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The Normative Framework of Legal Accountability

1.1 INTRODUCTION

The developments described in the Introduction to this book loom large on the political equality of citizens. For example, the European Stability Mechanism (ESM) has been established by way of an international treaty, with a set-up designed to ensure that the voting rights reflect the respective contributions of Member States.[1] Using economic criteria in order to determine political rights is problematic: inequalities between creditor and debtor Member States are necessarily prolonged, as the latter are inevitably in the position of accepting the conditions attached to financial assistance measures.[2] Furthermore, the role of the citizen is reduced to national elections, leaving her without any influence with regard to creating, designing, and ultimately implementing the obligations stemming from the ESM. Pernice argues that the insistence of Member States on remaining the Masters of the Treaties[3] and the ESM being concluded in the realm of public international law results in a reliance on national procedures (meaning national parliaments and governments) as the only possible source of EU's legitimation, which ultimately enables the bypassing of citizens in decision-making.[4]

[1] Article 4(7) of the Treaty Establishing the European Stability Mechanism T/ESM 2012-LT/en 1 (ESM Treaty).

[2] F Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016) 15. See also F Losada, 'Institutional Implications of the Rise of a Debt-Based Monetary Regime in Europe' (2016) 22(6) *European Law Journal* 822, 833.

[3] See, for example, German Bundesverfassungsgericht Case 2 BvR 2728/13 *Gauweiler*, Order of 14 January 2014 [26]. On the novelty of the same rhetoric being used by the Court of Justice, see Section 1.3.1.

[4] I Pernice, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe' (2015) 11(3) *European Constitutional Law Review* 541, 543. See also M Dawson and F de Witte, 'From

Against this background, the aim of this chapter is to introduce a framework of legal accountability applicable to supranational multilevel polities, and thus to the EMU. As a first step, the chapter will offer a normative proposal of legal accountability that seeks to see it as a mechanism for achieving the political equality of citizens. On this view, accountability is the glue that binds the public institution to the common interest, in that it allows for a rebalancing of the principles underpinning it. Seen in this way, all decision-makers are under an obligation to take into account the interests involved and balance them in a way that best serves the common interest. This approach moves beyond the constraints of the nation-state structure of accountability and lends itself in particular to multilevel polities beyond the state, where traditional routes of legitimation can no longer be straightforwardly identified. This will include a normative proposal concerning the relationship between equality and solidarity of political units, with the aim of achieving the equality of every person in pursuing the common interest.

That framework is then applied to the EMU, while considering its specific features. The chapter will thus continue by looking at the position of the individual, and the principles of equality and solidarity. I will also zoom further into the Treaties in search of objectives and principles of the common interest that should guide public policy in the EMU. Taking into account the redistributive effects that EMU policies and measures have on EU citizens, I will argue that the EMU's legal framework allows courts to reinterpret these objectives in a way that overcomes the current lack of citizens' ability to influence decision-makers.

In that sense, I will first present the theoretical framework ensuring the political equality of citizens, resulting in their ability to hold decision-makers to account (Section 1.2). This framework will draw on sociological and philosophical approaches to solidarity and the cosmopolitan literature on equality in order to present a conceptual understanding of political equality of citizens. The framework put forward is based on an equilibrium between the principles of solidarity and equality that better provides for the political equality of citizens. I will then apply this normative framework to the EMU (Section 1.3), addressing also more specifically the ways in which courts can contribute to the political equality of citizens through procedural and

Balance to Conflict: A New Constitution for the EU' (2016) 22(2) *European Law Journal* 204, 206; J Pisani-Ferry, 'Rebalancing the Governance of the Euro Area' in M Dawson, H Enderlein and C Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press 2015) 79.

substantive routes. Section 1.4 will summarise these findings and present the way the same analysis will be carried out in more depth in relation to individual case studies in Chapters 3–5.

1.2 A NORMATIVE PROPOSAL OF LEGAL ACCOUNTABILITY

We have seen in the Introduction how the dominance of the principal–agent theory shaped approaches to accountability studies, with the aim of transcending the constraints that the state as the default polity set to this theoretical inquiry. In that analysis, I have also shown the limited bite of the principal–agent theory[5] when it meets conditions of convoluted representation coupled with increased executive discretion:[6] it results in the political inequality of citizens. Legal accountability beyond the state requires taking a different approach. Achieving political equality of citizens in a supranational polity focuses on ways to ensure that institutions conduct public policy in the common interest. Accountability is in that construct central. However, instead of seeing accountability merely as a vehicle for ensuring the responsiveness of institutions, accountability should be seen as a value in itself,[7] a normative good to be achieved. In this context, accountability itself is seen as a good in the common interest. It is a value that leads to political equality of citizens. How though?

Accountability should be seen as the glue that binds the public institution to the common interest, a mechanism that allows for a rebalancing of the principles underpinning it. Seen in this way, all decision-makers are under an obligation to take into account the interests involved and balance them in a way that best serves the common interest. Through this approach, I want to emphasise that a dichotomy between institutions who make political decisions (the actor) and those who hold those decision-makers to account (the forum) is a misleading one. Instead, all public institutions make decisions of a

[5] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447. For exceptions, see M Dawson and A Maricut-Akbik, 'Procedural vs Substantive Accountability in EMU Governance: Between Payoffs and Trade-offs' (2021) 28 (11) *Journal of European Public Policy* 1707; M Goodhart, 'Democratic Accountability in Global Politics: Norms, Not Agents' (2011) 73(1) *The Journal of Politics* 45.

[6] Exemplified clearly in the context of the EMU.

[7] See, for example, the argument of Bovens on accountability as a virtue. M Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33(5) *West European Politics* 946.

political nature[8] inasmuch as these carry consequences for the achievement of the common interest. This outlook also helps us set aside the approach to accountability that regards it mainly as a process, one where we should be looking for chains of responsiveness and the resulting sanctions. In other words, accountability is not a process of some institutions controlling others in a set procedure, but rather a normative value that all institutions achieve in their own ways.

In the supranational context, my accountability framework seeks to overcome the formal reading of equality of states pervading the intergovernmental logic of polities beyond the state, which hampers the achievement of the common interest of citizens. Shifting from the perspective of states to that of the individual in my opinion needs a substantive reading of equality. To achieve this, adding solidarity to the mix is indispensable. The two are then brought together to offer an abstraction of accountability beyond the state for the benefit of the individual. Here, instead of being marked by a clear representational relationship between the principal and the agent, accountability is characterised by decision-makers acting in the common interest of all citizens. The abstract common interest takes concrete shape in a specific polity, in constitutional foundations that determine the common interest to be pursued equally for all citizens.[9] In the following sections, I will further specify my approach to equality and to solidarity and conclude by showing how I see them operating in an equilibrium.

1.2.1 *Equality*

Turning to the interpretation of equality, the starting point of this inquiry is based on the argument that accountability in multilevel polities beyond the state demands taking into account the common interest of all citizens of the states that are members of such a polity. This requires a rethink of the necessary routes of legitimation in multilevel supranational polities, with the aim of moving past the classic elections–ratification spectrum. In that sense, a cosmopolitan understanding of equality will be used to support the argument that accountability means delivering public policy in the common interest.

[8] For this argument made specifically as regards judicial activity, see J Rawls, A *Theory of Justice* (Harvard University Press 1971) 107–111.

[9] In Section 1.3, I will present the foundations determining the common interest in the EMU context.

This also means abandoning the formal equality of states participating in the supranational organisation.

Any initial search of the term equality of states yields results from the area of public international law and the principle of sovereign equality of states. Article 2 of the UN Charter[10] tells us that sovereign equality is the basic principle guiding states' interactions in the international arena. Sovereign equality also means that once states sign up to a legal obligation in the international sphere, they are all equally bound to abide by it.[11] The cosmopolitan literature emphasises the drawbacks that equality of states inflicts upon the equality of individuals.[12] In the words of Buchanan:

> ... political equality among states is of value *only* so far as it contributes to justice as goal or as process. Political equality among states is not valuable for its own sake, and certainly cannot be regarded as a necessary condition in its own right for system legitimacy.[13]

In fact, sovereign equality of states in the international arena serves the purpose of non-domination[14] or non-interference: each state is equal and can only be bound by an international obligation through consent.[15] This rings particularly true for single-purpose international treaties that lead to none or a very limited extent of political connection between the contracting states. However, states' consent is in that respect unable to ensure equality under conditions of increased interdependence that follows from the multiplication of areas of international cooperation, coordination, and ultimately, integration.[16] When international treaties create complex duties and obligations between its members, insistence on formal equality can also become an instrument of domination. Sharing resources and mutually deciding on ways in which to redistribute them, in pursuit of multiple commonly pursued

[10] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[11] S R Ratner, *The Thin Justice of International Law* (Oxford University Press 2015) 194.
[12] D Chandler, 'New Rights for Old: Cosmopolitan Citizenship and the Critique of State Sovereignty' (2003) 51 *Political Studies* 332, 343.
[13] A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2004) 321.
[14] I am grateful to Mark Dawson for raising this point.
[15] M Lister, 'The Legitimating Role of Consent in International Law' (2011) 11(2) *Chicago Journal of International Law* 663.
[16] I am aware of the risk of coming across as a neo-functionalist here. The argument here is, however, much narrower.

objectives, paves the way for actual inequality.[17] In that sense, insistence on formal equality of states in supranational organisations for its own sake may be counterproductive.

As argued by Rossi, with the increase in the ability of international (and arguably, supranational) organisations to assume responsibility for carrying out the common interest of its members, it is likelier that those members will decrease their insistence on their 'sovereign status and, correlatively, to equality'.[18] Thus, the principle of equality of states is merely an indicator of membership, whereas the normative aim should be one of partnership.[19] Admittedly, this demands a higher level of engagement by states in the multilevel polity in question, and at times, the possibility of accepting varying outcomes for different members. This higher standard of responsibility stems from mutual obligations taken up by partnering states, who then work for the common interest of all citizens, rather than just their own. This reading of equality of states provides the possibility of moving beyond formal equality, meaning that decision-makers in the supranational sphere may at times detract from it, in order to serve the common interest of all citizens of partnering states.

1.2.2 *Solidarity*

In the quest for determining the role of solidarity in delivering public policy in the common interest, a brief theoretical examination of the concept of solidarity is due. The purpose of this theoretical exploration is to conceptualise the conditions under which citizens, rather than states, can become the primary focus in multilevel polities beyond the state. In other words, solidarity is the principle that allows for a move towards a cosmopolitan understanding of equality in the supranational context. This will allow us ultimately to re-conceptualise legal accountability from account being owed through indirect routes of democratic legitimation (first by way of elections and then by supranational participation of elected representatives), to one where the

[17] For a discussion on the normative argument concerning the established contractual norms in international law, see N Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108(1) *The American Journal of International Law* 1 and the references cited.

[18] L S Rossi, 'The Principle of Equality among Member States of the European Union' in L S Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 10.

[19] ibid 39.

recognition of equality of each citizen creates a demand for the decision-makers to conduct public policy in the common interest.[20] Durkheim found that the danger for solidarity lies in selfish individualism, but importantly also in the nationalism of states, which he claimed can be countered by supranational integration.[21]

I therefore argue that solidarity provides the basis for a connection between citizens beyond the indirect route of democratic legitimation through elections on the national level and ratification on the supranational level. We will see that the literature demonstrates the existence of roughly three stages of understanding of solidarity in societies, each of which represents a conceptually tighter bond between citizens than the previous one. Accordingly, the third stage will be used as the blueprint for the type of accountability relationship necessary in multilevel polities beyond the state.

The first two stages of solidarity can be found in the well-known work of Durkheim, who differentiates between mechanic and organic solidarity.[22] First, mechanic solidarity is present in traditionally small and homogeneous societies and assumes help is provided on the premise that it will also be received if and when necessary as an act of altruism. Second, organic solidarity exists in modern and heterogeneous societies with a multitude of interests and interdependence, where help is provided based on 'enlightened self-interest' that guides the smooth operation of the system.[23]

The third understanding of solidarity in the work of Forst and Honneth is, however, of most relevance to the re-conceptualisation of accountability in supranational multilevel polities. For Forst, solidarity has an important social cohesive as well as political role. As a consequence, citizenship is the necessary condition for the expression of equality in terms of rights and taking part in a common project.[24] In this respect, he underlines that 'a political community is a community of the recognition *and* realisation of equal rights and duties'.[25] In other words, recognition is due to the other as ethical and legal

[20] See also Dawson and Maricut-Akbik (n 5) 1719.

[21] E Durkheim, *The Division of Labour in Society* (1893; New York Free Press 1997) 405.

[22] ibid. Durkheim's contributions are also prevalent in the existing literature concerning solidarity and the EU. See, for example, F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015); V Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis* (Cambridge University Press 2020).

[23] S Fernandes and E Rubio, 'Solidarity within the Eurozone: How Much, What For, For How Long?' Notre Europe Policy Paper 51 (2012) 3–4.

[24] R Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism* (University of California Press 2002) 116.

[25] ibid 136.

persons, and as fellow citizens both in their difference and their sameness.[26] Similarly, Honneth introduced the concept of social solidarity, defining it as 'a felt concern for what is individual and particular about the other person', implying the recognition of 'one another in light of values that allow the abilities and traits of the other to appear significant for shared praxis'[27] based on mutual and unconditional respect.[28]

Crucially, then, solidarity is a necessary tool for organising society according to standards which ensure equal opportunities of recognition for everyone[29] and where the relationship between individuals and groups allow for 'collective interest to be served'.[30] A solidarity obligation is therefore one owed in the common interest.[31] As put by Cohen and Sabel:

> Solidarity here rests neither on a sentiment of identity nor on a complementarity rooted in the division of labor. Rather it is both moral and practical. Moral, in that individuals recognize one another as moral agents entitled to be treated as equals; practical, in that they are bound to each other by the recognition that each is better able to learn what he or she needs to master problems through collaboration with the others whose experiences, orientations and even most general goals differ from his or her own – a recognition that both expresses and reinforces a sense of human commonality that extends beyond existing solidarities.[32]

In the language of democratic theory, such an understanding of solidarity can be translated to political equality of all citizens.[33] Solidarity should thus serve the function of recognition of each citizen in the social sphere, in the

[26] ibid 137.

[27] A Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (MIT Press 1996) 129.

[28] N Fraser and A Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003) 188. With great thanks to Wayne V Walton for inspiring conversations on these concepts.

[29] S Juul, 'Solidarity and Social Cohesion in Late Modernity: A Question of Recognition, Justice and Judgement in Situation' (2010) 13(2) *European Journal of Social Theory* 253, 256. See also H Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (MIT Press 2005).

[30] W van Oorschot and A Komter, 'What is it that ties . . .? Theoretical Perspectives on Social Bond' (1998) 41(3) *Sociale Wetenschappen* 4, 11.

[31] Borger (n 22) 52.

[32] J Cohen and C F Sabel, 'Sovereignty and Solidarity: EU and US' in K H Ladeur (ed), *Public Governance in the Age of Globalization* (Routledge 2004) 721–722.

[33] R A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971) 1.

language of Honneth. Importantly for the context of multilevel polities beyond the state, solidarity should be used to extend, rather than narrow down, membership[34] and the resulting public policy duties towards the common interest. This in turn means that accountability must be organised in a way that ensures the recognition, by the institutions holding public powers, of the individual in the design, implementation, and consequences of public policy. Specifically, they must show how this inclusion figured in the decision-making process and how the decision itself will serve the common interest.[35]

1.2.3 *The Equilibrium*

Taking into account these considerations, the application of an equilibrium between equality and solidarity in a multilevel polity with different layers of membership (state and individual) has the purpose of ensuring the political equality among all its citizens (their ability to 'determine politically their destiny').[36] The idea behind connecting equality and solidarity seeks to overcome the use of traditional concepts, such as nationality, to connect citizens to commitments of justice[37] in the supranational sphere. The need for this equilibrium stems precisely from the nature of supranational polities, where we can observe different sources of membership overlapping and potentially inhibiting each other.[38] This may lead to undesirable results: a public policy conducted by decision-makers with input from one level of membership (for example, national) with consequences for the other level (individual), or vice versa. Traditional accountability routes in that context are increasingly unable to ensure that public policy is delivered in a way that serves the common interest.

A possible solution to this problem is, I argue, to rethink what role pertains to the principles of equality (of political units on the one hand, and of citizens,

[34] In the words of Steinvorth: 'Solidarity is understood as a bond that makes up a "we".' U Steinvorth, 'Applying the Idea of Solidarity to Europe' in A Grimmel and S My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer 2017) 10.

[35] See also Dawson and Maricut-Akbik (n 5).

[36] E O Eriksen, 'Structural Injustice: The Eurozone Crisis and the Duty of Solidarity' ARENA Working Paper 4/2017, 13.

[37] de Witte (n 22) 60.

[38] See also Dawson and de Witte (n 4) 218–219; M van den Brink, 'The Promises and Drawbacks of European Union Citizenship for a Polycentric Union' in J van Zeben and A Bobić, *Polycentricity in the European Union* (Cambridge University Press 2019) 164.

on the other) and that of solidarity in conceiving and ensuring the common interest. In the above theorisation of solidarity, Honneth's work was used as an inspiration to imagine a society connected through the respect of the other as an individual. This requires that decision-makers are guided by the common interest in the conduct of supranational public policy that accounts for preferences of individuals, rather than those of states. Equality between states was, in turn, theorised not as a value in itself but as instrumental for achieving justice among all citizens of a supranational polity. In that sense, the two principles read together create conditions of achieving the common interest. Accountability in this context is the process which allows for the rebalancing of the two principles to take place. Specifically, it is through the activity of giving account in all the different stages of the decision-making process that the principles are identified and given specific weight.

This approach promotes accountability, but in a different manner than that employed in the nation-state context. Dahl defines the key characteristic of democracy as 'the continuing responsiveness of the government to the preferences of its citizens, considered as political equals'.[39] Returning to the proposed understanding of the principle of solidarity as a concept where the recognition of the individual is central for delivering public policy in the common interest, creating conditions for democratic discourse equally for all is imperative. Accountability is in this context the necessary condition of political equality, given that it guarantees that the institutions pursue public policy in the common interest. Solidarity adjusts the attention of decision-makers from states to citizens, and their equality thus becomes the normative focus of public policy. In that sense, accountability is the mechanism ensuring that decision-makers achieve that equilibrium between the two principles. Specifically, they are to use a wide array of contributions (by shifting the focus from states to citizens) in the fact-finding process and the expected outcomes of public policy.[40]

This conceptualisation of supranational accountability necessarily results in a changed relationship between different types of accountability mechanisms found in the national setting,[41] where political accountability dominates the system through electoral legitimation. The very temporal

[39] Dahl (n 33) 1. See also G de Búrca, 'Developing Democracy beyond the State' (2008) 46(2) *Columbia Journal of Transnational Law* 101, 130.

[40] See also, in this sense, the accountability good of publicness discussed by Dawson and Maricut-Akbik (n 5) 8.

[41] J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 141.

relationship of the *ex ante* political and *ex post* legal control at the national level does not recognise the diminished control capacity of the traditional principal on the supranational level.[42] In addition, the conventional role of legal accountability as a corrective to the majoritarian set-up of political accountability,[43] in particular vis-à-vis the executive,[44] is facing legitimacy and enforcement issues at the supranational level.[45] Processes of accountability therefore need to provide a space for connection between all citizens,[46] where solidarity represents the act of defining the shared goal through the recognition of the citizen as the central normative concern for public policy, while equality ensures mutual respect among partners on the path of achieving that goal. In that sense, accountability structures need to ensure that the institutions are in fact making decisions towards the fulfilment of that common goal.

1.3 APPLYING THE FRAMEWORK TO THE EMU

In this section, my aim is to assess the correspondence between accountability in the EMU with the normative proposal of accountability from the previous section. The starting point for this task is that problematically, the design of EMU decision-making placed an emphasis on giving voice to Member States and ensuring their formal equality. As I explained in the Introduction, political forms of accountability in the Treaties have proven deficient in the realities of the financial crisis, specifically in the operation of different institutions that worked on addressing it.[47] Dawson and de Witte convincingly showed that reliance on legitimation through the national level deprived citizens of the ability to be meaningfully represented at the EU level, due to

[42] C Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* 38, 39.

[43] C Harlow, *Accountability in the European Union* (Oxford University Press 2002) 17.

[44] ibid 146; C Harlow and R Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' (2006) *European Governance Papers* No. C-06-02, 8.

[45] A von Bogdandy, 'The Democratic Legitimacy of International Courts: A Conceptual Framework' (2013) 14(2) *Theoretical Inquiries in Law* 361, 364; N Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 *George Washington International Law Review* 107.

[46] In the context of legal accountability, see Harlow (n 43) 148–149.

[47] P Craig, 'The Eurogroup, Power and Accountability' (2017) 23 *European Law Journal* 234, 248.

the domination of Member State preferences clashing against each other at the EU level.[48] In that constellation, citizens were unable to connect based on their social or economic preferences but only through the preferences of the political majority in their Member State.[49]

For example, routes of national democratic legitimation were not sufficient to control the Troika in devising financial assistance mechanisms and the conditions imposed on the Member States receiving such assistance.[50] Legal accountability, although traditionally dominant in EU law, has in the financial crisis not been used to its full potential, given the refusal of the Court of Justice to place a more serious hold over the decision-makers within the European Financial Stabilisation Mechanism[51] and the ESM,[52] or in respect of the unconventional monetary policies of the ECB.[53] To achieve this, we must rethink the position of legal accountability and its possible contribution within existing rules on the EMU and the ESM Treaty. To do so, legal accountability needs to ensure the equilibrium between the principles of equality and solidarity in the conduct of public policy in the EMU.

I will show that this is a normative aim that is possible to achieve within the current constitutional framework, although it requires a shift in the conduct of judicial review. In so doing, I will first conceptualise the terminology relevant for guiding my argument. I will then set out the working definition of the individual in the EMU as the citizen that requires recognition in the conduct of public policy in the common interest. Next, I will present how EU law currently treats the principle of equality of Member States, on the one hand, and the principle of solidarity, on the other. This will make visible the deficiencies as well as space for progress towards the normative framework of accountability proposed in the previous section. The last part of this section will then bring these findings together to conceptualise the common interest in the EMU that strives towards the recognition of the individual and the achievement of political equality.

[48] Dawson and de Witte (n 4) 212. See also C Harlow, 'Citizen Access to Political Power in the European Union' (1999) EUI Working Paper RSC No. 99/2, 32.

[49] Dawson and de Witte (n 4) 209.

[50] M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020) 55–57.

[51] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118) 1.

[52] For example, explicitly constrained in terms of the applicability of the Charter in Case C-370/12 *Pringle* EU:2012:756.

[53] For example, in Case C-62/14 *Gauweiler* EU:C:2015:400.

1.3.1 *On Concepts*

For the purposes of applying the proposed accountability framework to the EMU context, the aim here is to determine the relevant level of analysis and the terminology that I will use throughout the book. Both equality and solidarity are principles, the meaning of which spans several dimensions and refers to different actors. In EU law, different provisions of the Treaties refer to the two principles addressing relationships between states and between citizens. For example, Article 3(3) of the Treaty of the European Union (TEU) refers to solidarity among generations and among Member States,[54] whereas Article 2 TEU lists solidarity between men and women as one of the founding values of the EU. The same is the case with the principle of equality: Article 2 TEU mentions equality of Member States (also reinforced in Article 4(2) TEU); Articles 9 and 10(3) TEU refer to the political equality of EU citizens who have the right to participate in the democratic life of the Union; whereas equality between men and women, referred to in Article 3(3) TEU and in Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU), is also among the founding values.

Keeping this variety in mind, this book takes the following approach: in revisiting the way in which the principle of equality *between Member States* is interpreted, the normative proposal concerning their interpretation seeks to achieve political equality *between citizens*. I argue that achieving political equality of citizens in the EU cannot be achieved by retaking the nation-state path. In the words of Walker, the '[t]ouch of stateness – so familiar as to be often invisible – affects our understanding of key ideas and institutional possibilities as diverse as democracy, fundamental rights, equality [...]'.[55] While the current realities of EU integration make it impossible to disregard the sovereignty discourse and the central role that the Member States still occupy in its institutional structure, this does not mean there is no space for the principle of solidarity to change our understanding of equality of Member States, in particular if such a change is capable of improving the political equality of citizens.

[54] Solidarity between Member States is further used in the context of the Area of freedom, security and justice (Articles 67(2) and 80 TFEU), in economic policy (Article 122(1) TFEU), energy policy (Article 194(1) TFEU) and in the general solidarity clause (Article 222 TFEU).

[55] N Walker, 'Late Sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart 2003) 5.

Legal accountability is one mechanism that can contribute to the transformation of how the principle of equality of Member States, on the one hand, and the principle of solidarity, on the other, may be applied in the EMU. My aim here is not to propose a Treaty change but to offer ways in which legal accountability in specific can serve as a mechanism that shifts the relationship between these principles. In my view, the Treaties already offer the possibility of reimagining the common interest, which would place the political equality of citizens at the centre of public policy. The dominant position of courts in the EU means they are able to act as a corrective to other forms of accountability, as they hold the interpretative powers necessary for ensuring the conduct of public policy in the common interest. Courts can and should, the argument goes, act as promoters of the recognition of the citizen, which should be the central concern if decision-makers are to act in the common interest.

1.3.2 *The Individual*

This book's focus is on the position of the individual in her quest for political equality. But who exactly is this individual? The answer to this question is by no means simple: one natural or legal person, under EU law, may have several defining characteristics, depending on the EU law situation she finds herself in (e.g., worker, provider and/or receiver of services, dependent family member, to name a few).[56] Two directions present themselves in defining the individual: first, our intuition may take us to the rules on EU citizenship that focus on addressees of the EU's economic constitution and its four freedoms. The second option is to look further into the political dimension of who is in fact the EU citizen with a legitimate demand to seek recognition in shaping and enforcing the common interest. I will first show how the first direction does not lead to satisfactory political equality outcomes. After this, I will present my approach to the concept of the individual.

The EU's economic constitution has, at least until the Maastricht Treaty's inclusion of EU citizenship in primary law, been the dominant source of and rationale for granting and expanding the rights of individuals. Free movement rights have been elevated to the status of fundamental rights, placing

[56] See L Azoulai, S Barbou des Places and E Pataut, 'Being a Person in the European Union' in L Azoulai, S Barbou des Places and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities*. (Hart 2016) 3.

cross-border economic activity at the centre of individual rights discourse.[57] On this view, individuals are instrumental to the greater aim of legitimising the EU as an autonomous system of law and governance,[58] rendering the EU itself as 'functional and not ontological'.[59] With the formal introduction of EU citizenship and subsequent decisions of the Court of Justice,[60] EU citizenship has arguably acquired a self-standing quality moving beyond its original economic mover paradigm.[61]

The critique directed to the Court of Justice in this phase revolves around its superficial appropriation of the proportionality discourse that national constitutional courts traditionally employ in the fundamental rights discourse. On this view, the balance is primarily skewed in favour of economic rights, whereas fundamental rights come into play merely as a possible counterargument.[62] In consequence, the economic element remains dominant[63] and cannot, in my view, produce conditions for political equality of all citizens. More importantly, the dominance of the economic element does not provide space for the exercise of political rights at a transnational level. At the same time, it provides only a limited exercise of political rights of those moving across national borders (e.g., the active and passive right to vote in local elections in the host Member State).[64]

[57] A J Menéndez, 'Whose Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship' (2014) 15(5) *German Law Journal* 907, 908. For a comprehensive overview of this law and its critique, see Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano* EU:C:2010:560 [67]–[89].

[58] M Dani, 'The Subjectification of the European Citizen' in Azoulai, Barbou des Places and Pataut (n 56) 61; J H H Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12(1) *International Journal of Constitutional law* 93, 102.

[59] Azoulai, Barbou des Places and Pataut (n 56) 9.

[60] For example, Case C-60/00 *Carpenter* EU:C:2002:434; Case C-34/09 *Ruiz Zambrano* EU:C:2011:124. However, the Court has arguably backtracked from this progressive trend in Case C-333/13 *Dano* EU:C:2014:2358 and Case C-67/14 *Alimanovic* EU:C:2015:597. A similar trend is proposed to the Court in the Opinion of Advocate General Richard de la Tour in Case C-624/20 *E.K. v Staatssecretaris van Justitie en Veiligheid* EU:C:2022:194. See also R Lanceiro, '*Dano* and *Alimanovic*: The Recent Evolution of CJEU Caselaw on EU Citizenship and Cross-border Access to Social Benefits' (2017) 3(1) *UNIO – EU Law Journal* 63.

[61] E Spaventa, 'From Gebhard to Carpenter: Towards a (Non-)economic Constitution' (2004) 41 (3) *Common Market Law Review* 743, 744.

[62] Menéndez (n 57) 925.

[63] F de Witte, 'Emancipation through Law?' in Azoulai, Barbou des Places and Pataut (n 56) 24, 29–30.

[64] Article 20(2)(b) TFEU, Article 22 TFEU, and Article 40 of the Charter. See also Case C-673/20 *Préfet du Gers* EU:C:2022:449 [49]–[51]. For an elaboration of the deficiencies attached to

The second way of envisioning the individual entails a greater level of political autonomy for EU citizens. Their role in the European project is not merely to use and benefit from the internal market and its (many and diverse) by-products. It is possible to envisage a role for the EU citizen that is more than a self-interested agent in the internal market:[65] that of political citizenship.[66] As the integration project expands, so does the space for the citizen to take part in these political and institutional transformations. Harlow argues that cultural identity and bonds of solidarity are both the necessary condition *and* the consequence of input into political decision-making.[67] Habermas highlights the same mutual reinforcement of solidarity and the sovereignty of EU citizens at a transnational level.[68] The literature emphasises that the position of the EU citizen in the EU's constitutional frame does not yet amount to a true political role (or in the words of de Witte, offer emancipation on the transnational level).[69]

This is certainly also due to the lack of a proper political stage for such participation, exemplified most clearly by the representation in the European Parliament, which is still based on national voting lists.[70] It is also the result of multiple memberships that EU citizens hold: at a minimum, a national and

this set-up and an argument for a more local focus on the exercise of political rights of EU citizens, see van den Brink (n 38) 180–184.

[65] Azoulai, Barbou des Places and Pataut (n 56) 5; F de Witte, 'Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50(6) *Common Market Law Review* 1545.

[66] See also Harlow (n 48) 1.

[67] She explicitly emphasises the circularity of this position as embedded in political citizenship. ibid.

[68] J Habermas, *The Crisis of the European Union: A Response* (Polity 2012) 45–47; J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 269.

[69] de Witte (n 56) 31; Menéndez (n 57) 933; P C Schmitter, *How to Democratize the European Union . . . and Why Bother?* (Lanham, Rowman & Littlefield 2000) 33–34.

[70] See Articles 1 to 4 of the Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage (OJ 1976 L 278, p. 5), last amended by Council Decision (EU, Euratom) 2018/994 of 13 July 2018 (OJ 2018 L 178, p. 1). For a proposal of the European Parliament on the creation of transnational lists, see European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) – 2022/0902(APP)). See also a Study conducted by the European Parliamentary Research Service, 'Transnational Electoral Lists: Ways to Europeanise Elections to the European Parliament' (February 2021), available at <www.europarl.europa.eu/RegData/etudes/STUD/2021/679084/EPRS_STU(2021)679084_EN.pdf>.

supranational one (with the possibility of autonomous regions and local self-government adding political rights and obligations to the spectrum).[71] While a full transnational political membership in the EU is still incipient,[72] it creates an important momentum: the sovereign power of citizens at the supranational level now exists alongside and is a competitor to Member State sovereignty.[73]

It is here that the principle of solidarity comes into play and offers space for recognition that may result in genuine political citizenship. And this is where the courts can step in: the institutional set-up does not explicitly recognise but allows for an interpretation of transnational membership of citizens as a demand of recognition and the exercise of public power in their common interest. The courts can demand that decision-makers recognise such transnational interests in their conduct of public policy precisely through the tool of accountability. Primacy and autonomy of EU law are specifically the glue that binds EU citizens, allowing them to circumvent the laws of Member States,[74] also, or particularly, when EU law is constructed to stress the common interest. In the same vein, the political exercise of citizenship takes shape through the actions of individuals accessing courts and seeking that they impose common interest demands on the exercise of public policy.[75]

I therefore argue for a move towards an approach that sees the individual as capable of shaping and enforcing the common interest in the public space of a supranational polity such as the EU. Specifically in the context of legal accountability, this means that individuals enforce the common interest before national and EU courts. This, in any event, has been the main logic of enforcing EU law due to political fragmentation within Member States and a strong focus on judicial enforcement led by individuals.[76] For lack of a treaty change that would create a genuine public sphere for 'unconstrained deliberation among equals',[77] courts under this view provide the arena for public debate and deliberation. I am not suggesting that citizens suddenly abandon

[71] van den Brink (n 38) 163.

[72] But nevertheless, unprecedented and a powerful counterforce to the traditional nation-state monopoly of force through its constituting powers on the EU level. Habermas, *The Crisis of the European Union* (n 68) 30.

[73] ibid 13, 35.

[74] ibid 26.

[75] On a principled level, the same argument is taken up by R D Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance' (2006) 39(1) *Comparative Political Studies* 101, 103. See also Cohen and Sabel (n 32) 731.

[76] Kelemen (n 75) 107–114.

[77] Cohen and Sabel (n 32) 718–719.

the membership of the nation-state they belong to, and they indeed may have different interests and preferences vis-à-vis that constituency.[78] However, the powers granted to the supranational level in the creation of the EMU conferred upon that level redistributive powers not explicitly spelled out in the treaties and without appropriate mechanisms to account for them.[79] The EU citizen is at the moment able to fill that gap through the demand of a reinterpretation of solidarity and equality by courts.

Throughout this book, I will look at national and EU case law where applicants will be those privileged by the EU or national procedural rules (such as the EU institutions and Member States at the EU level, and political actors such as presidents or groups of members of parliament before national courts). In addition, I will also include non-privileged applicants: natural and legal persons who either find themselves in concrete cases of enforcing their rights or who challenge national or EU legislation and thus must meet high standing thresholds, most commonly demonstrating a certain interest in the action. My broader argument is that all these actors, not only natural persons, can and do, in direct or indirect ways, enforce the common interest.[80]

What of the argument that access to courts is an elitist exercise accessible only to some[81] and therefore in practice of only a limited contribution to the achievement of genuine political equality? The Single Supervisory Mechanism (SSM) provides fertile ground for this criticism: litigation in this area before the Court of Justice by non-privileged applicants is dominated by banks and other types of credit institution as they are the ones directly and individually concerned by the decisions of the ECB or national supervisors.[82] In my view, notwithstanding the fact that it is these arguably more powerful actors who have the ability to raise issues related to banking supervision, the result of their activity is to bring matters of common interest before EU courts. In that sense, we will see that in the SSM, EU courts can contribute to ensuring prudential requirements upon banks and credit institutions, thereby increasing their overall responsibility also towards citizens

[78] Habermas, *The Crisis of the European Union* (n 68) 37.
[79] Dawson and de Witte (n 4) 214.
[80] For a comprehensive analysis of using litigation as an enforcement tool of EU law on the EU, national, and litigant-type level, see L Conant, A Hofmann, D Soennecken and L Vanhala, 'Mobilizing European Law' (2018) 25(9) *Journal of European Public Policy* 1376.
[81] Menéndez (n 57) 921.
[82] For more detailed information on these trends, see Chapter 5, Section 5.3.1.

who have not directly taken part in a specific litigation. Powerful actors are, in that sense, inadvertent promoters of legal accountability under the condition that the courts use their powers to enforce the common interest.

At the national level, the picture is more nuanced and may allow for a greater variety of applicants to access justice. For example, class actions, interest group litigation,[83] and differing standing rules before national courts allow citizens to surpass the national prism of representation at the EU level and organise themselves instead based on social and economic interests, and ultimately bring these issues, along different conflict lines, also before the Court of Justice through the preliminary reference procedure. Even when national courts refrain from submitting a reference, it is important to keep in mind that they too are, regardless, courts with an EU law mandate and take part in the enforcement of the common interest.[84] Access to national courts is furthermore not confined solely to nationals and residents of a Member State, as are voting rights. Consequently, national courts are powerful enough actors[85] to impose on decision-makers within their jurisdiction requirements that the conduct of public policy in the common interest demands.

1.3.3 *Equality*

In EU law more generally, Article 4(2) TEU provides for the equality of Member States, whereas Article 9 TEU places the equality of citizens as the underlying obligation for all Union's activities. Under Article 8 TFEU, the Union shall in all its activities aim to eliminate inequalities. The balance between the two perspectives of the principle of equality (of states and of individuals) has originally been tilted towards EU citizens, when the Court of Justice established the so-called Simmenthal mandate, according to which national courts must apply EU law to cases within their jurisdiction and protect the resulting citizens' rights.[86]

In economic governance, equality of Member States in my view acquired a novel quality through the application of conditionality. Judicial review of

[83] For an interesting analysis of interest group litigation in Belgium, Lithuania, the Netherlands, Slovenia and Sweden, see A Hofmann and D Naurin, 'Explaining Interest Group Litigation in Europe: Evidence from the Comparative Interest Group Survey' (2021) 34 *Governance* 1235.

[84] For an example of this trend in the securities regulation and enforcement, see Kelemen (n 75) 117–118.

[85] Conant et al argue that the bulk of EU law litigation happens before national courts and never reaches EU courts. Conant et al (n 80) 1384.

[86] M Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 108.

measures of economic governance at both the national and EU level[87] endorsed that logic, to the detriment of equality between citizens. Specifically, the logic of conditionality is at its core an insurance that the Member States receiving assistance will continue to pursue a sound budgetary policy. It would thus not become necessary for Member States to cover the liabilities of others in contravention of the prohibition of monetary financing under Article 125 TFEU.[88] As a result, strict conditionality that features in Article 136(3) TFEU, endorsed both in financial assistance and as a relevant consideration in the quantitative easing programmes of the ECB, had rather different outcomes across the EU, with little ability for the affected citizens to contest them. Take the example of the conditionality attached to financial assistance: debtor states implemented severe cuts to their social security systems and citizens affected by these changes only had recourse against the national decision-makers implementing them. Yet, because these changes were the result of the conditions set out in Memoranda of Understanding, there was no possibility for a challenge at the national level to succeed. In creditor states, the same financial assistance mechanisms were subject to legal challenge for fears that this would incentivise debtor states to shirk their responsibility of a sound budgetary policy. Inevitably, macroeconomic surveillance was also conducted differently for the two groups of states.[89]

In the context of the litigation concerning the Public Sector Purchase Programme (PSPP) of the ECB, equality of Member States was emphasised yet again as the normative priority: the Bundesverfassungsgericht insisted that a risk-sharing programme could not find its place under the Treaties as it would breach the prohibition of monetary financing, whereas the ECB must be bound by the principle of proportionality in designing and implementing its monetary policy decisions. This, because it would otherwise remove from the Member States their equal sovereign right to determine their budgetary policy. However, such an approach disregards the fact that debtor Member States already, through conditionality, lost a significant part of their budgetary sovereignty by the need to abide by specific reforms that usually remain within their powers.[90] The Bundesverfassungsgericht's focus on the PSPP's effects on different social groups in Germany equally misses the bigger picture that

[87] Analysed in detail in Chapters 3–5.
[88] See, for example, Case C-370/12 *Pringle* (n 52) [143]–[147].
[89] For a detailed comparison of macroeconomic surveillance between Germany and Greece, see Markakis (n 50) 76–102.
[90] Markakis (n 50) 66–67.

monetary policy is supposed to achieve: that of ensuring the stability of the euro for all eurozone members, which entails a much broader consideration of the policy's effects.[91]

It is equally lamentable that the Court of Justice employed the equality of Member States logic in its press release following the *Weiss* judgment of the Bundesverfassungsgericht, where it restated the jurisprudence concerning the primacy of EU law, concluding: 'That is the only way of ensuring the equality of Member States in the Union they created.'[92] In the context of the EU's economic governance, this results in an emphasis on conditionality and less on the major redistributive effects of such decisions for citizens across different socioeconomic groups across the EU.

Yet, it was not always like this. The way that the Court of Justice previously applied and interpreted the principle of equality of Member States departs from formal equality and is relevant for the present discussion in at least three ways. First, equality of Member States ensures uniform and effective application of EU law across its territory and to all its citizens.[93] In *Commission v Italy*,[94] the Court stated that national interests are not a justification to depart from an obligation imposed by EU law, as this would jeopardise the effective application of EU law throughout the Member States and would result in an undue advantage over those Member States that have given proper effect to the same obligation.[95] The Court also stressed that Member States' equality before EU law ensures the equal treatment of their citizens.[96] Second, the Court stated that equal treatment of Member States does not apply where differentiated circumstances exist. In consequence, the Court separated formal and substantive equality: '[an] appearance of discrimination in form may therefore correspond in fact to an absence of discrimination in substance.'[97] Third, the principle of equality may be overridden if concerns of

[91] P Dermine, 'The Ruling of the Bundesverfassungsgericht in *PSPP* – An Inquiry into Its Repercussions on the Economic and Monetary Union' (2020) 16 *European Constitutional Law Review* 525, 538.

[92] Available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020–05/cp200058en.pdf>. For a rebuke of the logic of the Press Release, see J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' (2020) 21(5) *German Law Journal* 1032.

[93] See also Rossi (n 18) 15–16. For an argument that an unconditional application of the principle of supremacy ensures the equality of Member States, see F Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of Member States' (2015) 16 *German Law Journal* 1003.

[94] Case 39/72 *Commission v Italy* EU:C:1973:13.

[95] ibid [21].

[96] ibid [24].

[97] Case 13/63 *Commission v Italy* EU:C:1963:20 [4].

market unity so require.[98] The rationale is simple: the application of differentiated measures will ultimately result in homogeneous conditions across the market. All these considerations ring true particularly loudly for the EMU context.

The architecture of the EMU as set out in the Maastricht Treaty sought to preserve the balance between large and small states.[99] Despite this ideal, the EMU was in its very creation not an optimal currency area, meaning that the economic conditions across members varied significantly.[100] Formal equality was therefore a shield against the EMU turning into a transfer union, resulting in the introduction of the no-bailout clause and the prohibition of direct transfers from the ECB.[101] The strong focus on the sovereignty of Member States influenced the division of competences between the EU and the Member States in a way that necessarily decreased the emphasis on solidarity.[102] The deficiencies of this design became obvious in the management of the EMU after the crisis, dominated by the European Council, and within it, Germany and France. The actions undertaken demonstrated the limits of formal equality of Member States,[103] to paraphrase the Court of Justice.[104] The guise of equality allowed for an ideological domination of some Member States over others (the well-known German ordoliberal approach, for example).[105] To this, we may also add the unified voice of Member States in the institutions which does not allow for spaces of recognition for diverse socioeconomic preferences of citizens.[106]

Equality of Member States has, since the conflict between the Court of Justice and the Bundesverfassungsgericht in respect of quantitative easing programmes of the ECB,[107] gained renewed attention in the former's

[98] Joined Cases C-181/88, C-182/88 and C-218/88 *Deschamps* EU:C:1989:642 [21].
[99] Fabbrini (n 2) 8.
[100] Losada (n 2) 828.
[101] ibid.
[102] Domurath (n 122) 466. See also M Ekengren, N Matzén, M Rhinard and M Svantesson, 'Solidarity or Sovereignty? EU Cooperation in Civil Protection' (2006) 28(5) *Journal of European Integration* 457, 470.
[103] Fabbrini (n 2) 13–15. See also S Fabbrini, 'Intergovernmentalism and Its Limits' (2013) 46(9) *Comparative Political Studies* 1003, 1018.
[104] See n 98 in this chapter.
[105] Dermine (n 91) 538.
[106] Dawson and de Witte (n 4) 212–213.
[107] See Chapter 4 for more detail.

jurisprudence concerning primacy of EU law. Arguably echoing the argument put forward by Fabbrini,[108] the Court's response to national challenges to primacy has now turned into a standardised formula: primacy is a tool for ensuring equality of Member States.[109] In other words, primacy requires that all Member States always disregard conflicting national legislation of any possible type.

What is more, the Court has even begun referring to the Member States as 'Masters of the Treaties'.[110] Of course, I am not suggesting that Member States do not have a decisive influence on the creation of and amendments to the treaties. However, the Court of Justice has worked long and hard to push the EU's constitutional identity outside and beyond this public international law logic. For example, the Court rejected the original version of the European Economic Area (EEA) Treaty despite the possibility for the Member States to afterwards entirely abandon and amend the system in which the Court of Justice can reject an international treaty.[111] This is even more so in the internal realm. A brief glance over the case law concerning general principles

[108] Fabbrini (n 93). I have strongly criticised Fabbrini's argument elsewhere. See A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice' (2017) 18(6) *German Law Journal* 1395.

[109] Case C-430/21 *RS* EU:C:2022:99 [55]; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Asociaţia 'Forumul Judecătorilor din România'* EU:C:2021:1034 [249].

[110] Case C-423/20 P(R) *Council v Sharpston* EU:C:2020:700 [17] and Case C-424/20 P(R) *Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705 [17]. Prior to this, the phrase was mentioned only by Advocates General of the Court, in only a handful of occasions. Opinion of Advocate General Kokott in Case C-13/07 *Commission v Council* EU:C:2009:190 [60]; Opinion of Advocate General Szpunar in Case C-113/14 *Germany v Parliament and Council* EU:C:2016:279 [93]; Opinion of Advocate General Szpunar in Joined Cases C-360/15 and C-31/16 *College van Burgemeester en Wethouders van de gemeente Amersfoort* EU:C:2017:397 [3], footnote 9.

[111] While this is certainly politically true, legally the Court has, starting with its Opinion concerning the Uruguay round of negotiations, drawn red lines that Member States would not be able to cross when concluding international treaties without 'rise to adverse consequences for all interested parties, including third countries'. See Opinion 3/94 EU:C:1995:436 [17]; Opinion 1/09 EU:C:2011:123 [48]; Opinion 2/13 EU:C:2014:2454 [146]. The Court stated in 1971 that 'each time the Community [. . .] adopts provisions laying down common rules . . . the Member States no longer have the right [. . .] to undertake obligations with third countries which affect those rules'. Case 22/70 *Commission v Council* EU:C:1971:32 [17]. For a comprehensive overview of how EU law affects Member States' competences in the international sphere, see Opinion of Advocate General Ćapeta in Case C-500/20 *ÖBB-Infrastruktur Aktiengesellschaft* EU:C:2022:79 [59]–[86]; A Arena, 'Exercise of EU Competences and Pre-emption of Member States' Powers in the Internal and the External Sphere: Towards "Grand Unification"?' (2016) 35(1) *Yearbook of European Law* 28, 64–98.

of EU law that now have horizontal effect'[112] demonstrates that Member States can hardly be considered Masters of the Treaties. Finally, in affirming the validity of the Rule of Law Conditionality Regulation, the Court emphasised that the identity of the European Union, expressed in Article 2 TEU, is shared by and cannot be detracted from by the Member States.[113] In sum, the approach of the Court of Justice is regrettably moving towards a formal reading of equality of Member States, paradoxically using a public international law logic to advance a more federalist result: one where the Member States are equal in their subordination to the legal order of the EU.[114] It will be one of the main aims of the case studies in Chapters 3–5 to point to possible changes to this approach in improving the political equality of citizens.

Thus, we have seen that the principle of equality of Member States and recourse to national sovereignty dominated the discourse employed in judicial review of anti-crisis mechanisms, consequently distancing the decision-makers from the influence of citizens. At the same time, the redistributive consequences of anti-crisis mechanisms were felt with different intensities across the Member States,[115] without a proper avenue for the EU citizens to have a say on the creation or the aftermath of such disparities.

1.3.4 *Solidarity*

Solidarity, in contrast to the principle of equality, is a principle of an unclear legal nature in the EU legal system.[116] The Treaties refer to solidarity in multiple places,[117] but do not offer clarity in respect of the principle's different scopes and legal nature. The Court of Justice, in the above-mentioned decision in *Commission v Italy*, stated that the principle of solidarity underpins the

[112] For an analysis, see A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) chapter 5.

[113] Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 [127]; Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98 [145].

[114] With thanks to Mark Dawson for pointing this out.

[115] Markakis (n 50) 67.

[116] A Ott, 'A Flexible Future for the European Union: The Way Forward or a Way Out?' in S Blockmans and S Prechal (eds), *Reconciling the Deepening and Widening of the European Union* (TMC Asser Press 2007) 153. This is particularly the case in relation to the rights stemming from EU citizenship and the consequences for national social welfare systems. C Barnard, 'EU Citizenship and the Principle of Solidarity' in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart 2005) 161–165.

[117] See Section 1.3.1.

entire EU legal system.[118] In theorising solidarity in the EU context, the literature differentiates between three levels of solidarity: between Member States, between generations, and between peoples.[119] All three find expression in different places in the Treaties, albeit without defining precisely its position as a principle. However, as McDonnell argues, solidarity should be regarded as a fundamental principle of the EU legal framework and guide interpretation even where it is not explicitly mentioned.[120] The literature on solidarity in the EU echoes its unclear legal nature by most extensively addressing it in the context of social rights and social policy contrasted to the imperatives of the internal market.[121]

Nevertheless, it is possible to discern several types of solidarity mechanisms in EU law. Durkheim's mechanic solidarity is evident in the law on EU citizenship, where the Court of Justice gradually expanded solidarity obligations of the host Member State, albeit solely after a certain period of integration, or in the words of Domurath, of 'acquired sameness'.[122] Solidarity here is premised at a certain level of integration of free movers into the host Member State, thus still not departing from identity as the glue for membership. Conversely, we can find the elements of solidarity formation based on the pursuit of a shared goal in Cohesion Policy, the aim of which is 'reducing disparities between the various regions and the backwardness of the least-favoured regions'.[123] Solidarity in that sense means recognising the high level of interdependence and a shared sense of advancing European integration to everyone's benefit.[124] Yet, solidarity in the EU legal framework has still not reached the cohesive status where its central purpose is creating conditions for achieving the political equality of all EU citizens.

[118] Case 39/72 *Commission v Italy* (n 94) [25]. See also Case 128/78 *Commission v United Kingdom* EU:C:1979:32 [12].

[119] V Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 *European Constitutional Law Review* 7, 8.

[120] A McDonnell, 'Solidarity, Flexibility and the Euro-Crisis: Where Do Principles Fit In?' in L S Rossi and F Casolari (eds), *The EU after Lisbon Amending or Coping with the Existing Treaties?* (Springer 2014) 61. See also M Kotzur, 'Solidarity as a Legal Concept' in Grimmel and My Giang (n 34) 43–44.

[121] See, for example, Barnard (n 116); A J Menéndez, 'The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the European Union' (2003) 16(3) *Ratio Juris* 374.

[122] I Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach' (2013) 35(4) *Journal of European Integration* 459, 463.

[123] <http://ec.europa.eu/regional_policy/en/faq/#1>.

[124] In that sense, see M Ross, 'Solidarity – A New Constitutional Paradigm for the EU?' in M Ross and Y Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010) 30–31.

Recently, the Court of Justice has added further flesh to the bone of the principle of solidarity in its decision in the field of energy. Germany appealed against the decision of the General Court in which the latter annulled a Commission decision concerning the OPAL pipeline.[125] Originally, the OPAL pipeline was to be used exclusively for gas supplied through the Nord Stream by the Russian Gazprom.[126] However, Gazprom never used more than 50 per cent of the pipeline's capacity. As a consequence, following Germany's request, the Commission amended the conditions of use and allowed that 50 per cent of the pipeline use be bid for by an undertaking having a dominant position on the Czech market (given that the exit point of the pipeline is in Czechia).[127]

Poland initiated an action for annulment of this decision, among others, based on the breach of the principle of energy solidarity, which the General Court upheld.[128] In its appeal to the Court of Justice,[129] Germany argued that the principle of solidarity has but a political significance and cannot be relied on to annul a decision of the Commission.[130] This, in turn, prompted both the Advocate General and the Court of Justice explicitly to address the legal status of the principle of solidarity. The Advocate General found that, although the principle of solidarity appears throughout the Treaties, it has many forms and purposes and does not always operate at the same level (between Member States, between citizens, between generations). Nevertheless, the Advocate General found that the principle 'is such that it may be regarded as significant enough to create legal consequences'.[131]

[125] As usefully explained by Advocate General Campos Sanchez-Bordona: 'OPAL stands for Ostseepipeline-Anbindungsleitung. The OPAL pipeline is the onshore section, to the west, of the Nord Stream gas pipeline, the point of entry to which is located close to the municipality of Lubmin, near Greifswald, in Germany, and the point of exit from which is in the municipality of Brandov in the Czech Republic. The Nord Stream pipeline transports gas from Russian fields across the Baltic Sea to Germany. Nord Stream has another onshore extension, the NEL (Nordeuropäische Erdgasleitung) pipeline, which has a capacity of 20 million cubic metres and runs from Greifswald to the Netherlands and the rest of North-West Europe.' See Opinion of Advocate General Campos Sanchez-Bordona in Case C-848/19 P *Germany v Poland* EU:C:2021:218 [1], footnote 3.

[126] Case C-848/19 P *Germany v Poland* EU:C:2021:598 [10].

[127] ibid [14].

[128] Case T-883/16 *Poland v Commission* EU:T:2019:567.

[129] Poland's original action before the General Court and the appeal were supported by Latvia and Lithuania, whereas Germany supported the Commission. Interestingly, before the Court of Justice, the Commission did not submit an appeal against the General Court's decision in support of Germany.

[130] Case C-848/19 P *Germany v Poland* (n 126) [28]–[29].

[131] Opinion of Advocate General Campos Sanchez-Bordona in Case C-848/19 P *Germany v Poland* (n 125) [70].

The Advocate General also explicitly emphasised that the application of the principle of solidarity in the area of asylum, immigration and external border control[132] is transferrable to the area of energy.[133] By the same token, I argue it is transferrable to the EMU.

In the presentation of the normative framework in Section 1.2, I have argued that legal accountability specifically is able to change the way decision-makers balance the principles of equality and solidarity by demanding that they show how these principles figured in the decision-making process and how the decision itself will serve the common interest. Advocate General Campos Sanchez-Bordona set out exactly the type of obligations that befall accountable decision-makers and are subject to judicial review:[134]

> A judicial review of such decisions must, first and foremost, establish whether the EU institutions have conducted an analysis of the interests involved which is compatible with energy solidarity and takes into account, as I have said, the interests of both the Member States and the European Union as a whole (. . .).[135]

The Court of Justice followed the Advocate General's approach. It stated that the principle of energy solidarity is a specific expression of the principle of solidarity, one of the fundamental principles of EU law and closely linked to the principle of sincere cooperation.[136] The Court continued, agreeing with the Advocate General, that solidarity has in fact been justiciable before, in the area of asylum, immigration, and external border control, and there is no reason for it not to form the legal basis for reviewing the decisions of EU institutions.[137]

[132] For an endorsement of differentiated measures issued by the Council on the basis of solidarity in this area, see Joined cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:631 [251]–[253].

[133] Opinion of Advocate General Campos Sanchez-Bordona in Case C-848/19 P *Germany v Poland* (n 125) [73].

[134] Although the Advocate General refers to obligations pertaining specifically to the area of energy, as is already established, the principle of solidarity and the obligations it imposes are transferrable across areas of EU law.

[135] Opinion of Advocate General Campos Sanchez-Bordona in Case C-848/19 P *Germany v Poland* (n 125) [116]. Endorsed explicitly by the Court in Case C-848/19 P *Germany v Poland* (n 126) [53].

[136] Case C-848/19 P *Germany v Poland* (n 126) [41].

[137] ibid [42]–[45].

Perhaps addressing the concern expressed by the Advocate General on the lack of an express definition of the principle of solidarity, the Court set out an important interpretation of the principle:

> [...] the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.[138]

Solidarity is therefore the glue connecting the Member States and the European Union in all their interactions. The common interest, in turn, is contingent upon Member States and the EU acting in respect of the principle of solidarity. In carrying out that commitment, it may well happen that equality of Member States is at times reduced. The Court of Justice's explicit approach in setting out the scope and content of solidarity obligations importantly also tells us that courts indeed can be one forum for protecting the political equality of citizens. In their work, they are able to impose on decision-makers solidarity considerations, which in turn may hinder the equality of Member States. In so doing, the courts can ensure that decision-makers balance the interests of citizens over those of the Member States, or, if they do not do so, they may impose on them a higher burden of justification for the balance of interests they carried out. My argument here is that such an approach is beneficial for achieving the political equality of citizens.

1.3.5 *The Common Interest*

Conceptualising the common interest seems a deceptively straightforward exercise at first glance. It appears in the TFEU and the case law of the Court of Justice[139] at several places, albeit without further specification as to its content. For example, Article 107(3)(c)–(d) TFEU determines that State aid shall be considered compatible with the internal market 'to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent

[138] ibid [49]. Confirmed also by the Court most recently in the two decisions concerning the Rule of Law Conditionality Mechanism. See Case C-156/21 *Hungary v Parliament and Council* (n 113) [129]; Case C-157/21 *Poland v Parliament and Council* (n 113) [147].

[139] For example, cited above in Case C-848/19 P *Germany v Poland* (n 126) [49].

contrary to the common interest' and 'to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest'.

One can infer from this that the common interest is the limit to individual decisions of Member States to selectively support certain policy areas, contrary to a unified approach of the EU as a whole. Following this logic, Article 197 (1) TFEU provides that 'effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest'. In addition, in areas where the EU has exclusive competence, Member States can only act as 'trustees of the common interest'.[140] Across the board, the common interest is implicitly achieved through more integration and harmonisation.

Beyond express references to the common interest, it is worth looking closer at the Treaty rules relevant for the EMU. To begin with, there are minimum standards in national and EU constitutional spheres that have achieved a universal level of agreement,[141] codified[142] in Article 2 TEU. Values listed in this provision may be seen as the underlying common interest of all activities of the Union and the Member States. As already mentioned, these values have recently been proclaimed by the Court of Justice to represent the constitutional identity of the EU.[143] To this must be added the principle of sincere cooperation from Article 4(3) TEU.[144]

We have also already seen that Article 3 TEU lists the EU's aims, many of which are relevant for discerning the common interest behind the EMU's operation. Such is in specific Article 3(3) TEU, focusing on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress. The same provision also refers

[140] Case 804/79 *Commission v United Kingdom* EU:C:1981:93 [30]; Opinion of Advocate General Maduro in Case C-411/06 *Commission v Parliament and Council* EU:C:2009:189 [12].

[141] Although the universality of this agreement might have been taken for granted, as we are currently witnessing the grave deterioration of Article 2 TEU values in a number of Member States. For an overview of the numerous judgments of the Court of Justice in response to these issues, see L Pech and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the *Portuguese Judges* Case' SIEPS Report 2021. Available at <www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf?>.

[142] But by no means sourcing its original authority exclusively in Article 2 TEU, but rather in the constitutional foundations of all the Member States and the EU.

[143] See n 113 in this chapter.

[144] We have seen above that when Member States act in line with the principle of solidarity, they do so also as an expression of the principle of sincere cooperation. Case C-848/19 P *Germany v Poland* (n 126) [41].

to economic, social, and territorial cohesion, alongside solidarity between Member States. In the TFEU, the elimination of inequalities is an aim underpinning all Union activities under its Article 8. Article 9 TFEU adds to these the promotion of a high level of employment, the guarantee of adequate social protection, as well as the fight against social exclusion.[145] These are all considerations directly or indirectly influenced by the decisions taken within the EMU. They should without a doubt contribute to our understanding of the common interest in the EMU,[146] which provides space for these interests to be taken into account when making redistributive choices.

Moving next to the EMU section of the TFEU, Article 119 TFEU sets the principle of an open market economy with free competition as a guidance for setting common objectives in economic policy. It sets further guiding principles: stable prices, sound public finances and monetary conditions, and a sustainable balance of payments. Under Article 120 TFEU, Member States are obliged to conduct economic policy with a view to contributing to the achievement of the objectives of the EU, keeping to an efficient allocation of resources. The conduct of economic policies is for the Member States under Article 121(1) TFEU a matter of common concern and to be coordinated with the Council. All these provisions always explicitly connect EMU action with the aims in Article 3 TEU.

In the interpretation of the common interest in the EMU, of relevance is also Article 122 TFEU, something we might call an emergency solidarity clause: it allows, in the spirit of solidarity between Member States, to introduce measures appropriate to the economic situation of severe difficulties (paragraph 1), and to provide, in the same spirit, financial aid to an individual Member State experiencing 'severe difficulties caused by natural disasters or exceptional occurrences beyond its control' (paragraph 2). We will see in the Epilogue that this article used as one of the legal bases for Next Generation EU,[147] which allows the Commission to borrow on capital markets for the purposes of providing loans, but also non-refundable grants, to the Member States as a response to the COVID-19 crisis. The generous nature of this

[145] See also on the role of Article 9 TEU, E Muir, 'Drawing Positive Lessons from the Presence of "The Social" outside of EU Social Policy *Stricto Sensu*' (2018) 14(1) *European Constitutional Law Review* 81.

[146] For an example of Article 3 TEU being used as an overarching objective in the public interest, see Case C-201/15 *AGET Iraklis* EU:C:2016:972 [76].

[147] Specifically of Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ 2020 L 433 I) p. 23.

provision is arguably there to offset it against the no-bailout clause (Article 125 TFEU).[148] That latter provision, as well as the prohibition of monetary financing from Article 123(1) TFEU, offer a contrasting spirit of the Treaties: that of a tight set of rules for national fiscal policy revolving around strict responsibility.[149]

Lastly of relevance for the common interest in the EMU is monetary policy, with Article 127(1) TFEU at the centre. The primary objective of monetary policy is to maintain price stability. We will see in Chapter 4 that this primary objective provided the ECB with unprecedented constitutive powers,[150] which is to be read alongside Article 130 TFEU, which grants it independence 'from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body'. Subordinate to that primary objective of price stability, the ECB also supports economic policies of Member States (again in line with the objectives of Article 3 TEU). Its activities should further be in line with the principle of an open market economy, free competition, and the efficient allocation of resources. The objectives of Article 119 TFEU that were mentioned above are also referred to here.

We have therefore seen that the common interest in the EMU is a category of broadly defined aims, and it is possible to imagine their interpretation in multiple ways. The idea is that the common interest can only loosely be defined in the Treaties,[151] with Article 3 TEU operating as a horizontal provision, providing a normative anchor to all EMU activities. This is exactly its main strength in a polity that lacks proper spaces for the citizen in the political sphere. Another advantage of broad objectives is that they provide an interpretative margin when they come into conflict with one another, which is not at all seldom. For example, the exercise of the price stability mandate of the ECB necessarily entails value choices that materialise in the redistribution field. It is impossible to say that its decisions, although aiming at price stability, do not also have consequences for income inequality, to take one example. The

[148] B de Witte, 'Guest Editorial: EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59(1) *Common Market Law Review* 3, 9.

[149] This in itself was arguably a counterweight granted to Germany for its acceptance of a monetary union without a high level of macroeconomic convergence as the necessary starting position. See P Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022) 28–32.

[150] J Mendes, 'Constitutive Powers and Justification: The Duty to Give Reasons in EU Monetary Policy' in M Dawson (ed), *Towards Substantive Accountability in EU Economic Governance* (Cambridge University Press, forthcoming 2023); and more generally J Mendes, 'Constitutive Powers of Executive Bodies: A Functional Analysis of the Single Resolution Board' (2021) 84 (6) *Modern Law Review* 1330, 1339–1342.

[151] See also Dawson and de Witte (n 4) 212–213.

pursuit of sound budgetary policy, to take another, can exacerbate social exclusion, as the implementation of austerity measures in Greece demonstrated.[152]

The interpretation of these different objectives by courts should ensure that decision-makers have made a sufficient effort to understand, within the current institutional structure, what is the common interest in pursuing public policy. We have seen above that solidarity, as interpreted by the Court of Justice, demands a shift in the approach of decision-makers, accepting deviations from equality of Member States as an expression of sincere cooperation. If in so doing, the aims from Article 3 TEU and Article 9 TFEU, for example, are taken seriously, they may, at times, demand a different balance against the principles set out in Article 119 TFEU. Specifically, solidarity concerns between citizens may lead to an interpretation according to which price stability can only be pursued so long as it does not hamper income inequality within and between Member States. In such a situation, courts can demand of the ECB, for example, to demonstrate that, while working on achieving price stability, it also sought to prevent income inequality or similar redistributive outcomes that hinder aims from Article 3 TEU and Article 9 TFEU.

1.4 CONCLUDING REMARKS

The expression and enforcement of the common interest in the EMU thus needs renewed attention, in particular by reconsidering the possible mechanisms available to citizens in the design and subsequently access to accountability mechanisms. Without attempting to conceive of new fora for political participation of individuals in the creation of EMU policies and instruments in the common interest, my analysis will be confined to proposing ways in which access to legal accountability can be reimagined. As already presented in the previous section, substantively the focus will be placed on the relationship between the principles of solidarity and equality in legal accountability. Precisely because the individual is unable to express her preferences in the political sphere, courts are capable of providing space for that expression. There are at least three main areas of judicial action through which courts can act on behalf of citizens in holding decision-makers to account through a

[152] For some striking examples, see Markakis (n 50) 86–93; M E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) *European Law Journal* 521, 523–527; M Matsaganis, 'The Greek Crisis: Social Impact and Policy Responses' Friedrich Ebert Stiftung (November 2013) 12–13; A Koukiadaki and L Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41(3) *Industrial Law Journal* 276.

reinterpretation of the common interest, thereby shifting the current balance between the principles of solidarity and equality.

First, through a teleological interpretation of the relevant legal framework, the courts are able to control the scope of access. For example, Article 263 TFEU, regulating access for direct action, requires that the applicant be directly and individually concerned, or directly concerned when the act in question does not require further implementing measures.[153] The issue of standing is a topic where a well-established pessimism pervades the literature.[154] If we understand the EMU as a solidarity area where decision-makers act in the interest of all citizens, and where the effects of these decisions (for example, resulting in austerity measures at the national level) lead to more immediate effects to a broad group of citizens, there is space for the concept of 'direct concern' to be interpreted more broadly when interpreting access conditions. For example, the effects-based review that courts employed in the financial crisis[155] may well be used to interpret more broadly the direct concern requirement necessary to trigger access to justice.

Second, judicial remedies are not static legal instruments withstanding the demands created by societal realities. In its decision in *Rimšēvičs*,[156] the Court of Justice invalidated a national measure when applying the Statutes of the European System of Central Banks and of the ECB.[157] The Court justified the decision by underlining the independence of the ECB and entered for the first time an unchartered territory by annulling a national measure. The relevant provision of the Statutes provides for a referral to the Court of Justice, but nowhere explicitly allows annulling a national measure. Yet, it is through the interpretation of the purpose of this provision that the Court found the legal justification for its action.[158] In addition, the Bundesverfassungsgericht in *Weiss* employed a novel temporary remedy,

[153] See Case T-18/10 *Inuit* EU:T:2011:419 and Case T-262/10 *Microban* EU:T:2011:623.

[154] On this more generally, see A Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty' (1995) 32(1) *Common Market Law Review* 7; C F Bergstrom, 'Defending Restricted Standing for Individuals to Bring Direct Actions against Legislative Measures: Court of Justice of the European Union Decision of 3 October 2013 in Case C-583/11 P' (2014) 10 *European Constitutional Law Review* 481; L Carmosino, 'Direct Concern in State Aid Direct Actions: A Review of the Scuola Montessori Case' (2019) 2019 *European State Aid Law Quarterly* 71.

[155] A Steinbach, 'Effect-Based Analysis in the Court's Jurisprudence on the Euro Crisis' (2017) 42 (2) *European Law Review* 254, 254.

[156] Joined Cases C-202/18 and C-238/18 *Rimšēvičs* EU:2019:139.

[157] For a comment on the novelties of the case, see A Hinarejos, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: *Rimšēvičs*' (2019) 56 *Common Market Law Review* 1649.

[158] Joined Cases C-202/18 and C-238/18 *Rimšēvičs* (n 156) [45]–[48].

providing the Bundesbank with a three-month period to ensure that the ECB had, in fact, taken a plurality of interests into account when rolling out its PSPP programme.[159]

Finally, even without interfering into the structure of remedies formally prescribed, the courts are still able to enforce the obligation of decision-makers to act in the interest of the entire interdependent euro area. The grounds for reviewing administrative action, such as the duty to state reasons or legality, may be used to ascertain the interests pursued by the decision under review, as well as to determine standards of necessity in proportionality review. I turn to explore these possibilities in more detail in Chapter 2. Without reforming the Treaties, courts are able to control the access, remedies, and interpretation of the obligations of decision-makers towards the common interest of all EU citizens. This forms the basis for a more detailed inquiry into the three areas of economic governance that are the object of the case studies in Chapters 3–5: the law on financial assistance mechanisms, monetary policy mechanisms, and the single supervisory mechanism.

[159] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* Judgment of 5 May 2020 [235].