

# FOUNDATIONAL PRINCIPLES AND THE RULE OF LAW IN THE EUROPEAN UNION: HOW TO ADJUDICATE IN A RULE-OF-LAW CRISIS, AND WHY SOLIDARITY IS ESSENTIAL

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*In the seminal cases C-156/21 and C-157/21 ('Budget Conditionality Cases') the Court of Justice of the European Union demonstrated a shift in the perception of the operational functionality of foundational values of the EU, establishing that the rule of law is a founding value of the Union which represents a legal norm and imposes an obligation on the Member States to comply with its constituent elements. Such an interpretation of the CJEU, however, raises a few questions about the possibility of adjudicating the foundational values enshrined in Article 2 TEU and their extended role in the EU constitutional framework. Given the latest developments in the Court's case law, can all the foundational values under Article 2 TEU then acquire the status of legal norms and become 'foundational' or 'founding' principles? Does the attainment of this status happen automatically, or does a value need to fulfil specific criteria in order to obtain the necessary normativity, that would in turn make it enforceable? And how will the answer to that question affect our understanding of the role and function of the Court in EU law adjudication? In our contribution, we are going to attempt to address these very questions on the basis of four different premises. In Part I, the first premise – the possibility of the values of the EU becoming normative principles – will be discussed through theoretical and practical prisms. In Part II, the notion of 'foundational (or 'founding') principles and their relation to values will be explicated in light of the Budget Conditionality Cases and as EU principles of the highest constitutional rank. In Part III, and still in light of the Budget Conditionality Cases, the principle of solidarity will be analysed and presented as a foundational and legal principle of EU law. In Part IV, the idea of the CJEU as a 'deontic' Court will be outlined and then challenged on its grounds. This will be followed by some concluding remarks.*

## 1 INTRODUCTION

The rule-of-law debate remains to be one of the topical issues permeating the discussions about the current and future functioning of the European integration.

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Today, the European project witnesses not only the internal challenges of the ‘rule-of-law backsliding’<sup>1</sup> saga, but also, since the 24<sup>th</sup> of February 2022, an acute external threat which has implications and repercussions for the current rule-of-law crisis and its political management by the European Commission.<sup>2</sup> Replacing the rule of the iron fist with the rule of law was fundamental to the creation of the EU as a community.<sup>3</sup> All available tools must be employed to ensure that commitment to this EU value remains unscathed in the current situation and that the spirit of solidarity is strengthened rather than undermined. From a legal perspective, many doubts have been raised as to the *per se* justiciability of the rule of law as a value enshrined in Article 2 TEU.

Given the shortcomings in the assessment of compliance with the Copenhagen criteria in the 2004 pre-accession process and the adherence of the candidates to the values, enshrined in Article 2 TEU,<sup>4</sup> together with the zero functionality of the EU’s ‘nuclear option’,<sup>5</sup> one might think that the battle for the rule of law as a constitutional and *per se* justiciable value might have been lost. However, the recent case law of the Court of Justice of the European Union (CJEU), namely the seminal cases C-156/21<sup>6</sup> and C-157/21 (*‘Budget Conditionality Cases’*),<sup>7</sup> demonstrates a shift in the perception of the operational functionality of foundational values of the EU, establishing that the rule of law is a founding value of the Union which represents a legal norm and imposes an obligation on the Member States to comply with its constituent elements.<sup>8</sup> In addition, the *Budget Conditionality Cases* appear to be crucial since they also crown the principle of solidarity as a principle of constitutional and legal relevance, one we think should also be understood as a proper foundational principle of EU law, similarly to the rule of law, and in light of Article 2 TEU.<sup>9</sup> In other words, these cases open up the possibility for the principle of solidarity, an acknowledged fundamental principle of EU law, to be transformed into a *founding* principle.

Such an interpretation of the CJEU, however, raises a few questions about the possibility of adjudicating the foundational values enshrined in Article 2 TEU and their extended role in the EU constitutional framework. Given the latest developments in the Court’s case law, can *all* the foundational values under Article 2 TEU then acquire the status of legal norms and become ‘foundational’ or ‘founding’ principles? Does the attainment of this status happen automatically, or does a value need to fulfil specific criteria in order to obtain the necessary normativity, that would in turn make it enforceable? And how will the

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<sup>1</sup> Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 3.

<sup>2</sup> Dimitry Kochenov and Petra Bard, ‘War as a Pretext to Wave the Rule of law Goodbye? The Case for An EU Constitutional Awakening’, European Law Journal, 2022.

<sup>3</sup> Commission ‘White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025’ COM (2017) 2025 6.

<sup>4</sup> Jan Wouters, ‘Revisiting Art. 2 TEU: A True Union of Values?’ (2020) 2020 5 European Papers - A Journal on Law and Integration 255, 266.

<sup>5</sup> Laurent Pech and Kim Scheppele, ‘Is Article 7 Really the EU’s “Nuclear Option”?’ [2018] Verfassungsblog: On Matters Constitutional <[https://intr2dok.vifa-recht.de/receive/mir\\_mods\\_00003246](https://intr2dok.vifa-recht.de/receive/mir_mods_00003246)> accessed 5 July 2022.

<sup>6</sup> Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97.

<sup>7</sup> Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2022:98.

<sup>8</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 231.

<sup>9</sup> For an excellent case note on *Budget Conditionality Cases*, see Andi Hoxhaj, ‘The CJEU Validates in C-156/21 and C-157/21 The Rule of law Conditionality Regulation Regime to Protect EU Budget’, 5 (1) Nordic Journal of European Law (forthcoming).

answer to that question affect our understanding of the role and function of the Court in EU law adjudication? In our contribution, we are going to attempt to address these very questions on the basis of four different premises. In Part I, the first premise – the possibility of the values of the EU becoming normative principles – will be discussed through theoretical and practical prisms. In Part II, the notion of ‘foundational (or ‘founding’) principles and their relation to values will be explicated in light of the *Budget Conditionality Cases* and as EU principles of the highest constitutional rank. In Part III, and still in light of the *Budget Conditionality Cases*, the principle of solidarity will be analysed and presented as a foundational and legal principle of EU law. In Part IV, the idea of the CJEU as a ‘deontic’ Court will be outlined and then challenged on its grounds. This will be followed by some concluding remarks.

## 2 VALUES AND ADJUDICATION IN MOTIONS

From a legal perspective, the design of the EU constitutional framework might be thought to suffer from a disturbing paradox regarding the practical enforceability of EU values, since the Treaty of Lisbon brought some confusion<sup>10</sup> to the categorisation of the rule of law in the EU legal universe by referring to it both as a value<sup>11</sup> and a principle.<sup>12</sup> That cast some doubt on Article 2 TEU’s ability to produce ‘justiciable legal effects’ for the values, contained therein.<sup>13</sup> Whereas different opinions have been expressed in this regard,<sup>14</sup> the complexity, imbedded in the legal notion of a ‘value’ in the European context, has been even deepened by the construction of Article 2 TEU itself, which could be read as vesting the values listed in two separate sentences in Article 2 TEU with different legal statuses.<sup>15</sup> The confusion is deepened by the preamble to the Charter of Fundamental Rights, which, while stating that ‘the Union is founded on [certain] indivisible, universal values’, textually contrasts these with the ‘principles’ of democracy and the rule of law.<sup>16</sup> Although it is common practice to use

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<sup>10</sup> Dimitry Kochenov states that when Article 2 TEU speaks of ‘values’ it means ‘principles’, Dimitry Kochenov, *The Acquis and Its Principles*, vol 1 (Oxford University Press 2017) <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198746560.001.0001/acprof-9780198746560-chapter-2>> accessed 9 June 2022.

<sup>11</sup> Preamble and Article 2 TEU.

<sup>12</sup> Preamble and Article 21 TEU.

<sup>13</sup> Armin von Bogdandy and Luke Dimitrios Spieker, ‘Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges’ (2019) 15 *European Constitutional Law Review* 391, 409.

<sup>14</sup> *ibid* 410; as Thomas von Danwitz puts it: ‘the repeated recognition of the common values of the Union are much more than abstract references without any practical importance’, Thomas Von Danwitz, ‘Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ’ (2018) 21 *Potchefstroom Electronic Law Journal* 1, 17.

<sup>15</sup> The status of the values under Article 2 TEU has been interpreted differently by different scholars, see, for example, Wouters (n 4) 258; as Nicolosi states ‘following the paradigm outlined by the defunct European Constitution, the Lisbon Treaty does not assign a merely rhetorical bearing to the values enshrined in Article 2 TEU’, Salvatore Fabio Nicolosi, ‘The Contribution of the Court of Justice to the Codification of the Founding Values of the European Union’ [2015] *Revista de Derecho Comunitario Europeo* 613, 637; see in relation to solidarity, Dagmar Schiek, ‘Solidarity in the Case Law of the European Court of Justice - Opportunities Missed’ in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020).

<sup>16</sup> Preamble in Charter of Fundamental Rights of the European Union; the same type of confusion resides in the preamble of the TEU.

these notions interchangeably,<sup>17</sup> there is a fundamental difference between them that creates a legal conundrum.

According to Article 2 TEU, the rule of law constitutes one of the foundational values of the EU, along with democracy and respect for human rights. However, the operability of values is extremely circumscribed since values are not properly normative<sup>18</sup> until they are transformed into *legal* norms.<sup>19</sup> Without such a legal conception, values remain too broad to be legally binding. In combination with the mismatch between the proclamation of the values under Article 2 TEU and the Union's competences to enact them,<sup>20</sup> the scope of application of the values is limited to Article 2 TEU and 7 TEU only.<sup>21</sup>

Whereas the academic discourse on the concept of values is extremely rich and developed, the notion of EU values as normative principles requires further exploration. The traditional understanding presupposes that a value is a difficult concept<sup>22</sup> that serves as a bridge between morality and law.<sup>23</sup> In order to become full-fledged legal norms they need to be converted into valid laws.<sup>24</sup> Indeed, the usual lack of unified definitions for the concepts in Article 2 TEU as well as their unspecified scope<sup>25</sup> makes it extremely controversial to endow values with legal force. In reality, though, the Court has officially acknowledged the normativity of one of the EU values, namely, the rule of law, thereby assigning a new status to the EU values and highlighting the specific nature of the principles contained in Article 2 TEU.

In this respect Daniel Overgaauw's recent work, while providing a great overview of the framework, within which the EU principles function, draws our attention to a separate category of principles, 'founding values' or 'founding principles',<sup>26</sup> which are non-amendable principles of the highest rank within the polyarchy of principles in EU law.<sup>27</sup> The explanation of the Court's position on EU values (contained in Article 2 TEU) through the concept of 'founding principles' sheds some light on the reasoning of the Court and provides a theoretical framework for understanding the transformation of an EU value into an operable norm of EU law.

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<sup>17</sup> Daniël Overgaauw, 'A Polyphony of Principles: The Application and Classification of the Principles of European Union Law' (University of Groningen 2022) 42 <<http://hdl.handle.net/11370/7884336a-2e1b-43d4-8c23-31752a328a5f>> accessed 3 June 2022; Wouters (n 4) 260.

<sup>18</sup> Hermerén however distinguishes between empirical and normative concepts of value, Göran Hermerén, 'European Values, Ethics and Law.' (2006) 11 *Jahrbuch für Wissenschaft und Ethik* 9 <<https://www.degruyter.com/document/doi/10.1515/9783110186406.5/html>> accessed 8 June 2022.

<sup>19</sup> Overgaauw (n 17) 41.

<sup>20</sup> Wouters (n 4) 260.

<sup>21</sup> Sasha Garben has underlined this problematic aspect through the prism of the 'competence creep' argument at the Panel Discussion on the Rule of Law Conditionality on the 24<sup>th</sup> of February 2022, available at <<https://www.youtube.com/watch?v=NjuLR1gn9TU>>, accessed 9 June 2022.

<sup>22</sup> Hermerén (n 18) 8.

<sup>23</sup> Markus Frischhut, *The Ethical Spirit of EU Law* (Springer Open 2019) 134.

<sup>24</sup> Giulio Itzcovich, *On the Legal Enforcement of Values. The Importance of the Institutional Context*, vol 1 (Oxford University Press 2017) 28–29

<<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198746560.001.0001/acprof-9780198746560-chapter-3>> accessed 8 June 2022.

<sup>25</sup> Scarce attention to these aspects has been pointed out by Nicolosi in Nicolosi (n 14).

<sup>26</sup> See elaborations on the nature of founding principles and their correlation with EU values under Article 2 TEU in Armin Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal* 95.

<sup>27</sup> Overgaauw (n 17) 172–173.

Back in *Kadi* the CJEU underlined the impossibility of any derogations from ‘the principles that form part of the very foundations of the Community legal order’,<sup>28</sup> whereas in Opinion 2/13 the Court reminded us of the *sui generis* nature of the EU, an entity with ‘its own constitutional framework and founding principles’.<sup>29</sup> Such language suggests that the concepts, constituting the *ground* for the European legal order are different from other legal concepts within the EU constitutional framework, the conceptualisation that was further explicated in the *Budget Conditionality Cases*, C-156/21 and C-157/21,<sup>30</sup> where the Court vests the principle of the rule of law with an obligational nature.

### 3 THE BUDGET CONDITIONALITY CASES – THE RULE OF LAW AS FOUNDATIONAL VALUE

The *Budget Conditionality* judgements have had great significance both on the micro and the macro levels of the EU constitutional framework. On the micro level, the Court confirmed the validity of the Budget Conditionality Regulation; on the macro level, it paved a way for ensuring the adherence to the foundational values of the Union, by putting an end to the era of Member States’ merely ‘declaratory’ compliance with the Union’s values after their accession to the Union.<sup>31</sup> The impact of the judgements can be perceived as being two-fold. While the long-awaited outcome of the judgements on the micro level has been welcomed, the concessions, which affect the operational potential of the Budget Conditionality Instrument, require further comment.

The major concession is the limited scope of the Regulation’s applicability, which stems from that compromise between the Member States without which the Regulation could not have been adopted.<sup>32</sup> While noting that the Regulation is a complement to the other instruments in the EU’s *Rule of Law Toolbox*,<sup>33</sup> the Court underlined that the mechanism is only to be applied for the protection of the Union budget<sup>34</sup> – only such an interpretation would justify the legal basis of the adopted regulation. The Court pointed out that the Budget Conditionality Regulation allows EU institutions to review a Member State’s respect for the fundamental principles of the rule of law *only* with regard to the sound implementation of

<sup>28</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* EU:C:2008:461, paras 303-304.

<sup>29</sup> Opinion 2/13, para 158.

<sup>30</sup> In these cases the validity of the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget OJ L 433I was challenged; hereafter the Budget Conditionality Regulation.

<sup>31</sup> Anna Zemskova, ‘Rule of Law Conditionality: A Long-Desired Victory or a Modest Step Forward?: Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)’ <<https://rgdoi.net/10.13140/RG.2.2.14189.46562>> accessed 9 March 2022; Anna Zemskova, ‘En (del)seger för rättsstatsprincipen’ (*Europakommentaren*, 9 March 2022) <[europakommentaren.eu/2022/03/09/en-delseger-for-rattsstatsprincipen/](http://europakommentaren.eu/2022/03/09/en-delseger-for-rattsstatsprincipen/)> accessed 18 May 2022; in regard to EU values in general Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 71 <<http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=344655&site=eds-live&scope=site>>.

<sup>32</sup> Antonia Baraggia and Matteo Bonelli, ‘Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges’ (2022) 23 German Law Journal 131, 139–141.

<sup>33</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 154-163; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 191-199.

<sup>34</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 117; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 131 with a reference to recital 14 of the Budget Conditionality Regulation.

the Union budget, meaning that measures undertaken with that purpose fall within the scope of EU law.<sup>35</sup> Moreover, the Court recalled the strict requirements, that need to be fulfilled in order to invoke the conditionality<sup>36</sup> mechanism against a Member State: there must be reasonable grounds to believe firstly, that a breach of the principles of rule of law has occurred within the Member State; and secondly, that the breach may affect or seriously risk affecting the EU budget or the Union's financial interests in a sufficiently direct way.<sup>37</sup> The criterion of a 'sufficiently direct link' effectively circumscribes the scope of the Regulation by prohibiting application of the Budget Conditionality Regulation in situations unrelated to the implementation of the Union budget.<sup>38</sup> In Case C-157/21 the Court clarified that while all the situations in Article 4(2) of the Conditionality Regulation may potentially be *relevant* to the sound implementation of the Union budget, this does not mean that the EU institutions may invoke the conditionality mechanism *automatically*, whenever a breach of the principles of the rule of law occurs.<sup>39</sup> The Commission would have to prove that the link to the budget is genuine,<sup>40</sup> complying with the requirements provided by the Regulation.<sup>41</sup>

The CJEU identified the distinguishing features of Article 7 TEU and the Budget Conditionality Instrument in light of their differentiated purposes,<sup>42</sup> scope,<sup>43</sup> nature,<sup>44</sup> and conditions for enactment,<sup>45</sup> confirming that the contested conditionality mechanism is not parallel to the procedure in Article 7 TEU.<sup>46</sup> As we have seen, the Achilles' heel of the protection of the rule of law as an EU value on a micro level is the limited scope of the Budget Conditionality Regulation, which dims the prospects of victory of the principle.<sup>47</sup>

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<sup>35</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 164; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 267.

<sup>36</sup> Conditionality is described as a 'nexus between solidarity and responsibility' in Baraggia and Bonelli (n 26) 155.

<sup>37</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 111; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 125.

<sup>38</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 142-144.

<sup>39</sup> *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 179-180.

<sup>40</sup> *Ibid*, paras 178-180. It is worth drawing attention to footnote 96 of the Opinion where the AG indicates awareness of the heavy burden on the Commission to prove the presence of the conditions, that would trigger the application of the Budgetary Conditionality Instrument referred to as a 'probatio diabolica' in the Editorial in European Papers 2020, No 5, 1101-1104, in Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2021:974, Opinion of Advocate General Campos Sánchez-Bordona, Enzo Cannizzaro, 'Neither Representation nor Values? Or, "Europe's Moment" - Part II' (2021) 2020 5 European Papers - A Journal on Law and Integration 1101.

<sup>41</sup> Recitals 16 and 26, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget OJ L 433I, *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 284.

<sup>42</sup> The non-punitive purpose of the Budget Conditionality Instrument is reflected in the judgements, *Hungary v European Parliament and Council of the European Union* (n 6), paras 115, 170, 172; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 209-210 and in Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2021:974, Opinion of Advocate General Campos Sánchez-Bordona, points 179, 186.

<sup>43</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 173-174; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 212-213.

<sup>44</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 171, 177; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 210, 216.

<sup>45</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 175-176, 178; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 214-215, 217.

<sup>46</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 179-180; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 218-219.

<sup>47</sup> Zemszkova, 'Rule of Law Conditionality' (n 31); Zemszkova, 'En (del)seger för rättsstatsprincipen' (n 31).

However, if the impact of the *Budget Conditionality* judgements on the macro level is taken into consideration, the achievements in the field of ensuring adherence to the EU values can be described as positively far-reaching and even revolutionary.

The *Budget Conditionality Cases* have demonstrated how the foundational values of the Union under Article 2 TEU can successfully become normative principles. Indeed, before the adoption of the Budget Conditionality Regulation and the subsequent judgements that confirmed its validity, the rule of law, whose position, although strengthened throughout the years, had been an invisible caveat of the constitutional design of the EU, whose protection through the primary existing mechanism under Article 7 TEU has not turned out to be successful. The only more or less effective tool for safeguarding the rule of law was the Court's active engagement in the attempts to resolve the internal rule-of-law crisis, by means of ruling in either infringement proceedings, initiated by the Commission,<sup>48</sup> or preliminary reference procedures.<sup>49</sup>

Moreover, the CJEU, while adjudicating on the protection of the rule of law, referred to the constituent elements of the principle, which were anchored in different provisions of both primary and secondary law. Thus the Court, applying a value-oriented interpretation,<sup>50</sup> took recourse to provisions of the Treaties other than Article 2 TEU.<sup>51</sup> This allowed it to concretise the principle,<sup>52</sup> and potentially empower its protection on a broader scale (as was the case in *Portuguese Judges*). The value expressed in Article 2 TEU became normative through Article 19 TEU that contains a specific obligation for the Member States.<sup>53</sup> But if, in the case *Portuguese Judges*, the Court did not find a violation of judicial independence, and hence did not demonstrate the judicial applicability of the values under Article 2 TEU in practice in that very case, in *Commission v. Poland*<sup>54</sup> the Court proved its readiness to apply 'a new, ground-breaking rationale' in its quest to ensure that the Union values under Article 2 TEU are respected.<sup>55</sup>

In *Kadi*,<sup>56</sup> the Court had left its understanding of EU constitutional identity implicit. In the *Budget Conditionality* judgements, by contrast, it explicitly channelled the essence of that identity through the values of Article 2 TEU, specifically through the founding principle of

<sup>48</sup> Case C-619/18 *Commission v Poland* EU:C:2019:531; C-192/18 *Commission v Poland* EU:C:2019:924.

<sup>49</sup> Case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others* EU:C:2021:153.

<sup>50</sup> von Bogdandy and Spieker (n 13) 413.

<sup>51</sup> The combination of Articles 2, 4 (3) and 19 (1) TEU in Case C-64/16 *Associação Sindical Dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117. The use of Article 2 TEU on combination with other Treaty provisions has also been suggested by scholars, see *ibid* 410.

<sup>52</sup> *Associação Sindical Dos Juizes Portugueses v Tribunal de Contas* (n 51), para 32: "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 66; judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P EU:C:2013:625, paragraph 90, and of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P EU:C:2015:284, paragraph 45)."

<sup>53</sup> von Bogdandy and Spieker (n 13) 416.

<sup>54</sup> *Commission v Poland* (n 48).

<sup>55</sup> Luke Dimitrios Spieker, 'Commission v. Poland: A Stepping Stone Towards a Strong "Union of Values"?' [2019] *Verfassungsblog: On Matters Constitutional* <[https://intr2dok.vifa-recht.de/receive/mir\\_mods\\_00007487](https://intr2dok.vifa-recht.de/receive/mir_mods_00007487)> accessed 9 June 2022.

<sup>56</sup> Pekka Pohjankovski pointed that out during the Panel Discussion on the Rule of law Conditionality on the 24<sup>th</sup> of February 2022, available at <https://www.youtube.com/watch?v=NjuLR1gn9TU>, accessed 9 June 2022.

the rule of law,<sup>57</sup> presented as an unchangeable core of the Treaties.<sup>58</sup> Referring to its case law, the Court reiterated that the rule of law is a foundational value of the EU and a common value, shared by all the Member States.<sup>59</sup> In acceding to the Union, a state joins ‘a legal structure that is based on the *fundamental premise* that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded.’<sup>60</sup> Furthermore, referring to case *Repubblika*,<sup>61</sup> the Court confirmed that respect for the rule of law is a prerequisite for a Member State’s enjoyment of Treaty rights, and that a Member State cannot disregard this duty post-accession,<sup>62</sup> in practice resolving the ‘Copenhagen criteria’ conundrum<sup>63</sup> that has tormented the European project for years. The Court has also managed to curtail attempts by some Member States to justify divergent understandings of the Union values by playing the ‘national identity card’,<sup>64</sup> stating that although the Member States do enjoy a degree of discretion when implementing the principles of the rule of law in their domestic constitutional orders, the practical results which are to be achieved cannot be allowed to differ between them.<sup>65</sup> The duty to respect the Member States’ national identities, found in Article 4(2) TEU, does not yield a different conclusion, as the rule of law is stipulated as a *common* value of all EU Member States.<sup>66</sup> As is demonstrated by both the continuous work

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<sup>57</sup>*Hungary v European Parliament and Council of the European Union* (n 6), para 232. Pekka Sakari Pohjankoski, ‘The Unveiling of EU’s Constitutional Identity: Judgments in C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council’, (2022) Weekend Edition 91 EU Law Live, 4 <<https://eulawlive.com/weekend-edition/weekend-edition-no91/>> accessed 6 July 2022.

<sup>58</sup> *Ibid* para 234: “Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of “the rule of law” which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.”

<sup>59</sup> *Ibid* para 124, *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 142 referring to Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Criminal Proceedings against PM and Others* EU:C:2021:1034, paras 160-161 that in its turn refers to Case C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația “Forumul Judecătorilor Din România” and Others* EU:C:2021:39, paras 160-161 that cites Case C-896/19 *Repubblika v Il-Prim Ministru* EU:C:2021:311, paras 61-62 citing *Associação Sindical Dos Juizes Portugueses v Tribunal de Contas* (n 51), para 30.

<sup>60</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 125; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 143 citing both *Associação Sindical Dos Juizes Portugueses v Tribunal de Contas* (n 51), para 30 and *Repubblika v Il-Prim Ministru* (n 59), para 62.

<sup>61</sup> *Repubblika v Il-Prim Ministru* (n 59).

<sup>62</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 126; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 144 referring to *Repubblika v Il-Prim Ministru* (n 59), paras 63-64; *Asociația “Forumul Judecătorilor Din România” and Others* (n 59), para 162; *Criminal Proceedings against PM and Others* (n 59), para 162.

<sup>63</sup> A constituent element of the ‘double hurdle’ of Article 2 TEU, Luke Dimitrios Spieker, ‘From Moral Values to Legal Obligations – On How to Activate the Union’s Common Values in the EU Rule of Law Crisis’ [2018] SSRN Electronic Journal 3 <<https://www.ssrn.com/abstract=3249021>> accessed 9 June 2022.

<sup>64</sup> Such a development has been foreseen by scholars, that warned about a possible ‘massive power shift to the Union....to the detriment of national autonomy, identity, and diversity’, von Bogdandy and Spieker (n 13) 421.

<sup>65</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 232-233; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 264-265.

<sup>66</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 234; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 266.



of the Commission<sup>67</sup> and the adjudication of the Court, the rule of law is one of the European values that are regarded as ‘common denominators’<sup>68</sup> for the Members of the Union.

Since the values in Article 2 TEU are defining features of the EU legal order, the Court stated that the EU must be allowed to defend these values, albeit within the limits set by the Treaties.<sup>69</sup> While acknowledging the common values as the basis for the principle of mutual trust between the Member States, the Court introduces a new link, namely, the principle of solidarity. The appeal to this fundamental principle together with the language of EU values is far away from accidental. A new source of inspiration was needed as the doctrine of mutual trust did not live up to its expectations when it came to tackling threats to the rule of law.

#### 4 BUDGET CONDITIONALITY CASES II – SOLIDARITY AS A LEGAL AND FOUNDATIONAL PRINCIPLE

The principle of solidarity is a contested notion within EU law even though it is both a core value and an objective of the EU Treaties, and has its historical roots in the Schuman Declaration of 9 May 1950.<sup>70</sup> The concept is mentioned throughout the Treaties,<sup>71</sup> but lacks any clear definition.<sup>72</sup> Moreover, although solidarity is enshrined in the second sentence of Article 2 TEU, and thus can be understood as a foundational value of the Union,<sup>73</sup> its legal status remains uncertain. Early case law of the Court<sup>74</sup> mentions the principle of solidarity and links it to the principle of loyalty – which later became the principle of sincere cooperation found in Article 4(3) TEU – but solidarity is never used as basis to create any legal effects.<sup>75</sup> The recent jurisprudence of the Court characterises solidarity as one of the fundamental principles of EU law.<sup>76</sup> In the Grand Chamber case *Germany v Poland*, the CJEU

<sup>67</sup> Commission, ‘A New EU Framework to Strengthen the Rule of Law’ COM (2014) 158; Commission, ‘Further Strengthening the Rule of Law within the Union. State of Play and Possible Next Steps’ COM (2019) 163; Commission ‘Strengthening the Rule of Law within the Union A Blueprint for Action’ COM (2019) 343 final; Commission ‘2020 Rule of Law Report. The Rule of Law Situation in the European Union’ COM (2020) 580; Commission ‘2021 Rule of Law Report. The Rule of Law Situation in the European Union’ COM(2021) 700 final.

<sup>68</sup> Hermerén (n 18) 29.

<sup>69</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 127; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 145.

<sup>70</sup> See Schuman Declaration of 9 May 1950 (‘discours de l’horloge’), available at [http://www.schuman.de](#), accessed on the 5<sup>th</sup> of July 2022. See also Jean Monnet, *Mémoires* (Fayard 1976), mentioning the concept of solidarity in relation to the ‘États unis d’Europe’; see also Rostane Mehdi, Preface, in Estelle Brosset, Rostane Mehdi and Nathalie Rubio (eds), *Solidarité et droit de l’Union européenne: un principe à l’épreuve* (DICE Éditions 2021) <<http://books.openedition.org/dice/2737>> accessed 4 July 2022 where Mehdi qualifies the cardinal principle of the European identity.

<sup>71</sup> See eg Article 2 TEU, Article 3(3) TEU and Articles 67(2), 80, 122(1), 192 TFEU and 222(1) TFEU. It is also mentioned in the preambles to the TEU and the Charter.

<sup>72</sup> Hermerén points out in his contribution that solidarity has ‘several meanings’, Hermerén (n 18) 20; Sangiovanni states that “Yet, despite such prolific use of ‘solidarity’, there is very little analysis of what the nature of solidarity [is]...”, A Sangiovanni, ‘Solidarity in the European Union’ (2013) 33 *Oxford Journal of Legal Studies* 213, 215.

<sup>73</sup> See in general, the discussion in Dagmar Schiek, ‘Solidarity in the Case Law of the European Court of Justice - Opportunities Missed’ in Krunke, Petersen and Mannens (n 15).

<sup>74</sup> See eg Case 6 & 11/69 *Commission v France* EU:C:1969:68, para 16; Case 39/72 *Commission v Italy* EU:C:1973:13, para 24; Case 39/72 *Commission v Italy* EU:C:1973:13, para 25; Case 128/78 *Commission v the UK* EU:C:1979:32. However, for a modern example, see Case C-105/03 *Pupino* EU:C:2004:712, para 41.

<sup>75</sup> Esin Küçük, ‘Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?’ (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 966–967 and 974–975.

<sup>76</sup> Case C-848/19 P *Germany v Poland* EU:C:2021:598, para 38.

is very didactic in showing the legal implications and the broad scope of the ‘spirit of solidarity’.<sup>77</sup> While the CJEU highlighted the exceptional relevance of solidarity in extraordinary situations,<sup>78</sup> it also indicated that the application of the principle of solidarity is not limited to emergency occurrences, but ‘serves as the thread that brings them [the objectives of the EU in a specific policy, in this case, energy policy] together and gives them coherence’.<sup>79</sup> The link with the principles of loyalty and solidarity is emphasised as an appeal to the State’s responsibility for respecting its obligations under EU law, which flow from Article 192 TFEU read in conjunction with Article 4(3) TEU.<sup>80</sup> The CJEU made clear that the principle of solidarity is not an abstract concept unable to produce legal effects.<sup>81</sup>

This recent jurisprudential development contrasts sharply with the cautious approach usually taken by the CJEU. Indeed, solidarity is generally considered to be a political concept, which guides the ‘horizontal’ relationship between the EU Member States, not the ‘vertical’ relationship between the Member States and the Union.<sup>82</sup> In a recent text comparing the principles of loyalty and solidarity, Klämert argues that the principle of solidarity is not a general principle of EU law and has not been decisive in developing EU constitutional law and its scope.<sup>83</sup> For him, the only area in which the principle has shown any strength is in ‘energy solidarity’.<sup>84</sup> The principle remains weak in the sense that the principle is not self-standing and, like the principle of loyalty, does not boast direct effect.<sup>85</sup>

As already mentioned above, the close link between loyalty and solidarity has been much rehearsed in the EU literature, as has their interplay when, in crises and emergencies, they are relied upon in order to identify specific legal duties.<sup>86</sup> Here, solidarity seems to have managed to acquire a certain ‘legal solidity’ and ‘legal core’.<sup>87</sup> When linked to loyalty, the

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<sup>77</sup> Ibid. paras 41-46.

<sup>78</sup> Such as Articles 67 (2), 122 (1) and 222 TFEU, *Germany v Poland* (n 76).

<sup>79</sup> *Germany v Poland* (n 76), para 43.

<sup>80</sup> Ibid, para 52. Thus, the principle of energy solidarity, read in conjunction with the principle of sincere cooperation, requires that the Commission verify whether there is a danger for gas supply on the markets of the Member States, when adopting a decision on the basis of Article 36 of Directive 2009/73.

<sup>81</sup> Responding to the argument of the state.

<sup>82</sup> Marcus Klämert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 40

<<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199683123.001.0001/acprof-9780199683123>> accessed 4 July 2022; 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)

<<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199583188.001.0001/acprof-9780199583188-chapter-2>> accessed 4 July 2022.

<sup>83</sup> Klämert (ibid) 128.

<sup>84</sup> ibid 129.

<sup>85</sup> ibid 134.

<sup>86</sup> See Federico Casolari, ‘EU Loyalty and the Protection of Member States’ National Interests’ in Marton Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer International Publishing 2019) 67–68 <[https://doi.org/10.1007/978-3-030-05782-4\\_3](https://doi.org/10.1007/978-3-030-05782-4_3)>; Marc Blanquet, ‘L’Union européenne en tant que système de solidarité: la notion de solidarité européenne’ in Maryvonne Hecquard-Théron (ed), *Solidarité(s): Perspectives juridiques* (Presses de l’Université Toulouse 1 Capitole 2009) <<http://books.openedition.org/putc/232>> accessed 4 July 2022; See also Karine Abderemane, ‘Le « mot » solidarité en droit de l’Union européenne’ Brosset, Mehdi and Rubio (n 70) 31 It is also worth noting that the first time that the principle of ‘solidarity’ was relied on by the CJEU was in a case concerning the steel industry crisis (see *Commission v. France* [n 74]).

<sup>87</sup> See case law previous (n 74).

principle of solidarity seems to acquire a ‘vertical dimension’ akin to EU law obligations in contrast with the ‘horizontal nature’ of the concept of solidarity.<sup>88</sup>

The ‘interplay logic’ between loyalty and solidarity also appears to be present in the *Budget Conditionality Cases* in the context of the rule of law crisis in the EU, in relation to the principle of mutual trust. Indeed, bringing the principle of solidarity into the ‘rule of law and mutual trust’ equation is an extremely important aspect of the *Budget Conditionality* judgements and protection of the Union budget in regard to the principle of the rule of law. The Union budget functions as a projection of the principle of solidarity which rests on the mutual trust between the Member States. That trust, in its turn, stems from the commitments of each Member State to comply with its obligations under EU law (the duty of loyalty), which includes compliance with the values of Article 2 TEU, among which one finds the rule of law.<sup>89</sup>

In essence, the Court established that without sufficient respect for the rule of law, there can be no mutual trust among the EU Member States,<sup>90</sup> and no solidarity in the implementation of the EU budget. In other words, the Court created a link of interdependence between two EU values under Article 2 (solidarity and the rule of law) with the help of the principle of mutual trust: if an EU Member State does not respect the fundamental principles of the rule of law, the mutual trust among the EU Member States is undercut, and the solidarity among them is eroded. A logical consequence of this line of reasoning is that these two values must be perceived as mutually reinforcing: if there is no respect for the rule of law, there can be no solidarity among EU Member States and vice versa.

By introducing a causal link between the rule of law and solidarity, the CJEU effectively elevates the status of the latter, so that the principle of solidarity becomes *en parité* with the rule of law.<sup>91</sup> This endorsement of a broader view of Article 2 TEU is an anticipated development, the necessity of the implementation of which has been advocated for previously.<sup>92</sup> In this respect the Court clarified that solidarity is a fundamental principle, with distinct judicial enforceability, which may be invoked when the rule of law and the principle of mutual trust are at stake. This broadens enormously the interpretation of the CJEU relied on in *Germany v Poland*, which was limited to energy solidarity and Article 192 TFEU. This constitutes a radical shift in EU constitutional law.<sup>93</sup>

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<sup>88</sup> For a horizontal understanding of the concept of solidarity, see Pierre Musso, ‘La Solidarité : Généalogie d’un Concept Sociologique’, *La Solidarité* (Odile Jacob 2015) 107 <<https://www.cairn.info/solidarite-2015--9782738131430-page-93.htm?ref=doi>> accessed 4 July 2022; Pierre Musso qualifies the concept of solidarity as not ‘institutionnalisant’.

<sup>89</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 129; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 147.

<sup>90</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 129; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 147.

<sup>91</sup> Some scholars consider though that ‘there is no hierarchy in such a system of values: they are not distinct from one another, as they rather represent a consistent code providing the EU with a genuine constitutional identity, which is a common heritage to all Member States’, Nicolosi (n 15) 642.

<sup>92</sup> Wouters (n 4).

<sup>93</sup> Compare Küçük (n 75); Klamert (n 82).

The confirmation of the legality of defining the rule of law on the EU level, despite the high contestability of the notion,<sup>94</sup> is also of crucial significance. While acknowledging that the rule of law is ‘an abstract legal notion’, the CJEU stated that abstractness does not preclude the EU legislator from adopting laws related to the rule of law.<sup>95</sup> The Court added that the principles listed in Article 2(a) of the Conditionality Regulation<sup>96</sup> are not meant to constitute an exhaustive definition of the concept of the rule of law, but include the principles which are most important for implementing the Union budget,<sup>97</sup> whereas the notion itself should be considered synonymous with the value expressed in Article 2 TEU.<sup>98</sup>

The introduction of the unified, though non-exhaustive definition of a Union value is welcome, as any specification of the conditions to be fulfilled by the Member States facilitates adherence to them, and, by the same token, makes compliance easier to monitor that projects transparency and strengthens accountability of Union actors in such proceedings. Establishing the content of a Union value might be in that sense a prerequisite for enforceability. Therefore, the essence of solidarity<sup>99</sup> may have to be spelled out before the scope of the application of the *Budget Conditionality* judgements can be expanded to other Union values.

It clearly follows from the *Budget Conditionality Cases* that solidarity constitutes a legal principle and not only a political concept, just as EU law doctrine often insists. Alain Supiot’s edited collection of interdisciplinary inquiries into the legal nature of the principle of solidarity makes it difficult to deny that solidarity is a legal principle.<sup>100</sup> His book traces the legal roots of the principle from Roman to French law<sup>101</sup> in the context of collective creditor’s responsibility; then describes the strong impact of Durkheimian sociology<sup>102</sup> on the public law theory of *État social*, which has marked French jurisprudence for generations.<sup>103</sup> Solidarity

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<sup>94</sup> Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)?’ (2002) 21 *Law and Philosophy* 137; Jeremy Waldron, ‘The Rule of Law as an Essentially Contested Concept’ in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/cambridge-companion-to-the-rule-of-law/rule-of-law-as-an-essentially-contested-concept/66DF80FFCD91CBE9B0044CA82F2AB207>>.

<sup>95</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 224; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 320 with reference to Case C-206/16 *Marco Tronchetti Provera and Others* [2017] EU:C:2017:572, paras 39-40 (by analogy).

<sup>96</sup> *Hungary v European Parliament and Council of the European Union* (n 6), paras 236 and 242.

<sup>97</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 227; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 323.

<sup>98</sup> *Hungary v European Parliament and Council of the European Union* (n 6), para 228.

<sup>99</sup> On the differentiated understanding of the concept of solidarity in economic emergency measures see Anna Zemskova, ‘Guest Note on the Impact of the COVID-19 Outbreak on EU Law’ (2020) 3 *Nordic Journal of European Law* III, VIII.

<sup>100</sup> See in general Alain Supiot (ed), *La Solidarité: Enquête Sur Un Principe Juridique* (Odile Jacob 2015).

<sup>101</sup> *ibid* 8, eg Article 1797 and following of the French Civil code (incorporated in 1804).

<sup>102</sup> See Musso, who traces the development of the concept of solidarity from its origins with August Comte in 1842 in Musso (n 88); see Émile Durkheim, *De la division du travail social* (Presses Universitaires de France 2013) <<http://www.cairn.info/de-la-division-du-travail-social--9782130619574.htm>> accessed 4 July 2022. See Musso (n 88) 96–100, where he describes the theory of Durkheim as a reaction to liberalism.

<sup>103</sup> Alain Supiot, ‘Introduction’ in Supiot (n 100).

has always had a special place in the ‘Republican feeling’<sup>104</sup> of the ‘French hexagon’.<sup>105</sup> Yet it has only recently been recognised as a general principle of law, first at the national level and then the EU level. According to Supiot, the CJEU and the EU Charter of Fundamental Rights<sup>106</sup> have been central to this development.<sup>107</sup> Interestingly, he makes reference to an anecdote of Guy Braibant – the French member of the Convention drafting the EU Charter – that reported that the English delegate considered that the notion of solidarity in its continental sense was in fact unknown in the UK.<sup>108</sup>

In our view, the drafting of the EU Charter of Fundamental Rights and its recognition in 2000 (though as a non-binding instrument) is key to understanding solidarity as a true foundational principle of EU law since it is the only instrument of EU primary law that explicitly recognises it as such.<sup>109</sup> It is worth noting here that this is not the case with Article 2 TEU and Article 3 TEU which do, however, mention solidarity as both a value (though indirectly)<sup>110</sup> and an objective. Marc Blanquet in his study of solidarity in EU law highlights that the principle has often been described in the literature as ‘existential’, ‘ontological’ or ‘structural’ and should be viewed as a foundational principle of EU law.<sup>111</sup> In the wake of the proclamation of the EU Charter, solidarity became a very trendy word during the negotiations of the Constitutional Treaty. The EU Commission in 2002 even proposed that the motto of the EU should be ‘Peace, Liberty and Solidarity’.<sup>112</sup> As we all know, the Constitutional Treaty and the Lisbon Treaty included another motto in the Treaties: ‘United in Diversity’. Looking at the recent historical evolution, the first motto would have been more apt for the European Union in its present state: more divided than ever and hit by a ‘poly-crisis’. Our view in this article is that solidarity in the Lisbon Treaty became an explicit

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<sup>104</sup> Accordingly, Durkheimian sociology aimed at ‘de-christianising’ the concept of solidarity by relying on biosociology. See Pierre Musso Musso (n 88); Karine Abderemane, ‘Le mot solidarité en droit de l’Union européenne’ in Brosset, Mehdi and Rubio (n 70) 19. Karine Abderemane discusses in detail the papal origin of the concept of solidarity. Interestingly she refers to a papal decree of 19 June 2021 that ascribes to Robert Schuman the heroic status of ‘serf de Dieu’; for a discussion on the Christian roots of the concept, see also Eleni Karageorgiou, ‘Rethinking Solidarity in European Asylum Law: a Critical Reading of the Key Concept in Contemporary Refugee Policy’ (Lund University 2018).

<sup>105</sup> Alain Supiot, ‘Introduction’ in Supiot (n 100) 7,8; see also Michel Borgetto, ‘La Notion de Fraternité en droit public français: le passé, le présent et l’avenir de la solidarité’ in Driss Basri, Michel Rousset and Georges Vedel (eds), *Trente Années de Vie Constitutionnelle Au Maroc* (Libr générale de droit et de jurisprudence 1993); Michel Borgetto, ‘Fraternité et Solidarité : un couple indissociable?’ in Maryvonne Hecquard-Théron (ed), *Solidarité(s) : Perspectives juridiques* (Presses de l’Université Toulouse 1 Capitole 2009) <<http://books.openedition.org/putc/216>> accessed 5 July 2022; see also Robert Lafore, ‘Solidarité et doctrine publiciste. Le “solidarisme juridique” hier et aujourd’hui’ in Maryvonne Hecquard-Théron (ed), *Solidarité(s) : Perspectives juridiques* (Presses de l’Université Toulouse 1 Capitole 2009) <<http://books.openedition.org/putc/220>> accessed 5 July 2022; see also Karageorgiou (n 104) 114–118, linking solidarity to the Aristotelean notion of friendship and also discussing the concept of fraternity in French law (p. 225).

<sup>106</sup> Supiot (n 100) 9. In international instruments, solidarity can be traced back to the African Charter of Human Rights and People from 1981.

<sup>107</sup> Supiot (n 100).

<sup>108</sup> *ibid.*

<sup>109</sup> See EU Charter of Fundamental Rights, recital 1: “The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.”

<sup>110</sup> Solidarity is mentioned in the second sentence of Article 2 TEU.

<sup>111</sup> Blanquet (n 86).

<sup>112</sup> *Commission ‘On the Institutional Architecture, For the European Union: Peace, Freedom, Solidarity’ COM (2002) 0728 final*, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52002DC0728>>, accessed 5 July 2022.

foundational principle of EU primary law as the EU Charter entered into force. Yet a few years later, this foundational principle was weakened and came under attack, notably by the Visegrad group<sup>113</sup> which argued for the application of a flexible notion of solidarity in EU law.<sup>114</sup> It is in light of this evolution that the decision in the *Budget Conditionality Cases* should be analysed and understood. And it is in that sense that solidarity should be explicitly recognised as a foundational principle of EU law (and not merely as a ‘fundamental’ principle – the term used by the CJEU in the *Budget Conditionality Cases*). In fact, this ruling shows and confirms that solidarity is a legal and foundational principle of EU law and that its weakening is fully contrary to EU law. Solidarity is now clearly anchored in the EU constitutional legal order as an existential principle that is non-regressive and absolute (non-flexible) in its meaning.

## 5 THE CJEU AS A DEONTIC AND LIBERAL COURT – AND WHY IT SHOULD NOT BE ONLY SO

By adjudicating the values enshrined in Article 2 TEU as judicial and foundational principles of EU law, the CJEU acted (in the *Budget Conditionality Cases*) as a deontic court that requires the EU Member States to respect their duties and obligations which stem from the very existence of the EU values (understood here as moral obligations by the CJEU). These *values* may thus become (judicial) *norms* if recognised as such by the CJEU, as was the case with the rule of law in the *Budget Conditionality Cases*.<sup>115</sup> In addition, the CJEU’s deontic reasoning is strongly articulated through the concept of principles (‘founding’ or ‘foundational’ or even ‘fundamental’ principles) which arguably situates the case-law on values in a Dworkinian model of adjudication.<sup>116</sup> Furthermore, the recognition of the Article 2 values as founding principles also has the effect of fostering a liberal approach to EU law.<sup>117</sup> In this last section, and in light of the *Budget Conditionality Cases* as well as the previous section on the principle of solidarity, we address two questions which are essential for understanding and challenging the logic of the CJEU in the *Budget Conditionality Cases*. First, why should the CJEU be perceived as a deontic court by relying on the foundational principle, or value, of the rule of law and, more importantly, what is the significance and range of those principles? Secondly, what more should the CJEU do in future adjudication? In that respect, the adjudication of the founding principle of solidarity in EU law may offer a path to mitigating the deontic and liberal approaches. This path is not only highly dependent on how the CJEU judges will

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<sup>113</sup> Poland, Hungary, Czech Republic and Slovakia are part of the so-called ‘Visegrad group’.

<sup>114</sup> See Karine Abderemane, ‘Le mot solidarité en droit de l’Union européenne’ Brosset, Mehdi and Rubio (n 70) 21. She discusses the threats posed to solidarity after the entry into force of the Lisbon Treaty making reference to the statements of the Visegrad group on 13 October 2016 and 18 November 2017.

<sup>115</sup> On the transformation of values into norm, see Overgaaun (n 17). For him, democracy has for instance not been transformed into a norm by the CJEU. He also considers solidarity a systemic principle and not a founding principle.

<sup>116</sup> For an elaboration on the Dworkinian model, see Xavier Groussot and Johan Lindholm, ‘General Principles: Taking Rights Seriously and Waving the EU Rule of Law’ Katja S Ziegler, Päivi J Neuvonen and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022); see also, for the use of deontic reasoning in relation to natural law, John Finnis, *Natural Law and Natural Rights* (Clarendon P 1980); for a seemingly approach specific to EU law, see eg the Kantian approach of Armin Von Bogdandy Von Bogdandy (n 26).

<sup>117</sup> See the discussion in *ibid* Groussot and Lindholm in Ziegler, Neuvonen and Moreno-Lax (n 116).

adjudicate on the principle of solidarity in the near future but also shows the potential importance of the *Budget Conditionality Cases* in influencing EU integration through law.

Concerning the first issue, about the scope and range of foundational principles,<sup>118</sup> Daniel Overgaauw has recently argued that ‘the founding principles are not always referred to as norms (i.e. principles), but also as values’.<sup>119</sup> He uses the example of democracy to show that a recognised founding principle does not necessarily have any normative weight.<sup>120</sup> Certain founding values ‘remain devoid of the deontological character of true founding principles’.<sup>121</sup> In his view, the founding principles that are recognised as norms are superior to Treaty norms; they are the highest class of principles in the polyarchy of principles.<sup>122</sup> Notably, Overgaauw considers the principle of solidarity is not a founding principle but a ‘systemic’ one.<sup>123</sup> This position enters in our view in conflict with the logic of the *Budget Conditionality Cases*, which recognise both the rule of law and (indirectly) solidarity as founding principles with normative force. It is true that solidarity is not mentioned as a founding principle in, for example, ex Article 6 EU or even in the *Budget Conditionality Cases* themselves. But it is expressly called a ‘Founding Principle’ by the preamble of the EU Charter of Fundamental Rights.<sup>124</sup> The *Budget Conditionality Cases* confirm the normativity of the principle of solidarity aside from the normativity of the rule of law and thus create legal obligations to be respected by the EU Member States. This is the reason why the CJEU acts as a deontic

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<sup>118</sup>See Overgaauw (n 17).

<sup>119</sup> *ibid* 123.

<sup>120</sup> Overgaauw (n 17), where he makes reference to Case C-138/79 *Roquette Frère* EU:C:1980:213, para 33.

<sup>121</sup> *ibid* 125.

<sup>122</sup> *ibid* 172. This argument is based on *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (n 28), paras 303-304, where it is stated that Treaty provisions cannot derogate from founding principles.

<sup>123</sup> *ibid* 124, which shows the difficulty of finding a dividing line. Using the examples of Fundamental Rights as both founding principles and general principles, at *ibid* 177, solidarity is considered a systematic principle like direct effect, primacy, loyalty, institutional balance or subsidiarity, laying the foundation for the institutional structure; Overgaauw presents a limited definition of ‘founding principle’ based on ex Article 6 EU on ‘Founding principles’ *ibid* 122.

<sup>124</sup> For a classification of solidarity in pre-Lisbon Treaty see eg Xavier Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?* (Faculty of Law, Lund Univ 2005); Henry G Schermers, *Judicial Protection in the European Communities* (Kluwer 1976); Rebecca-Emmanuela Papadopoulou, *Principes généraux du droit et droit communautaire: origines et concrétisation* (Sakkoulas 1996); Jean Boulouis and Jean Boulouis, *Droit Institutionnel de l'Union Européenne* (6. éd, Montchrestien 1997); and Bruno de Witte, ‘General Principles of Institutional Law’ in Ulf Bernitz and others (eds), *General Principles of European Community Law: Reports from a Conference in Malmö, 27-28, August 1999: Organised by the Swedish Network for European Legal Studies and the Faculty of Law, University of Lund* (Kluwer Law International 2000). For instance, Groussot considers solidarity to be a regulative principle. Indeed, those principles, arising as they do from the special nature of a particular legal order, seems to perfectly match their function - to govern the relation between the Member States and the institutions or between the institutions themselves or Member States themselves. In general terms, the regulative principles are not necessarily enforceable. Consequently, the principles deduced from the nature of the Community (Boulouis), are similar to the indigenous principles (Schermers), the structural principles (Papadopoulou), and institutional principles (De Witte). According to Papadopoulou, ‘[t]he structural principles express the objectives of the particular judicial order to which they belong. They are deduced from the very nature and characteristics of the system. The principles include, for instance, the principle of solidarity and the principle of institutional balance ruling the communitarian construction and permitting the judge to ensure the functioning of the judicial order from which those belong’ (my translation), at 8-9. De Witte considers the ‘non-traditional principles’ or ‘general principles of institutional law’ to be defined as “not serving to protect the position of the individual, but rather to regulate the relations between the institutions”. De Witte further follows a two-fold classification of horizontal institutional principles (between the institutions of the Community) and vertical institutional principles (between the Community and the Member States institutions).

court in the *Budget Conditionality Cases*, a *plenum* case where the twenty-seven judges of the CJEU were sitting and ruling.

The next question to deal with is whether the principle of solidarity may help to mitigate the approach of the CJEU in creating and developing founding principles of a liberal nature such as the rule of law principles. In that respect, the reliance on (or crowning of) the principle of solidarity in the *Budget Conditionality Cases* may help us to develop a more balanced approach in EU law by taking into consideration its social dimension. This approach is not infeasible if one takes the example of France and its long use of the principle of solidarity in adjudication.<sup>125</sup> It is well-known that, in the French doctrine, Durkheim's sociological approach and its reaction towards liberalism has been a source of inspiration.<sup>126</sup> The 'solidarity approach' was powerfully enshrined in the public law tradition of 'État social' as founded in the theories of both Duguit and Hauriou.<sup>127</sup> According to Diane Roman, although the Second Republic (1848 – 1852) saw the birth of solidarity as a political concept, it was the III Republic (1870 – 1940) that affirmed the omnipotence of solidarity in its judicial meaning, where the social function takes priority over the concept of subjective or liberal rights in the legal order and where liberty is regarded as *servicing the cause of solidarity* ('*mise au service de la solidarité*'). Nowadays, liberalism – and responsibility as its corollary<sup>128</sup> – has taken priority over *solidarisme*; solidarity 'must follow, liberty leads'.<sup>129</sup>

EU law could well be considered to provide and foster only a liberal vision.<sup>130</sup> Taken to its extreme, liberalism and its ideology may in fact hamper if not eliminate the application of the principle of solidarity.<sup>131</sup> To counter such a probable evolution, Supiot has invited the CJEU to securely anchor the principle of solidarity in EU constitutional law.<sup>132</sup> Karine Abderemane has also rightly noted that the manifold crises lead to a decrease in social liberties and to growing of inequalities that call for a reinforcement of the principle of solidarity in EU law.<sup>133</sup> Are the *Budget Conditionality Cases* a step in that direction? Certainly, as we have seen, the CJEU there explicitly calls solidarity a fundamental principle with normative force. Are the constitutional tools therefore available and ready for use if needed by the Kirchberg judges? The principle of solidarity would be particularly useful for the

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<sup>125</sup> Karageorgiou (n 104) 231. The Chapter 7 of her dissertation offers an excellent discussion on the 'immense importance' of French solidarism for understanding the principle of solidarity in EU law.

<sup>126</sup> See Musso (n 88) 100. Musso summarised the Durkheimian conceptual evolution of solidarity in four words: society-altruism-solidarity-morality. According to him, solidarity has become a 'Bio-socio-moral' concept 107.

<sup>127</sup> See for a development on Duguit and the social State Diane Roman, 'L'État social, entre solidarité et liberté' in Maryvonne Hecquard-Théron (ed), *Solidarité(s) : Perspectives juridiques* (Presses de l'Université Toulouse 1 Capitole 2009) <<http://books.openedition.org/putc/248>> accessed 5 July 2022; see also Karageorgiou (n 104) 226–227.

<sup>128</sup> Roman (n 127); see also Karageorgiou (n 104) 228–232, where she discusses the influence of Léon Bourgeois and his attempt to transplant the French principle of solidarity to the international level. Léon Bourgeois became Minister of Foreign Affairs in 1906.

<sup>129</sup> Roman (n 127).

<sup>130</sup> See Supiot (n 100).

<sup>131</sup> *ibid*; see also Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in Brosset, Mehdi and Rubio (n 70) 38.

<sup>132</sup> Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in Brosset, Mehdi and Rubio (n 70). Karine Abderemane makes reference to Supiot (Alain Supiot, *Homo juridicus, Essai sur la fonction anthropologique du droit, Le seuil*, 2005) which also discusses the role of dignity (an integral part of Kantian philosophy) in abstracting from social realities by relying on ethics.

<sup>133</sup> Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in *ibid*.



application of the social rights enshrined in the EU Charter in its Chapter IV entitled ‘Solidarity’. It is no secret that the CJEU’s interpretation of this Chapter has so far been quite limited and shy, and the CJEU has often prioritised economic rights over social ones.<sup>134</sup> Hopefully, the recent placement of the solidarity principle at the apex of the EU constitutional law hierarchy may help rebalance the EU legal order (through adjudication) towards a more Durkheimian understanding of EU society and widen the perspective of EU law from its current narrow focus on liberty. Solidarity is now regarded as a ‘primordial principle’<sup>135</sup> of EU law and the duty of solidarity is without doubt a ‘hidden but essential part of the (economic and social) rights of the second generation’.<sup>136</sup> It is in that sense that it can be used in EU law adjudication as a tool of recalibration and *equilibrium*.

To conclude, let us underline that the EU concept of solidarity encapsulates three essential markers or invariants when compared to national law (and French law more specifically) – a comparison that is in our view important to keep in mind when dealing with solidarity from a judicial perspective. First of all, solidarity is an itinerant or ‘nomadic’<sup>137</sup> concept. Indeed, it is often described in the French literature as circulating from one discipline to another.<sup>138</sup> The same is also true in EU law where solidarity is present and articulated in a multitude of areas of EU law<sup>139</sup> and in many different provisions in the TEU,<sup>140</sup> TFEU<sup>141</sup> and the EU Charter.<sup>142</sup> It is often described as an *insaisissable* (elusive) principle both in French and EU law.<sup>143</sup> Secondly, the principle of solidarity is ‘federative’. Solidarity has the ability to organise a community that shares one destiny.<sup>144</sup> In that sense, it may also be viewed at the international level not only as a ‘federative’ but also as a true *federal* principle, as expressed clearly in the doctrine of Georges Scelle.<sup>145</sup> In addition, as Pierre Musso puts it, solidarity has the potential to bring extremes and thereby bridge the gap between liberalism and contrary values which actively promote social functions instead of

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<sup>134</sup> See eg Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, ‘Weak Right, Strong Court – the Freedom to Conduct Business and the EU Charter of Fundamental Rights’ in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017) <<https://www.elgaronline.com/view/9781782546399.00025.xml>> accessed 5 July 2022.

<sup>135</sup> Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart 2018) 52.

<sup>136</sup> Supiot (n 100) 21, quoting M Borgetto and R Lafore Droit de l’aide et de l’action sociale, (Montchrestien, 6e éd), p. 52.

<sup>137</sup> Musso (n 88) 106.

<sup>138</sup> Musso (n 88).

<sup>139</sup> See Blanquet (n 86) for an in-depth analysis of the case law of the CJEU on solidarity in relation to the various provisions of the EU Treaties.

<sup>140</sup> Articles 2, 3, 21 TEU, 24 TEU.

<sup>141</sup> Articles 67 TFEU, 80, 192 and 222 TFEU.

<sup>142</sup> Recital 1 of the EU Charter and solidarity Chapter.

<sup>143</sup> Musso (n 88); see also Rostane Mehdi in Brosset, Mehdi and Rubio (n 70) which compares solidarity to Leonardo Di Caprio who played the main character in the Hollywood movie *Catch Me If You Can*.

<sup>144</sup> See Karine Abderemane, ‘Le mot solidarité en droit de l’Union européenne’ in Brosset, Mehdi and Rubio (n 70) 28.

<sup>145</sup> For a discussion on the relationship between Georges Scelle’s theory on solidarity and EU law, see Karageorgiou (n 104), 231-238 where she says that the theory of Scelle has a great potential for explaining the project of the European Union. The argument is based on a text of Antonio Cassese, ‘Remarks on Scelle’s Theory of ‘Role Splitting’ (dédoublément fonctionnel) in International Law’ (1990) 1 EJIL 210. Going further, it can also be said that his work is of interest for a discussion on the principle of solidarity in EU since his theory is founded on the concept of ‘objective law’ (which derives from ‘social reality’ and must be distinguished from natural law). See in that respect, Hubert Thierry, ‘The Thought of Georges Scelle’ in *The European Tradition in International Law: Georges Scelle*, 1 EJIL (1990) 193.

individual freedoms.<sup>146</sup> That is also a reason why solidarity can play a decisive role in a crisis, by closing the gap between the ‘normal’ and the ‘exceptional’.<sup>147</sup> In EU law, solidarity is often conceived as the glue of the Union at both the political<sup>148</sup> and the judicial levels.<sup>149</sup> Solidarity – as a founding principle – would make EU law more equalitarian, simply by counterbalancing an extreme version of liberalism.<sup>150</sup> Thirdly, solidarity is an organic and therefore dynamic concept: a concept that allows for mutations and transformations. It indicates both a fact<sup>151</sup> and an effect – *un être et un devoir-d’être*.<sup>152</sup> In EU law, this translates to the definition of solidarity as both a value of the EU under Article 2 TEU (a presupposed fact) and an objective of EU law (a desired effect). The organic nature of the principles is also an argument for the explicit recognition of solidarity as a foundational value or foundational principle in EU law. In relation to the EU poly-crisis, solidarity is both the problem (lack of solidarity) and the solution (need for solidarity).<sup>153</sup> In a nutshell, solidarity is a narrative and normative concept that may deeply transform the ideological and value-laden orientation of a legal order. Now, particularly after the *Budget Conditionality Cases*, the principle of solidarity has become part of the narrative in EU law. Going forward, recognising the normativity of the principle in EU law could forcefully impact the future of EU integration, lending itself as a tool for recalibrating the EU values through law. This is the reason why solidarity is so essential in the *Budget Conditionality Cases* and why, in its wake, it should be understood as a foundational principle of EU law.

## 6 CONCLUSION

The *Budget Conditionality Cases* could not have been delivered at a more appropriate time: the Union is facing both internal and external challenges and needs to ensure that its foundational values are properly protected. The shift, demonstrated by the CJEU in these cases, is, beyond any doubt, seminal. By vesting the rule of law with an obligational nature, the Court confirmed that value’s operational functionality as a founding principle, one that is normative in its essence and judicially independent. Whereas the full impact of the *Budget Conditionality Cases* is yet to be seen, several implications can already be drawn out now. Firstly, the foundational values of the Union are capable of acquiring a normative nature and being transformed into normative principles, justiciable and enforceable under EU law. Secondly, the *Budget Conditionality Cases* illustrate such a transformation in the case of the principle of

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<sup>146</sup> Musso (n 88).

<sup>147</sup> The spirit of solidarity is perhaps best encapsulated in this quote of Martin Luther King touching upon the ‘spirit of solidarity’: “we must learn to live together as brothers or we will die together as fools”.

<sup>148</sup> See eg Jean-Claude Juncker, State of the Union Speech 2016: “Solidarity is the glue that keeps our Union together ...”.

<sup>149</sup> See eg Opinion of AG Sharpston in Joined Cases C-715/17 *Commission v Poland*, C-718/17 *Commission v Hungary* and C-719/17 *Commission v Czech Republic* EU:C:2019:917.

<sup>150</sup> See in that respect Raymond Saleilles, *De la déclaration de volonté* Paris, 1901, p. 351, quoted in Roman (n 127): “les juristes veulent pouvoir dire: “cela est juste parce que cela a été voulu”. Il faut désormais que l’on dise: “cela doit être voulu parce que cela est juste”.

<sup>151</sup> See Schuman Declaration of 9 May 1950 (‘discours de l’horloge’), available at <[https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950\\_en](https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en)>, accessed 5 July 2022, referring to *de facto* solidarity.

<sup>152</sup> See Musso (n 88); Roman (n 127) and and Abderemane (n 70).

<sup>153</sup> Musso (n 88); see on solidarity and crisis in EU law, Rostane Mehdi, ‘préface’ in Brosset, Mehdi and Rubio (n 70) where he calls the EU crisis “totale, continue et essentielle”.

the rule of law and explicate the interplay between foundational values and principles in the EU constitutional framework. Thirdly – and what is most important, perhaps even revolutionary – the Court elevates solidarity to the status of a legal, fundamental principle of EU law, constituting a crucial element in both the rule of law and Article 2 ‘equations’. Fourth, as we have argued, solidarity possesses a great potential to become a truly foundational principle of the EU: the principle, that, thanks to its ‘Scellian’ mode of functioning<sup>154</sup> and its crisis-related nature, might become an effective tool for resolving the future challenges, caused by extraordinary occurrences. Smoothly recalibrating EU law through adjudication, it can counterbalance the liberal and deontic tendencies in an endeavour to achieve the long-desired equilibrium of values necessary for a more sustainable European integration, where market and social objectives are balanced.<sup>155</sup>

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<sup>154</sup> See, in that respect, Cassese and Karageorgiou (n 145).

<sup>155</sup> On ‘sustainable integration’, see Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing 2019).

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