 'originate and distribute' model.<sup>5</sup> This means that contrary to the conventional practice of keeping loans on their own balance sheets, they

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2 For a detailed discussion of the underlying causes of the global financial crisis see Paul De Grauwe, 'The Banking Crisis: Causes, Consequences and Remedies' (CEPS Policy Brief No 178, November 2008); Markus K Brunnermeier, 'Deciphering the Liquidity and Credit Crunch 2007-2008' (2009) 23 *Journal of Economic Perspectives* 77; Jacopo Carmassi, Daniel Gros and Stefano Micossi, 'The Global Financial Crisis: Causes and Cures' (2009) 47 *JCMS* 977; Jakob de Haan, Sander Oosterloo and Dirk Schoenmaker, *Financial Markets and Institutions: A European Perspective* (2<sup>nd</sup> ed, CUP 2012) 29-68.

3 De Haan, Oosterloo and Schoenmaker (n 2) 53-54. See also Brunnermeier (n 2) 77; Carmassi, Gros and Micossi (n 2) 979-980.

4 Brunnermeier (n 2) 82.

5 Brunnermeier (n 2) 78-79. See also De Haan, Otterloo and Schoenmaker (n 2) 29-30, 54-55. For a detailed analysis of the US subprime mortgage market and the process of securitization see Dwight Jaffee and others, 'Mortgage Origination and Securitization in the Financial Crisis' in Viral V Acharya and Matthew Richardson (eds), *Restoring Financial Stability: How to Repair a Failed System* (John Wiley & Sons 2009) 61ff.

introduced 'structured' or 'securitized products'.<sup>6</sup> Banks grouped together different kinds of mortgages and other assets in 'portfolios' and subsequently 'sliced' them into distinct 'tranches', which were often cleverly devised so as to obtain particular 'ratings' by credit rating agencies.<sup>7</sup> Investors could then buy a tranche matching their taste for risk and profit, allowing the selling bank to 'offload risk'.<sup>8</sup> To make matters even more complicated, banks very often operated through 'off-balance sheet vehicles'.<sup>9</sup> Such vehicles would take on the task of managing the structured products, whereas the bank would merely act as an ultimate 'backstop' by providing them with a 'credit line'.<sup>10</sup> As 'capital requirements' for such credit lines were at the time significantly less onerous compared to those that applied when banks were holding the assets on their own balance sheets, this created a loophole enabling them to lower the capital they were required to have by law and take on more 'leverage'.<sup>11</sup>

This process of securitization contributed to an enormous expansion and increased complexity of the financial system and further fuelled the housing bubble as it lured financial actors into thinking they were masters of risk management. Even as the first cracks in the financial system already became visible, Citigroup's *Chief Executive Officer* (CEO), Chuck Prince, told the *Financial Times* in July 2007 that he:

[D]ismissed fears that the music was about to stop for the cheap credit-fuelled buy-out boom ... [he stated that] "When the music stops, in terms of liquidity things will be complicated. But as long as the music is playing, you've got to get up and dance. We're still dancing."<sup>12</sup>

Only months later Chuck Prince came down to earth with a bump when he had to step down as CEO in the face of mounting losses at Citigroup. A year later the bank had to be rescued by the US government through a capital injection of \$20bn and state guarantees totalling \$306bn.<sup>13</sup>

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6 Brunnermeier (n 2) 78-80. See also De Haan, Oosterloo and Schoenmaker (n 2) 30-31, 54-55.

7 Brunnermeier (n 2) 78-79.

8 Brunnermeier (n 2) 78-79.

9 Brunnermeier (n 2) 79-80. See also De Haan, Oosterloo and Schoenmaker (n 2) 30-31, 56-57.

10 Brunnermeier (n 2) 80. See also De Haan, Oosterloo and Schoenmaker (n 2) 30-31.

11 Brunnermeier (n 2) 80-81; De Haan, Oosterloo and Schoenmaker (n 2) 30-31. For a detailed analysis of how banks used off-balance sheet vehicles and other techniques to improve their 'leverage' see Viral V Acharya and Philipp Schnabl, 'How Banks Played the Leverage Game' in Viral V Acharya and Matthew Richardson, *Restoring Financial Stability: How to Repair a Failed System* (John Wiley & Sons 2009) 83ff.

12 Quoted in Michiyo Nakamoto and David Wighton, 'Bullish Citigroup is "still dancing" to the beat of the buy-out boom' *Financial Times* (10 July 2007). See also Christopher J Green, "'The day the music died": the financial tsunami of 2007-2009' in Christopher J Green, Eric J Pentecost and Tom Weyman-Jones (eds), *The Financial Crisis and the Regulation of Finance* (Edward Elgar 2011) 9; Brunnermeier (n 2) 82.

13 Greg Farrell, Henny Sender and Andrew Ward, 'US agrees bail-out for Citigroup' *Financial Times* (FT.Com) (24 November 2008). See also Green (n 12) 9.

What had happened?<sup>14</sup> Since late 2006 the sub-prime mortgage market had started to unravel as more and more households were experiencing problems paying off their mortgage. With banks groping in the dark about the risks each of them had taken on, they became increasingly averse to lending each other money, triggering a 'liquidity crisis'.<sup>15</sup> To make matters worse, in a desperate attempt to raise funds they all started to dispose of their assets.<sup>16</sup> Such large scale 'fire sales', however, brought down the price of these assets even further, which in turn negatively affected the capital position of banks and weakened their solvency.<sup>17</sup> To avoid a 'meltdown' of the financial system, authorities had to intervene.<sup>18</sup> The Federal Reserve started to inject massive amounts of liquidity into the banking system and the government got involved in the rescue of important financial institutions like investment bank Bear Stearns, mortgage enterprises Fannie Mae and Freddie Mac and insurance giant AIG. In fall 2008, Congress eventually decided on a massive bail-out scheme of \$700bn by adopting the 'Emergency Economic Stabilization Act' which, among other things, allowed the Treasury to buy 'troubled assets' from financial institutions.<sup>19</sup> By that time, however, problems had crossed the Atlantic to hit the European Union.

Already in 2007, Europe had started to feel the negative effects from the financial crisis.<sup>20</sup> But things really took a turn for the worse in September 2008 when US authorities, wanting to signal that they were not prepared to rescue every troubled institution with taxpayers' money, refused to bail-out investment bank Lehman Brothers.<sup>21</sup> The collapse of Lehman sent shockwaves through global finance and created enormous panic on the markets, forcing central banks around the world to intervene. The actions of the European Central Bank (hereafter 'Bank') focused first and foremost on the 'interbank market'.<sup>22</sup> Contrary to the United States, where there is greater reliance on financial markets to obtain financing, banks play a crucial role in allocating

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14 For a detailed analysis of the various liquidity and solvency problems banks faced during the crisis see Brunnermeier (n 2) 91-95.

15 De Haan, Oosterloo and Schoenmaker (n 2) 57.

16 De Haan, Oosterloo and Schoenmaker (n 2) 57-58.

17 De Grauwe (n 2) 1.

18 De Haan, Oosterloo and Schoenmaker (n 2) 58-59. For an event logbook of the key events in the financial crisis during 2007-2008 see Brunnermeier (n 2) 82-91.

19 Archit Shah, 'Emergency Economic Stabilization Act of 2008' (2009) 46 Harv J on Legis 569, 574-577.

20 For a discussion of the ECB's actions during the first phase of the crisis in 2007 see European Central Bank, 'The ECB's Response To the Financial Crisis' (ECB Monthly Bulletin, October 2010) 63-70.

21 De Haan, Oosterloo and Schoenmaker (n 2) 59.

22 Philippine Cour-Thimann and Bernhard Winkler, 'The ECB's non-standard monetary policy measures: the role of institutional factors and financial structure' (2012) 28 Oxf Rev Econ Policy 765, 771ff.

funds in the European economy.<sup>23</sup> A drying up of the interbank market can therefore seriously frustrate the Bank's ability to 'steer' monetary policy through the setting of official interest rates.<sup>24</sup> If all goes well these rates affect 'refinancing conditions' on the money, or interbank, market and,<sup>25</sup> as a result, 'retail interest rates' (i.e. rates on loans or savings concerning individuals and firms).<sup>26</sup> However, during a liquidity crisis the Bank's official rates and money market rates tend to get disconnected, which can seriously constrain the Bank in its ability to reach the 'real' economy and deliver on its mandate to secure price stability.<sup>27</sup>

The first thing the Bank did was to lower its interest rates significantly.<sup>28</sup> Together with other central banks around the world, it brought down its key interest rate with 50 basis points (0.5%) in October 2008.<sup>29</sup> The Bank subsequently further reduced its 'main refinancing rate' – the chief instrument through which it lends funds to banks and manages liquidity conditions –<sup>30</sup> with 325 basis points, as a result of which it reached the unprecedented low of 1% in May 2009.<sup>31</sup> In tandem with this assertive use of its 'standard' interest rate instrument, the Bank also resorted to several 'non-standard' measures.<sup>32</sup> Termed 'enhanced credit support' by its President Jean-Claude Trichet,<sup>33</sup> these measures served as a 'complement' to the Bank's conventional interest rate tool and aimed to ensure that the latter's 'signals' could still be 'transmitted' throughout the currency union.<sup>34</sup>

Three of these exceptional measures deserve to be singled out.<sup>35</sup> First of all, the Bank decided to put in place a 'fixed rate full allotment tender procedure' for all of its 'refinancing operations'.<sup>36</sup> From 2000 until the crisis, it had employed a 'variable rate' procedure.<sup>37</sup> Under such a procedure private banks

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23 Cour-Thimann and Winkler (n 22) 768-769.

24 Cour-Thimann and Winkler (n 22) 770-771.

25 Broadly speaking, the 'money market' relates to the market for 'short-term funds' (ie with a maturity of a year or less). The interbank market concerns the transactions in the money market in which banks lend to one another. For more information see De Haan, Otterloo and Schoenmaker (n 2) 136-140.

26 European Central Bank, 'The ECB's Response To the Financial Crisis' (n 20) 60-61.

27 European Central Bank, 'The ECB's Response To the Financial Crisis' (n 20) 60-63.

28 European Central Bank, 'The ECB's Response To the Financial Crisis' (n 20) 65; Cour-Thimann and Winkler (n 22) 772.

29 ECB Press Release, 'Monetary Policy Decisions' (ECB, 8 October 2008).

30 European Central Bank, 'The Monetary Policy of the ECB' (3<sup>rd</sup> ed, ECB 2011) 96, 104.

31 European Central Bank, 'The ECB's Response To the Financial Crisis' (n 20) 65.

32 European Central Bank, 'The ECB's Response To the Financial Crisis' (n 20) 66.

33 Jean-Claude Trichet, 'State of the Union: The Financial Crisis and the ECB's Response between 2007-2009' (2010) 48 JCMS Annual Review 7, 12.

34 Cour-Thimann and Winkler (n 22) 781-783.

35 For an overview of all measures see European Central Bank, 'The ECB's Response To the Financial Crisis' (n 20) 66; Cour-Thimann and Winkler (n 22) 772-774.

36 European Central Bank, 'The ECB's Response To the Financial Crisis' (n 20) 66.

37 For an explanation of 'fixed' and 'variable' tender procedures see European Central Bank, 'The Monetary Policy of the ECB' (n 30) 104-106.

(‘counterparties’) can make ‘bids’ to obtain certain amounts of liquidity at an interest rate level equal to, or above, a ‘minimum rate’ set by the Bank.<sup>38</sup> The latter subsequently distributes a pre-determined amount of liquidity to the bidding banks, starting with those offering the highest rate.<sup>39</sup> Under the fixed rate full allotment procedure, however, the Bank satisfies all liquidity needs of its counterparties at a predefined rate.<sup>40</sup> At the same time, and this leads to the second measure, it broadened the pool of assets that could serve as collateral in such refinancing operations.<sup>41</sup> In line with Article 18.1 of the Statute of the Bank, all credit operations need to be based on adequate collateral so as to shield the Bank from losses. By (temporarily) accepting a larger group of assets as collateral, the Bank eased access to liquidity.<sup>42</sup>

The Bank’s third move was to put in place additional ‘longer-term refinancing operations’.<sup>43</sup> Contrary to ‘main refinancing operations’, which have a maturity of one week, longer term ones normally have a maturity of 3 months.<sup>44</sup> By introducing additional longer term refinancing operations, initially with a maximum maturity of 6 months and later on with one year, the Bank sought to further ease the liquidity stress of banks. More specifically, it aimed to address the ‘mismatch’ between their borrowing and lending activities.<sup>45</sup> Given that banks ‘are in the business of borrowing short and lending long’,<sup>46</sup> liquidity problems in the market can significantly impair their ability to obtain ‘short-term funding’ and place them in a precarious position.<sup>47</sup> With the additional longer term refinancing operations the Bank aimed to tone down these problems and stimulate banks to keep extending credit to customers.<sup>48</sup>

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38 European Central Bank, ‘The Monetary Policy of the ECB’ (n 30) 105.

39 European Central Bank, ‘The Monetary Policy of the ECB’ (n 30) 105.

40 European Central Bank, ‘The Monetary Policy of the ECB’ (n 30) 105.

41 European Central Bank, ‘The ECB’s Response To the Financial Crisis’ (n 20) 66.

42 In relation to changes to the Bank’s collateral framework during the crisis a distinction should be made between ‘temporary’ and ‘standard’ changes. Temporary changes were specifically launched in response to the crisis and laid down in separate legal instruments. Standard changes, however, regularly occur and are not necessarily crisis related. During the past years, however, several temporary measures have found their way into the standard collateral framework. For more information about all changes to the collateral regime, temporary and standard, that have occurred during the crisis years 2008-2013 see European Central Bank, ‘The Eurosystem collateral framework throughout the crisis’ (ECB Monthly Bulletin, July 2013) 71-86.

43 European Central Bank, ‘The ECB’s Response To the Financial Crisis’ (n 20) 66.

44 European Central Bank, ‘The Monetary Policy of the ECB’ (n 30) 104-106.

45 European Central Bank, ‘The ECB’s Response To the Financial Crisis’ (n 20) 66.

46 De Grauwe (n 2) 1. See also Brunnermeier (n 2) 91-92.

47 European Central Bank, ‘The ECB’s Response To the Financial Crisis’ (n 20) 66.

48 European Central Bank, ‘The ECB’s Response To the Financial Crisis’ (n 20) 66; Cour-Thimann and Winkler (n 22) 772-773.



Though the Bank acted swiftly and boldly, it could not take on the crisis by itself. Some financial institutions did not only face liquidity problems, they were struggling with their solvency too. Yet, it took time for Europe to realise the magnitude of this problem and the need for collective action. As late as 24 September 2008, after Lehman Brother's collapse, Commissioner Almunia, responsible for economic and monetary affairs, had been saying to the European Parliament that contrary to the United States 'The situation we face here in Europe is less acute and Member States do not at this point consider that a US-style plan is needed'.<sup>49</sup> Only days later the facts on the ground proved him wrong.<sup>50</sup> On 28 September the Belgian, Dutch and Luxembourg governments had to rescue Fortis bank through a capital injection of 11.2bn.<sup>51</sup> When during the next week this move appeared insufficient, the Dutch government even decided to completely take over the Dutch activities of the bank while its other parts moved to the French bank BNP Paribas.<sup>52</sup> At around the same time Dexia received a capital injection of € 6.4bn by the Belgian, Luxembourg and French governments.<sup>53</sup> In Germany authorities and private banks together saved the commercial property lender Hypo Real Estate by putting in place a credit line,<sup>54</sup> whereas the United Kingdom nationalised mortgage lender Bradford and Bingley.<sup>55</sup> All over Europe, moreover, governments were stepping in to guarantee bank deposits. Telling is the case of Ireland. On 30 September 2008 its government decided to fully guarantee the liabilities of its banks, not only deposits but also their debts, for a period of two years.<sup>56</sup>

Amid fears that these unilateral actions could lead to 'beggar thy neighbour' policies and disrupt the European banking system,<sup>57</sup> French President Sarkozy decided to convene (and create) the first 'Eurosummit'.<sup>58</sup> On 12 October 2008 euro area Heads of State or Government reached agreement on a European

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49 Joaquín Almunia, 'Situation of the world financial system and its effects on the European economy' (European Parliament Plenary Debate, 24 September 2008). See also Martin Heipertz and Amy Verdun, *The Politics of the Stability and Growth Pact* (CUP 2010) 186.

50 See also Heipertz and Verdun (n 49) 186-187; De Haan, Oosterloo and Schoemaker (n 2) 61.

51 Peter Thal Larsen, Michael Steen and Tony Barber, 'Fortis thrown 11.2bn lifeline' *Financial Times (FT.Com)* (28 September 2008).

52 Michael Steen, 'Dutch government takes over Fortis units' *Financial Times (FT.Com)* (3 October 2008); Michael Steen, Joshua Chaffin and Peter Thal Larsen, 'Belgium in Fortis deal with BNP' *Financial Times* (6 October 2008).

53 Scheheradze Daneshky and Ben Hall, 'Dexia receives €6.4bn funding from European governments' *Financial Times* (1 October 2008).

54 James Wilson and Bertrand Benoit, 'Berlin agrees second package to save Hypo' *Financial Times* (6 October 2008).

55 Jane Croft, 'B&B deal holds banks to account' *Financial Times* (30 September 2008).

56 Esther Bintliff, 'Government guarantee boosts Irish banks' *Financial Times* (1 October 2008); John Murray Brown, 'Irish solution is not an answer EU wants' *Financial Times* (1 October 2008).

57 Heipertz and Verdun (n 49) 187.

58 See also text to n 479 (ch 3) and n 95 (ch 6).

action plan aiming 'to restore confidence and proper functioning of the financial system'.<sup>59</sup> It contained general guidelines on facilitating the funding of banks, their recapitalisation and cooperation among governments. A few days later, on 16 October 2008, the action plan was endorsed by the European Council.<sup>60</sup>

In December of that year the European Council also decided to combat the effects of the financial crisis on the real economy.<sup>61</sup> Fearing a recession, and acting on plans of the Commission,<sup>62</sup> it launched a 'European Economic Recovery Plan' in order to provide a budgetary stimulus to the economy of € 200bn, amounting to 1.5% of the Union's GDP.<sup>63</sup> Although part of this stimulus (0.3%) was paid out of the pockets of the Union and the European Investment Bank, the bulk of it had to be provided by the member states (1.2%) and came on top of 'automatic stabilizers', such as lower tax revenues and higher social security payments, that were already doing their work.<sup>64</sup> A significant deteriorating of states' fiscal positions was bound to come. Or to put it in the words of the Commission assessing the fiscal prospects for 2009 and beyond: 'Looking ahead to 2009 and 2010, the public finance situation is expected to dramatically deteriorate'.<sup>65</sup>

### *Sovereign despair*

The financial crisis indeed left member states fiscally weakened, turning them into easy prey for the markets. Greece was their first victim. Concerns about its fiscal position had already been present for years. As early as 2004 the Commission had criticised it for acting 'inconsistent[ly] with a prudent fiscal policy' and for providing it with data that was 'not satisfactory'.<sup>66</sup> But as a result of the crisis Greece's fiscal situation suddenly gained a higher urgency. It even caused Prime Minister and leader of the New Democracy Party Kostas Karamanlis to call for general elections late 2009. He had looked at the overdue maintenance of the Greek economy, and then to his slim majority in parliament of just one seat, and had judged that without a renewed mandate from the people he would not be able implement the severe austerity measures and

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59 Summit of the Euro area countries, 'Declaration on a concerted European Action Plan of the euro area countries', 12 October 2008, para 4.

60 European Council, Conclusions, Brussels, 15-16 October 2008, para 3.

61 Heipertz and Verdun (n 49) 189.

62 Commission, 'A European Economic Recovery Plan' (Communication of 26 November 2008) COM (2008) 800 final.

63 European Council, Conclusions, Brussels, 11-12 December 2008, para 9.

64 COM (2008) 800 final, 7.

65 Commission, 'Public Finances in EMU 2009' (European Economy No 5, 2009) 22.

66 Commission, 'Greece: Report of 19 May 2004 prepared in accordance with Article 104(3) of the Treaty' SEC (2004) 623 final, 10.

reforms his country so desperately needed.<sup>67</sup> His assessment turned out to be correct, but the Greeks had no appetite for his reform agenda, instead giving their trust to George Papandreu, leader of the social democratic PASOK Party.<sup>68</sup> Having lost the elections twice in 2004 and 2007, Papandreu now managed to secure victory by repudiating Karamanlis' austerity talk, telling his electorate that 'We can't have recovery if we don't take steps to get the economy moving again'.<sup>69</sup>

Despite the fact that dark clouds were already gathering above the Acropolis, Papandreu was still optimistic about Greece's future when entering office. In the victory speech he gave on election night on 4 October he told the Greek people:

'Today we set off together to build the Greece we want and need. We have no time to waste. We want it, we can do it, we will succeed. Nothing will be easy. I will always be honest and upfront with the Greeks.'<sup>70</sup>

And honest Papandreu had to be, probably even a little more and a little earlier than he had expected. Right at the start of his term, he had to admit that the fiscal data the previous government had shared with its European partners had been a pack of lies. Contrary to deficit estimations varying between 6 to 8% of GDP that his predecessor had communicated only weeks earlier, and shockingly far above the forecast of 3.7% the Commission had published as late as January 2009,<sup>71</sup> Papandreu told the public he expected it to reach a staggering 10% that year.<sup>72</sup> Markets, which were already very sceptical about Greece, started to panic.<sup>73</sup> Rating agencies were downgrading the state's credit rating notch by notch, fuelling a rise in the interest rate it had to pay on its government bonds. The price of 'credit default swaps' – instruments offering the buying party insurance against a Greek 'credit event' (i.e. a 'default' or 'bankruptcy') – rose dramatically.<sup>74</sup> The situation became untenable when the Commission issued a report on Greece's fiscal statistics in January 2010. It found that the misreporting in 2009 'was neither without

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67 Kerin Hope, 'Weakened Karamanlis calls snap election in Greece' *Financial Times* (3 September 2009); See also Matthew Lynn, *Bust: Greece, the Euro, and the Sovereign Debt Crisis* (Bloomberg Press 2011) 113.

68 See also Lynn (n 67) 113-114.

69 Quoted in Kerin Hope, 'Greek socialists ride wave of popular discontent' *Financial Times* (3 October 2009).

70 Quoted in Rachel Donadio and Anthee Carassava, 'Voters give Greek socialists a landslide win' *The New York Times* (5 October 2009). See also Lynn (n 67) 113.

71 Commission, 'Public Finances in EMU 2009' (n 65) 32.

72 Tony Barber, 'Greece rapped for understating deficit' *Financial Times (FT.Com)* (20 October 2009).

73 Lynn (n 67) 127-128.

74 For more information on credit default swaps see De Haan, Oosterloo and Schoenmaker (n 2) 162-163.

precedent nor an isolated episode' and that unless bold action was taken 'the reliability of the Greek deficit and debt data will remain in question'.<sup>75</sup>

At the beginning of 2010 it was clear to everyone that Greece had no future in the currency union unless it was helped out by its European partners. The interest rate on Greek 10-year government bonds was approaching 7%, a level widely considered to be unsustainable for any state. But politicians had difficulty in coming to terms with this reality, not least the Greek government itself. Behind the scenes it was conducting difficult negotiations about an assistance package, while to the outside world it was maintaining that it could handle the situation on its own by implementing ambitious, yet unrealistic austerity programmes aimed at bringing its deficit below the 3% limit within three years.<sup>76</sup> 'We are in a state of emergency, it's true', Papandreou told the press, 'but we can turn this crisis into an opportunity. This year will be one of radical reforms both of the economy and the public administration'.<sup>77</sup> But by April even Papandreou could no longer keep up appearances when Eurostat, the Union's office for statistics, further adjusted Greece's fiscal deficit of the previous year upwards to 13.6% and the interest rate soared to 9%.<sup>78</sup> On 23 April Papandreou appeared on public television and told his people:

'Yesterday the data was announced on the real size of the 2009 deficit....It reminded us all of the incomprehensible mistakes, omissions, criminal decisions and storm of problems we inherited from the previous government. We all inherited – today's government and the Greek people – a ship ready to sink; a country with no authority and credibility which had lost the respect of even its friends and partners; an economy exposed to the mercy of doubt and the appetite of speculators.'<sup>79</sup>

The prime minister subsequently explained how the government saw no other option but to draw on a 'lifeline' from the Union and the IMF of € 45bn that had been hammered out the months before.<sup>80</sup> Very soon, however, it became clear that almost a threefold of that amount would be required to shield Greece from the markets for several years.<sup>81</sup> On 2 May 2010 the finance ministers of the currency union eventually reached agreement on a joint assistance

75 Commission, Report of 8 January 2010 on Greek government deficit and debt statistics' COM (2010) 1 final, 6, 29.

76 Kerin Hope, 'Greek PM rejects fears over eurozone' *Financial Times* (14 January 2010); Lynn (n 67) 133-135.

77 Quoted in Hope, 'Greek PM rejects fears over eurozone' (n 76).

78 Kerin Hope, Stanley Pignal and Anousha Sakoui, 'Greece downgraded as deficit revised up' *Financial Times (FT.Com)* (22 April 2010); Lynn (n 67) 147.

79 Quoted in 'Greece's Papandreou Requests EU, IMF Financial Lifeline: Video' *Bloomberg News* (23 April 2010) (as cited in Lynn (n 67) 147).

80 Tony Barber, Kerin Hope and Gerrit Wiesmann, 'Greece grasps €30 bn lifeline' *Financial Times* (24 April 2010).

81 Public officials already knew that the amount of €45bn would only suffice for one year. See also Eurogroup statement of 11 April 2010 and text to n 97 (ch 5).

package from their states and the International Monetary Fund (IMF) worth € 110bn.<sup>82</sup>

Coming out of the meeting, the ministers were eager to point out that all of the currency union's woes had been solved by rescuing Greece. French Finance Minister and future IMF Governor Christine Lagarde said that 'Greece and Portugal and Spain and Italy and whoever are different cases. Greece is very peculiar in the sense that the numbers, the statistics that were given over the years were wrong'.<sup>83</sup>

But markets assessed the situation very differently. They had not just doubts about Greece, they were panicking about pretty much the whole of the currency union's 'periphery'. Being financially closely tied to each other Ireland, Portugal, Spain and Italy all found themselves within a ring of fire, as interest rates on their government bonds started to soar. Greece's rescue had been merely the beginning of a debt crisis that would haunt the currency union for years to come.

### *The transformation*

In fighting the debt crisis, the Union and its member states had to take measures that have profoundly changed the set-up of the currency union.<sup>84</sup> As a result, it now differs fundamentally from what it was when it was introduced in the early 1990s by the Treaty of Maastricht. Yet, this change has come about with hardly any formal amendment to the Union's 'basic constitutional charter',<sup>85</sup> the Treaties.<sup>86</sup> How to understand the form of this change? Not surprisingly, many legal scholars have studied it using the concept of 'transformation'.<sup>87</sup> This is by no means a concept peculiar to Union law, far from

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82 Statement by the Eurogroup, Brussels, 2 May 2010. For greater detail about the Greek assistance package and its legal nature see text to n 101 (ch 5).

83 Quoted in Kerin Hope, Nikki Tait and Quentin Peel, 'Eurozone agrees Greek bailout' *Financial Times* (3 May 2010).

84 The European Union is certainly not the only union in which financial distress and constitutional change are closely connected. For a discussion of America's sovereign debt crisis in the 1780s and its connection to the transformation from a confederal to a federal union see Aart Loubert, 'Sovereign Debt Threatens the Union: The Genesis of a Federation' (2012) 8 *EuConst* 442.

85 Case 294/83 *Les Verts* [1986] ECLI:EU:C:1986:166, para 23.

86 The only formal amendment is the insertion of Art 136(3) into the TFEU. For an analysis of this amendment see text to n 308 (ch 5).

87 Among the contributions that even include the notion in their titles are Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance* (Hart Publishing 2014); Nicole Scicluna, 'Politicization without democratization: How the Eurozone crisis is transforming EU law and politics' (2014) 12 *ICON* 545; Mark Dawson, Henrik Enderlein, and Christian Joerges (eds), *The Governance of Europe's Economic, Political and Legal Transformation* (OUP 2015); Michael Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis' (2016) 53 *CML Rev* 1237; Damien Chalmers,

it.<sup>88</sup> The German public lawyer Georg Jellinek already distinguished between ‘amendment’ and ‘transformation’ in analysing constitutional change. In his *Verfassungsänderung und Verfassungswandlung* of 1906 he writes:

‘By constitutional amendment, I mean change in the text of the constitution through a purposeful act of will; by constitutional transformation, I mean change that allows the text to remain formally unchanged and is caused by facts that need not be accompanied by an intention or awareness of the change. I need hardly mention that the theory of transformation is much more interesting than that of amendment.’<sup>89</sup>

Constitutional transformation is indeed much more interesting than constitutional amendment. Operating on the intersection between *law* and *politics*, between *legality* and *power*,<sup>90</sup> it challenges lawyers to look beyond text and procedure and recognise that constitutions can validly change shape without formal amendment.<sup>91</sup> Or to put it in the words of Bruce Ackerman: it invites them to be receptive to ‘constitutional moments’ other than amendment, moments whose ‘deeper structures’ they should strive to understand, ‘both how they operated in the past and how they may discipline the future’.<sup>92</sup>

In the context of the Union legal order, the notion of transformation does have great potential for understanding this order precisely because it looks into the direction of both law *and* politics. Arguably the first to explicitly recognise this was Joseph Weiler. In *The Transformation of Europe* he describes how during the first decades of the (then) Community’s existence, its relationship with the member states changed spectacularly over the course of several ‘distinct phases’.<sup>93</sup> During a first ‘foundational’ phase the Court of Justice (hereafter ‘Court’) ‘constitutionalised’ the Community’s legal order through the introduction of doctrines like direct effect, supremacy, implied powers

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Markus Jachtenfuchs and Christian Joerges, ‘The retransformation of Europe’ in Damien Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (CUP 2016) 1-28.

88 See also Ioannides (n 87) 1241-1244.

89 Georg Jellinek, *Verfassungsänderung und Verfassungswandlung: Eine staatsrechtlich-politische Abhandlung* (Verlag von O Häring 1906) 3. The translation follows, notwithstanding a minor change, the one of Julian Arato, ‘Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations’ (2013) 38 *Yale J Int’l L* 289, 290.

90 See also Arato (n 89) 303: ‘Constitutions do not belong exclusively to the province of pure legal theory; they are not just about law, but also about power. In establishing institutions, rights and obligations, constitutions create and regulate power, and as such they also belong to the realm of politics’.

91 Ioannides (n 87) 1242-1243.

92 Bruce Ackerman, *We the People II: Transformations* (HUP 1998) 15.

93 JHH Weiler, ‘The Transformation of Europe’ (1990-1991) 100 *Yale LJ* 2403, 2408. Weiler discusses three phases: a ‘foundational’ one (1958-mid 1970s), one of ‘mutation of jurisdiction and competences’ (1973-mid 1980s) and one concerning ‘1992 and beyond’. Reference is made here only to the first two phases.

and human rights.<sup>94</sup> Then, in a second phase, the Community expanded its jurisdiction and competences, not least by ‘absorbing’ those of the member states and by adopting an extensive reading of the ‘residual’ clause in what is now Article 352 TFEU, as a result of which ‘the principle of enumerated powers ... substantially eroded’.<sup>95</sup>

Confronted with constitutional developments of such magnitude, and the Court’s prominent role in them, lawyers may be inclined to assess and explain them on purely legal grounds. Weiler, however, guards against such an approach. Not only does he consider the debate about the legal permissibility of these developments, which such an approach risks degenerating into, rather futile in the face of their broad acceptance among key constitutional players, it also fails to recognise that they were truly the result of the interaction between law *and* politics.<sup>96</sup>

Decisive for the Community’s transformation, Weiler argues, was the ‘interplay of Exit and Voice’.<sup>97</sup> The constitutionalisation of the Community in the foundational phase, constraining the ability of member states to escape its obligations (‘the closure of selective Exit’), was possible only because of the fact that the states managed to increase their hold on decision-making through initiatives like the Luxembourg Accord and the establishment of the European Council (‘increased Voice’).<sup>98</sup> This increase in Voice also explains why the subsequent phase witnessed a relatively quiet expansion of Community jurisdiction. In federations, Weiler argues, such changes usually take place only after fierce battles between the central government and the constituent units.<sup>99</sup> In the Community, however, such battles were largely absent as ‘the constituent units’ power *was* the central power’.<sup>100</sup>

One does not need to subscribe to Weiler’s specific proposition about ‘Exit’ and ‘Voice’ to support his more general argument that one cannot fully account for the transformation of the Community during its first decades through legal analysis only. It needs broadening to include politics, in particular the role played by the member states. At the same time, it is precisely this combination of law and politics which leads to the concept of ‘transformation’ risking

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94 Weiler (n 93) 2410-2431.

95 Weiler (n 93) 2434-2435.

96 According to Weiler (n 93) 2407 it may ‘lead to flawed analysis’ and risks ‘suggesting that the cardinal material locus of change has been the realm of law and that the principal actor has been the European Court’. This is ‘deceptive’, he argues as ‘legal and constitutional structural change have been crucial, but only in their interaction with the Community political process’.

97 Weiler (n 93) 2411.

98 Weiler (n 93) 2412, 2423-2431.

99 Weiler (n 93) 2449.

100 Weiler (n 93) 2449.



inflation. To some extent that risk has materialised during the crisis.<sup>101</sup> This becomes apparent once one distinguishes between ‘*institutional*’ and ‘*substantive*’ transformations.<sup>102</sup> Although fully aware of the impossibility to separate them strictly, one could say that the first kind of transformation concerns changes in the Union’s system of decision-making and institutions, whereas the second relates to changes in the meaning and substance of the policies the Union needs to implement.

It is in relation to its institutional dimension that the concept of transformation has experienced inflation. A host of scholars assessing institutional developments during the crisis have uttered the concept or twin notions like ‘constitutional mutation’ or a changing ‘constitutional balance’ or ‘architecture’.<sup>103</sup> In support of their position they point to phenomena like a shift towards intergovernmental decision-making, in particular the rise of the European Council and related fora,<sup>104</sup> the resort to intergovernmental treaties

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101 Note that ‘inflation’ as employed here concerns the use of the concept of ‘transformation’ in relation to constitutional change. Some scholars, however, have used the concept more generally to assess substantive and institutional legal changes during the crisis, without necessarily linking them to constitutional change. Thomas Beukers, for example, uses it to review and discuss the literature covering the ‘substantive’ and ‘institutional’ changes experienced by the Union, not all of which relates to constitutional change. See Thomas Beukers, ‘Legal Writing(s) on the Eurozone Crisis’ (EUI Working Papers No 11, 2015) 5-11.

102 Bruno De Witte, ‘Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?’ (2015) 11 *EuConst* 434, 436-437. De Witte in turn bases the distinction on the one made by Beukers (n 101).

103 See eg Mark Dawson and Floris De Witte, ‘Constitutional Balance in the EU after the Euro-Crisis’ (2013) 76 *MLR* 817, 818 alleging a ‘disregard of the *constitutional balance* laid down in new institutional arrangements (and indeed, the rejection of the treaties’ normative structure altogether)’ (emphasis added); Koen Lenaerts, ‘EMU and the EU’s Constitutional Framework’ (2014) 39 *EL Rev* 753, 753 arguing that the reforms to the currency union have ‘altered the constitutional balance on which the European Union is founded.’ Agustín José Menéndez, ‘Editorial: A European Union in Constitutional Mutation?’ (2014) 20 *ELJ* 127, 127: ‘The ongoing European constitutional *transformation* is the cumulative result of decisions ... taken off the beaten constitutional track through ordinary law-making procedures, through peculiar intergovernmental negotiations and ... through the toleration of new institutional practices’ (emphasis added). Paul Craig, ‘Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications’ in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 40: ‘The economic and financial crisis has had profound effects on the EU, including its *constitutional architecture*’ (emphasis added). Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2016) 10 arguing that ‘the Euro-crisis, and the legal and institutional responses to it, have changed the *constitutional architecture* of economic governance in Europe’ (emphasis added). See also Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014) 117 (using the notion of *constitutional mutation* to denominate their assessment of legal developments during the crisis, including institutional ones).

104 See eg Edoardo Chiti and Pedro Teixeira, ‘The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis’ (2013) 50 *CML Rev* 683, 685-690; Dawson and De Witte (n 103) 830-832; Christian Joerges, ‘Europe’s Economic Constitution in Crisis



outside the Union legal order,<sup>105</sup> or differentiated integration.<sup>106</sup> However, although these developments are certainly important, they do not amount to a genuine transformation. Rather, they show an increase in certain *modus operandi* that, in principle, are already known to Union law. Instead of speaking about a transformation, Bruno De Witte therefore prefers to regard them as signs of ‘increased institutional variation’ within the existing legal order.<sup>107</sup> Or to put it even more simply: these developments are highly significant *politically*, yet *legally* their significance is not of such depth as to justify the label ‘transformation’.

Things are different in relation to the substantive dimension of constitutional transformation. In this respect, the Union *has* witnessed constitutional change as crucial policy provisions of the currency union’s legal set-up have been given a new *meaning*. Surprisingly, however, scholarly attempts to understand this transformation are less numerous than those covering its (alleged) institutional counterpart. The most elaborate one so far comes from Michael Ioannidis.<sup>108</sup> Central to his analysis are assistance operations for financially distressed member states and government bond purchases by the Bank. Both, he argues, are evidence of a change in the policy rationale underlying the currency union. Whereas it used to be based on the idea that states themselves are responsible for their financial commitments and dependent on the markets to satisfy any financing needs exceeding their tax revenues, it has transformed into one that allows for financial support.<sup>109</sup> This development, moreover, has generated a shift from ‘market discipline’ to ‘bureaucratic discipline’.<sup>110</sup> To address the risk of ‘moral hazard’ that accompanies the granting of assistance and bond buying, the Union and its member states have put in place ‘public control’ mechanisms, in particular by attaching strict conditions to these actions.<sup>111</sup> This too, Ioannidis argues, amounts to a transformation as it constitutes a departure from the currency union’s original set-up under which states were supposed to be solely disciplined by the markets through interest rates matching their fiscal health and economic record.

In analysing both transformations Ioannidis attributes central importance to the Court. ‘Although the executive and other constitutional actors also play

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and the Emergence of a New Constitutional Constellation’ (2015) 15 GLJ 985, 1001; Fabbrini (n 103) 123-128.

105 See eg Menéndez (n 103) 137; Dawson and De Witte (n 103) 833, 838-839, 841; Chiti and Teixeira (n 104) 690-697; Scicluna (n 87) 557ff; Fabbrini (n 103) 128-135.

106 See eg Menéndez (n 103) 134-135; Chiti and Teixeira (n 104) 693, 695-697; Tuori and Tuori (n 103) 192-194.

107 De Witte (n 102) 453.

108 See, however, also Chiti and Teixeira (n 104) 697-701, 703; Tuori and Tuori (n 103) 181-188; Joerges (n 104) 1009-1013.

109 Ioannidis (n 87) 1249-1263.

110 Ioannidis (n 87) 1263-1274.

111 Ioannidis only speaks about ‘bureaucratic discipline’ in the abstract to his article as well as in its conclusion. Yet, he seems to use ‘public control’ as its equivalent.

a role in establishing new meaning in textually-unaltered constitutional provisions', he reasons, 'it is the constitutional adjudicator that essentially sanctions a constitutional transformation'.<sup>112</sup> In the present context, the Court did so in *Pringle* and *Gauweiler*.<sup>113</sup> There, it declared both transformations compatible with the currency union's legal set-up, in particular the no-bailout clause in Article 125 TFEU, the prohibition on monetary financing in Article 123 TFEU and the mandate of the Bank.

Now, as Ioannidis argues, the assistance operations of the Union and its member states as well as the bond purchases of the Bank, all legally devised between February 2010 to September 2012, are indeed key to the substantive transformation experienced by the currency union during the debt crisis. However, the shift to assistance and 'bureaucratic discipline' are not its defining characteristics. The currency union, this study argues, has experienced a *single* transformation, one that is ultimately driven by a change in its conception of stability. Whereas it used to grant overriding importance to *price stability*, it has transformed into one that also explicitly takes into account *financial stability*.

Moreover, to argue that the Court 'sanctioned' this transformation in *Pringle* and *Gauweiler* is to only tell half the story. The Court *had* to sanction the transformation. Or to be more precise, the Court could not disapprove it. Primacy did not lie with the *judiciary* but with *politics*.<sup>114</sup>

Understanding the transformation of the euro, and the role played in it by the Court, is the central concern of this study. *Solidarity* is its lens.<sup>115</sup>

### *Solidarity*

'Solidarity' is by no means a concept unfamiliar to Union law. In fact, there is an abundance of references to it in the Treaties. The preamble to the TEU states that the contracting states desire to 'strengthen the solidarity between their peoples'. Article 2 TEU even lists solidarity among the Union's founding values. Solidarity also serves as an objective. Article 3(3) TEU states that the Union should promote 'solidarity between generations', just as it should strive for solidarity between its member states and, in its relations with the outside world, among peoples more generally.

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112 Ioannidis (n 87) 1244.

113 Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756; Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:400.

114 This is not to say that in the context of transformation primacy can never lie with the Court. The study only claims that in the context of the debt crisis it lay with politics.

115 See also WT Eijsbouts, 'The European Way. History, Form and Substance' (2005) 1 *EuConst* 5, 9: 'Whatever else a constitution is about, it must express some fundamental commitments of solidarity between those involved'.

Besides these general references, solidarity features in numerous specific policy provisions. In the area of external relations, the Union's actions should be guided by the principle of solidarity,<sup>116</sup> whereas its common foreign and security policy should be based on 'mutual political solidarity' among its member states.<sup>117</sup> In the provisions on the Union's area of freedom, security and justice the notion also figures prominently. Not only should policy concerning this area likewise be based on solidarity between the member states,<sup>118</sup> its implementation should also 'be governed by the principle of solidarity' where it relates to border checks, asylum and immigration.<sup>119</sup> Moreover, in the area of economic policy the Council may, 'in a spirit of solidarity', decide on appropriate measures in the event of 'severe difficulties ... in the supply of certain products', especially in relation to energy.<sup>120</sup> Similar wording features in the 'solidarity clause' in Article 222 TFEU. When a member state is hit by a 'terrorist attack' or struck by 'a natural or man-made disaster', its first paragraph makes clear, 'the Union and its member states shall act jointly in a spirit of solidarity'. The Charter, finally, dedicates a whole Title to solidarity.<sup>121</sup> It contains important social rights such as the right to collective bargaining or to fair and just working conditions.

This study does not employ an overarching concept of solidarity that covers all its different uses, no matter the specific context or actor. Instead, it focuses on solidarity between the *member states*, referred to in general by Article 3(3) TEU. Moreover, it does not approach this solidarity as merely a legal concept.<sup>122</sup> This calls for two clarifications. First, as chapter 2 will explain, the study adopts the premise that states do not only have an existence in law. States are more than legal 'fictions' that serve to make legal sense of actions that are really those of someone else.<sup>123</sup> They are *real*. More specifically, the study presumes that states can be seen as social groups held together by joint

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116 Art 21(1) TEU.

117 Art 24(2) TEU. The remainder of Ch 2 of Title V of the TEU contains various references to this kind of solidarity in the context of the Union's common foreign and security policy. See eg Arts 24(3), 31(1) and 32 TEU.

118 Art 67(2) TFEU.

119 Art 80 TFEU.

120 Art 122(1) TFEU. See also Art 194(1) TFEU which more generally makes clear that the Union's energy policy should be based on 'a spirit of solidarity' between the member states.

121 See Title IV of the Charter of Fundamental Rights of the European Union.

122 Note, however, that it does not claim the contrary, ie that it should not be studied as a legal concept. As far as the nature of solidarity as a legal principle is concerned see text to n 57 (conclusion).

123 For such a view see Colin Wight, *Agents, Structures and International Relations: Politics as Ontology* (CUP 2006) 196, 220-221. Wight argues that the 'notion of the state as a legal person is, I think unobjectionable', only to continue later that 'the state does not and cannot exercise power. It is not a unified subject that possesses the capacity to exercise power', nor is it 'capable of independent action'.

commitments.<sup>124</sup> Second, just as states have an existence in reality wider than the law, so does solidarity. It is a *mode of group cohesion as a result of which individual members act in unison*, operating in full reality.<sup>125</sup>

On that basis, this study defends the thesis that i) the Union has gone through a constitutional transformation, which can be understood through the lens of solidarity as it allows to ii) conceptualise the unity between the member states; and iii) analyse how that unity was preserved during the crisis; and iv) why this substantively changed the single currency's legal set-up; and v) why the Court could not turn against this change.

Much of this study is *doctrinal*. It *interprets* and *systematises* legal principles and provisions, case law, documents, declarations and statements so as to understand the currency union's legal set-up, both as it stood before the debt crisis and as it subsequently developed. By adopting a certain reading of the law using accepted canons of interpretation, especially in relation to some of the currency union's most fundamental provisions that were subject to judicial scrutiny in *Pringle* and *Gauweiler*, it is naturally also *argumentative*.<sup>126</sup> As it ultimately aims to contribute to the theory of constitutional change in the Union legal order, the study engages with constitutional theory too.

Doctrine and jurisprudence alone, however, will not suffice. Examining constitutional *change*, and thus the development of law over time, this study necessarily has a historical dimension to it.<sup>127</sup> Moreover, as constitutional transformation operates at the intersection between law and politics, it must also reach out to other disciplines so as to place the law in its appropriate context.<sup>128</sup> It does so, aware of its own limitations. Neither does it claim to

124 See text to n 6ff (ch 2).

125 This definition is inspired by the much more elaborate definition used by William Rehg, 'Solidarity and the Common Good: An Analytical Framework' (2007) 38 *Journal of Social Philosophy* 7, 8. He uses 'the term solidarity to refer to a quality of human association, specifically the cohesive social bond that holds the people of a group together in an association they both understand themselves to be part of and value. In other words, solidarity is a *mode of group cohesion* based on some level of conscious or intentional commitment...on the part of the members' (emphasis added). In addition it is based on the theoretical discussion of social solidarity in Graham Crow, *Social Solidarities: Theories, Identities and Social Change* (Open University Press 2002) 11 (stating that the concept of 'social solidarity' can be used to discover 'what it is that people have in common that makes it possible and desirable for them to *act in unison*') (emphasis added). I have already introduced the definition in Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 *EuConst* 7, 9.

126 Explaining that legal doctrine is essentially a hermeneutic discipline in which interpretation and argumentation are inherently linked is Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 4-5.

127 On the close relation between historical and legal interpretation see Carel Smith and others, 'Criteria voor goed rechtswetenschappelijk onderzoek. De omgekeerde route' (2008) 83 *NJB* 685ff.

128 On 'law in context' see Francis Snyder, *New Directions in European Community Law* (Weidenfeld and Nicolson 1990) 14-30.

master methodologies of other disciplines, nor to carry out truly interdisciplinary research. Yet, it is open to social and political philosophy as well as to the insights of economists and political scientists as this serves its essential purpose, which is firmly legal: understanding the transformation of the euro.

To get to that objective, this study takes three steps. The first part, spanning chapters 1 and 2, examines the solidarity that exists between the member states. Chapter 1 contains a general exploration of the concept of solidarity. It pays particular attention to a specific kind of solidarity, 'social solidarity', and discusses its evolution over time. Chapter 2 uses this exploration to conceptualise the solidarity that exists between the member states. This conceptualisation helps to understand both *why* they may act in support of their unity and the *kind* of acts this requires them to display. It also provides insight into the relation between such acts and the demands that Union law places on member states.

The second part, covering chapters 3 and 4, shifts attention to the currency union's original stability conception. Chapter 3 shows why the drafters of the Treaty of Maastricht attached overriding importance to price stability, how this has influenced the currency union's legal set-up and what kind of solidarity member states consequently had to display in support of their currency. Chapter 4 subsequently discusses several major flaws of this set-up that have been exposed by the debt crisis.

The third part, consisting of chapters 5 to 7, looks at the transformation of the euro. Chapter 5 shows how a commitment to safeguard financial stability, made by the member states at an early stage of the crisis, lies at the basis of this transformation. It argues that this commitment is a fundamental act of solidarity, one that has led to a widening of the currency union's stability conception. Under this new stability conception member states are required to grant financial assistance to states in need, signifying a change in the kind of solidarity they have to display. Chapter 6 then shows how the government bond programmes of the Bank are linked to this commitment and therefore form an intrinsic part of the transformation. Chapter 7 subsequently looks at how the Court managed to approve of this transformation in *Pringle* and *Gauweiler* despite the fact that it put massive strain on the law, which still largely reflected a stability conception from the past.

The conclusion winds up the various chapters, to show why the Court simply could not disapprove of the transformation; and then further even to argue why the Court should have acted on that duty not by assessing the transformation on the merits, but by silence.

