

# THE ODD COUPLE: A LEGAL REFLECTION ON THE INTERACTION BETWEEN LOYALTY AND SOLIDARITY IN THE EU LEGAL SYSTEM

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*This contribution seeks to explore the legal interaction between loyalty and solidarity at EU level, also when it comes to crisis situations. Section 1 identifies the major features of the principle of loyalty – also known today as principle of sincere cooperation – and briefly illustrates the role that the principle plays in the EU legal order. After having stressed the multifaceted nature of the concept of solidarity in the EU legal order, Section 2 discusses the possible interactions this concept may have with loyalty in securing the constitutional framework of the Union. Section 3 traces the ways in which loyalty and solidarity may interact in crisis scenarios. The major findings of the analysis are summarized in Section 5.*

## 1 INTRODUCTION

Over the last decades, the European Union (EU) and its Member States have increasingly been facing situations of global emergency, responding to which, in principle, should require greater unity among EU actors. These situations include the economic and financial crisis, international terrorism and other significant threats to peace and international security (e.g., piracy or the proliferation of weapons of mass destruction), the emergencies caused by natural and man-made disasters, the humanitarian consequences of the massive influx of international migration, the COVID-19 pandemic, and the consequences of the war in Ukraine.

No doubt, any attempt to elaborate a united response to such events shall be based on EU loyalty, in so far as this concept requires a mutual interaction (and respect) between the Member States, and between the Member States and the Union as well, to find solutions for events having a cross-border nature which are likely to undermine the functioning of the European integration process.

But there is another concept which is strictly linked to the EU involvement in addressing global emergencies. Indeed, crisis scenarios in the post-Lisbon legal framework often evoke the need of solidarity among the Member States and vis-à-vis the Union. More precisely, the Treaties expressly recognise that a spirit of solidarity should guide the way in which actions are framed and carried out in: (a) the Area of Freedom, Security and Justice (AFSJ),<sup>1</sup> especially in regard to border checks, asylum and immigration where crisis and emergency situations are more likely to emerge;<sup>2</sup> (b) the EU economic policy, when Member States are in difficulty or threatened with severe difficulties with regard to the supply of

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<sup>1</sup> Article 67 TFEU.

<sup>2</sup> Article 80 TFEU.

products;<sup>3</sup> (c) the EU energy policy with a view to addressing potential energy crises in the Member States as caused by external political or other causes;<sup>4</sup> and (d) in the EU's and Member States' action when a Member State suffers a terrorist attack or is struck by a natural or man-made disaster.<sup>5</sup>

Against this background, this contribution seeks to explore the legal interaction between loyalty and solidarity at EU level,<sup>6</sup> also when it comes to crisis situations. Section 2 identifies the major features of the principle of loyalty – also known today as principle of sincere cooperation – and briefly illustrates the role that the principle plays in the EU legal order. After having stressed the multifaceted nature of the concept of solidarity in the EU legal order, Section 3 discusses the possible interactions this concept may have with loyalty in securing the constitutional framework of the Union. Section 4 traces the ways in which loyalty and solidarity may interact in crisis scenarios. The major findings of the analysis are summarized in Section 5.

## 2 SUPRANATIONAL LOYALTY AND THE EU CONSTITUTIONAL FRAMEWORK

Before considering the interaction among loyalty and solidarity, the role the loyalty principle plays in the EU legal order is firstly illustrated. Enshrined in EU primary law, in particular in Article 4(3) TEU,<sup>7</sup> that principle has evolved over time into a veritable cornerstone of the EU legal order.<sup>8</sup> It is often listed among the constitutional principles of the Union,<sup>9</sup> and has been labelled by some authors as the most important general principle of EU law.<sup>10</sup> This follows foremost from its internal structure: while it has been raised specifically that it

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<sup>3</sup> Article 122 TFEU.

<sup>4</sup> Article 194 TFEU.

<sup>5</sup> Article 222 TFEU.

<sup>6</sup> See also Federico Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi* (Editoriale Scientifica 2020) 65–72; Markus Klamert 'Loyalty and Solidarity as General Principles' in Katja S Ziegler et al (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022) 118.

<sup>7</sup> Other explicit references to loyalty are present in Articles 13(2) and 24(3) TEU concerning respectively cooperation among EU institutions and the Member States' support to the Common Foreign and Security Policy. A specific manifestation of a more general duty of loyalty of the Member States towards the Union may also be found in Articles 344 and 351(2) TFEU, see Case C-459/03 *Commission v Ireland* EU:C:2006:345, para 169; Opinion of AG Tizzano in Case C-216/01 *Budvar* EU:C:2003:302, para 150. See also Markus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 13–19.

<sup>8</sup> cf Marc Blanquet, *L'article 5 du Traité CEE. Recherche sur les obligations de fidélité des États membres de la Communauté* (LGDJ 1994) 1; Loïc Azoulay, 'Structural Principles in EU Law: Internal and External' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018) 32; Beatrice Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of the European Union. Volume I: The European Union Legal Order* (Oxford University Press 2018) 354.

<sup>9</sup> Armin von Bogdandy, 'Constitutional Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009) 49–51; Klamert, *The Principle of Loyalty in EU Law* (n 7); Anna Gerbrandy and Miroslava Scholten, 'Core Values: Tensions and Balances in the EU Shared Legal Order' in Ton van den Brink et al (eds), *Sovereignty in the Shared Legal Order of the EU — Core Values of Regulation and Enforcement* (Intersentia 2015) 20; Timothy Roes, 'Limits to Loyalty. The Relevance of Article 4(3) TEU' (2016) 52(1) *Cahiers de droit européen* 253, 256.

<sup>10</sup> John Temple Lang, 'Article 10 EC—The Most Important “General Principle” of Community Law' in Ulf Bernitz et al (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 75.

originates from the good faith principle of international law,<sup>11</sup> especially from the *pacta sunt servanda* provision of the 1969 Vienna Convention on the Law of Treaties,<sup>12</sup> the principle of sincere cooperation perfectly mirrors the multilevel nature of the EU legal order for its roots may also be identified in supranational and municipal law, particularly in the municipal legal systems inspired by federal models.<sup>13</sup>

But it is its fundamental aim – the fulfilment of the EU objectives and obligations – which mostly illustrates the importance of the principle for the development of the EU legal order. Its substantive role in the European integration process is mainly revealed by its interconnection with the other structural principles of the EU legal order, namely the primacy of EU law,<sup>14</sup> its direct effect,<sup>15</sup> and the principle of *effet utile*.<sup>16</sup> Also importantly, the Court of Justice has recognised the connection between loyalty and the fundamental values of the EU (now enumerated in Article 2 TEU). In an order issued in *J.J. Zwartveld and others*,<sup>17</sup> the Court made it clear that:

the European Economic Community [now European Union] is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty [...].

In that Community subject to the rule of law, relations between the Member States and the Community [now EU] institutions are governed, according to Article 5 of the EEC Treaty [now Article 4.3 TEU], by a principle of sincere cooperation.<sup>18</sup>

This linkage has been reaffirmed later on in the opinion on the *EU's Accession to the European Convention of Human Rights*<sup>19</sup> and further elaborated, more recently, in the *Achmea* ruling,<sup>20</sup> where the Grand Chamber of the Court maintained that:

EU law is [...] based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason *inter alia* of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their

<sup>11</sup> See Opinion of AG Mazák in Case C-203/07 P *Greece v Commission* EU:C:2008:270, para 33 and the corresponding footnote, where he argued that ‘it is recognized that a strengthened good faith seems to be at least implicitly reflected in the obligation of loyal cooperation contained in Article 10 EC [now 4(3) TEU]’.

<sup>12</sup> Klamert, *The Principle of Loyalty in EU Law* (n 7) 46; Geert De Baere and Timothy Roes, ‘EU Loyalty as Good Faith’ (2015) 64(4) *International and Comparative Law Quarterly* 829; Roes (n 9) 268.

<sup>13</sup> Klamert, *The Principle of Loyalty in EU Law* (n 7) 47–61.

<sup>14</sup> Case 6/64 *Costa v Enel* EU:C:1964:66, and, with regard to the doctrine of consistent interpretation, Case 14/83 *Sabine von Colson and Elisabeth Kamann* EU:C:1984:153, para 26.

<sup>15</sup> Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd* EU:C:1990:257, para 19.

<sup>16</sup> Eleftheria Neframi, ‘The Duty of Loyalty: Rethinking its Scope through its application in the Field of EU External Relations’ (2010) 47(2) *Common Market Law Review* 323, 359.

<sup>17</sup> Case C-2/88 *Imm. J.J. Zwartveld* EU:C:1990:315.

<sup>18</sup> *ibid* paras 16–17.

<sup>19</sup> Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, paras 168 and 173.

<sup>20</sup> Case C-284/16 *Achmea BV* EU:C:2018:158, para 34.

respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU [...].

Not only has the Court clarified the interaction between loyalty and the very foundation of the EU legal order; the EU institution has also relied on the principle to limit (without undermining) the Member States' prerogatives when the preservation of the EU law effectiveness is at stake. This is what AG Pikamäe named the 'framing of powers doctrine' in his Opinion in *Slovenia v Croatia*.<sup>21</sup> By relying on the abstention duties flowing from the loyalty clause enshrined in Article 4(3) TEU – implying that Member States shall refrain themselves from acting when there is a risk of undermining the fulfilment of EU objectives – the Court of Justice has affirmed that state prerogatives must be exercised 'having due regard to EU law', meaning without unduly limiting the effectiveness of EU law. Put in other words, loyalty towards the Union shall prevent Member States from invoking their prerogatives as general reservations to EU law.<sup>22</sup> At the same time, the EU's loyalty duties *vis-à-vis* the Member States, imposing on the EU institutions mutual obligations to cooperate in good faith with the Member States,<sup>23</sup> should prevent the Union from acting, while disregarding the allocation of competences enshrined in the Treaties as well as the Member States' national identities and fundamental functions. In the light of the foregoing, it does not come as a surprise that the loyalty principle has become an essential 'balance factor' between the Member States' national interests and EU common interests, contributing thus to pave the way for a sound legal integration at supranational level.

### 3 THE INTERPLAY BETWEEN LOYALTY AND SOLIDARITY IN SECURING THE EU CONSTITUTIONAL FRAMEWORK

The interplay between loyalty and solidarity is by no means a novelty in the European integration process, also considering that the concept of solidarity had been recognised as an essential part of the European idea from the outset, being – as rightly underlined in the literature – 'even more evocative than loyalty'.<sup>24</sup> For the present purposes, it will suffice to

<sup>21</sup> Opinion of AG Pikamäe in Case C-457/18 *Slovenia v Croatia* EU:C:2019:1067, para 138.

<sup>22</sup> See also Loïc Azoulay, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *European Journal of Legal Studies* 192; Federico Casolari, 'Inter se Agreements between Member States, and the Outer Limits of the Court's Jurisdiction in Infringement Proceedings: *Slovenia v Croatia*' in Graham Butler and Ramses A Wessel (eds), *EU External Relations Law. The Cases in Context* (Hart Publishing 2022) 981.

<sup>23</sup> Case 848/19 P *Federal Republic of Germany v European Commission* EU:C:2021:598, para 41.

<sup>24</sup> Klamert, 'Loyalty and Solidarity as General Principles' (n 6) 124. Supranational solidarity is expressly mentioned in the political manifesto of the European integration process. See the Schuman Declaration, 1950: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity' (<<https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950-en>> accessed 21 July 2023). For further discussion, see Anne-Marie Oliva, 'Solidarité et construction européenne' in Jean-Claude Beguin et al (eds), *La solidarité en droit public* (L'Harmattan 2005); Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005); Malcolm Ross, 'Solidarity — A New Constitutional Paradigm for the EU?' in Malcolm Ross and Yuri Bourgmans-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010); Chahira Boutayeb, 'La solidarité, un principe immanent au droit de l'Union européenne—Éléments pour une théorie' in Chahira Boutayeb (ed), *La solidarité dans l'Union européenne — Éléments constitutionnels et matériels* (Daloz

go back to the 1969 *Commission v France* ruling, where the Court found that ‘solidarity [...] is at the basis [...] of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the [EEC] Treaty [now Article 4(3) TEU]’.<sup>25</sup> For the Court, at least in this judgment, solidarity and loyalty are thus intrinsically connected, representing the foundations of the supranational legal order.<sup>26</sup> That said, we are still faced with the problem of specifying the exact nature of this connection. This bears particular relevance having regard to the development of the concept of solidarity in the Union’s post-Lisbon structure, which acquired a manifold (and rather complex) status.<sup>27</sup>

Solidarity is often considered as a constitutional (or fundamental) principle of the EU legal order,<sup>28</sup> underpinning the legal system of the Union as a whole.<sup>29</sup> Although this solution could be deemed to be in line with the Treaties’ legal framework, as Article 21 TEU expressly lists solidarity among the principles that have inspired the creation of the EU, the multifarious functions embedded into the concept of solidarity make it difficult to pin down the exact legal status of the corresponding principle.<sup>30</sup> Not surprisingly, that difficulty has led to argue the existence of an ‘idea of solidarity between the Member States’.<sup>31</sup>

More to the point, the legal concept of solidarity can be said to serve at least three functions in contemporary EU law. First, as it has just been stressed, solidarity is argued to represent a *fundamental principle* of the EU legal order. Secondly, as is explicitly stated in the preambles of the Treaties and the EU Charter of Fundamental Rights (EUCFR), solidarity functions as a *core value* of the Union.<sup>32</sup> Article 2 TEU further specifies that solidarity is an intrinsic component of society in the Member States. Thirdly, solidarity is *one of the objectives* of Union action as set out in Article 3 TEU. In all cases, solidarity is primarily understood as a form of shared responsibility, a communion of interests, group cohesion, and unity. It may refer to the interplay between EU institutional actors, on the one hand, and the position of

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2011); Eleanor Sharpston, ‘Thinking About Solidarity and EU Law’ in Eva Kassoti and Narin Idriz (eds), *The Principle of Solidarity. International and EU Law Perspectives* (T.M.C. Asser Press 2023).

<sup>25</sup> Joined Cases 6/69 and 11/69 *Commission of the European Communities v France* EU:C:1969:8, para 16. See also Opinion of AG Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and Others* EU:C:2019:917, paras 246-255, arguing that ‘Solidarity is the lifeblood of the European project’.

<sup>26</sup> See also Case 39/72 *Commission v Italy* EU:C:1973:13, para 25.

<sup>27</sup> See Opinion of AG Bot in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* EU:C:2017:618, paras 17–21. See also Susanna Villani, *The Concept of Solidarity within EU Disaster Response Law. A Legal Assessment* (Bononia University Press 2021) 75.

<sup>28</sup> See Opinion of AG Mengozzi in Case C-226/16 *ENI SpA* EU:C:2017:616, para 33; View of AG Kokott in Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* EU:C:2012:675, paras 142–144; Case 848/19 P *Germany v Commission* (n 23), para 41. See also the Regulation (EU) 2019/1896 on the European Border and Coast Guard [2019] OJ L295/1, where reference is made to ‘the overarching principle of solidarity’ (Recital 9). Cf also, in this regard, Ross (n 24); Anne Levade, ‘La valeur constitutionnelle du principe de solidarité’ in Chahira Boutayeb (ed), *La solidarité dans l’Union européenne — Éléments constitutionnels et matériels* (Daloz 2011) 41; Eglé Dagilyte, ‘Solidarity: a general principle of EU law? Two variations on the solidarity theme’ in Andrea Biondi et al (eds), *Solidarity in EU Law — Legal Principle in the Making* (Edward Elgar Publishing 2018) 61.

<sup>29</sup> Case 848/19 P *Germany v Commission* (n 23), para 41.

<sup>30</sup> Abdelkhaleq Berramdane, ‘Solidarité, loyauté dans le droit de l’Union européenne’ in Chahira Boutayeb (ed), *La solidarité dans l’Union européenne — Éléments constitutionnels et matériels* (Daloz 2011) 67, and Klamert, ‘Loyalty and Solidarity as General Principles’ (n 6) 134.

<sup>31</sup> Opinion of AG Mengozzi in Case C-226/16 *ENI SpA* (n 28).

<sup>32</sup> See also the Opinion of AG Bot in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (n 27), para 19: ‘Solidarity [...] continues to form part of a set of values and principles that constitutes “the bedrock of the European construction”’.

individuals in society (or rather, in the Union),<sup>33</sup> on the other. It goes without saying that manifestations of supranational solidarity may occur either in the internal development of the EU action or when the Union acts on the international scene.<sup>34</sup>

As for the interaction between EU institutional actors, solidarity essentially reflects the level of political integration the supranational order has reached or should aim to reach. Here, a distinction needs to be drawn between *de facto* and normative solidarity. While the former hinges on a factual interdependence among EU actors, in particular among the Member States, the latter implies the existence of specific legal duties to achieve common goals and/or to protect common interests.<sup>35</sup> Interestingly, such meaning of solidarity is also applicable under international law. For instance, the UN Independent expert on human rights and international solidarity has recently held that

[i]nternational solidarity and international cooperation are based on the foundation of shared responsibility. In the broadest sense, solidarity is a communion of responsibilities and interest between individuals, groups and States, connected by the ideal of fraternity and the notion of cooperation.<sup>36</sup>

However, it is undeniable that the level of solidarity achieved through the European integration process is far from being replicated in other international fora or organizations.<sup>37</sup> This is not only a consequence of the specific features of the EU legal order. At EU level, solidarity goes further, in that it requires individuals to fully and actively participate in the functioning of the legal order.<sup>38</sup> This explains why the term ‘solidarity’ also figures in the EUCFR, where it identifies a specific set of social rights the Member States and the Union must ensure when implementing EU law, namely, the workers’ right to information and consultation within the undertaking (Article 27), the right of collective bargaining (Article 28), the right of access to placement services (Article 29), protection against unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31), the prohibition of child labour and the protection of young people at work (Article 32), the right to reconcile family and professional life (Article 33), the right to social and security assistance (Article 34), the right to healthcare (Article 35), access to services of general economic interest (Article 36), environmental protection (Article 37), and consumer protection (Article 38). In this sense, the way the term is used in the Charter supports the idea that European society must ensure that all the basic needs of individuals are met and that individuals can fully participate in economic and social life. This is even more important

<sup>33</sup> Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 16.

<sup>34</sup> The external dimension of the EU solidarity is stressed by Eleftheria Neframi, ‘La solidarité et les objectifs d’action extérieure de l’Union européenne’ in Chahira Boutayeb (ed), *La solidarité dans l’Union européenne — Éléments constitutionnels et matériels* (Daloz 2011) 137.

<sup>35</sup> Verster Borger, ‘How the Debt Crisis Exposes the Development of Solidarity in the Euro Area’ (2013) 9(1) *European Constitutional Law Review* 7, 10–11.

<sup>36</sup> Human Rights Council, Human rights and international solidarity, UN doc A/HRC/9/10, 15 August 2008, para 6. See also Flavia Zorzi Giustiniani, *International Law in Disaster Scenarios. Applicable Rules and Principles* (Springer Cham 2021) 147; Craig Eggett, ‘Solidarity as an International Legal Norm’ in Eva Kassoti and Narin Idriz (eds), *The Principle of Solidarity. International and EU Law Perspectives* (T.M.C. Asser Press 2023) 29.

<sup>37</sup> Jean-Marc Coicaud, ‘Conclusion: Making Sense of National Interest and International Solidarity’ in Jean-Marc Coicaud and Nicholas J Wheeler (eds), *National Interest and International Solidarity — Particular and Universal Ethics in International Life* (United Nations University Press 2008) 288, 297.

<sup>38</sup> As recognized by the Court of Justice in the leading Case 26/62 *van Gend & Loos* EU:C: 1963:1.

when it comes to the enforcement of the rights and freedoms of EU citizens, which are functional to make their status – according to a well-established formula elaborated by the Court of Justice – ‘the fundamental status of nationals of the Member States’.<sup>39</sup> Here, solidarity serves as a kind of interpretive canon, recourse to which is meant to ensure a fair balance between social and economic rights;<sup>40</sup> a canon which, as the *Dano* overruling clearly illustrates,<sup>41</sup> is not immune from worries about the free movement of persons in the EU, particularly in times of budgetary constraints.<sup>42</sup>

In this (fragmented) context, it might be asked how the interaction between loyalty and solidarity is perceived. Undoubtedly, the interplay between EU loyalty and the last two expressions of EU solidarity – i.e., solidarity as a value and objective of the European integration process – is not controversial. As the Court suggested in the 1969 *Commission v France* ruling, when the value and the objective of solidarity come into play, solidarity and loyalty must be conceived of as two sides of the same coin.<sup>43</sup> First, the EU loyalty duties are functional to the respect and promotion of the EU value of solidarity – a circumstance that may easily be inferred from the general argument elaborated by the Court of Justice in *Achmea*.<sup>44</sup> Secondly, the loyalty duties show an instrumental approach when the time comes to achieve the solidarity objectives enshrined in the Treaties. This last circumstance may clearly be inferred from the wording of the Loyalty Clause enshrined in Article 4(3) TEU, whose second and third indents provide a direct linkage between positive and negative loyalty duties and the EU objectives.<sup>45</sup>

As it will appear evident from the subsequent analysis, the interaction between the loyalty principle and that of solidarity seems to be more ambiguous. Today, the starting point of every discussion on such an interaction is represented by the ruling given in the *OPAL pipeline* case, where the Court of Justice has further stressed the fundamental nature of the solidarity principle and recognised for the first time ever its justiciability before the EU judges. Two elements of the Court’s argumentation deserve to be mentioned for our purposes. First, it is noteworthy the fact that the Court recognises the mutual nature of the solidarity principle. Exactly as the loyalty principle, the former

entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity

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<sup>39</sup> Case C-184/99 *Grzeleczyk* EU:C:2001:458, para 31. In *Brey*, the Court argued that the main piece of EU legislation on the rights and freedoms of the EU nationals, that is, the Directive 2004/38/EC, ‘recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States’ which must be taken into consideration in interpreting the legal requirements the Directive states for the enjoyment of rights concerned. Cf Case C-140/12 *Brey* EU:C:2013:565, para 72.

<sup>40</sup> Caroline Picheral, ‘La solidarité dans la Charte des droits fondamentaux de l’Union’ in Chahira Boutayeb (ed), *La solidarité dans l’Union européenne — Éléments constitutionnels et matériels* (Dalloz 2011) 93.

<sup>41</sup> Case C-333/13 *Dano* EU:C:2014:2358. Cf Daniel Thym, ‘The elusive limits of solidarity: Residence rights of and social benefits for economically inactive EU citizens’ (2015) 52(1) *Common Market Law Review* 17.

<sup>42</sup> See also the contribution by Katarina Hyltén-Cavallius, in this Special Issue.

<sup>43</sup> Joined Cases 6/69 and 11/69 *Commission v France* (n 25), para 16. For further discussion, see Berramdane (n 30).

<sup>44</sup> See *supra*, Section 2.

<sup>45</sup> ‘The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’.

between themselves and with regard to the common interest of the European Union and the policies pursued by it.<sup>46</sup>

But not only the structure of the solidarity duties flowing from the corresponding principle perfectly mirrors that of the EU loyalty obligations. Quite significantly, and this is the second argument to be mentioned here, the content of such duties echoes the features of the loyalty obligations identified by both the Treaties and the Court of Justice. Even though the Court did not particularly discuss the implications of the solidarity duties imposed by the EU Treaties in *OPAL pipeline*, there is a passage of the ruling where the Luxembourg judges have given some details on the obligations related to the principle of (energy) solidarity imposed upon the EU institutions. The Court has made it clear that such a principle ‘requires that EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole’.<sup>47</sup> It is difficult not to see in this passage some traces of the doctrine elaborated by the EU judges with regard to the loyalty duties, this doctrine implying the need to find a fair balance among EU’s and Member States’ interests in fulfilling the Union’s objectives.<sup>48</sup>

Against this background, it is arguably no coincidence that even before the *OPAL pipeline* judgment, some commentators suggested that the praetorian version of the principle of solidarity *de facto* largely corresponds to the obligations flowing from the loyalty clause enshrined in Article 4(3) TEU.<sup>49</sup> Others claimed that solidarity appears in the jurisprudence in the form of the joint concept ‘solidarity-loyalty’.<sup>50</sup> Similar arguments could be made in the light of some Treaty provisions that clearly merge the Member States’ loyalty with their solidarity duties. A clear example of such an intertwining in primary law can be found in Article 24(3) TEU which expressly requires Member States to support the Union’s external and security policy ‘in a spirit of loyalty and mutual solidarity’.<sup>51</sup> Solidarity and loyalty are thus required to achieve the EU objectives in that domain, making sure that appropriate measures are adopted to fulfill relevant obligations, something echoing the positive loyalty duties enshrined in Article 4(3) TEU.<sup>52</sup> Similarly, Article 31(1) TEU combines solidarity with the negative duties stemming from the Loyalty Clause,<sup>53</sup> for it provides that Member States abstaining from a CFSP vote shall ‘[i]n a spirit of mutual solidarity [...] refrain from any action likely to conflict with or impede Union action’ based on that vote.

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<sup>46</sup> Case 848/19 P *Germany v Commission* (n 23), para 49.

<sup>47</sup> *ibid* para 53.

<sup>48</sup> See *supra*, Section 2.

<sup>49</sup> Berramdane (n 30) 74–75; Boutayeb (n 24) 13.

<sup>50</sup> Roland Bieber and Francesco Maiani, ‘Sans solidarité point d’Union européenne—Regards croisés sur les crises de l’Union économique et monétaire et du Système européen commun d’asile’ (2012) 48(2) *Revue trimestrielle de droit européen* 295, 296–297.

<sup>51</sup> Pieter Jan Kuijper and Esa Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking Out’ in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 35, 40.

<sup>52</sup> Which provides that ‘The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’.

<sup>53</sup> Pursuant to the last indent of Article 4(3) TEU, ‘The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’.



A further level of ambiguity in the discussion of the legal value of the solidarity principle is present in the *Budget Conditionality* cases. It is true that in these cases the Court, by relying on the *OPAL pipeline* judgment, has made it clear that ‘the Union budget is one of the principal instruments for giving practical effect [...] to the principle of solidarity’.<sup>54</sup> Quite significantly, however, the Court has also specified that the solidarity principle is mentioned in Article 2 TEU.<sup>55</sup> In other words, the Court seems to imply that EU solidarity is mainly to be understood as a fundamental value of the Union, a value which obtains a concrete expression by means of the budgetary obligations imposed upon the Member States. Importantly, this approach echoes the argument elaborated by the Luxembourg judges in *Associação Sindical dos Juizes Portugueses* where it was maintained that Article 19 TEU ‘gives concrete expression to the value of the rule of law states in Article 2 TEU’.<sup>56</sup> It goes without saying that such a reading seems to undermine the capacity of the solidarity principle of representing an autonomous source of obligations under EU law.

#### 4 LOYALTY AND SOLIDARITY IN TIMES OF CRISIS

The fact that, to borrow from Klamert’s words, ‘solidarity has to date not played a decisive role in developing Union constitutional law or in extending its scope’<sup>57</sup> does not mean that Member States’ solidarity duties cannot in any way be identified. More precisely, the interplay between loyalty and solidarity duties enshrined in specific provisions of the Treaties seems to be determined by very different factors when invoked in the context of crises and emergencies. Due to space constraints, it is not possible here to enter into an in-depth analysis of each and every provision that has been mentioned at the beginning of this contribution. It suffices to say that what emerges from the (rather limited) practice related to those provisions is that such duties are generally meant to *reinforce* the cooperation required under the loyalty principle. More precisely, these duties mean that EU’s and Member States’ institutional actors must share the financial and operative burdens entailed by the activities covered by the EU policies involved.

It has been suggested in legal literature that these duties may be considered as specific manifestations of the general principle enshrined in Article 4(3) TEU.<sup>58</sup> This argument finds its basis, in particular, in the previously mentioned passage of the 1969 *Commission v France* ruling where the Court of Justice explicitly linked solidarity to loyalty.<sup>59</sup> This judgment was made in the context of the mutual assistance provided for by former Article 108 TEEC, now Article 143 TFEU. As is known, this Treaty provision introduced for Member States (outside the Eurozone) a balance-of-payments assistance that, to some extent, resembles the assistance mechanism enshrined in Article 122, which mentions the spirit of solidarity. On this basis, it has been argued that if Article 4(3) TEU can be invoked to identify the legal foundations of the duties of assistance flowing from Article 143 TFEU, the same should be possible with regard to Article 122 TFEU. This reasoning could then be extended, by way of analogy, to all the other TFEU provisions that mention specific solidarity duties.

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<sup>54</sup> cf Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97, para 129.

<sup>55</sup> *ibid.*

<sup>56</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 32.

<sup>57</sup> Klamert, ‘Loyalty and Solidarity as General Principles’ (n 6) 128.

<sup>58</sup> Borger (n 35) 14.

<sup>59</sup> Joined Cases 6/69 and 11/69 *Commission v France* (n 25), para 16.

However, there are limits to this legal option; the interpretative construction does not seem fully consistent with the post-Lisbon legal framework, which the Court of Justice could not have envisioned in 1969. It is true that most of the TFEU solidarity mechanisms, with the exception of the solidarity clause enshrined in Article 222 TFEU, are directly or indirectly aimed at ensuring the effectiveness of EU law.<sup>60</sup> But this is not enough to conclude that only Article 4(3) TEU should govern their functioning.<sup>61</sup> On the contrary, the reference to solidarity in the Treaties seems to suggest that in some circumstances the Union and its Member States might be asked to adopt measures that go beyond what may normally be required under the principle of loyal cooperation. The reason for adopting such measures, which regulate a sharing of responsibility among institutional actors, lies precisely in the exceptional nature of the factual context that requires strong support for the affected Member State. Indeed, the lack of such support could undermine the participation of the affected State to the Union, limiting thus the effectiveness of EU law. In other words, a similar scenario is likely to have consequences for all the other Member States, and for the Union as well.<sup>62</sup>

To put this in more general terms, solidarity duties in the EU Treaties – solidarity *stricto sensu* – seem to be particularly invocable in crisis or emergency situations.<sup>63</sup> Of course, when a crisis or an emergency arises, the loyalty principle continues to inform the interaction between institutional actors. However, their action for further support and reinforcement can rely on the specific solidarity duties stemming from the Treaty provisions. As a further point, the loyalty principle is functional to the proper application of those duties insofar as it ensures the effectiveness of the relative implementing measures. On this basis, the interplay between loyalty and solidarity can be argued to contribute to the deepening of supranational integration, strengthening, as a result, that general frame of interaction between EU integration and the protection of national interests under the ‘Ever Closer Union’ perspective enshrined in the preamble to the EU Treaties and in Article 1 TEU.<sup>64</sup> When no crises or emergencies arise, the need to invoke specific solidarity duties seems to be less strict. These cases will be mainly subject to the ordinary rules governing the interplay between loyal cooperation on the one hand, and the value and the objective of solidarity on the other; loyalty duties, as a result, may ensure the proper functioning of relative EU tools and arrangements.

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<sup>60</sup> Marco Gestri, ‘EU Disaster Response Law: Principles and Instruments’ in Andrea de Guttry et al (eds), *International Disaster Response Law* (T.M.C. Asser Press 2012) 105, 109–115.

<sup>61</sup> For a contrary view, see Blanquet (n 8) 233.

<sup>62</sup> Traces of this idea, which is strictly related to a reconceptualization of the membership to the Union in terms of ‘mutual membership’, are also present in some cases decided by the Court of Justice in the 1980s: Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *SpA Ferriera Valsabbia and others v Commission of the European Communities* EU:C:1980:81, para 59; Case 263/82 *Klockner-Werke AG v Commission of the European Communities* EU:C:1983:373, para 17.

<sup>63</sup> For a contrary view, see Alberto Miglio, ‘Solidarity in EU asylum and migration law: A crisis management tool or a structural principle?’ in Elzbieta Kuzelewska et al (eds), *Irregular Migration as a Challenge for Democracy* (Intersentia 2018) 23; Filippo Croci, *Solidarietà tra Stati membri dell’Unione europea e governance economica europea* (G. Giappichelli Editore 2020); Pieralberto Mengozzi, *L’idea di solidarietà nel diritto dell’Unione europea* (Bologna University Press 2022). Cf also *infra*, Section 5.

<sup>64</sup> cf also Jürgen Bast, ‘Deepening supranational integration: interstate solidarity in EU migration law’ in Andrea Biondi et al (eds), *Solidarity in EU Law — Legal Principle in the Making* (Edward Elgar Publishing 2018) 114. For further development on the ‘Ever Closer Union’ perspective, see Xavier Groussot and Anna Zemskova, ‘The Resilience of Rights and European Integration’ in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe. Political and Legal Integration Beyond Brexit* (Hart Publishing 2019) 97.

These observations are not called into question by the fact that the Treaty provisions mentioning solidarity have not yet been fully implemented by Member States. Rather, practice reveals that in cases where the conduct of Member States departs from their obligations, the loyalty principle might be invoked to fill the gaps between what primary law dictates and the behaviour of the Member States. A good example in this regard is the implementation of the so-called Dublin Regulation<sup>65</sup> in the Member States. In its judgment in *N.S.*, the Court found, albeit in a rather indirect manner, that the loyalty principle requires Member States to exercise the discretionary power provided by the Dublin Regulation in the sense that they may not transfer an asylum seeker to the Member State that, within the meaning of that regulation, bears responsibility, if it would be unreasonable for Member States to ignore that the asylum seeker could face a real risk of being subjected to inhuman or degrading treatment as a result of well-known systemic deficiencies in that State's asylum procedure and in the conditions under which it receives asylum seekers.<sup>66</sup> Clearly, the rationale behind the Court's solution mainly lies in the need to respect the human rights of asylum seekers as provided under the EUCFR. Nevertheless, the ruling unquestionably addresses the degree of solidarity that may be expected from the Member States when one State finds it difficult to follow EU rules on asylum procedures, for instance as a result of a massive inflow of irregular migrants.<sup>67</sup> Practically, the judgment aimed at compensating the lack of solidarity mechanisms in the existing EU legal framework by interpreting the relevant EU legislation in light of the loyalty principle.

A similar approach is visible in another judgment given by the Court of Justice in the migration domain. In the *Relocation scheme* infringement procedure, Poland and Hungary maintained their right to disapply the EU Relocation scheme – which was adopted to share among the EU States the pressure on local reception and asylum systems – in light of their prerogatives in the field of public and national security under Article 72 TFEU, read in conjunction with Article 4(2) TEU. By indirectly relying on the 'framing of powers' doctrine,<sup>68</sup> the Court rejected the plea in defence derived by Poland and Hungary. To the Court, such Member States' prerogatives cannot be considered as an 'inherent general exception' to EU law.<sup>69</sup> Indeed, '[t]he recognition of such an exception [...] might impair the binding nature of European Union law and its uniform application'.<sup>70</sup> As is evident also in this case, the Member States' loyalty duties are functional to preserve the solidarity obligations enshrined in the EU acts concerned.

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<sup>65</sup> 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. It has been recast by 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 [2013] OJ L180/31.

<sup>66</sup> Joined Cases C-411/10 and C-493/10 *N.S. et al.* EU:C:2011:865, para 94.

<sup>67</sup> *ibid* paras 87 and 93.

<sup>68</sup> See *supra*, Section 2.

<sup>69</sup> Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Poland, Hungary and Czech Republic* EU:C:2020:257, para 143.

<sup>70</sup> *ibid*.

## 5 CONCLUSION

While loyalty and solidarity are often mentioned as two foundational elements of the European integration process and related legal order, their respective role still significantly differs. As shown above, loyalty has acquired a fundamental role in shaping the status of EU Member State, contributing to identify corresponding positive and negative duties that have led in turn to affirm the existence of a structural principle of loyalty at EU level.

Yet, some shadows are still present: in particular, the mutual nature of loyalty duties remains underdeveloped in the EU legal discourse, aggravating the identification of clear-cut obligations for the EU institutions.<sup>71</sup> It is, however, undisputed that the loyalty principle has already immensely contributed to the shaping of the EU constitutional framework.

As far as solidarity is concerned, the same conclusion is far from being reached. Even though the Court of Justice and some commentators have claimed the existence of a EU principle of solidarity, imposing specific obligations upon both the Union and its Member States, its definition and role are still vague. More precisely, the analysis carried out in this contribution has shown that the distinctive features of the solidarity duties seem to (excessively) mirror those of the loyalty obligations, making thus unclear the distinction between the two corresponding principles and, more generally, the identification of the markers qualifying solidarity as a general principle of EU law.<sup>72</sup>

As seen, this does not preclude any possibility to identify concrete manifestations of solidarity duties. But contrary to what was maintained by the General Court in the *OPAL pipeline* case<sup>73</sup> – and further confirmed by the Court of Justice in the appeal brought by the Federal Republic of Germany<sup>74</sup> – the most relevant solidarity duties so far invoked are mainly restricted to emergency situations and scenarios, reducing thus significantly the operational scope of solidarity. Time will tell if the interaction between solidarity and loyalty will evolve in a way leading to clearer affirmation of a general (and maybe structural) principle of EU law, contributing thus to strengthening the ‘structured network of principles [...] binding the EU and its Member States’<sup>75</sup> and giving expression to the constitutional framework of the Union.

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<sup>71</sup> Casolari, *Leale cooperazione tra Stati membri e Unione europea* (n 6) 182–210.

<sup>72</sup> Klamert, ‘Loyalty and Solidarity as General Principles’ (n 6) 134. On the supranational methods leading to the identification of general principles, see Päivi J Neuvonen and Katja S Ziegler, ‘General Principles in the EU Legal Order: Past, Present and Future Directions’ in Katja S Ziegler et al (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022) 7, 15–17; Emanuel Castellarin, ‘General Principles of EU Law and General International Law’ in Mads Andenas et al (eds), *General Principles and the Coherence of International Law* (Brill 2019) 131.

<sup>73</sup> Case T-883/16 *Republic of Poland v European Commission* EU:T:2019:567, para 72: ‘contrary to what the Commission asserts, the principle of energy solidarity cannot be restricted to [...] extraordinary situations [...] On the contrary, the principle of solidarity also entails 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’.

<sup>74</sup> See *supra*, Section 3.

<sup>75</sup> Case C-284/16 *Achmea BV* (n 20) para 33.

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