SOLIDARITY IN THE EU: WHAT IS IN A NAME?

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The jurisprudence on EU solidarity is rapidly expanding. Notably, the Court of Justice of the EU has progressively recognized the principle of solidarity in its rulings, elevating it to constitutional status. However, as the legal scope of solidarity widens, its scope of application and meaning become increasingly complex. This article seeks to refine our understanding of solidarity as a constitutional principle of EU law. Focused on the Court's case law, the article maps the evolution of solidarity as a constitutional principle and unpacks the ways in which solidarity has given rise to novel interpretations and extended its sphere of influence. The article concludes that while the meaning and arguably the scope of the principle have expanded, such evolution comes with its set of challenges.. The intrinsic dependency of solidarity on specific relational and situational contexts raises a significant obstacle for its conceptualization as a fundamental principle underpinning the EU legal order, particularly if it has legal implications. Consequently, the article argues that elevating solidarity to a fundamental principle of EU law - one that permeates the entire legal structure of the EU and has legal consequences - would be premature until the practical manifestation of solidarity matures beyond the confines of inter-Member-State relations. The article suggests that solidarity might be more accurately conceptualized as a fundamental value rather than an all-encompassing constitutional principle of EU law.

1 INTRODUCTION

Today, solidarity as a facet of the EU constitutional order is practically indisputable. The Treaties are replete with references to solidarity, including Article 2 TEU, which establishes the fundamental principles of the EU and characterises solidarity as a cornerstone of European society, and Article 3 TEU, which invokes solidarity among the Member States as a Union objective. Moreover, the Treaties mandate the Member States and the EU to uphold solidarity across diverse policy areas. This includes Article 80 TFEU on asylum, immigration, and border checks, Article 122 TFEU regarding emergencies and crises, Article 194 TFEU on energy, and Articles 222 TFEU and 42(7) TEU on security policy. Last, but not least, despite some differences, the principle of sincere cooperation as articulated in Article 4(3) TEU can be viewed as a manifestation of solidarity.[1]

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[1] Koen Lenaerts and Piet Van Nuffel, *European Union Law* (3rd edn, Sweet & Maxwell 2011) 147 (considering the principle of sincere cooperation as an expression of the principle of solidarity). However, it should also be noted that there are relevant differences between solidarity and loyalty, on this point see, , Daniel Thym and Evangelia (Lilian) Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24(5) Maastricht Journal of European and Comparative Law 605.

The concept of solidarity is far from novel to the Court of Justice of the European Union. Initial references to solidarity in the Court's jurisprudence can be traced back to as early as the 1960s concerning the common market for coal and steel and the common agricultural policy.[2] As time has progressed, the role of solidarity has ascended in prominence, especially in areas like asylum and energy policy, which will be discussed later in detail.[3]

Solidarity is often referred to as a value that underpins the EU's legal order.[4] Advocate General Bot perceived solidarity as an 'existential value' and the driving force as well as the end goal of the European project.[5] This viewpoint was echoed by Advocate General Sharpston, who compared solidarity to the Union's 'lifeblood'.[6]

Recent judicial developments have seen the Court taking strides in enhancing the normative status of solidarity. Most notably, the General Court, in a seminal decision, *OPAL*, classified solidarity between the Member States as a general principle of EU law,[7] while the Court of Justice identified solidarity as a fundamental principle of EU law.[8] The Court of Justice also invoked the principle of solidarity in critical cases concerning the legality of the EU Budget Conditionality Regulation 2092/2020,[9] referring to it as a fundamental principle.[10] These judicial developments signal the Court's inclination towards attributing a prominent status to solidarity, elevating it to a principle of constitutional relevance within the EU legal order.

While it is clear that solidarity now plays a prominent role in adjudication, the parameters and scope of application of the principle are evolving in increasingly intricate ways, signalling a complex evolution within EU law. Considerable scholarly effort has been directed towards investigating the scope and content of solidarity in specific areas of EU law[11] and

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[2] Joined cases C-6/69 and 11/69 *Commission v France* EU:C:1969:68, para 16; Case 39/72 *Commission v Italy* EU:C:1973:13, para 25.

[3] Sections 4 and 5.

[4] Opinion of AG Cruz Villalón in Case C-62/14 *Gauweiler* EU:C:2015:7, para 131; Opinion of AG Mengozzi in Case C-574/12 *Centro* EU:C:2014:120, para 25; Opinion of AG Wahl in Case C-113/13 *Azienda* EU:C:2014:291, para 64.

[5] Opinion of AG Bot in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* EU:C:2017:618, paras 17-19.

[6] Opinion of AG Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic* EU:C:2019:917, para 253.

[7] Case T-883/16 *Poland v Commission* EU:T:2019:567, para 69.

[8] Case C-848/19 P *Germany v Commission* EU:C:2021:598, para 38.

[9] Regulation on a General Regime of Conditionality for the Protection of the Union Budget [2020] OJ L433I/1.

[10] Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97, para 129; Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98, para 147.

[11] Studies exploring solidarity as a legal concept in the EU constitutional order include Armin von Bogdandy, 'Founding principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2009) 11, 53-54; Irina Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach' (2013) 35(4) Journal of European Integration 459; Tonia Hieronymi, *Solidarität als Rechtsprinzip in der Europäischen Union* (Peter Lang 2003); Esin Küçük, 'Solidarity in EU law: An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23(6) Maastricht Journal of European and Comparative Law 965, 973; Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010); Floris de Witte, 'Transnational

conceptualising solidarity as a constitutional concept.[12] However, the jurisprudential status of individual provisions that address varying aspects of solidarity, as well as their collective legal impact, remain somewhat obscure. While solidarity as a general principle has been examined in academic circles, opinions on the nature of solidarity remain diverse.[13] The elevation of solidarity to a fundamental principle, in particular, is an area that demands further scholarly attention.

This article aspires to enrich the rapidly growing body of literature by providing a cohesive and systematic review of recent developments, aimed at deepening our understanding of solidarity as a constitutional principle of EU law. It focuses on the Court's case law and traces the evolution of solidarity as a constitutional principle, while simultaneously illuminating the inherent complexities associated with conceptualizing solidarity as a fundamental principle of EU law. The article discusses the novel interpretations and normative status recently attributed to the principle, underlining the significance and potential implications of these transformations. It posits that despite these developments, the perception of solidarity as a cornerstone of the legal system, particularly in terms of its definition and scope, inadequately considers the principle's emergence and expansion, which shows that the meaning of solidarity is intrinsically dependent on specific relational and situational contexts. It proposes to view solidarity as a fundamental value instead of a constitutional principle that can be applied across the EU legal order. The article contends that adopting this perspective would lead to a more nuanced and context-aware understanding of solidarity's constitutional role, ultimately enabling its organic development within the legislative framework.

Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18(5) European Law Journal 694; Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe: Constitutional Tensions for EU Integration* (Edward Elgar 2022); Eva Kassoti and Narin Idriz (eds), *The Principle of Solidarity* (Springer 2023).

[12] Malcolm Ross, 'Promoting Solidarity: From Public Services to a European Model of Competition?' (2007) 44(4) Common Market Law Review 1057; Elspeth Guild, 'Does European Citizenship Blur the Borders of Solidarity?' in Elspeth Guild, Cristina Gortázar Rotaeche, and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff Publishers 2013); Theodore Konstadinides, 'Civil Protection Cooperation in EU Law: Is There Room for Solidarity to Wriggle Past?' (2013) 19(2) European Law Journal 267; Esin Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22(4) European Law Journal 448; Vestert Borger, *The Currency of Solidarity: Constitutional Transformation During the Euro Crisis* (Cambridge University Press 2020).

[13] Roland Bieber, 'Gegenseitige Verantwortung- Grundlage des Verfassungsprinzips der Solidarität in der Europäischen Union' in Christian Calliess (ed), *Europäische Solidarität und nationale identität* (Mohr Siebeck 2013) 67-82 (considering solidarity as a general principle of EU law); Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (external) Asylum Policy' (2017) 24(5) Maastricht Journal of European and Comparative Law 740, 751-756 (arguing that solidarity is a general principle that extends to cover external relationships of the EU with third countries). See, on the other hand, Eglė Dagilytė, 'Solidarity - A General Principle of EU Law? Two Variations on the Solidarity Theme' in Andrea Biondi, Eglė Dagilytė, and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018) 80-88 (describing solidarity as an evolving general principle); Koen Lenaerts, 'La solidarité, valeur commune aux Etats membres et principe fédératif de l'Union européenne' (2021) Cahiers de droit européen 416 (extrajudicially arguing that solidarity is not intended to serve as a general principle of Union law).

The remainder of this article is organized into eight sections. Section two provides a concise overview of the Court's initial engagement with the principle of solidarity, aiming to illuminate the original interpretation of this concept. Section three highlights the challenges that arose during its evolution. Section four discusses instances where the principle of solidarity could have profoundly influenced the Court's rulings, but did not do so, thereby demonstrating the Court's occasionally cautious approach. The subsequent three sections, five through seven, examine the Court's most recent jurisprudence. Special emphasis is placed on cases relating to asylum and energy solidarity to shed light on the Court's progressive approach in defining both the content and legal nature of the principle of solidarity. Section eight offers a critical reflection on potential challenges that could emerge amidst this evolution. The final section draws the article to a conclusion.

2 EARLY CASE LAW

The Court's initial interaction with solidarity has been thoroughly analysed,[14] thus making a detailed examination redundant in this context. However, for the aims of this article, it is crucial to briefly highlight the context in which the principle was utilized, and the meaning ascribed to it. This overview will facilitate a clearer understanding of how both the application and interpretation of solidarity have evolved over time.

As mentioned earlier, the employment of solidarity in jurisprudence dates back to early days of market integration. In the context of the common market, the Court has consistently been called upon to adjudicate disputes involving Community measures that influence market demand and supply, such as setting minimum prices. In several early cases under the European Coal and Steel Community (ECSC) Treaty, undertakings contested Commission decisions establishing minimum prices or production quotas in the iron and steel sector.[15] According to the ECSC Treaty, the Commission could implement such measures if required to address a 'manifest crisis' in the coal and steel industry.[16] In the late 1970s and early 1980s, the Commission acknowledged a manifest crisis due to continued oversupply, falling demand, and consequently, plummeting prices.[17] These conditions created challenges for steel producers in several Member States, though some small to medium-sized companies managed to stay competitive due to lower production costs.[18] The Commission's market interventions, therefore, advantaged some firms at the expense of others.

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[14] Catherine Barnard, 'Solidarity and New Governance in Social Policy' in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 154-169.
[15] Joined cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *SpA Ferriera Valsabbia* EU:C:1980:81; Joined Cases 26 and 86/79 *Forges de Thy-Marcinelle et Monceau SA v. Commission*, EU:C:1980:82; Case 276/80 *Ferriera Padana SpA v Commission* EU:C:1982:57.
[16] ECSC Treaty, Articles 58(1), 61(b).
[17] On this crisis, see the ECSC Treaty set out a diverse list of objectives that the institutions of the ECSC had to pursue, Article 3 ECSC Treaty. For a more detailed discussion of the goals of the ECSC, see Karen Alter and David Steinberg, 'The Theory and Reality of the European Coal and Steel Community' in Sophie Meunier and Kathleen McNamara (eds), *Making History: European Integration and Institutional Change at Fifty* (Oxford University Press 2007) 98-101.
[18] ibid 99.

The Court of Justice upheld the Commission's actions, emphasizing that the Commission was obliged by Article 3 of the ECSC Treaty to act in the common interest, which meant it could 'exercise its decision-making power based on situational requirements, even to the detriment of certain individual interests'.[19] The Court referred to solidarity as a 'fundamental principle' that was 'given practical expression' throughout the Treaty, for example in the requirement to act in the common interest pursuant to Article 3.[20] In times of crisis, this principle permitted the Commission to demand 'heavy sacrifices'[21] from companies to ensure the industry's survival, even necessitating greater sacrifices from some than others.[22]

It is worth mentioning that the Court recognized solidarity as a fundamental principle, stemming from both the Preamble[23] and the specific expressions provided in the Treaty provisions of the ECSC Treaty, such as Article 3 that emphasized the priority given to the common interest, which inherently implies a duty of solidarity and Articles 49 et seq. that set out a Community-financing system based on levies.[24]

Additionally, the Court's interpretation of the fundamental principle of solidarity insists that Member States bear shared responsibilities to safeguard the sustainability of their common objective of the creation of an internal market. The fundamental concept invoked by the Court when referring to solidarity in this context remained consistent: The creation of an internal market necessitates a regulatory framework that is aligned with the broad interests of the market. This inherently calls for compromise, resulting in the potential that some market participants and Member States may, at least in the short term, find themselves in a less favourable position than they would have if the market had retained a higher degree of fragmentation. Thus, this conception of solidarity functions as a requisite mechanism, underpinned by the mutual reliance of Member States in actualizing their collective undertakings.

3 TOO BOLD TOO FAST?

The principle of solidarity has continually expanded, notably with the incorporation of the concept of citizenship into EU law, and the introduction of 'communitarian solidarity'[25] obligations through legal interpretation.

[19] Joined cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia* (n 15) para 49.
[20] Joined cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia* (n 15) para 59.
[21] Case 263/82 *Klöckner-Werke AG v. Commission* EU:C:1983:373, para 19.
[22] Joined cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia* (n 15) para 120; Joined Cases 26 and 86/79 *Forges de Thy-Marcinelle* (n 15) para 10; Case 276/80 *Ferriera Padana* (n 15) paras 30-32.
[23] The parties of the Treaty are '[conscious] of the fact that Europe can be built only by concrete actions which create a real solidarity and by the establishment of common bases for economic development'.
[24] Joined cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia* (n 15) para 59.
[25] Barrowing the term from Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 123 et seq.

When the Court used solidarity in this context for the first time in *Grzelczyk*, it referred solidarity as a foundation of social welfare obligations between the EU citizens.[26] This case represents a departure from previous instances where the Court employed the principle of solidarity. What is particularly important here is that it does not directly address the relationship between Member States, but rather, focuses on the relationship between EU citizens. The central issue is whether an EU citizen can benefit from social welfare in the host state without contributing to it. The Court concluded that nationals of a host Member State are expected to demonstrate a level of financial solidarity towards nationals of another Member State unless the beneficiaries become an 'unreasonable burden' on the host state's public finances.[27] This was a new conception of solidarity, a communitarian type, that diverges from the traditional market-oriented perspective.[28]

However, this significant advancement has somewhat diminished in intensity. This can arguably be attributed to the strong criticism levelled at the Court's novel interpretations of the concepts of citizenship and solidarity, primarily due to the lack of a clear legal basis to justify demands for solidarity from Member States.[29] The problematic aspect of this expansion was that it primarily hinged on a somewhat overstretched interpretation of the concept of not being an 'unreasonable burden',[30] which was transformed into a legal obligation of solidarity.

Subsequently, the Court resolved the issue by acknowledging that Member States could demand an EU citizen to integrate into their host society to claim benefits,[31] a concept often referred to as the 'real link' principle.[32] This shift implicitly acknowledged that social solidarity, as portrayed by the legislative framework, was fundamentally national in nature. In this refined understanding of social solidarity, an EU citizen can access the national welfare system of their host state only when they can demonstrate a certain degree of integration into the society of that state.

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[26] Case C-184/99 *Rudy Grzelczyk* EU:C:2001:458, para 44. See also Case C-413 *Baumbast* EU:C:2002:493, paras 90-94 (although the Court does not make explicit reference to solidarity, it arguably serves as an underpinning rationale).

[27] Case C-184/99 *Grzelczyk* (n 26) para 44.

[28] Michael Dougan and Eleanor Spaventa, '"Wish You Weren't Here …": New Social Models of Social Solidarity in the European Union' in Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 208; Stefano Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 European Law Journal 360.

[29] Stephen Weatherill, 'Activism and Restraint in the European Court of Justice' in Patrick Capps, Malcolm Evans, and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003) 490; Kay Hailbronner, 'Union citizens and access to social benefits' (2005) 42(5) Common Market Law Review 1245; Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13(5) European Law Journal 623, 636-637; Henri de Waele, 'EU Citizenship: Revisiting its Meaning, Place and Potential' (2010) 12 European Journal of Migration and Law 324.

[30] This found expression in the sixth recital in the preamble of the Council Directive 93/96/EEC of 29 October 1993 on the Right of Residence for Students [1993] OJ L317/59.

[31] Case C-209/03 *Bidar* EU:C:2005:169, para 57. See also, Case C-158/07 *Förster* EU:C:2008:630, para. 60.

[32] On the real risk principle, see Michael Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009).

In blunt terms, the Court was rather bold, both in terms of the interpretation it assigned to the principle and the breadth it accorded to its scope. The backlash the Court faced due to its innovative interpretation of solidarity and the absence of legislative advancements to promote solidarity could arguably be the main reasons why solidarity within this context has largely been confined to such a narrow scope and limited by the real link principle.[33]

4 A PERIOD OF STAGNATION

Indeed, even after the Lisbon Treaty, which explicitly accentuates the principle of solidarity, the Court has remained circumspect in shaping arguments based on this principle. This cautious approach is particularly apparent in the jurisprudence in asylum, an area governed by Article 80 of the TFEU. This, now well-known, provision requires the Union's policies in the areas of asylum, immigration and border checks and their implementation to be governed by the principle of solidarity and fair sharing of responsibility.

The Court refrained from employing”the ’rinciple of solidarity in its analysis even though the rulings related directly to a shift in the balance of responsibility sharing. The Court's reluctance to use Article 80 TFEU in the interpretation of other provisions can be observed most clearly in *Halaf*,[34] a case in which the Court was openly asked about the role of Article 80 TFEU in the interpretation of the Dublin II Regulation.[35] To provide context, the Dublin II Regulation established the criteria for determining which Member State is responsible for processing and examining an application for international protection. Mostly, responsibility is assigned based on the 'country of first entry' rule, which stipulates that the first Member State that an asylum seeker irregularly enters from a third country bears the responsibility for examining the application for international protection.[36] A process known as 'Dublin returns' provides a procedure for transferring an asylum seeker from one EU Member State to another that is either deemed responsible for examining their asylum application or has already done so.[37] However, under Article 3(2) of the Dublin II Regulation, often termed as 'sovereignty clause', Member States had the discretion to review an asylum application submitted to them, regardless of whether they were designated as responsible according to criteria set out in the Regulation.

Halaf concerned the return of asylum seekers to Greece, which was the responsible state for processing the application as it was the country of first entry. At that time, however, it was clearly established that the asylum processing system in Greece was under significant pressure. The Court was asked whether Article 3(2) of the Regulation permitted a Member

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[33] For further insight on the implications of the 'toxic legacy' of citizenship cases, see Martin Steinfeld, *Fissures in EU Citizenship: The Deconstruction and Reconstruction of the Legal Evolution of EU Citizenship* (Cambridge University Press 2022) 296-341.

[34] Case C-528/11 *Zuheyr Frayeh Halaf* EU:C:2013:342.

[35] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1 (Dublin II Regulation).

[36] Article 10(1) Dublin II Regulation.

[37] Chapter 5 Dublin II Regulation.

State to assume responsibility in the application of the sovereignty clause, even though the Regulation did not contain provisions to give effect to Article 80 TFEU.[38] In other words, the question concerned the relevance of the principle of solidarity and fair sharing of responsibility in the interpretation of the Regulation. The Court, however, preferred not to express an opinion on the relevance of Article 80 TFEU in applying the sovereignty clause and simply stated that the exercise of this clause was not subject to any particular condition.[39]

Where possible, the Court relied on conventional arguments of an administrative nature to substantiate decisions that alter the balance of responsibility between the Member States.[40] This can be observed in case law concerning the implementation of returns under the Dublin III Regulation,[41] which is the successor of the Dublin II Regulation and retains a similar structure for assigning responsible Member States and managing returns. In *Shiri*, for instance, the Court held that a transfer was impermissible, as the six month period for returns under Article 29(1) of the Dublin III Regulation had expired.[42] Likewise, in *Mengesteab*, the Court ruled that a take-charge request had not been made within three months of the date when the application for international protection was made (in accordance with Article 21(1) of the Dublin III Regulation), meaning that the transfer state assumed jurisdiction, and thus the return was impermissible.[43]

The Court's reserved approach in using solidarity in its argumentation is also visible in the litigation concerning the legality of fiscal solidarity instruments adopted during the sovereign debt crisis. In the three leading decisions on the legality of the Member States' crisis response measures and the market interventions of the European Central Bank,[44] solidarity is only mentioned once, namely in Advocate General Kokott's opinion.[45] Advocate General Kokott suggested that the 'concept' of solidarity militated against a broad interpretation of Article 125 TFEU, the no-bailout clause, that prevented Member States from granting any form of financial assistance. While she acknowledged that it could not 'be inferred from the concept of solidarity that there exists a duty to provide financial assistance of the kind that is to be provided by the ESM', she was of the view that 'a broad teleological interpretation of Article 125 TFEU [that prohibited] the Member States [...] from voluntarily providing mutual assistance [...] would call into question the very purpose and objective of

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[38] Case C-528/11 *Halaf* (n 34) para 25.

[39] ibid paras 36-39.

[40] On this point, see Daniel Thym, 'Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: *Jafari*, *A.S.*, *Mengesteab* and *Shiri*' (2018) 55(2) Common Market Law Review 549, 562-563 (highlighting that the Court has progressively turned to administrative reasoning in cases with constitutional dimension).

[41] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (Dublin III Regulation).

[42] Case C-201/16 *Shiri v Bundesamt für Fremdenwesen und Asyl* EU:C:2017:805, paras 42-44.

[43] Case C-670/16 *Tsegezab Mengesteab v Bundesrepublik Deutschland* EU:C:2017:587, paras 63-74.

[44] Case C-370/12 *Thomas Pringle v Ireland* EU:C:2012:756; Case C-C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400; Case C-493/17 *Weiss and Others* EU:C:2018:1000.

[45] Opinion of AG Kokott in Case C-370/12 *Thomas Pringle v Ireland* EU:C:2012:675, paras 142-143.

a Union'.[46] Ultimately, the Court upheld voluntary financial assistance measures adopted in response to the crisis by interpreting provisions of the Treaty that prohibit the monetary financing of Member State governments[47] or the assumption of the liabilities of a Member State[48] restrictively, and the mandate of the European Central Bank expansively. However, it relied on a technical line of reasoning in holding that the fiscal solidarity instruments complied with the Treaty.[49]

The reasons behind the reluctance of the Court to invoke the principle of solidarity with more assertiveness within these policy domains can only be hypothesized. As has been observed in the literature, the Court has adopted a passive role in the area of asylum in general, either by declining to assume jurisdiction or addressing issues in a rather formalistic way without resorting to teleological reasoning or appealing to the rationale underpinning the rules.[50] However, it is conceivable that the Court's approach may be swayed by the politically charged context encompassing both risk and fiscal sharing in the monetary union and the distribution of responsibilities in asylum policy. The political volatility of these issues is highlighted by the overt opposition displayed by certain Member States and their courts to obligations under EU law that were perceived as undermining national interests.[51] This friction is further exemplified by the recurring legislative deadlocks that hinder the enhancement of solidarity amongst Member States within both the monetary union and asylum policy sectors.[52]

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[46] ibid para 143.

[47] Article 123(1) TFEU. In particular, the ECB and national central banks are prohibited from granting credit facilities to Member States or purchasing debt instruments directly from them on the primary market.

[48] Article 125(1) TFEU (no-bailout clause).

[49] See in particular Case C- 62/14 *Gauweiler* (n 44) paras 46-59, 104-108, 115-120; Case C-493/17 *Weiss* (n 44) paras 53-61, 109-128, 137-142.

[50] On this point see Iris Goldner Lang, 'Towards 'Judicial Passivism' in EU Migration and Asylum Law?' in Tamara Capeta, Iris Goldner Lang, and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) 176-177, 181 (calling the Court's rejection of jurisdiction 'judicial passivism in the narrow sense', and its formalistic approach 'judicial passivism in the extensive sense').

[51] See the judgment of the German Federal Constitutional Court concerning the ECB's public sector purchase programme, BVerfGE 146, 216, 2 BvR 859/15, refusing to accept the binding nature of the decision of the Court of Justice in Case C-493/17 *Weiss and Others* (n 44); and the failure of Poland, Hungary and the Czech Republic to comply with relocation decisions of the Council, which were the subject of an infringement action in Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic*, EU:C:2020:257.

[52] See, for example, the 2017 legislative package proposed by the Commission to reform the constitutional architecture of European monetary union and strengthen risk sharing within the Eurozone, Communication from the Commission to the Institutions, 'Further steps towards completing Europe's economic and monetary union: A roadmap' COM(2017) 821 final, which is unlikely to become law. Similarly, in asylum policy, the Commission has withdrawn the unsuccessful Dublin IV Proposal, which failed to find enough support in the Council due to a deadlock concerning the solidarity chapter of the Proposal that involved a corrective allocation mechanism based on mandatory quotas.

5 PICKING UP THE THREADS

The 'refugee crisis' of 2015 stands as a critical juncture, giving rise to an unprecedented emphasis on solidarity in legal argumentation. This shift emerged in response to the EU's efforts to engineer schemes of solidarity to address the crisis.[53] Amidst the large-scale arrival of refugees during the Syrian civil war, in response to escalating pressure in Italy and Greece, the Council introduced Decision 2015/1601 using Article 78(3) TFEU, which provides for the adoption of provisional measures in the event of a 'sudden increase of arrivals of third-country nationals'.[54] The scheme required the relocation of asylum seekers to other Member States based on compulsory quotas. The Court reengaged with the principle of solidarity when the legality of this scheme came under scrutiny.[55]

The legality of this scheme was challenged before the Court on various grounds, including the violation of the principle of proportionality.[56] The Slovak Republic objected to the mandatory nature of the relocation scheme, specifically in the form of imposed quotas, and questioned its necessity.[57] The Court, however, found that a joint interpretation of Articles 78(3) and 80 TFEU justified the mandatory nature of the relocation quotas, meaning that the Council was under an obligation to give effect to the principle of solidarity and fair sharing of responsibility. Given the urgency of the circumstances, the Court concluded that the Council had not committed a manifest error of assessment by instituting provisional measures based on compulsory quotas.[58]

Hungary, on the other hand, argued that the Decision 2015/1601 violated the principle of proportionality due to its implications, and thus called for the annulment of a clause that established relocation quotas for Hungary. The argument advanced was that the compulsory quotas imposed a disproportionate burden on Hungary, given that the country itself was in an emergency situation at the time of the scheme's introduction. The Court ruled that according to the contested decision, it was a crucial component that the responsibility of relocating asylum seekers should be shared among *all* Member States, adhering to the principle of solidarity and fair distribution of responsibility, especially when a Member State is confronted with an emergency situation as set out in Article 78(3) TFEU.[59] The Court upheld the Council Decision and concluded that the compulsory nature of the relocation quotas was justified by a combined reading of Articles 78(3) and 80 TFEU.[60]

Similarly, in an infringement action brought against several Member States that had failed to comply with emergency relocation schemes, *Commission v Poland, Hungary and the Czech Republic*, the Court relied on the principle of solidarity and fair sharing of responsibility

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[53] Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* EU:C:2017:631; Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic* (n 51).

[54] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

[55] Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (n 53).

[56] ibid paras 206-310.

[57] ibid paras 225-233.

[58] Ibid paras 246-253.

[59] ibid paras 291-293 (emphasis added).

[60] ibid paras 246-253.

to hold that the 'burdens' associated with relocating asylum seekers had to be shared by *all* Member States that were not confronted with an emergency and were thus not in need of assistance.[61] Solidarity was thus again used to uphold solidarity responsibilities and prevent Member States from adopting unilateral actions that compromised the goal of a common scheme.

It is necessary to point out that the principle of solidarity was also used in the context of immigration and border checks for the purpose of supporting a strict application of the country of first entry rule of the Dublin III Regulation.[62] The *Jafari* case revolved around this rule, which obligates the Member State where an asylum seeker first enters EU territory to process their application for international protection, particularly if the asylum seeker has irregularly crossed the border into that Member State from a third country.[63] The question was whether an asylum seeker could be regarded as having entered in a Member State 'irregularly' if that Member State authorised the asylum seeker to transit through its territory and lodge an asylum application in another Member State, because it was faced with the arrival of an unusually large number of asylum seekers that put its asylum system under severe pressure. The Court invoked the principle of solidarity to assert that the rule designating the first country of entry applied even in a situation where the asylum system of a Member State was overwhelmed. This principle was upheld even when a Member State permitted or authorized the transit of an asylum seeker to another Member State on humanitarian grounds.[64] The Court reasoned that the abolishment of internal border controls implied that the administration of external borders was conducted not solely for the benefit of those Member States with external frontiers, but for all Member States within the Schengen Area.[65] Consequently, each Member State was 'answerable to all the other Member States for its actions concerning the entry and residence of third-country nationals and [had to] bear the consequences thereof in a spirit of solidarity and fair cooperation'.[66]

From the above, it is evident that the Court has adopted a more assertive stance when the legislator has specifically created a scheme to promote solidarity. However, it remains cautious about giving a new interpretation of responsibility-sharing rules based on the principle of solidarity. As for the meaning of the principle, this context depicts the principle of solidarity in asylum and immigration law – much like in the early case law related to the internal market – as a mechanism for upholding a shared framework to which all Member States have agreed. The essence of the role of solidarity becomes clearer when examined in light of the fundamental purpose of the common asylum regime. The main impetus for creating a unified approach to asylum stemmed from the ambitious aim of abolishing internal borders. There is an intrinsic connection between a unified asylum policy and free movement rights, which is a fundamental pillar of the single market. In the above-mentioned cases on asylum, solidarity served as a safeguard to preserve the viability of a common asylum system.

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[61] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic* (n 51) para 80 (emphasis added).
[62] Article 13(1).
[63] Case C-646/16 *Jafari* EU:C:2017:586.
[64] ibid para 92.
[65] ibid para 85.
[66] ibid para 88.

In the context of immigration, according to the Court, the notion of solidarity underlined the responsibility of the country of first entry in managing the EU's external borders. This system, grounded in the 'country of first entry' rule, precludes Member States from unilaterally withdrawing from schemes designed to mitigate the rule's adverse impacts on border states. In essence, solidarity, for the Court, meant the willingness to put aside self-interest in favour of a shared objective - a necessity borne out of the functional demands of a common goal to which all Member States are committed.

6 MAKING OF A GENERAL PRINCIPLE

Although the Court's rulings on asylum and immigration responsibility-sharing marked a significant advancement, highlighting the normative relevance of the principle of solidarity as a tool for interpretation, they did not fully showcase the principle's potential, which rests more in its function as a standard of legality. In this context, the General Court's ruling in the *OPAL* case concerning energy solidarity represents a pivotal development.[67] The Court did not only acknowledge the principle of solidarity between Member States as a general principle of EU law, but also took decisive action by annulling the contested act due to its violation of the principle of solidarity as outlined in Article 194 TFEU.[68] Furthermore, the General Court did not confine itself to a narrow understanding of the principle but endowed it with a more encompassing interpretation that goes beyond a definition that is anchored around the common interest of the EU and the attainment of shared objectives. Understanding the significance of this development necessitates a closer look at the specific circumstances in the case.

This case concerned a Commission decision that authorised an increase in the volume of natural gas transferred through a pipeline, abbreviated OPAL, which is an onshore extension of the Nord Stream 1 offshore pipeline that transfers gas from Russia through the Baltic Sea to Germany and onwards to central Europe.[69] Significantly, the OPAL pipeline offers a fresh alternative route compared to existing pipelines that route gas across Poland to the rest of Europe.

Poland challenged the validity of the Commission's decision, citing various reasons, one of which was a breach of the principle of solidarity as outlined in Article 194(1) TFEU.[70] Poland expressed concern that the contested decision would grant Gazprom, the supplier of gas through Nord Stream 1, the power to control the gas flow along the OPAL pipeline.

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[67] Case T-883/16 *Poland v Commission* (n 7) paras 69-78. For a detailed analysis of the case, see Anatole Boute, 'The Principle of Solidarity and the Geopolitics of Energy: *Poland v. Commission (OPAL pipeline)*' (2020) 57(3) Common Market Law Review 889; Mykola Iakovenko, 'A need for clarification of the energy solidarity principle: what can be learned from the General Court's judgment in the OPAL case?' (2021) 14(1) Journal of World Energy Law and Business 38; Kaisa Huhta and Leonie Reins, 'Solidarity in European Union Law and its Application in the Energy Sector' (2023) 72(3) International and Comparative Law Quarterly 771, 778.
[68] Article 194(1) TFEU requires the Union's policy on energy to aim, in a spirit of solidarity, to ensure the functioning of the energy market and energy security in the Union, promote energy efficiency and energy saving, the development of new and renewable energy, and the interconnection of energy networks.
[69] Commission Decision C(2016) 6950 final of 28 October 2016 on the review of the conditions for exemption of the OPAL pipeline.
[70] Case T-883/16 *Poland v Commission* (n 7) paras 61-64.

Given the lack of a significant increase in demand for natural gas in central Europe, an increase in the supply of gas along the OPAL pipeline could lead to a reduction or complete interruption of the transmission of gas via Poland, thus compromising Poland's energy security.[71] It followed, the applicant argued, that the failure of the Commission to consider the implications of its decision for existing routes that ran through Poland infringed the principle of solidarity under Article 194 TFEU.

The Commission disputed this argument, submitting that (i) Article 194(1) TFEU was addressed to the legislator and not the administration (the Commission) that applied the legislation; (ii) the principle of solidarity set out in Article 194 TFEU concerned only situations of crisis in the supply and functioning of the internal gas market and not the normal functioning of the market; (iii) the OPAL pipeline was a project that served the common interest of the EU; and (iv) the contested decision did not have a detrimental effect on the security of gas supply in central and eastern Europe in general, or in Poland in particular.[72] Dismissing the Commission's arguments concerning Article 194 TFEU, the General Court concluded that the contested decision, in fact, infringed the principle of energy solidarity.

Crucially, for the focus of this article, the General Court, in its effort to substantiate the justiciability of Article 194 TFEU, recognised solidarity among Member States as a general principle of EU law.[73] The General Court was brief in its reasoning and did not define the content of solidarity as a general principle of EU law, arguably, because the judgment was not based directly on this aspect of solidarity, but on the principle of energy solidarity. In the short paragraph devoted to the question, the Court drew on constitutional provisions expressly referring to solidarity and stated that energy solidarity pursuant to Article 194 TFEU was a 'specific expression' of the general principle of solidarity between the Member States, which was 'at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU'.[74]

The practical result of elevating solidarity between the Member States to a general principle would be that solidarity, as a general principle, can be applied even where no express solidarity obligations were imposed under the Treaties.[75] This would have implications for a variety of policy areas, for example environmental policy, where solidarity between the Member States has not been elevated to an express legal principle, but is regarded as integral to the promotion of environmental protection and has been incorporated into secondary legislation combatting climate change.[76] As a general principle of EU law, solidarity between the Member States would guide both the legislature and the judiciary. It would be used in the interpretation of provisions of both primary and secondary EU law and national law that

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[71] ibid paras 62-64.

[72] ibid paras 65-66.

[73] ibid para 69.

[74] ibid.

[75] The gap-filling function of general principles is most evident in fundamental rights protection, e.g., Case 29/69 *Stauder* EU:C:1969:57, para 7.

[76] Directive (EU) 2018/410 of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments [2018] OJ L76/3, recital 8.

falls within the scope of EU law.[77] In adjudication, it could serve as a 'shield' supporting Union acts that introduced new solidarity obligations, or as a 'sword', i.e., a legality standard in the constitutional review of EU acts as well as national acts, thus having a direct impact on the whole EU legal order.[78]

A recent case brought before the Court of Justice demonstrates that this is not merely hypothetical.[79] The case in question was initiated by the Czech Republic, asserting that Poland had breached Directive 2011/92 by extending the development consent for lignite mining in the *Turów* mine without performing an environmental impact assessment.[80] This case was dismissed from the register, due to a settlement reached between the two Member States. Nonetheless, Advocate General Pikamäe's opinion emphasises the vital role of the solidarity principle in interpreting the provisions of the Directive upon which the infringement case was predicated.[81]

As far as the scope of the principle of solidarity is concerned, the General Court addressed several issues: the personal scope of the principle and its application in situations not amounting to a crisis. First, the Court read the personal scope of Article 194 TFEU inclusively, holding that on the one hand the Union, including the Commission and other non-legislative institutions and administrative bodies, were 'bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States [were] bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it'.[82] This broad reading of the provision is convincing, given that the Member States are partly responsible for attaining the policy goals set out in Article 194(1) TFEU.

Second, the General Court rejected the Commission's argument that the principle of energy solidarity concerned only situations of a crisis in the supply or functioning of the internal gas market. The General Court held that solidarity operated not only as a contingency mechanism but entailed 'a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders'.[83] It is true that solidarity actions across all areas are generally triggered in response to emergencies. Nevertheless, the EU solidarity framework cannot be characterized as an emergency management system. In fact, when a solidarity

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[77] Case C-314/89 *Siegfried Rauh* EU:C:1991:143, para 17; Joined Cases 46/87 and 222/88 *Hoechst* EU:C:1989:337, para 12; Joined Cases C-90/90 and C-91/90 *Neu* EU:C:1991:303, paras 12-13; Case C-1/94 *Cavarzere* EU:C:1995:266, para 30; Case C-135/93 *Spain v Commission* EU:C:1995:201, para 37.

[78] On the functions of general principles and their influence on the EU legal order, see Jose Gutiérrez-Fons and Koen Lenaerts, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47(6) Common Market Law Review 1629. For a comparison between the functions of general and ordinary principles, see Engsig Sørensen, 'What Is a General Principle of EU Law? A Response' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011) 26, 28.

[79] Case C-121/21 R *Czech Republic v Poland* EU:C:2021:752.

[80] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1.

[81] Opinion of AG Pikamäe in Case C-121/21 R *Czech Republic v Poland* EU:C:2022:74, paras 215-120.

[82] ibid para 70.

[83] ibid para 72.

system is designed as a crisis management instrument, the Treaty expressly says so.[84] In addition, a legal basis for emergency measures to deal with an energy supply crisis using a special legislative procedure already exists in the form of Article 122 TFEU. This suggests that non-emergencies are governed by Article 194 TFEU, which provides for measures to be adopted in accordance with the ordinary legislative procedure. Furthermore, it is difficult to see how the objectives of the EU's energy policy, for example the promotion of efficiency and energy saving and the development of new and renewable forms of energy, can be achieved by emergency solidarity instruments alone. Thus, neither the wording of Article 194 TFEU, nor the context supports a narrow reading of the principle covering only emergencies.

Finally, the General Court made important statements concerning the meaning of solidarity and the concomitant demands that the principle of energy solidarity places on Member States. This, arguably, is the most controversial part of the ruling, because the General Court's approach differs substantially from the concept of solidarity expressed in earlier case law. According to the General Court, the principle of energy solidarity requires the Union and the Member States to take account of the interests of other stakeholders - the EU as a whole and individual Member States - and to balance these interests when they are in conflict.[85] In *OPAL*, the application of the principle thus required (i) the identification of the detrimental effects of the contested decision on Member States other than Germany; and (ii) balancing those interests with Germany's interest in increasing the capacity of the OPAL pipeline.[86] Since the Commission had failed to examine the impact of the capacity increase on the security of energy supply in Poland, and balance these effects against the decision's impact on the security of supply to the EU as a whole, the Court concluded that the contested decision infringed the principle of solidarity.[87]

The General Court's application of this principle exemplifies a markedly broader interpretation of solidarity, transcending the traditional market-oriented understanding of the term.[88] In other policy areas, the Court of Justice relies on solidarity to prevent Member States from taking unilateral action where this would imperil the viability of a common project, such as the internal market, borderless Europe, or the common asylum system.[89] In *OPAL*, in contrast, unilateral action by Germany did not put the functioning of the common energy market at risk, although it potentially imperilled the security of the energy supply of one Member State, Poland. Acting in solidarity was thus not related to the need to compromise or bring sacrifices in the interest of the Union as a whole. Rather, according to the General Court, it required Member States and Union institutions to consider the interests

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[84] See, for example, Article 222 TFEU.

[85] Case T-883/16 *Poland v Commission* (n 7) paras 72, 77.

[86] ibid para 78.

[87] ibid paras 81-82.

[88] On the broad interpretation of the Article 194 specifically, see the analysis by Huhta and Reins (n 67) 781.

[89] Joined cases *Valsabbia* 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 (n 15) para 120; Joined Cases 26 and 86/79 *Forges de Thy-Marcinelle* (n 15) para 10; Case 276/80 *Ferriera Padana* (n 15) paras 30-32; Case 263/82 *Klöckner-Werke* (n 21) para 19; Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (n 53) paras 291-93; Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic* (n 51) para 80; Case C-646/16 *Jafari* (n 63) para 88.

of individual Member States and refrain from acting if other Member States were disproportionately affected. This suggests that the interests of an individual Member State may prevail over the interests of other states, and beyond that, over the common interest of the Union as a whole. The General Court's approach consequently constitutes an inversion of the conventional understanding of solidarity in other policy areas, which is based on the conception that the common good prevails over the interests of individual Member States, since all Member States ultimately benefit from the attainment of a common goal. It further implies that solidarity obligations arise simply by virtue of being a member of the Union, even if acting in solidarity is not in the interest of an individual Member State either in the short or the long run. The criteria under which the interest of a single member state could potentially supersede the collective interest of the entire EU remains an open question.

An ongoing case before the Court presents a good opportunity for it to expand on its stance concerning the concept of energy solidarity.[90] In response to the energy crisis triggered by the Russian Federation's military aggression against Ukraine, the Council has introduced a new regulation, using Article 122(1) TFEU as the legal basis. This statute sets the guidelines for addressing severe difficulties, intending to ensure the security of the Union's gas supply.[91] The Regulation, reflecting the principle of energy solidarity, requires all Member States to strive towards reducing their gas demand. For this purpose, it establishes rules concerning voluntary and mandatory demand-reduction targets.[92] Poland, however, has initiated an annulment action, questioning the legality of the Regulation. The focal point of the ruling is likely be appropriateness of legal basis - Article 122 TFEU, which has been increasingly and controversially invoked in recent times.[93] In the scenario that the Court rejects *ultra vires* claim by adopting a broad interpretation of Article 122 TFEU, the issue will resolve around the principle of energy solidarity, Article 194 TFEU, on which both parties are relying upon.

The intriguing reality that both the disputed legislation and the plea for its annulment hinge on the same tenet - the call for solidarity, highlights the undeniable fact that the meaning of solidarity is far from being clear despite the evolving jurisprudence. The rationale for solidarity rests on the prevention of significant internal market distortions, an issue that impacts all Member States, albeit to varying degrees; thus, despite some Member States being more susceptible to disruptions in Russian supplies, it is understood that all would suffer negative consequences and are in a position to help curtail the economic damage of such disruptions.[94] The application falls short of elucidating the logic underpinning Poland's assertion of a solidarity infringement. Rooted in its successful solidarity claim in the *OPAL* ruling, it is arguably postulated that Poland's solidarity argument is premised on the contention that the scheme does not duly consider the repercussions on Poland's energy security. The scheme exerts substantial influence over Poland's selection of energy mix, an

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[90] Case C-675/22 *Poland v Council* [2022] OJ L 206.

[91] Council Regulation 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L 206/1 (Council Regulation 2022/1369), Article 1.

[92] Council Regulation 2022/1369, Articles 3, 5.

[93] Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its constitutional ramifications: A critical assessment' (2022) 59(2) Common Marker Law Review 433, 445-48.

[94] For the reasons for and objectives of the Regulation, see Explanatory Memorandum, 'Proposal for a Council Regulation on coordinated demand reduction measures for gas' COM(2022) 361 final.

element of critical significance to its energy security. Poland, once again, appears to be advocating for its national interest to be given precedence over the interests of other Member States, or even the collective interest of the EU.

In the *OPAL* case, energy solidarity was invoked as a procedural principle, upon which the Court scrutinised whether the Commission considered Poland's interests. When applied as a procedural principle, solidarity would require the Council to demonstrate that a balancing exercise has been conducted. Given the discretion typically exercised by the decision-maker, it seems unlikely that the Court would extend its scrutiny to assess the rigour with which this balancing act is performed. It is important to note that the case will be considered by the Court of Justice, not the General Court. Despite the Court of Justice upholding the decision of the General Court on appeal, it is plausible that these two courts may interpret the limits of the principle and the level of scrutiny it necessitates in different ways. The following section will delve deeper into this matter.

7 MAKING OF A FUNDAMENTAL PRINCIPLE

The *OPAL* case was also subject to review by the Court of Justice on appeal. Advocate General Campos Sánchez-Bordona delivered an opinion supporting the General Court's finding in relation to the legality of the contested decision.[95] The Court of Justice subsequently affirmed the *OPAL* decision made by the General Court, but instead of identifying 'solidarity between Member States' as a general principle, it deemed 'solidarity' as a fundamental principle of EU law.[96] Despite the Court of Justice aligning with the General Court on the importance of solidarity within the constitutional order, the specific language employed by the Courts may seem to present only a subtle variance. However, upon a more detailed examination, this semantic distinction could carry significant practical consequences.[97]

In the *OPAL* case, referring to the binding nature attributed to the principle of energy solidarity and drawing parallels to its role in other legal areas such as asylum, the Court of Justice asserted: 'there is nothing that would allow for the inference that the principle of solidarity, as mentioned in Article 194(1) TFEU, cannot, as such, produce binding legal effects on the Member States and institutions of the European Union […] including […] the Commission'.[98] The Court maintained that the principle of energy solidarity, akin to the broader principles of EU law, served as a standard for evaluating the legality of measures adopted by EU institutions.[99] More significantly, the Court of Justice referred solidarity as a

[95] Opinion of AG Campos Sánchez-Bordona in Case C-848/19 P *Germany v. Poland* EU:C:2021:218.

[96] Case C-848/19 P *Germany v Commission* (n 8) para 38.

[97] Consider the example where the two Courts differ in their conceptualisation of a principle, as demonstrated in Case T-74/00 *Artegodan* EU:T:2006:286, paras 183-184, and Case C-111/16 *Fidenato* EU:C:2017:676, para 46. In the former case, the General Court (then known as the Court of First Instance) considered the precautionary principle as a general principle. However, in the latter case, the Court of Justice showed more caution and did not explicitly label it as a general principle.

[98] Case C-848/19 P *Germany v Commission* (n 8) paras 43-44.

[99] ibid para 45 (emphasis added).

fundamental principle of EU law, and emphasized that it 'underpin[ned] the entire legal system of the European Union'.[100]

Might one contend that this analysis risks overreaching by attempting to discern meaning from the Court's discourse, which has not consistently demonstrated coherence? The use of the term 'fundamental principle' in this context is far from incidental. It is worthwhile to note that this is not the Court's first instance of labelling solidarity as a fundamental principle.[101] In reality, from the very beginning, even without explicit reference in the Treaties, the Court maintained that solidarity is a fundamental principle that manifests practically throughout the Treaty.[102] Granted, at that time, the scope of what constituted the Community was significantly narrower. Therefore, from this perspective, one might hesitate to attach too much significance to this classification alone. However, the recent judgments of the Court of Justice regarding the legality of the EU Budget Conditionality Regulation reinforce that this choice of terminology is purposeful and deliberated.[103] We do not need to go into the details of these widely recognized cases. .[104] At a glance, the central concern of the annulment cases initiated by Hungary and Poland revolved around the validity of the rule-of-law conditionality mechanism introduced by Regulation 2092/2020. The Regulation was designed to safeguard the Union budget against breaches of rule-of-law principles within Member States. It established a mechanism allowing EU institutions to suspend funds to any Member State violating rule-of-law principles in a manner that 'directly and significantly' impacts the EU's budget or its financial interests.[105]

These cases hold significance for numerous reasons. First, they illuminated the legal nature of the values outlined in Article 2 TEU, such as the rule of law, categorizing them as legally binding obligations.[106] Second, the Court clarified the nexus between the rule of law, as enshrined under Article 2 TEU, the principle of mutual trust and the principle of solidarity. For the Court, the Union budget is the principal instrument that gives effect to the principle of solidarity, the implementation of which is based on mutual trust between the Member States in the responsible use of common resources included in that budget. This mutual trust hinges on Member States' commitment to fulfil their obligations under EU law and uphold the values specified in Article 2 TEU, including the rule of law. Most significantly for the context of this analysis, the Court identified solidarity as a fundamental principle of EU law.[107]

The judicial developments position solidarity as a fundamental principle of constitutional importance. It is clear that both the General Court and the Court of Justice

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[100] ibid para 41.

[101] See above, Section 2.

[102] Joined cases *Valsabbia* 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 (n 15) para 59.

[103] Case C-156/21 *Hungary v Parliament and Council* (n 10) para 129. Case C-157/21 *Poland v Parliament and Council* (n 10) para 147.

[104] For a detailed analysis of the cases, see Xavier Groussot, Anna Zemskova, and Katarina Bungerfeldt, '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' (2022) 5(1) Nordic Journal of European Law 1.

[105] EU Budget Conditionality Regulation (n 9), Articles 4 and 6.

[106] Case C-156/21 *Hungary v Parliament and Council* (n 10) para 232.

[107] ibid para 129.

assign considerable weight to this principle in their judgments. Considering this shared recognition, one might ask, does the specific categorization of the principle carry any relevance? Practical and epistemic considerations suggest that the distinct conceptualisation of the principle of solidarity by the two Courts have distinct implications.

The General Court confines the scope of the general principle with the Member State relationship, and primarily drew upon Treaty provisions that highlighted solidarity among Member States. Conversely, the Court of Justice appears to entertain a more expansive view, potentially incorporating additional facets of solidarity, particularly those existing between individuals. The Court of Justice explicitly refers the preamble of the TEU, arguing that the establishment of the EU manifested the Member States' intention to 'deepen the solidarity between their peoples'. This wider interpretation is further demonstrated by the Court of Justice's decisions in cases related to student finance, revealing its readiness to accord considerable breadth to this principle.[108] It is also useful to recall that, in the context of the internal market, the Court insists that the *fundamental principle of solidarity* grants the Commission the authority to require significant concessions from businesses to ensure the industry's sustainability.[109] This broader perspective mirrors the Court's profound aspiration for augmented solidarity among the peoples of Europe, as expressed in the preamble to the TEU.

The preceding examination of case law reveals that the Court's interpretation of solidarity has considerably expanded its scope and influence. This principle has seen growth not only in the fields where it can be applied but also in terms of the expectations and responsibilities it imposes on its addressees. The pivotal question that arises is: does the judicial conceptualization of solidarity, which underpins the entire EU legal structure, accurately reflect the contemporary EU as a polity?

8 SEIZING THE *ZEITGEIST*?

There is an undeniable momentum for advancing solidarity in the EU. The Council has recently reached an agreement on the New Pact on Migration and Asylum, which introduces a new solidarity scheme.[110] Most notably, the EU launched 'Next Generation EU', its largest-ever recovery strategy, committing over €800 billion to alleviate the immediate economic and social ramifications of the Covid-19 pandemic.[111] The funds are intended to be spent primarily within the context of cohesion policies aimed at backing domestic reforms and investments. The disbursements of funds under this new initiative are tied to the expenses and successful execution of these reforms and investments. However, traditional

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[108] See above, Section 2.

[109] Case 263/82 *Klöckner-Werke* (n 21) para 19 (emphasis added).

[110] European Commission, 'Statement on the political agreement on the New Pact on Migration and Asylum', (9 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3183> accessed 25 June 2023.

[111] Council Regulation 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433I/23; Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

conditionality does not apply.[112] This approach to redistribution substantially differs from the EU's past responses to economic crises, that have typically been characterized by austerity measures and conditionality.[113] Could we then posit that EU solidarity has now evolved to encompass all facets of EU law, potentially including other forms of redistribution across the Union?

While this question appears predominantly normative on the surface, a meaningful response necessitates an understanding of the underpinnings and functioning of solidarity. Solidarity is intrinsically a social phenomenon powered by a variety of underlying motivations.[114] Empirical research indicates that both the relational and situational dynamics of social interaction play crucial roles in fostering solidarity.[115] It is heavily reliant on the strength of shared identities and social bonds within a group.[116] This relational facet of social interaction offers valuable insights into individuals' readiness to support each other. As appealing as it may sound, asserting that EU society has already reached such a degree of unity and that the rising solidarity is a by-product of this social cohesion would be a significant overgeneralization. This assertion does not fully account for the swift and substantial shift towards solidarity. Research suggests public support for within-EU redistribution is influenced by long-standing factors.[117] Apart from this, neither legislative progress nor the preceding case law analysis substantiates this viewpoint.[118] Indeed, both the case law and failed legislative proposals expose profound divisions, not only concerning the interpretation of solidarity but also its practical implications.

It is true that a recent Eurobarometer survey revealed that approximately 74% of participants endorse the strategy of Member States financially supporting one another through the EU Recovery Plan as a means to recover more robustly from the pandemic.[119] However, this finding does not necessarily signal a sweeping change in public sentiment towards European solidarity. In a 2018 survey carried out by YouGov, public support for European solidarity was found to fluctuate based on the specific issues at hand, the mechanisms employed, and the individual Member State in question. Notably, EU citizens demonstrated near 80% solidarity in response to natural disasters and over 60% in the event

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[112] On this point, Leino-Sandberg and Ruffert (n 93) 437.

[113] Kenneth Dyson, *States, Debt, and Power: 'Saints' and 'Sinners. In European History and Integration* (Oxford University Press 2014) 578, 585.

[114] Andrea Sangiovanni, 'Solidarity as Joint Action' (2015) 32(4) Journal of Applied Philosophy 340, 343.

[115] Further on the divide between relational and situational aspects of solidarity, see Max Heermann, Sebastian Koosand, and Dirk Leuffen, 'Who Deserves European Solidarity? How Recipient Characteristics Shaped Public Support for International Medical and Financial Aid during COVID-19' (2021) 53(2) British Journal of Political Science 629, 630.

[116] ibid.

[117] Monika Bauhr and Nicholas Charron, 'All hands on deck' or separate lifeboats? Public support for European economic solidarity during the Covid-19 pandemic' (2023) 30(6) Journal of European Public Policy 1092, 1094.

[118] For a comprehensive examination of the limitations of social solidarity in the from socio-legal perspective, see Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe: Constitutional Tensions for EU Integration* (Edward Elgar 2022).

[119] Flash Eurobarometer 515, 'EU Recovery Plan "Next Generation EU" Report' <https://europa.eu/eurobarometer/surveys/detail/2653> accessed 7 June 2023 (fieldwork is undertaken in December 2022 and the Report is published in January 2023).

of military attacks. However, their willingness to extend support declined significantly in the context of refugee protection (around 55%), and even further in regard to unemployment (approximately 45%) and debt burden (below 40%).[120]

The data, in fact, reveals that apart from the relational characteristics of the social interaction, situational aspects of social interactions have the potential to influence the scale of solidarity, and arguably provide a useful insight into the current dynamics of solidarity in the EU. The research also indicates that support is less conditional when it is in response to a natural disaster or medical necessity, as opposed to financial difficulties.[121] In fact, the extent to which the recipient has control over the adversity it faces is another situational factor that sways public support.[122] The likelihood of strong forms of solidarity could, to some extent, be influenced by the magnitude of recent crises. The shared understanding of a common challenge that poses a severe threat could arguably be another factor that explains the measures Member States have taken towards solidarity.[123] Therefore, without these crucial situational components, the bonds formed through social interactions among EU citizens may fall short of supporting more demanding forms of social solidarity, such as those involving redistribution.

The foregoing analysis demonstrates that solidarity is an innately adaptable concept, its emergence, intensity, and longevity hinging on a broad spectrum of factors. The challenges associated with the principle of solidarity surpass the typical complexities of preserving a consistent interpretation of a legal concept and the risk of oversimplification. It also involves the formidable task of discerning societal dynamics, understanding its shared values and identity, and evaluating the extent to which this communal unity can bolster rigorous forms of solidarity. This is especially significant when the foundation of solidarity primarily relies on relational factors that are in continuous fluidity.

Considering the complexities involved, it seems premature to consider solidarity as a 'catch-all' principle of constitutional status. Despite being a fundamental value anchoring the EU legal order, the application of solidarity as a fundamental principle - one that can extend to encompass communitarian solidarity - arguably surpasses both the intentions of the Treaty's authors and the prevailing societal dynamics.

For clarity, it appears beneficial to elucidate the distinction drawn between values and principles, as well as the significance of these differences, especially given that these terms - as defined in legal theory and employed in this research - are not always explicitly

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[120] YouGov Survey Results, 'Fieldwork: 18th - 30th April 2018', <https://yougov.co.uk/topics/politics/articles-reports/2018/05/11/yougov-data-reveals-what-europeans-think-are-most-> accessed 7 June 2023.

[121] Michael M Bechtel and Massimo Mannino, 'Retrospection, fairness, and economic shocks: how do voters judge policy responses to natural disasters?' (2020) 10(2) Political Science Research and Methods 260.

[122] Michael Bang Petersen et al, 'Who Deserves Help? Evolutionary Psychology, Social Emotions, and Public Opinion about Welfare' (2012) 33(3) Political Psychology 395.

[123] This argument was raised by Sacha Garben, 'Dignity- and reciprocity-based solidarity as the normative framework of the EUs constitutional settlement' in Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe: Constitutional Tensions for EU Integration* (Edward Elgar 2022) 159.

differentiated in EU law, where they are often used interchangeably.[124] A notable example of this terminological complexity is the Court's acknowledgment of the 'rule of law' as a justiciable principle of EU law, even though it is designated as a value under Article 2 TEU.[125] Nonetheless, this terminological inconsistency does not negate the distinction that theorists often make between these concepts, typically reserving the term 'value' to denote a shared preference - an ideal deemed worthy of pursuit.[126] These shared preferences are closely tied to morality, as they are largely considered moral aspirations underpinning other legal standards.[127] Contrary to norms, values do not possess a deontological force, which is a key feature that differentiates them from principles and rules. In a legal order, their primary role is not one of enforcement, but rather of shaping and elevating the applicable normative standards. These values, while crucial, do not inherently command the promotion or safeguarding of what society deems virtuous and worthwhile pursuing. Furthermore, a value 'in the theoretical sense of the term' does not operate as a benchmark for legality in the same way that a fundamental principle does. Whereas principles establish the underlying standards for legality and shape the basic structure of the legal framework, values primarily serve to provide an ethical context and backdrop, influencing interpretation and application of legal norms but not necessarily determining their validity.

9 CONCLUSION

As we navigate through the multifaceted landscape of the EU legal order, the principle of solidarity emerges as a subject of growing importance and interest. This critical principle, often considered a foundational building block of the Union, has come under increased judicial scrutiny, and evolved through a series of complex judgments.

In a growing body of case law, the European Court appears to be embracing solidarity as a broad and potentially transformative component within the EU legal order. Although this recognition of the significance of solidarity resonates with recent developments, the conceptualization of this principle as a fundamental principle that underpins entire EU legal order presents its own set of challenges. Recent rulings contribute to a rich network of interpretations that clarify some aspects of solidarity but simultaneously infuse greater complexity and ambiguity, as the implications and limitations of the principle fluctuate in different legal contexts and judgments. While the principle is progressively positioned at the

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[124] Laurent Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6(3) European Constitutional Law Review 359, 366–68. Pech offers insightful observations on the interchangeable usage of the terms 'value' and 'principle' in Union Treaties and argues that the fact that 'rule of law' is identified as a value under Article 2 TEU does not change the conclusion that it is in fact an EU law principle.

[125] Case C-156/21 *Hungary v Parliament and Council* (n 10); Case C-157/21 *Poland v Parliament and Council* (n 10).

[126] Neil MacCormick, 'Coherence in Legal Justification' in Lars Lindahl, Aleksander Peczenik, and Bert van Roermund (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11-14, 1983* (Reidel 1984) 237. See, in a similar vein, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, The MIT Press 1996) 255.

[127] Edward Wilfrid Thomas, The Judicial Process: Realism, Pragmatism, Practical Reasoning, and Principles (Cambridge University Press 2005) 344.

heart of the EU legal order, a consistent and coherent meaning and clarity about the principle's scope appear to elude us.

The analysis highlights that solidarity is inherently adaptable, shaped by many factors and societal dynamics. Its complexity extends beyond simple legal interpretation, requiring a deeper understanding of communal unity, shared values, and identities. The foundation of solidarity, reliant on relational factors, is ever-changing. In addition, distinct domains, such as energy compared to asylum and immigration or security, demand unique and tailored approaches to solidarity. Factors such as the urgency of the matter, economic and political repercussions, and the interplay between fields call for a refined understanding of solidarity within each domain. Given these complexities, a cautious approach would be to treat solidarity as a fundamental value that underpins EU legal order. This perspective acknowledges the fluid and context-specific nature of solidarity, ensuring its nuanced and adaptable application within the EU's legal framework, while allowing it to evolve gradually in the political sphere in line with the EU's dynamic socio-economic and political realities.

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