

# Chapter XXX

## Disaster Management in EU Law:

### Solidarity among Individuals and among States

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Natural factors and human activity lead with increasing frequency to calamitous events – ‘disasters’ – which result in human suffering and environmental damage, and which seriously disrupt the functioning of society.<sup>1</sup> Disruptions often include the partial destruction of public infrastructures, such as roads and transportation, and the immediate discontinuation of access to important services, including water, housing, electricity and communication. Disasters may thus jeopardise the enjoyment of several human rights, including the rights to life, food, health and property.<sup>2</sup>

To ensure the protection of persons, environment and property, public authorities conduct ‘disaster management’ activities (also known as ‘civil protection’), such as search and rescue, firefighting, health aid and financial relief. Disaster management arguably constitutes an essential public service, which contributes to the pursuit of vital public interests (eg public health) and the fulfilment of essential individual needs and interests, notably human rights.<sup>3</sup> Disaster management is indeed classified as a public service in certain States.<sup>4</sup> Disaster management may also be seen as a ‘meta public service’, which enables the provision of *other* essential public services.<sup>5</sup> Calamitous events can destroy infrastructures that are essential to preserve public interest and fulfil

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<sup>1</sup> Cf. the definition of ‘disaster’ provided for in the Draft Articles of the International Law Commission (ILC) on the protection of persons from disasters, see ILC, ‘Report of the International Law Commission’ (8 August 2014) UN Doc A/69/10, Article 3 (p. 87). Although disasters are often categorised as either ‘natural’ (eg floods) or ‘man-made’ (eg oil spills), this distinction is not clearly cut in practice, since there is often an inherent link between natural catastrophes and human activities; see *inter alia* Alessandro Tonutti, *Famine Crisis and International Crimes* (International Disaster Law Project 2014), 2, <<http://disasterlaw.sssup.it/wp-content/uploads/2014/01/IDL-Working-Paper-22014.pdf>>.

<sup>2</sup> See Eduardo Valencia-Ospina, ‘Preliminary Report on the Protection of Persons in the Event of Disasters’, ILC (5 May 2008) UN Doc A/CN.4/598, para 26.

<sup>3</sup> Cf. the definition of ‘essential public service’ provided by the editors in the introductory chapter.

<sup>4</sup> See eg Italian Law 146/1990, art 1(1) and (2)(a), Official Journal of the Italian Republic 14 June 1990 (translation by the author). See further Mauro Gatti, *IDRL in Italy: A Study on Strengthening Legal Preparedness for International Disaster Response* (International Federation of Red Cross and Red Crescent Societies 2015) <<http://www.ifrc.org/PageFiles/116992/Italian%20IDRL%20Report%20ENG.pdf>>, 61.

<sup>5</sup> Spanish law, for instance, explicitly terms civil protection a ‘public service’ that aims at the ‘rehabilitation of essential public services’, see Spanish Law 2/1985, art 1(2) and (3)(g), Official Bulletin of Spain 25 January 1985 (translation by the author).

individual needs.<sup>6</sup> Disaster management authorities must consequently perform remedial works in order to restore the provision of public services.

The conduct of disaster management activities constitutes an expression of the principle of solidarity, intended as a ‘communion of responsibilities’ and interest among individuals,<sup>7</sup> which leads to ‘the inherently uncommercial act of involuntary subsidization of one social group by another’.<sup>8</sup> The nature of civil protection as a ‘communion of responsibilities’ is reflected at the level of international law: it would seem established that the State, by virtue of its sovereignty, has the duty to ensure the protection of the persons and the provision of disaster relief on its territory.<sup>9</sup> The case-law of the European Court of Human Rights confirms that in case of disasters European States are under a positive obligation to take appropriate steps to safeguard the right to life and the right to property of those within their jurisdiction.<sup>10</sup> Similar obligations arguably exist with respect to the protection of other human rights threatened by disasters, such as the right to health or the right to food.<sup>11</sup>

The performance of civil protection activities may encounter some obstacles. Economic rules may prevent the State from efficiently organising civil protection services, and especially the services that are outsourced to for-profit or non-profit private entities (eg ambulance transport). The concern for the free market may thus potentially trump the one for solidarity in disaster management.<sup>12</sup> Moreover, the resources available to the State may be inadequate; in that case, the only solution lies in turning to the international community for help. Unfortunately, solidarity among States is not as developed as solidarity among individuals. States should display a modicum of collaboration, at least in theory, since they must ‘cooperate’ in case of a disaster.<sup>13</sup> However, the principles of sovereignty, territoriality and non-interference, which are at the core of the international system, imply that States are generally not required to provide assistance to other countries affected by disasters. Similarly, it would seem that,

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<sup>6</sup> For instance, earthquakes may damage water pipelines, thereby hindering water supply and the fulfilment of the right to water.

<sup>7</sup> Cf. Eduardo Valencia-Ospina, ‘Second Report on the Protection of Persons in the Event of Disasters’, International Law Commission (7 May 2009) UN Doc A/CN.4/615, para 50.

<sup>8</sup> Opinion of AG Fennelly in Case C-70/95 *Sodemare and others* [1997] ECR I-3395, para 29.

<sup>9</sup> See provisional Article 12(1) adopted by the ILC, see ILC, A/69/10, 88; See also UN General Assembly, Resolution 46/182, 19 December 1991, Annex, para 4. Cf. Ki-Gab Park, *La Protection des Personnes en Cas de Catastrophe* (Vol. 368, Collected Courses of the Hague Academy of International Law 2013) 348-349.

<sup>10</sup> See *Öneryildiz v Turkey* App no 48939/99 (ECtHR 30 November 2004), paras 71, 89; *Budayeva and others v Turkey* App no 15339/02 (ECtHR 20 March 2008), paras 128-129; *Kolyadenko and others v Russia* App no 17423/05 (ECtHR 28 February 2012), paras 157-158; *Hadzhiyska v Bulgaria* App no 20701/09 (ECtHR 15 May 2012), paras 14-15.

<sup>11</sup> Cf. Marlies Hesselman, ‘Establishing a Full ‘Cycle of Protection’ for Disaster Victims: Preparedness, Response and Recovery according to Regional and International Human Rights Supervisory Bodies’, (2013) 18 *Tilburg Law Review* 106.

<sup>12</sup> This risk is generally assuaged through the adoption of emergency measures, that permit national authorities to avoid the rigidities imposed by the law. EU law, for instance, explicitly allows the Member States to award contracts without prior publication of a call for competition in case of extreme urgency brought about by events unforeseeable by the contracting authority, see Article 32 of Parliament and Council Directive (EU) 2014/24 on public procurement [2014] OJ L94/65. Other examples of economic rules that may negatively affect the conduct of disaster management activities are discussed below, in sections 1.2 and 1.3.

<sup>13</sup> See draft Article 8 on the protection of persons from disasters, ILC, A/69/10, 87.

under international customary law, affected States are not bound to request or accept such assistance.<sup>14</sup>

The intervention of the European Union may contemporarily complicate these problems, and contribute to solve them. As in the case of other essential public services, it is primarily for national authorities to define, organise, finance and monitor disaster management. Nonetheless, the advanced state of integration between EU Members means that there are several Union policies that affect the conduct of civil protection activities. The action of the Union, according to the Commission's White Paper on Service of General Interest (2004), should be aimed at guaranteeing 'the physical safety' of the population from 'environmental catastrophes'.<sup>15</sup> Yet, one may wonder to what extent EU law actually contributes to protect against catastrophes. It is true that Union law might provide for rules and instruments that specifically address civil protection, and which may positively contribute to international solidarity and to the protection of affected populations. It is also possible, at any rate, that EU economic law might reduce the States' discretion in the organisation of their civil protection services, thereby negatively impacting on solidarity among individuals and on the protection of the affected populations.

This topic has drawn limited attention so far. It is well established that solidarity is one of the values underpinning the model of European society and a concept central to EU law and, especially, to services of general interest.<sup>16</sup> Yet, it is not clear to what extent this concept affects EU law in general, and disaster management in particular.<sup>17</sup> This Chapter contributes to fill this gap, by assessing whether European Union law gives a positive or a negative contribution to solidarity in disaster situations, and whether it supports the protection of the victims of calamities. The article is divided in two parts. The first part evaluates the (negative) influence of EU competition and internal market rules on national disaster management systems, elucidating their impact on solidarity among individuals and on the protection of the population. The second part investigates the EU's (positive) contribution to international solidarity, discussing the Union

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<sup>14</sup> See *inter alia* Carlo Focarelli, 'Duty to Protect in Cases of Natural Disasters' (2013) Max Planck Encyclopaedia of Public International Law, para 17; Park (2014) 150-151. To be sure, the ILC's draft Articles on the protection of persons from disasters, ILC, A/69/10, affirm that the affected State must 'seek' assistance from among other international subjects, to the extent that a disaster exceeds its national response capacity (Article 13); in addition, the affected State should not 'arbitrarily' withhold consent to external assistance (Article 14). According to several States, in any event, these rules represent progressive development of the law, and not codification of it; see Amelia Teles, "Challenges to State Sovereignty in the Provision of International Natural Disaster Relief", in David D. Caron, Michael J. Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press 2014), 270-294, 284.

<sup>15</sup> European Commission, 'White Paper on Services of General Interest', COM(2004) 374, para 3.4.

<sup>16</sup> See Article 2 TEU; Opinion of AG Mengozzi in C-574/12, *Centro Hospitalar de Setúbal and Serviço de Utilização Comum dos Hospitais v Euresst Portugal*, 27 February 2014, para 40; Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU?', in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010) 23.

<sup>17</sup> Some authors have focused on the effects of EU economic law on the privatisation of health services, see eg Okeoghene Odudu, 'The Public/Private Distinction in EU Internal Market Law' (2010) 44 *Revue Trimestrielle de Droit Européen*, 826; others have elucidated aspects of civil protection rules, see eg Theodore Konstadinides, 'Civil Protection Cooperation in EU Law: Is There Room for Solidarity to Wriggle Past?' (2013) 19 *European Law Journal* 267. Existing analyses, at any rate, do not seem to systematically assess the impact of EU law on solidarity in disaster management.

instruments that address specifically civil protection and which may contribute to fulfil the rights of the persons stricken by disasters in Europe.

## **1. EU Economic Law and Disaster Management: A Negative Influence on Solidarity among Individuals?**

The application of EU economic rules in the field of civil protection may, in principle, have negative effects on the provision of effective assistance. Competition and internal market rules might indeed restrain the discretion of the Member States, by forcing them to organise disaster management services on the basis of liberalistic rules, and not in light of the concern for solidarity among citizens. EU economic law may thus potentially prevent the State from providing disaster-related services that are reliable and of good quality, and may thus negatively affect the protection of the rights of affected persons.

To properly discuss the impact of EU economic rules on the conduct of national disaster management activities, the analysis begins by assessing whether such rules may abstractly apply in the civil protection area (1.1). Then, the attention turns to the practice regarding the application of EU competition rules in the field of disaster management (1.2). Subsequently, the study addresses the interaction between internal market rules and the provision of disaster-services (1.3).

### *1.1. Applicability of EU Economic Law to Disaster Management Activities*

At first sight, one may think that disaster management activities can hardly be affected by EU economic rules. Disaster-related ‘services’, in fact, may seem not to have an economic character,<sup>18</sup> and may consequently be classified as ‘non-economic services of general interest’, which fall beyond the scope of application of competition and internal market rules.

The Court of Justice of the European Union (CJEU) addressed this issue in *Calì*. This case concerns an undertaking holding the exclusive concession – given by a public authority – for an anti-pollution surveillance service in a port specialised in oil products. This undertaking charged vessels which docked at the port wharves with compulsory fees, even when its anti-pollution services were not requested. The national court asked the CJEU whether this practice amounted to an abuse of dominant position. The Court argued that anti-pollution prevention forms part of the essential functions of the State and is not of an economic nature justifying the application of the Treaty rules on competition.<sup>19</sup> Preventing the risk of pollution and the risk of serious accidents is indeed linked to the more general endeavour to exercise supervision and guarantee safety in order to avert and limit the damage that ‘a disaster would cause to the maritime

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<sup>18</sup> Cf. Mustafa Karayigit, ‘The Notion of Services of Economic Interest Revisited’ (2009) 15 European Public Law 575; Daniele Gallo, *I servizi di interesse economico generale: Stato, mercato e welfare nel diritto dell’Unione europea* (Giuffrè 2010), 234-371.

<sup>19</sup> Cf. case C-393/95, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* [1997] ECR I-1547, paras 22-24; see also Nicolas De Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014), 344; Okeoghene Odudu, ‘The Public/Private Distinction in EU Internal Market Law’ (2010) 44 *Revue Trimestrielle de Droit Européen* 826, 833-834.

environment'.<sup>20</sup> The reasoning of the Court in *Calì* might be applied by analogy to other areas of disaster prevention; averting and limiting damage to the environment and to the population is, in general, an essential function of the State, which is not of economic nature.<sup>21</sup>

The considerations contained in *Calì*, in any event, should not lead one to assume that the whole of disaster management is non-economic in nature. Some disaster-related services are indeed 'economic' and may be characterised as 'services of general economic interest' (SGEI). The possible economic nature of certain disaster management services is elucidated by the case-law on emergency ambulance transport, which is a crucial component of disaster management. Transporting the sick and injured is indeed indispensable to protect lives in the immediate aftermath of catastrophes. In the leading case *Ambulanz Glöckner*<sup>22</sup> the Court was called to determine whether the rules on the abuse of dominant position (current Articles 102 and 106 TFEU) were compatible with national measures on the provision of ambulance transport.<sup>23</sup> The Luxembourg judges found that the domestic rules fell within the scope of application of EU competition law. Emergency transport indeed constitutes an economic activity, which can be performed on a market basis.<sup>24</sup>

One may hypothesise that, by analogy, other emergency management activities may be classified as 'economic'. This is confirmed by Directive 2014/24 on Public Procurement, which contains a list of civil protection 'services' that may be subject to public procurement procedures: fire-brigade and rescue services, fire-prevention services, forest-firefighting services and nuclear safety services.<sup>25</sup> The Directive thus implicitly acknowledges that these services constitute economic activities, which can be performed on a market basis. The outsourcing of these services – and, potentially, other 'economic' disaster-related functions – at the domestic level should be performed in compliance with EU competition and internal market rules, at least in principle.

If economic rules may abstractly apply to disaster-related services, two sets of EU norms may potentially raise issues in terms of solidarity among individuals: competition law (which is discussed in the next section) and internal market law (discussed in section 1.3).

## 1.2. Competition Law and Disaster Management

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<sup>20</sup> Case C-393/95, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* [1997] ECR I-1547, Opinion of AG Cosmas, para 62.

<sup>21</sup> Cf. Hans Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (Europa Law Publishing 2003), 120.

<sup>22</sup> Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089.

<sup>23</sup> This judgement is discussed below, see text to n 29.

<sup>24</sup> *Ambulanz Glöckner*, paras 21-22. See also Case C-119/06 *Commission v Italy* [2007] ECR I-168 paras 37 to 41; Opinion of AG Wahl in Case C-113/13, *ASL No 5 and others v San Lorenzo and Croce Verde*, 30 April 2014, para 24.

<sup>25</sup> Art 10(h) of Directive 2014/24 on public procurement (see n 12) excludes from its field of application civil defence, civil protection, and danger prevention services that are provided 'by non-profit organisations or associations'. This arguably means that the directive is applicable in case of services provided by *for-profit* organisations. In any event, the Court of Justice has confirmed that firefighting is not an activity that necessarily involves the exertion of public authority powers, see Case C-103/01 *Commission v Germany* [2003] ECR I-5369, paras 13, 38.

The application of competition norms in the field of disaster management may be problematic, since the outsourcing of disaster-related services to private entities is sometimes accompanied by the granting of economic benefits. The provision of emergency services is indeed financially draining and national authorities may give some special or exclusive rights to the undertakings that provide such services as a form of compensation.<sup>26</sup> The conferral of these rights may conflict with Article 106(1) TFEU, pursuant to which, in the case of undertakings to which Member States grant special or exclusive rights, the States shall neither enact nor maintain in force any measure contrary to competition rules.

The problems raised by the application of Article 106(1) TFEU in case of disaster-related services are elucidated by the case *Ambulanz Glöckner*. The national law at stake granted special rights to the organisations that performed emergency ambulance transport, thereby ensuring their *de facto* monopoly on the market for both emergency and non-emergency transport.<sup>27</sup> This policy had a seemingly clear rationale: ensure that the operators providing emergency transport (which is very expensive) may offset their costs by revenue from non-emergency transport. Yet, the national measure could have determined an abuse of dominant position on the part of the organisations involved, in violation of Articles 86 and 90 of the Treaty Establishing the European Community (TEC) (current Articles 102 and 106 TFEU).

The CJEU held that the granting of special rights to the organisations concerned could be justified in light of Article 90(2) TEC (now Article 106(2) TFEU). According to this provision, undertakings entrusted with the operation of a SGEI – such as the providers of emergency transport<sup>28</sup> – are subject to the rules on competition only in so far as the application of such rules does not obstruct the performance of the tasks assigned to them. The strict application of Article 106 TFEU in the circumstances of this case would have hindered the performance of a service of general economic interest, by jeopardising the economic viability of emergency ambulance transport.

The necessary capacities of the public ambulance service are determined by possible emergency cases, including catastrophes,<sup>29</sup> not by marketing concerns. Therefore, the restriction of competition in this case could be necessary to enable the providers of non-emergency transport sector to discharge their general-interest task of ensuring emergency transport in conditions of economic equilibrium.<sup>30</sup> It is only if it were established that the organisations entrusted with the operation of the public ambulance service were ‘manifestly unable’ to satisfy demand for emergency ambulance services and for patient transport at all times that the justification for extending their exclusive rights, based on the task of general interest, could not be accepted.<sup>31</sup>

Although the CJEU did not explicitly mention the word ‘solidarity’ in *Ambulanz Glöckner*, it would seem to have taken this principle into account. The Court indeed acknowledged that, to effectively perform their emergency-related tasks ‘in economically

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<sup>26</sup> For example, see the case *Ambulanz Glöckner* discussed in this section, or the case *San Lorenzo*, discussed in the next one.

<sup>27</sup> *Ambulanz Glöckner*, para 8.

<sup>28</sup> See n 24.

<sup>29</sup> *Ambulanz Glöckner*, para 8; see also the Opinion of AG Jacobs in the same case, para 29.

<sup>30</sup> *Ambulanz Glöckner*, para 61.

<sup>31</sup> *Id.*, para 62. See also Adam Cygan, ‘Public Healthcare in the European Union: Still a Service of General Interest?’ (2008) 57 *International and Comparative Law Quarterly* 529, 542-545.

acceptable conditions’,<sup>32</sup> the organisations concerned had to rely on the revenue of non-emergency services. The Court thus seems to admit that a State may oblige some individuals (that use non-emergency transport) to ‘subsidise’ others (the beneficiaries of emergency transport). In other words, the CJEU accepted, at least in principle, that a State can adopt measures that abstractly infringe on economic rules but foster solidarity among its citizens in emergency situations.

Given the specificities of this case, notably the strict connection between the emergency and non-emergency activities conducted by national operators, it is difficult to draw general conclusions about the applicability of SGEI exceptions in the case of other disaster-related services, such as firefighting or search and rescue. It would nonetheless seem possible to draw two conclusions from this case. First, *Ambulanz Glöckner* suggests that the Court of Justice does not ignore the concern for solidarity in the interpretation of economic rules, but actually admits the prioritisation of such concerns over liberalistic objectives. This approach is confirmed, and made more explicit, by the recent case-law on the internal market, discussed in the next section. Secondly, *Ambulanz Glöckner* indicates that the legality of the restraints to competition may be influenced by the concern for human rights protection. The exclusive rights conferred on the providers of emergency transports become incompatible with the Treaties if the private operators involved are ‘manifestly unable’ to perform their emergency-related tasks,<sup>33</sup> that is, protecting the life and health of the population. This may suggest that solidarity-based mechanisms in the disaster management field may lawfully impinge on competition rules, but only insofar as they contribute to the protection of the population and, thus, to the fulfilment of human rights.

### 1.3. Internal Market and Civil Protection

The outsourcing of disaster-related services to private entities is potentially problematic, not only in terms of competition law, but also in terms of freedom of establishment and freedom to provide services (protected by Articles 49 and 56 TFEU). A conflict between internal market and national civil protection rules may arise, in particular, because some Member States, such as France and Italy, outsource the provision of disaster-related services exclusively, or by preference, to non-profit organisations.<sup>34</sup> This practice constitutes an ‘expression of the principle of solidarity’, since it encourages citizens to provide voluntary work for the benefit of society as a whole.<sup>35</sup> It is nonetheless troublesome, since it may imply a discrimination against for-profit entities established in other Member States.

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<sup>32</sup> *Ambulanz Glöckner*, para 57.

<sup>33</sup> *Ambulanz Glöckner*, para 62; see also the Opinion of AG Jacobs in the same case, para 188.

<sup>34</sup> Italy routinely entrusts the provision of a number of disaster-related services (eg healthcare assistance, firefighting, and construction of shelters) to non-profit organisations, see the directive of the president of the Council of Ministers of 9 November 2012, *Gazzetta Ufficiale della Repubblica Italiana* (GURI) 1 February 2013; see further Gatti (2015) 25-26. On the French practice, see the Code de la Sécurité Intérieure, Articles L725-1 and L-725-3, Ordonnance n°2012-351, 12 March 2012, Official Journal of the French Republic number 62, 13 March 2012, page 4533.

<sup>35</sup> See the arguments of Italy in *San Lorenzo*, cit. in the Opinion of AG Wahl in *San Lorenzo*, para 32. See also the judgement in this case, Case C-113/13 *ASL No 5 and others v San Lorenzo and Croce Verde*, 11 December 2014, paras 11-12.

The recent case *ASL No 5 v San Lorenzo and Croce Verde* (hereinafter: *San Lorenzo*)<sup>36</sup> exemplifies the legal and practical problems generated by the outsourcing of civil protection services to non-profit organisations. This case, like *Ambulanz Glöckner*, concerns emergency ambulance transport. The object of the dispute is a measure of an Italian region, according to which public authorities should entrust emergency transport services, by preference, to non-profit organisations, for a mere reimbursement of the costs.<sup>37</sup>

*San Lorenzo* and *Croce Verde*, two non-profit Italian cooperatives, argued that the measure is incompatible, *inter alia*, with Articles 49 and 56 TFEU, since it excludes for-profit entities from an essential part of the relevant market. According to Advocate-General Wahl, the national measure is indeed incompatible with the Treaties, since it is potentially capable of excluding from the tendering procedure entities which are based in other Member States and ‘have not been established as non-profit-making entities.’<sup>38</sup>

The conclusion reached by the Advocate-General, if followed by the Court, could have negatively affected the provision of disaster management at the national level. If national authorities were unable to give priority to non-profit organisations in the awarding of medical transport services, they would arguably be incapable of giving priority to similar organisations in the awarding of other civil protection services.<sup>39</sup> Therefore, the States that systematically outsource civil protection services by preference to non-profit organisations through procedures similar to those applicable in the *San Lorenzo* case would possibly have to revise the organisation of their entire disaster management service, to integrate for-profit organisations.<sup>40</sup>

These potential problems never materialised, since the CJEU followed a different approach. The Court admitted that the domestic measures generated a difference in treatment to the detriment of for-profit undertakings which could be interested in that contract but were situated in another Member State. In principle, such a difference in treatment amounts to indirect discrimination on the basis of nationality.<sup>41</sup> However, the Court considered that such discrimination was justified by solidarity and public health concerns, in line with the previous case-law.

In *Sodemare*, the Luxembourg judges had indeed acknowledged that a Member State could legitimately consider that the admission of private operators to a social welfare system ‘based on the principle of solidarity’ is to be made subject to the

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<sup>36</sup> *San Lorenzo*.

<sup>37</sup> Regional Law 41/2006, Bollettino Ufficiale Regione Liguria (BURL) 13 December 2006, art 75 *ter*; see also Regional Law 15/1992, BURL 10 June 1992 (applicable at the time of the dispute, now substituted by Regional Law 42/2012, BURL 12 December 2012, whose art. 13(2) has similar content). See also Italian law 266/1991, GURI, 22 August 1991.

<sup>38</sup> Opinion of AG Wahl in *San Lorenzo*, para 51.

<sup>39</sup> The practical consequences of this development can hardly be foreseen with precision. Although the number of for-profit entities operating in this sector would seem to be limited at present, it may grow in the future, to match the increased demand deriving from the possible ‘opening’ of tendering procedures to for-profit organisations. Hence, one may hypothesise that, if the AG’s Opinion had been followed, there would have been substantial consequences for the management of national civil protection systems.

<sup>40</sup> Cf. n 34. To be sure, the outsourcing of civil protection in Italy is generally not performed through contracts between the public authorities and the non-profit organisations (as in *San Lorenzo*), but rather through a registration of such organisations in a list of civil protection bodies. Internal market rules would nonetheless seem to apply, since the organisations perform economic activities potentially having cross-border interest, which entail remuneration (in the form of reimbursement).

<sup>41</sup> *San Lorenzo*, para 52.

condition that they are non-profit-making.<sup>42</sup> Relying on this authority, in *San Lorenzo* the Court held that the ‘principle of the good of the community’ is ‘taken into consideration by EU law’.<sup>43</sup> Hence, a Member State may take the view that recourse to ‘voluntary associations’ is consistent with the social purpose of the emergency ambulance services, ie protecting the health and life of humans.<sup>44</sup>

The *San Lorenzo* judgement confirms the Court’s attention, already expressed in *Ambulanz Glöckner*, for the legitimate concerns of the Member States regarding solidarity and the organisation of emergency health services. The Court indeed acknowledges again that such services contribute to the ‘social purpose’ of the ‘good of the community’, and particularly to the protection of public health – an objective which ranks foremost ‘among the assets or interests protected by the Treaty’.<sup>45</sup> Hence, the recourse on a preferential basis to voluntary associations, which may abstractly amount to an indirect discrimination, may be justified.

Given the analogies between *San Lorenzo* and *Ambulanz Glöckner*, one may hypothesise that the legality of the preferential treatment for voluntary organisations, which forms the object of the former, is dependent on the same condition identified in the latter: the actual ability of the operators to pursue their ‘social purpose’, ie ensuring the protection of the persons in need. Arguably, if voluntary organisations were ‘manifestly unable’ to pursue their social purpose (ie guaranteeing access to a high-quality medical treatment),<sup>46</sup> the preferential treatment offered by the State would become incompatible with internal market rules. It may be contended, in other words, that solidarity should prime on free market in disaster situations, but only to the extent that it contributes to protect the life and health of persons.

It emerges from the analysis that the application of EU economic law – competition and internal market – may potentially impinge on the provision of certain services. Yet, the case-law suggests that the Court of Justice does not appear to ignore the specificities of disaster management, and properly acknowledges the concern for solidarity among the Member States’ citizens. The Court thus seems to minimise the risk that EU economic law may create for the efficient provision of disaster management services at the national level. Arguably, these findings may be relevant in all the ‘economic’ areas of disaster management. It is true that *San Lorenzo* and *Ambulanz Glöckner* concern a specific service, that is, emergency ambulance transport. Nonetheless, the case-law seems to be applicable to other emergency services, too. Disaster-related services, such as firefighting and search and rescue, indeed contribute to the protection of the health and life of humans, as much as emergency ambulance transport, and should be treated in a similar manner.

## 2. EU Civil Protection Law: A Positive Influence on International Solidarity

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<sup>42</sup> Case C-70/95 *Sodemare and others* [1997] ECR I-3395, paras 29-32. See further Leigh Hancher and Wolf Sauter, ‘One Step Beyond? From Sodemare to Docmorris: the EU’s Freedom of Establishment Case Law Concerning Healthcare’ (2010) 47 *Common Market Law Review* 117.

<sup>43</sup> *San Lorenzo*, paras 53-54.

<sup>44</sup> *San Lorenzo*, paras 56-59. See also Case C-70/95 *Sodemare and others* [1997] ECR I-3395, para 32; Commission document SWD(2013) 53 final/2, 29 April 2013, para 209.

<sup>45</sup> *San Lorenzo*, paras 59-60.

<sup>46</sup> *San Lorenzo*, para 57.

While EU economic law may potentially have a negative influence on the solidarity among citizens in the context of disasters, another sector of Union law – civil protection – may actually reinforce solidarity, in its inter-State dimension. In the international system, solidarity cannot be taken for granted, since the sovereignty of States generally implies that they are not obliged to assist each other. The Union may contribute to solve this problem within its territory, through its civil protection policy.<sup>47</sup> EU law imposes rather stringent obligations of inter-State cooperation with respect to disaster management (2.1). Moreover, the Union may mobilise its own financial resources to assist one of its Members in need (2.2).

### *2.1. International Cooperation in the EU: The Solidarity Clause and the Civil Protection Mechanism*

Disasters are increasingly frequent and States are not always capable of coping with them. To effectively protect the affected persons and to fulfil their human rights (notably, the rights to life and health), international cooperation is more and more necessary. The Union may facilitate such cooperation among EU Members, thereby indirectly contributing to the protection of the lives and health of European people (as well as other human rights, such as the right to food or the right to water).

Two primary law provisions are explicitly meant to reinforce collaboration between the Member States in case of disasters. Article 222 TFEU (labelled ‘Solidarity Clause’) stipulates that, should a Member State be the object of a natural or man-made disaster, the Union and, above all, the other Member States must assist it at the request of its political authorities. This provision was implemented by Decision 2014/415, which provides for ‘arrangements for coordination in the Council’ in case of catastrophes.<sup>48</sup> Furthermore, Article 196 TFEU explicitly grants the Union a competence in the ‘Civil Protection’ domain, enabling it to ‘encourage cooperation’ between Member States in disaster prevention and response. This provision was implemented by Decision 1313/2013, which establishes a ‘Union Civil Protection Mechanism’.<sup>49</sup> This Mechanism, based on a pre-existing Community instrument, regulates cooperation between the Member States in disaster management, and contributes to the implementation of the Solidarity Clause.

This legal framework seems to be conducive to increased international solidarity in case of disasters. The Civil Protection Mechanism contains a procedural and institutional framework that regulates the requests and offers of assistance, thereby facilitating the provision of international aid. Through the Mechanism, the EU has indeed monitored more than 300 disasters and received more than 200 requests of assistance, from within

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<sup>47</sup> It is worth noting that, while the Treaties confer a ‘Civil Protection’ *competence* to the Union (Article 196 TFEU), the civil protection *policy* of the Union encompasses the use of instruments founded on other legal bases, such as Articles 175 and 222 TFEU, see further section 2.1.

<sup>48</sup> Council Decision (EU) 2014/415, [2014] OJ L192/53 (hereinafter: Decision 2014/415); see, in particular, the preamble, para 2.

<sup>49</sup> Council Decision (EU) 1313/2013 on a Union Civil Protection Mechanism [2013] OJ L347/924 (hereinafter: Decision 1313/2013).

the EU and from outside the EU.<sup>50</sup> The positive effects of the Mechanism are magnified by the Solidarity Clause, which unequivocally provides for an *obligation* of mutual assistance in case of disasters (pursuant to Article 222 TFEU, any Member State ‘shall assist’ other disaster-stricken EU countries). This obligation arguably reinforces the ability of EU countries to protect their peoples: if a State were incapable of coping with a catastrophe, it may request assistance from the other EU Members, which would be bound to grant it.

The contribution of EU civil protection law to international solidarity, however, is only partial, for two reasons. In the first place, the obligation to provide mutual assistance in case of disasters is imprecise. Declaration 37, annexed to the Lisbon Treaty, stipulates that assisting States are free to determine the ‘most appropriate means’ to comply with their solidarity obligations under Article 222 TFEU. The Civil Protection Mechanism does not add clarity to the picture, since it states that EU States can independently define the scope and terms of any assistance that they provide to other Union Members.<sup>51</sup> Decision 2014/415 is even more laconic, since it does not seek to regulate the behaviour of countries ensuring assistance, but merely contains ‘arrangements for coordination in the Council’ in respect of the implementation of the Solidarity Clause.<sup>52</sup> One may argue, therefore, that the absence of a precise procedural framework for the delivery of assistance may complicate the enforcement of Article 222 TFEU.<sup>53</sup>

A second element that may limit the EU’s contribution to international solidarity lies in the possibility that the affected Member State may neither request nor authorise the provision of assistance from other Members. Under EU law, the State affected by a calamitous event *may*, but is not explicitly required to, request international assistance.<sup>54</sup> An obligation to request international assistance may possibly descend from the duty to protect fundamental rights, at least in those situations in which the affected State is incapable of coping with the emergency. A State in such a situation, in fact, is incapable of protecting the rights of affected persons; it may be argued that, to ensure appropriate protection for such rights, the State should request international assistance.<sup>55</sup> Such an extensive interpretation of fundamental rights seems to be supported by the very Union. The Regulation providing for the Instrument for Humanitarian Aid explicitly affirms that the victims of natural disasters and in other comparable circumstances have a ‘right to international humanitarian assistance’ where their own authorities prove unable to provide effective relief.<sup>56</sup> Arguably, the existence of such a ‘right’ to international assistance presupposes the existence of a duty, binding on the affected State, to request such assistance from abroad.<sup>57</sup>

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<sup>50</sup> See the DG ECHO factsheet, <[http://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/civil\\_protection\\_en.pdf](http://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/civil_protection_en.pdf)> accessed 24 July 2014.

<sup>51</sup> Decision 1313/2013, art 15.

<sup>52</sup> Decision 2014/415, in particular, the preamble, para 2.

<sup>53</sup> Cf. Konstadinides (2013) 282.

<sup>54</sup> Cf. Art. 222(2) TFEU; see also Decision 2014/415, Article 4(1); Decision 1313/2013, art 15.

<sup>55</sup> It would seem that such a duty does not currently exist under international customary law (see above, n 14); nonetheless, it might possibly exist in the legal order of the Union, as a corollary of fundamental rights, as they are interpreted in the EU.

<sup>56</sup> Council Regulation 1257/96/EC, [1996] OJ L163/1.

<sup>57</sup> It is true the Regulation on Humanitarian Aid concerns the assistance provided to third countries, but, since it enounces a principle (ie the existence of a right to international assistance), it provides for

In summary, the analysis of the mechanisms for international cooperation in the EU suggests that the Union may reinforce solidarity among the Member States and, consequently, it may positively affect, at least to a certain extent, the protection of the rights of the persons affected by disasters. It also indicates, however, that international solidarity still finds an obstacle in the principle of sovereignty: the EU legal order does not explicitly contemplate precise obligations regarding international disaster response, which may be relied on to ensure the complete fulfilment of the rights of affected persons.

## *2.2. Financial Assistance to Affected States: The Solidarity Fund*

The EU's positive contribution to international solidarity in Europe is not limited to the mobilisation of the operational resources of the Member States, but extends to the direct provision of financial resources, which should assist EU countries in the recovery from disasters.

Disasters affect not only people but also the environment and property. They also prevent the provision of essential public services, by disrupting, for instance, transports, communication and healthcare. Restoring these services is indispensable in order to ensure that life returns to normal levels, that is, to promote 'disaster recovery'. Recovery activities may therefore function as a meta-public service, which permits other essential public services to provide public goods and to protect and fulfil human rights. Rebuilding or repairing a hospital after a flood, for instance, contributes to fulfil the right to health.

Disaster recovery activities, like disaster relief, are normally performed by national authorities,<sup>58</sup> but are also affected by EU policies. The European Community decided in 2002 to 'show its solidarity' with the population of the regions concerned by natural disasters, by providing financial assistance to contribute to a rapid return to normal living conditions. This assistance is currently regulated by the 'European Union Solidarity Fund', provided in Regulation 2012/2002 and later amended by Regulation 661/2014.<sup>59</sup> Through the Fund, the Union can finance recovery-related activities, including the restoring to working order of infrastructure and plants in the fields of energy, telecommunications, water and waste water.<sup>60</sup>

The Fund increases solidarity, not only between EU institutions and the citizens, but also among the Member States. EU Members are indeed subject to different disaster risks: the use of a common Fund, financed by the Union, to finance recovery activities

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indications that may be relevant for the interpretation of EU law at large. See further Mauro Gatti, 'Normative or Hypocritical? Contradictions Between the EU's External Promotion of Human Rights and Member States' Policies', in Bea Lundt and Sophie Wulk (eds), *Global Perspectives on Europe* (LIT Verlag 2016).

<sup>58</sup> A typical disaster recovery activity consists in providing financial assistance to the persons affected by disasters. It may be noted that Article 107(2) TFEU explicitly allows the Member States to give undertakings 'aid to make good the damage caused by natural disaster' or 'exceptional occurrences' (including man-made disasters). See eg See Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, para 79. See also Casolari, 'Art. 47 – Aiuti pubblici per calamità naturali' in Luigi Costato and Lucia Serena Rossi (eds), *Commentario alla Legge 24.12.2012 n.234* (Editoriale Scientifica 2015).

<sup>59</sup> Council Regulation (EC) 2012/2002 [2002] OJ L311/3; Council Regulation (EU) 661/2014 [2014] OJ L189/143. Regulation 2012/2002, as amended by Regulation 661/2014, hereinafter referred to as 'Solidarity Fund Regulation'.

<sup>60</sup> Solidarity Fund Regulation, art 3(2).

means that the less disaster-prone States indirectly ‘subsidise’ assistance to the more disaster-prone ones.<sup>61</sup>

Nonetheless, the ‘solidarity’ on which the Fund is based has some limits. In the first place, the financial size of this instrument is modest: the Fund may cover only a small fraction of the damages caused by disasters in Europe every year.<sup>62</sup>

Secondly, the Fund can only be used in the context of ‘major’ disasters, that is, events resulting in direct damage estimated at over 3 billion Euros in 2011 prices, or more than 0,6 % of a States’ gross national income or in direct damage in excess of 1,5% of a region’s gross domestic product.<sup>63</sup> This limitation may be logical, at least in theory, since it may allow to save resources in case of less serious emergencies, to better show solidarity when it is most needed. In practice, however, it may be wondered whether the threshold for the mobilisation of the Fund at State level is not ‘extremely high’, as argued by the Commission in 2005.<sup>64</sup>

Finally, the Solidarity Fund has a limited scope. This instrument can only be used in case of *natural* disasters (eg floods) – and not after man-made events (eg oil spills). The preamble of Regulation 2002/2012/EU clarifies the rationale for this restriction: the Fund should not relieve third parties of their responsibility who are liable in the first instance for the damage caused by them. Such argument may seem justified in light of the ‘polluter pays’ principle that inspires Directive 2004/35 on environmental liability.<sup>65</sup> Since the damages caused by economic operators should be born by those operators, one may hypothesise that there should be no need for public authorities – including the EU – to provide economic support.

However, the environmental liability Directive does not establish liability for all kinds of environmental damage, but only for the damage caused by certain occupational activities.<sup>66</sup> In addition, the party responsible for the disaster might not be easily identifiable in practice: the competent authority is required to establish a causal link between the activities of the operators at whom the remedial measures are directed and the disaster.<sup>67</sup> Therefore, it is possible that public authorities may have to bear the costs for remedial actions after man-made catastrophes, including restoring the working order of essential public services. In such a situation, it would seem logical that the EU should financially assist the Member State concerned, as it would do in case of a ‘natural’ disaster.

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<sup>61</sup> For instance, Italy and Germany are among the main beneficiaries of the Fund, while other countries (such as Denmark or Belgium) seldom, if ever, use the Fund, see David Meier, *Success Stories: the Use of the Solidarity Fund* (European Parliament 2014) 7.

<sup>62</sup> Under the current Multiannual Financial Framework (2014-2020), the annual ceiling for expenditure of the Solidarity Fund is 500 million Euros per year. By contrast, disaster damages in Europe often amount to more than 20 billion Euros. A single flood in Germany in 2013 made damages estimated at more than 11 billion Euros; an earthquake in Italy in 2012 costed more than 14 billion Euros; see Guha-Sapir et al., *Annual Disaster Statistical Review 2014: The Numbers and Trends* (CREDES 2015) 32.

<sup>63</sup> Solidarity Fund Regulation, Article 2.

<sup>64</sup> COM(2005) 108 final.

<sup>65</sup> Pursuant to this instrument, subjects operating economic activities are required to bear the costs for remedial actions in case of the environmental pollution they generate, see Parliament and Council Directive (EC) 2004/35 [2004] OJ L143/56, Art. 8.

<sup>66</sup> See Directive 2004/35, Article 3(1) and annex III. See also C-378/08 *Raffinerie Mediterranee v Ministero dello Sviluppo Economico* [2010] ECR I -1919, Opinion of AG Kokott, para 89.

<sup>67</sup> C-378/08 *Raffinerie Mediterranee v Ministero dello Sviluppo Economico* [2010] ECR I -1919 paras 52-67.

The EU's focus on 'natural' disasters appears particularly incongruous when one takes into account the case-law of the European Court of Human Rights. This Court considers that the natural or man-made nature of a disaster bears on the type and extent of obligations to be involved.<sup>68</sup> The duties binding public authorities are not less, but *more* stringent in case of man-made catastrophes: natural disasters are 'as such beyond human control' and 'do not call for the same extent of State involvement as dangerous activities of a man-made nature.'<sup>69</sup> This makes clear that European States are required to protect and fulfil human rights in case of all calamities – *especially* in case of man-made ones. It appears incongruous that the EU should not show solidarity when it is most needed to protect human rights.

From a political perspective, it is perhaps understandable that the Member States, whose representatives approved the Solidarity Fund in the Council, wished to define the financial and substantive scope of this instrument in a restrictive manner. Given the scant solidarity displayed in other cases (such as the economic crisis or the massive influx of refugees in 2015), the limited solidarity that underlies the 'Solidarity Fund' is not surprising. Nonetheless, one may argue that, if the EU and its Members are truly to show their 'solidarity' in case of disasters, some reforms are in order. The EU should, in particular, increase the financial endowment of the Fund, lower the threshold for its mobilisation and allow for its use in case of *all* disastrous events, be they natural or man-made in nature.

## Conclusion

Disasters seriously disrupt the functioning of society and jeopardise the enjoyment of several human rights. States have the primary responsibility for protecting the life, health and property of people within their territory. They usually discharge their responsibility by providing an essential public service: disaster management. An efficient disaster management system presupposes a certain degree of solidarity among citizens, which is expressed by the State's duty to protect the population. When the resources of a single State are insufficient to address a disaster, international cooperation may be necessary; hence, solidarity might be required, not only among citizens, but also among States.

This Chapter verified whether EU law affects solidarity at the national and international level and, consequently, whether European rules influence the protection of human rights in case of disasters. The analysis showed that the principle of solidarity inspires the whole of the EU's action in the field of disaster management. In the first place, the principle of solidarity influences the application of the rules that address individuals. The case-law suggests that the Court of Justice takes into due account the concern for solidarity, thereby minimising the risk that EU economic law may negatively impact on the States' ability to organise their civil protection systems. Secondly, solidarity inspires the norms that regulate the relations among the Member States. EU civil protection rules require the States to assist each other, by providing operational

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<sup>68</sup> Marlies Hesselman, 'Regional Human Rights Regimes and Humanitarian Obligations of States in the Event of Disasters' in Andrej Zwitter et al. (eds), *Humanitarian Action: Global, Regional and Domestic Legal Responses* (Cambridge University Press 2014).

<sup>69</sup> *Budayeva*, para 174; *Hadzhiyska*, para 15.

resources and by contributing to a Fund that supports financially disaster-stricken EU countries.

The relevance of solidarity in the different ambits of EU disaster management law confirms that this concept is indeed central to the European Union and to its law. The influence of solidarity on the case-law of the Court of Justice may also corroborate the thesis whereby this principle has legal relevance, to the extent that it operates as an interpretative guide and an adjudicatory benchmark.<sup>70</sup> The rules on disaster management may thus contribute to demonstrate that solidarity constitutes a ‘constitutional paradigm’ of the EU.<sup>71</sup>

The application of solidarity in the context of disaster management is relevant in practice, since it contributes to ensure an effective protection of the rights of disaster victims, including the rights to life, health and property. In its case-law on competition and the internal market, the Court of Justice seems to appreciate that, to effectively protect persons in need, emergency services cannot be organised solely on the basis of liberalistic principles. The Union legislature, on the other hand, adopted civil protection instruments that regulate international cooperation, thereby facilitating the protection of the life, health and property of disaster victims, especially in situations in which national resources are insufficient.

Notwithstanding the generally positive effects of EU law on solidarity and on the protection of human rights, the analysis has also identified some problems and shortcomings. The risk that economic rules may be interpreted too rigidly is always present, as testified by the opinion of the Advocate-General in *San Lorenzo*. Moreover, it would seem that EU States are not subject to sufficiently stringent obligations of mutual support. Therefore, solidarity remains incomplete, and the EU’s contribution to the protection of persons in need potentially insufficient.

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<sup>70</sup> Malcolm Ross, ‘The Value of Solidarity in European Public Services Law’, in Markus Krajewski, Ulla Neergaard, Johan Van de Gronden (eds), *The Changing Legal Framework for Services of General Interest in Europe: Between Competition and Solidarity* (TMC Asser Press 2009) 81, 98.

<sup>71</sup> Cf. Ross (2010).