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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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* Assistant Professor, Essex Law School, UK. I am grateful to the participants of the Workshop on Solidarity in EU Law after the Budget Conditionality Cases, held at the University of Lund on November 25, 2022, for their insightful remarks on an early draft of this paper. I would also like to thank Geoff Gilbert, Theodore Konstadinides, Yseult Marique and Steve Peers for their valuable feedback. Any errors are mine alone.

[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.

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[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

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[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.

LIST OF REFERENCES

Alter K and Steinberg D, 'The Theory and Reality of the European Coal and Steel Community' in Meunier S and McNamara K (eds), *Making History: European Integration and Institutional Change at Fifty* (Oxford University Press 2007)

Bang Petersen M et al, 'Who Deserves Help? Evolutionary Psychology, Social Emotions, and Public Opinion about Welfare' (2012) 33(3) Political Psychology 395
DOI: https://doi.org/10.1111/j.1467-9221.2012.00883.x

Barnard C, 'Solidarity and New Governance in Social Policy' in de Búrca G and Scott J (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006)
DOI: https://doi.org/10.5040/9781472563668.ch-006

Bauhr M and Charron N, 'All hands on deck' or separate lifeboats? Public support for European economic solidarity during the Covid-19 pandemic' (2023) 30 Journal of European Public Policy 1092
DOI: https://doi.org/10.1080/13501763.2022.2077809

Bechtel MM and Mannino M, 'Retrospection, fairness, and economic shocks: how do voters judge policy responses to natural disasters?' (2020) 10(2) Political Science Research and Methods 260
DOI: https://doi.org/10.1017/psrm.2020.39

Bieber R, 'Gegenseitige Verantwortung- Grundlage des Verfassungsprinzips der Solidarität in der Europäischen Union' in Calliess C (ed), *Europäische Solidarität und nationale identität* (Mohr Siebeck 2013)

Borger V, The Currency of Solidarity: Constitutional Transformation During the Euro Crisis (Cambridge University Press 2020)
DOI: https://doi.org/10.1017/9781108864633

Boute A, 'The Principle of Solidarity and the Geopolitics of Energy: *Poland v. Commission (OPAL pipeline)*' (2020) 57(3) Common Market Law Review 889
DOI: https://doi.org/10.54648/cola2020697

Dagilytė E, 'Solidarity - A General Principle of EU Law? Two Variations on the Solidarity Theme' in Biondi A, Dagilytė E, and Küçük E (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018)
DOI: https://doi.org/10.4337/9781783477784.00009

de Waele H, 'EU Citizenship: Revisiting its Meaning, Place and Potential' (2010) 12(3) European Journal of Migration and Law 324
DOI: https://doi.org/10.1163/157181610x520391

de Witte F, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18(5) European Law Journal 694
DOI: https://doi.org/10.1111/j.1468-0386.2012.00624.x

— —, Justice in the EU: The Emergence of Transnational Solidarity (Oxford University Press 2015)
DOI: https://doi.org/10.1093/acprof:oso/9780198724346.001.0001

Domurath I, '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
DOI: https://doi.org/10.1080/07036337.2012.704630

Dougan M and Spaventa E, '"Wish You Weren't Here …": New Social Models of Social Solidarity in the European Union' in Dougan M and Spaventa E (eds), *Social Welfare and EU Law* (Hart Publishing 2005)
DOI: https://doi.org/10.5040/9781472563385.ch-009

Dougan M, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in Barnard C and Odudu O (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009)
DOI: https://doi.org/10.5040/9781472564702.ch-007

Dyson K, *States, Debt, and Power: 'Saints' and 'Sinners. In European History and Integration* (Oxford University Press 2014)
DOI: https://doi.org/10.1093/acprof:oso/9780198714071.001.0001

Garben S, 'Dignity- and reciprocity-based solidarity as the normative framework of the EUs constitutional settlement' in Hartzén AC, Iossa A, and Karageorgiou E (eds), *Law, Solidarity and the Limits of Social Europe: Constitutional Tensions for EU Integration* (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781800885516.00018

Giubboni S, 'Free Movement of Persons and European Solidarity' (2007) 13(3) European Law Journal 360
DOI: https://doi.org/10.1111/j.1468-0386.2007.00370.x

Goldner Lang I, 'Towards 'Judicial Passivism' in EU Migration and Asylum Law?' in Capeta T, Goldner Lang I, and Perišin T (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022)
DOI: https://doi.org/10.5040/9781509937363.ch-009

Groussot X, Zemskova A, and Bungerfeldt K, '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
DOI: https://doi.org/10.36969/njel.v5i1.24496

Guild E, 'Does European Citizenship Blur the Borders of Solidarity?' in Guild E, Gortázar Rotaeche C, and Kostakopoulou D (eds), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff Publishers 2013)
DOI: https://doi.org/10.1163/9789004251526_011

Gutiérrez-Fons J and Lenaerts K, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47(6) Common Market Law Review 1629
DOI: https://doi.org/10.54648/cola2010069

Habermas J, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (William Rehg tr, The MIT Press 1996)
DOI: https://doi.org/10.7551/mitpress/1564.001.0001

Hailbronner K, 'Union citizens and access to social benefits' (2005) 42(5) Common Market Law Review 1245
DOI: https://doi.org/10.54648/cola2005046

Hartzén AC, Iossa A, and Karageorgiou E (eds), Law, Solidarity and the Limits of Social Europe: Constitutional Tensions for EU Integration (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781800885516

Heermann M, Koosand S, and Leuffen D, '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
DOI: https://doi.org/10.1017/s0007123422000357

Hieronymi T, Solidarität als Rechtsprinzip in der Europäischen Union (Peter Lang 2003)

Huhta K and Reins L, 'Solidarity in European Union Law and its Application in the Energy Sector' (2023) 72(3) International and Comparative Law Quarterly 771
DOI: https://doi.org/10.1017/s002058932300026x

Iakovenko M, '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
DOI: https://doi.org/10.1093/jwelb/jwab001

Kassoti E and Idriz N (eds), *The Principle of Solidarity* (Springer 2023)
DOI: https://doi.org/10.1007/978-94-6265-575-1

Konstadinides T, 'Civil Protection Cooperation in EU Law: Is There Room for Solidarity to Wriggle Past?' (2013) 19(2) European Law Journal 267
DOI: https://doi.org/10.1111/eulj.12024

Kostakopoulou D, 'European Union Citizenship: Writing the Future' (2007) 13(5) European Law Journal 623
DOI: https://doi.org/10.1111/j.1468-0386.2007.00387.x

Küçük E, '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
DOI: https://doi.org/10.1177/1023263x1602300604

— —, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22(4) European Law Journal 448
DOI: https://doi.org/10.1111/eulj.12185

Leino-Sandberg P and Ruffert M, 'Next Generation EU and its constitutional ramifications: A critical assessment' (2022) 59(2) Common Marker Law Review 433
DOI: https://doi.org/10.54648/cola2022031

Lenaerts K and Van Nuffel P, *European Union Law* (3rd edn, Sweet & Maxwell 2011)

Lenaerts K, 'La solidarité, valeur commune aux Etats membres et principe fédératif de l'Union européenne' (2021) Cahiers de droit européen 416

Moreno-Lax V, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (external) Asylum Policy' (2017) 24(5) Maastricht Journal of European and Comparative Law 740
DOI: https://doi.org/10.1177/1023263x17742338

MacCormick N, 'Coherence in Legal Justification' in Lindahl L, Peczenik A, and van Roermund B (eds), Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11-14, 1983 (Reidel 1984)
DOI: https://doi.org/10.1007/978-94-009-6481-5_19

Pech L, '"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
DOI: https://doi.org/10.1017/s1574019610300034

Ross M and Borgmann-Prebil Y (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199583188.001.0001

Ross M, 'Promoting Solidarity: From Public Services to a European Model of Competition?' (2007) 44(4) Common Market Law Review 1057
DOI: https://doi.org/10.54648/cola2007089

Sangiovanni A, 'Solidarity as Joint Action' (2015) 32(4) Journal of Applied Philosophy 340
DOI: https://doi.org/10.1111/japp.12130

Sørensen E, 'What Is a General Principle of EU Law? A Response' in de la Feria R and Vogenauer S (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011)
DOI: https://doi.org/10.5040/9781472565570.ch-003

Steinfeld M, Fissures in EU Citizenship: The Deconstruction and Reconstruction of the Legal Evolution of EU Citizenship (Cambridge University Press 2022)
DOI: https://doi.org/10.1017/9781108859165

Thomas EW, The Judicial Process: Realism, Pragmatism, Practical Reasoning, and Principles (Cambridge University Press 2005)
DOI: https://doi.org/10.1017/cbo9780511493768

Thym D and Tsourdi E, '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
DOI: https://doi.org/10.1177/1023263x17741273

Thym D, 'Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: *Jafari*, *A.S.*, *Mengesteab* and *Shiri*' (2018) 55(2) Common Market Law Review 549

von Bogdandy A, 'Founding principles' in von Bogdandy A and Bast J (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2009)

Weatherill S, 'Activism and Restraint in the European Court of Justice' in Capps P, Evans M, and Konstadinidis S (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003)
DOI: https://doi.org/10.5040/9781472562814.ch-013

SOLIDARITY AND THE CRISIS OF VALUES IN THE EUROPEAN UNION

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Looking at Article 2 TEU, this contribution considers that there is an external and an internal crisis of values: the former referring to challenges to EU values coming from individual Member States which prioritize their own agendas and the latter referring to the tension between a liberal and more solidarity-driven understanding of the EU's foundations as it stems from the very wording of Article 2 TEU. In an attempt to unpack solidarity and offer a better understanding of its nature, scope and legal implications for the EU and its Member States, this contribution proceeds as follows: first, it studies solidarity within a specific methodological and theoretical framework based on a 'structured network of EU principles' established by the CJEU in the post-Lisbon era. Second, it operates under the assumption that a holistic understanding of EU solidarity requires us to go beyond the dominant form of solidarity based on the relationship between Member States ('interstate solidarity') and to explore the relationships between individuals ('interpersonal solidarity'). Our key argument is that a larger institutional recognition of 'interpersonal solidarity' has the potential to put the social question more squarely on the table and, as such, to enable the EU to better address the polycrisis it is facing. A 'Scellian approach' to EU solidarity - which places the person at the heart of the theoretical framework and as the real subject of solidarity is useful to adopt as a source of inspiration in such an endeavour.

1 INTRODUCTION

Following the delivery of the Cases C-156/21 and C-157/21 ('*Budget Conditionality Cases*'),[1] solidarity in European Union (EU) law and its relation with the rule of law context, that forms the basis of the litigations brought before the Court of Justice of the European Union (CJEU) by Hungary and Poland challenging the validity of the Budget Conditionality Regulation,[2] regained currency in debates on the constitutional structure of the EU.

The cases were adjudicated *in plenum* on 16 February 2022 and the CJEU confirmed the validity of the EU law legislation. These cases are paradigmatic of the understanding of the rule of law, as a value enshrined in Article 2 TEU, on the one hand, and the principle of solidarity, as more than a fundamental legal principle, on the other. As regards the former, the *Budget Conditionality Cases* have demonstrated a shift in the perception of the operational function of the values of the EU, establishing that the rule of law is a founding value of the

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[1] Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97 and Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2022:98.

[2] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1 (Conditionality Regulation).

Union and a legal norm which imposes an obligation on the Member States to comply with its constituent elements.[3] In addition, the *Budget Conditionality Cases* are central to a discussion of the nature and role of solidarity in EU law, with the CJEU referring to it as a principle of constitutional and legal relevance that might also be understood as a 'Foundational Principle' (or 'Founding Principle') of EU law, in a similar vein to the 'rule of law' as defined by the text of Article 2 TEU.[4]

The contributions in this special issue seek to explore the theoretical and practical implications of these and previous CJEU rulings on the principle of solidarity understood as an organic, regulatory, and organizational principle in the EU. Comparative aspects of the function of solidarity at various levels (national, regional, international) as well as its oftentimes conflictual relationship with other EU principles (e.g., loyalty) is also discussed; The core doubled-edged question of the special issue is, ultimately, whether a re-imagination of the current constitutional structure of the EU is possible so as to enable a shift of priorities in EU integration towards a more social values-based approach.

We address this question by exploring solidarity in EU law from a sociological and institutionalist perspective, which can prove helpful towards an understanding of the concept with regard to its constitutional function.

Looking at Article 2 TEU, this contribution considers that there is an external and an internal crisis of values:[5] the former referring to challenges to EU values coming from individual Member States which prioritize their own agendas and the latter referring to the tension between a liberal and a solidarity-driven understanding of the EU's foundations as it stems from the very wording of Article 2 TEU.

Our hypothesis is the following: key for EU institutions such as the European Commission and the CJEU in addressing this crisis of values, is to find ways to develop and concretize the constitutional functions of solidarity in the EU by emphasizing its

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[3] Conditionality Regulation (n 2); Case C-156/21 *Hungary v European Parliament and Council of the European Union* (n 1) para 231.

[4] For a detailed analysis, 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.

[5] The term 'crisis of values' is inspired by scholarly discussion on the EU as a community of values, see, among others, Jan Wouters, 'From an Economic Community to a Union of Values: The Emergence of the EU's Commitment to Human Rights' in Jan Wouters, Manfred Nowak, Anne-Luise Chané, and Nicolas Hachez (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020). The literature abounds by contributions on Article 2 TEU and the Union values and principles, see e.g., Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5(1) European Papers - A Journal on Law and Integration 255; Elżbieta M Goździak, Izabella Main, and Brigitte Suter (eds), *Europe and the Refugee Response: A Crisis of Values?* (Routledge 2020); Marcus Klamert and Dimitry Kochenov, 'Article 2 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press 2019); Andrew J Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010); Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29(3) Oxford Journal of Legal Studies 549; Justine Lacroix, 'Does Europe Need Common Values?' (2009) 8(2) European Journal of Political Theory 141; Päivi Leino and Roman Petrov, 'Between "Common Values" and Competing Universals' (2009) 15(5) European Law Journal 654; Pavlos Eleftheriadis, 'The Idea of a European Constitution' (2007) 27(1) Oxford Journal of Legal Studies 1; Takis Tridimas, *The General Principles of EU Law* (2nd edn Oxford University Press 2006); Armin von Bogdandy, 'Doctrine of Principles' (2003) European Integration: The New German Scholarship - Jean Monnet Working Paper 9/03 <https://jeanmonnetprogram.org/archive/papers/03/030901-01.pdf> accessed 01 August 2023; Koen Lenaerts and Marlies Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means' (2002) 27(4) European Law Review 377.

'interpersonal' dimension. A larger institutional recognition of 'interpersonal solidarity' has the potential to put the social question more squarely on the table and, as such, to enable the EU to better address the polycrisis[6] it is facing.

In an attempt to unpack solidarity and offer a better understanding of its nature, scope and legal implications for the EU and its Member States, this contribution proceeds as follows: first, it studies solidarity within a specific methodological and theoretical framework based on a 'structured network of EU principles' established by the CJEU in the post-Lisbon era. Second, it operates under the assumption that a holistic understanding of EU solidarity requires us to go beyond the dominant form of solidarity based on the relationship between Member States ('interstate solidarity') and to explore the relationships between individuals ('interpersonal solidarity').

Building on this, we argue that solidarity's potential is that it is attuned to the changing social, political and legal necessities, and thereby capable of contributing to the fulfilment of the purposes of the European Union as a whole. The analysis is divided into three parts: in the first, we discuss the historical, political, and legal dimensions of the concept of solidarity. In the second, we analyse the place of solidarity under the light of the 'structured network of principles' created by the CJEU in the context of the EU crisis of values; and in the third we explore the potential of solidarity drawing on the sociological work of the French jurist Georges Scelle on institutional structures and measures required to support them.

2 THE DIMENSIONS OF SOLIDARITY IN EU LAW: HISTORICAL, LEGAL, POLITICAL

Notwithstanding the centrality of solidarity to the project of European integration, questions regarding its actual function, application and enforceability remain somewhat elusive. The same applies to its interplay with other EU constitutional concepts such as, 'sincere cooperation', 'mutual trust', 'democracy', 'equality', and 'rule of law'.

This has been attributed partly to the nature of the concept which is both descriptive and normative,[7] and partly to its normative ground, namely whether it requires a shared bond, identity, common experience, group membership or shared action[8] (*particularistic* conception of solidarity), whether it appeals to a cosmopolitan ideal of a global community (*universalist* conception of solidarity) or whether it functions under a logic of rational self-interest (*interest-driven* conception of solidarity) rejecting any affective, altruistic or love-like

[6] A term first coined by the French sociologist Edgar Morin and Anne Brigitte Kern in their book, *Homeland Earth: A Manifesto for the New Millennium Advances in Systems Theory, Complexity and the Human Sciences* (Hampton Press 1999). The term has been used extensively in recent years, including in the political discourse, see e.g., the Speech by the former President of the European Commission, Jean-Claude Juncker at the 2016 Annual General Meeting of the Hellenic Federation of Enterprises, referring to the multiple, mutually reinforcing challenges facing the EU, from 'the worst economic, financial and social crisis since World War II' through to 'the security threats in our neighborhood and at home, to the refugee crisis, and to the UK referendum' <https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_16_2293> accessed 15 June 2023. See also, World Economic Forum, 'The Global Risks Report 2023' (18th edn) <https://www3.weforum.org/docs/WEF_Global_Risks_Report_2023.pdf> accessed 15 June 2023.

[7] See e.g., Karl-Peter Sommermann, 'Some Reflections on the Concept of Solidarity and its Transformation into a Legal Principle' (2014) 52(1) Archiv des Völkerrechts 10.

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

social qualities.[9] That is why, solidarity has been considered as a context- and circumstances-specific concept.

It is therefore crucial that the EU principle of solidarity in this present time is studied in light of a 'theory of crisis', notably a theory that allows for the understanding of the process of EU political and legal integration within a context of polycrisis, different from a 'business as usual' context. Similarly, solidarity in EU law cannot be studied in isolation but rather in relation to other EU constitutional concepts (such as 'mutual trust' and 'sincere cooperation') that form part of a 'structured network of principles' according to the CJEU since *Kadi I* and *Opinion 2/13*.[10]

The roots of the concept of solidarity are embedded within modern European history[11] and its development is to be traced in different historical trajectories, including the French revolution and the work of French sociologists such as Pierre Leroux (*De l'humanité*, 1840), Auguste Comte (*Système de politique positive*, 1852), Emile Durkheim (*De la division du travail social*, 1893) and Leon Bourgeois (*Solidarité*, 1896), the 'New Realism' in British liberal tradition, workers' struggles and the *Sociale Frage* in Germany, Catholic Social teachings, and the Polish *Solidarność* movement; one could add more recent manifestations of solidarity such as the Greta Thunberg movement on climate activism akin to 'environmental solidarity'[12] and the 'Refugees Welcome' movement, a grassroots response to the 2015 refugee crisis. These represent focal trajectories in solidarity's evolution through time and testimonies to its nature as a 'chameleon'[13] capable of adapting to different societal demands.

The common feature of solidarity's various historical manifestations is that it denotes a particular community.[14] In the same vein, the signatories of the Treaty establishing the European Economic Community (EEC), were aware that the political project they were embarking on was dependent on establishment of shared values and a sense of community grounded, first and foremost on a 'de facto solidarity' which could further unite their countries. [15] The Preamble to the Treaty establishing the European Coal and Steel Community (1951) emphasized that 'Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development', and later on both the Single European Act (1986) and the Maastricht Treaty (1992) listed 'economic and social cohesion and solidarity among Member States' among the Community's objectives. Solidarity has also been at the

[9] For a similar account see Reza Banakar, 'Law, Love and Responsibility: A Note on Solidarity in EU Law' in Reza Banakar, Karl Dahlstrand, and Lotti Ryberg Welander (eds), *Festskrift till Håkan Hydén* (Juristförlaget i Lund 2018).

[10] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* EU:C:2008:461; and Opinion 2/13 EU:C:2014:2475.

[11] Karl H Metz, 'Solidarity and History. Institutions and Social Concepts of Solidarity in 19th Century Western Europe' in Kurt Bayertz (ed), *Solidarity* (Springer 1999).

[12] See Sven-Eric Liedman, 'Solidarity: A Short History from the Concept's Beginnings to the Present Situation' in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020) 19.

[13] JES Hayward, 'Solidarity: The Social History of an Idea in Nineteenth century France' (1959) 4(2) International Review of Social History 261.

[14] Eleni Karageorgiou, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018).

[15] See the Schuman Declaration (1950) <https://europa.eu/european-union/about-eu/symbols/europeday/schuman-declaration_en> accessed 14 June 2023.

centre of the working groups discussions leading up to the Draft Treaty establishing a Constitution for Europe, which eventually paved the way for the Lisbon Treaty (2009). Albeit doubts raised with regard to its legal enforceability, the general impression from the working groups is that the inclusion of the principle of solidarity was considered to be critical for the realization of Union policies.[16]

At present, solidarity is codified in EU primary law and in particular in the preamble of the EU Charter of Fundamental Rights as a 'founding principle' of EU law.[17] In addition, the term appears 22 times in the Treaty framework established post-Lisbon.[18] Finally, recent evolutions marked by the European Green Deal[19] and the European Pillar of Social Rights,[20] are testimonies to an increased visibility and weight placed to the language of solidarity in the EU context. Worth noting is the fact that solidarity is not exclusively referred to in the treaties as a response to threats[21] or crisis situations.[22] The mutual defense clause in Article 42(7) TEU and the sudden inflow of third-country nationals clause in Article 78(3) TFEU do reflect an emergency-driven solidarity approach (imposing 'an obligation of aid and assistance' and of 'adopt[ing] provisional measures for the benefit of the Member State(s) concerned', respectively).[23] The same applies in cases of terrorist attacks and natural or man-made disasters (Title VII, Article 222 TFEU, solidarity clause) where 'joint action in a spirit of solidarity' between the EU and the Member States is explicitly required.[24] Yet, there are references to solidarity as the 'governing principle' in the areas of immigration, asylum and border checks (Article 80 TFEU) and as key guarantee for achieving the Union's aims in the energy sector,[25] including reinforcing the collective nature of energy

[16] For a detailed analysis of the discussions in the Convention Working Group X 'Freedom, Security and Justice' and the roots of Article 80 TFEU on solidarity in the field of asylum, immigration, and border checks, see Karageorgiou 2018 (n 14) 72-76.

[17] See Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EUCFR), recital 2.

[18] Florian Kommer, 'The Clash of Solidarities in the European Union: Rethinking Jürgen Habermas' Conception of Solidarity in the Transnational Context' (2018) 11(2) Fudan Journal of the Humanities and Social Sciences 175, 176. On the CJEU's regular references to the principle of solidarity in its jurisprudence see Siofra O'Leary, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in Gráinne de Búrca (ed), *EU law and the welfare state: In search of solidarity* (Oxford University Press 2005). On solidarity litigation before the CJEU, see the contributions by Hyltén-Cavallius and Küçük in this Issue.

[19] See Claire Dupont and Diarmuid Torney, 'European Union Climate Governance and the European Green Deal in Turbulent Times' (2021) 9(3) Politics and Governance 312.

[20] See the contribution by González Pascual to this Special Issue. See also Maribel González Pascual and Aida Torres Pérez (eds), *Social Rights and the European Monetary Union* (Edward Elgar 2022).

[21] See Theodore Konstantinides, 'Civil Protection in Europe and the Lisbon "Solidarity Clause". A Genuine Legal Concept or a Paper Exercise' (2011) 7 Uppsala Faculty of Law - Working Paper no 3.

[22] See Yves Bertoncini, 'European Solidarity in Times of Crisis: a legacy to develop in the face of COVID-19' (2020) European issues n 555 - Policy Papers, Fondation Robert Schuman, 10, <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-555-en.pdf> accessed 01 August 2023. Bertoncini argues that the incorporation of the 'solidarity clauses' in the Lisbon Treaty reflects another form of solidarity: Member State solidarity. For him, 'this obligation of solidarity is typical of de facto solidarity arising from the concrete achievements referred to in the Schuman declaration'.

[23] Sara Myrdal and Mark Rhinard, 'The European Union's Solidarity Clause: Empty Letter or Effective Tool?' (2010) UI Occasional Papers No 2, 1 <https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/the-european-unions-solidarity-clause-empty-letter-or-effective-tool-min.pdf> accessed 01 August 2023.

[24] Article 222 TFEU, the general solidarity clause, was introduced by the Lisbon Treaty as one of the new solidarity clauses. This clause is directly linked to a situation of crisis.

[25] See also Peter Oliver and Kaisa Huhta, 'Free Movement of Goods in the Labyrinth of Energy Policy and Capacity Mechanism' in Leigh Hancher, Adrien de Hauteclocque, Kaisa Huhta, and Malgorzata

policy in the functioning of the energy market, promoting energy efficiency and energy saving, the development of new and renewable energy, and the interconnection of energy networks (Article 194 TFEU).[26] These references demonstrate the function of solidarity as a 'dynamic and contextual meta-principle of constitutional rank' that informs the way EU institutions and Member States make use of their discretion in decision and lawmaking.[27]

As reflected in several contributions in this Special Issue, the discussion on EU solidarity is often limited to two specific narratives. The first narrative is concerned with the dichotomy and clash between national solidarity and EU solidarity.[28] The second narrative focuses mainly on the study of 'interstate solidarity' as the most common form of 'solidarity-practice' in EU law.[29] Arguably, what seems to have slipped scholarly attention and EU institutional practice is attention to 'interpersonal solidarity'. Although the Treaties mention solidarity as a value which binds together both Member States and their citizens, EU citizens' experiences of each other and their sense of community are not ascribed equal significance in the larger scheme of European integration. As Banakar puts it, 'the macro concern with 'mutual political solidarity among Member States' clearly overweighs any micro concern with solidarity among the EU citizens'.[30] Following a similar line of reasoning, Sophie Pornshlegel argues that the EU should move towards a definition of the concept that allows for the emergence of 'interpersonal solidarity' and should create the conditions necessary for this type of solidarity to be developed.[31] For Pornshlegel,

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Sadowska (eds), *Capacity Mechanisms in the EU Energy Markets: Law, Policy, and Economics* (Oxford University Press 2022) 220, 243. The authors stress that both Articles 194 TFEU and Article 222 TFEU are completely new to the Treaties.

[26] On the scope of Article 194 TFEU, see the *OPAL* cases discussed by Kücük in this Special Issue. See, in particular, Case T-883/16 *Poland v Commissio*n EU:T:2019:567. According to the General Court (at paras 68-70), 'That provision, introduced by the Treaty of Lisbon, inserted into the TFEU an express legal basis for the European Union policy on energy which previously rested on the basis, inter alia, of ex-article 95 EC on the completion of the internal market (now Article 114 TFEU). The "spirit of solidarity" referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity between the Member States, mentioned, inter alia, in Article 2 TEU, in Article 3(3) TEU, Article 24(2) and (3) TEU, Article 122(1) TFEU and Article 222 TFEU. That principle is at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU […]. As regards its content, it should be emphasised that the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are 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'. See also Case C-848/19 P *Germany v Poland* EU:C:2021:598, that confirmed the ruling of the General Court and noted that the principle of solidarity is a legal principle contrary to the claim by the German government that the principle of solidarity has no legal value since it is a political concept which cannot create enforceable rights. Article 194 TFEU was seen as integral part of the fundamental principle of solidarity (see paras 38-44).

[27] See 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, 749. See also Karageorgiou 2018 (n 14) 93.

[28] See Gill-Pedro and Herlin-Karnell in this Special Issue.

[29] See Bergström and Casolari in this Special Issue. See also Jürgen Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law' (2016) 22(2) European Public Law 289, where he argues that solidarity is primarily concerned with the relationships between the Member States, rather than citizens, and should be understood as part of the EU's efforts to 'make good on the promise of domestication global capitalism'.

[30] See Banakar (n 9) 9.

[31] Sophie Pornshlegel, 'Solidarity in the EU: More hype than substance?' (2021) European Policy Center - Issue Paper 28, 5 <https://www.epc.eu/content/PDF/2021/EU_solidarity_IP.pdf> accessed 01 August 2023.

> there are several mechanisms related to interstate solidarity at the Union level, but almost no interpersonal solidarity between citizens, let alone mechanisms. There are some solidaristic relations between EU citizens in civil society settings, but none that are institutionalized. This is problematic, as it means that citizens have no opportunities to create bonds beyond national borders and cannot create the basis for representative democracy at EU level. One form of solidarity should not trump the other, as both are equally important in a Union of states and citizens. However, both forms must exist if the EU is to remain legitimate in its current form.[32]

Interpersonal solidarity is founded on a common definition of solidarity (support among individuals). But there is no such commonly accepted definition at EU level that also necessitates a common and transnational political space.[33] The concept of 'interpersonal solidarity' is closely connected to Habermas' understanding of solidarity in the EU based on 'transnational solidarity' where solidarity is understood as primarily not about justice but rather about the need to achieve the welfare of citizens and promote democracy at EU level. In other words, it is about ensuring that European citizens are 'intimately linked in an intersubjectively shared form of life'.[34] According to Habermas, it is the lack of transnational solidarity that explains the weak posture of democracy at EU level. For him, transnational solidarity at EU level is not only needed but also feasible.[35] This, however, will not be possible unless the EU, through its law and policies, creates the conditions where all those involved (or subjected to EU regulation) are given an equal voice in processes of integration.[36] And this is not an easy task.

As argued earlier, solidarity in the EU is currently facing new challenges, exacerbated by a 'crisis of values' originating from Article 2 TEU; a 'crisis of values' which is both internal and external. The external crisis is exemplified by a frontal contestation of the liberal values enshrined in Article 2 TEU by Member States pushing their own illiberal agendas and playing on the chords of national solidarity, polemical to any form of solidarity at EU level.[37] The internal crisis is marked by the dominance of the liberal values over the social values not only within the text and wordings of Article 2 TEU but also in their dominance in adjudication

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[32] Pornshlegel (n 31) 11. As an example of the lack of interpersonal solidarity she discusses the EU's focus on negative integration and the weakness of positive integration in the social and healthcare domains at EU level.
[33] ibid 12-13. Pornshlegel contends that interpersonal solidarity implies that European citizens have a direct link to EU institutions and that a redistributive mechanism exists between different European citizens.
[34] See Jürgen Habermas, 'Justice and solidarity: On the discussion concerning Stage 6' in Thomas E Wren (ed), *The moral domain: Essays in the ongoing discussion between philosophy and the social sciences* (MIT Press 1990) 224, 244-245. For a similar account see also the work of the French-Russian jurist Georges Gurvich on social rights.
[35] See e.g., Jürgen Habermas, 'Democracy, Solidarity and the European Crisis' (2013) A Lecture delivered at Leuven University on 26 April 2013 <https://www.pro-europa.eu/europe/jurgen-habermas-democracy-solidarity-and-the-european-crisis/?print=print> accessed 01 August 2023. See, also in that respect and more broadly, Jürgen Habermas, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy* (Translated by William Rehg, MIT Press 1998) and Jürgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 New Left Review 5.
[36] For a similar point in the context of refugee protection, see Karageorgiou (n 14) 239.
[37] See Sanja Bogojevic and Xavier Groussot, 'Illiberal Democracy and Rule by Law from an EU Perspective' in Allan Rosas, Juha Raitio, and Pekka Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023) 45.

and legislation produced by the EU institutions.[38] We consider that this 'crisis of values' can only be fully grasped if analysed in relation to the constitutional principles of EU law, the so-called 'structured network of principles' that 'juridify' and 'constitutionalize' the EU values enshrined in Article 2 TEU.[39] In other words, an in-depth study and comprehension of these constitutional principles is necessary in order to be able to concretize the problématique around the 'crisis of values'.

3 THE CRISIS OF VALUES AND THE STRUCTURED NETWORK OF PRINCIPLES IN EU LAW

Articles 2 and 3 TEU reveal that the post-Lisbon Treaty system is defined by specific values and fundamental objectives which translate these fundamental values into tangible effects.[40] This has also been correctly described as 'a panoply of goals and values, including justice and solidarity'.[41] Together, these values and objectives reflect, as Raz puts it, the EU order's constitutional 'common ideology',[42] as they 'express the common beliefs of the population about the way their society should be governed'.[43] In a similar vein, they are seen as the basis and justification of the Union's very existence, as well as the standard for review of all subsequent EU law norms and provisions.[44] According to Vergis, in terms of constitutional architecture 'placing fundamental values at the top of the text of the TEU underlines their role as the normative compass of the whole system'.[45]

The (potential of) normativity of Article 2 TEU and the nature of European values referred to therein as part of the 'constitutional principles' of EU law has been boldly recognised by the CJEU in *Kadi.*[46] The reliance on 'constitutional principles' helps in concretizing and 'legalizing' the values enshrined in Article 2 TEU.[47] Their significance to

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[38] See for a further discussion on this point, Xavier Groussot and Anna Zemskova, 'The Resilience of Rights and European Integration' in Antonina Bakardjieva Engelbrecht and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration beyond Brexit* (Hart Publishing 2019). This opposition is also reflected in research related to the concept of solidarity at national level, see most notably, Francois Ewald*, The Birth of Solidarity: The History of the French Welfare State* (Duke University Press 2020 – translation), and at EU level, see Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) where Tuori's theory of sectorial constitutionalism reflects a clash between liberal and social values, what he called in his book 'the economic constitution' and 'the social constitution'.

[39] ibid.

[40] See Filip Dorssemont, 'Values and Objectives' in Niklas Bruun, Klaus Lörcher, and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 50–1.

[41] Maurizio Ferrara and Carlo Burelli, 'Cross-National Solidarity and Political Sustainability in the EU After the Crisis' (2019) 57 Journal of Common Market Studies 106.

[42] Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander Larry (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 152.

[43] ibid 154.

[44] See Stelio Mangiamelli, 'The Union's Homogeneity and Its Common Values in the Treaty on European Union' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basics, Economic Order and External Action* (Springer 2012).

[45] Fotis Vergis, 'European dys-integration, popular disillusionment and Brexit: could 'substantive constitutionalisation' help win back minds and hearts?' 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 Publishing 2022).

[46] Joined Cases C-402/05 P and C-415/05 P *Kadi I* (n 10) paras 303-304. Relevant here is, also, *Opinion 2/13* (n 10) where the Court referred to the EU as an entity with 'its own constitutional framework and founding principles' (para 158).

[47] See in general, Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006).

the integration project is such that the EU Treaties 'in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order'.[48] In light of this, as applicable to other general principles, they must guide the validity, construction, and application of secondary law.[49] As a result, 'if the wording of secondary [EU] law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the [EU] Treaty rather than to the interpretation which leads to its being incompatible with the Treaty'.[50]

Opinion 2/13 constitutes one of the key milestones in the methodology of 'constitutional principles' following the entry into force of the Lisbon Treaty and the entry into force of the EU Charter which codified the unwritten general principles developed by the CJEU since decades.[51] The CJEU in *Opinion 2/13* stated that the EU is founded on a 'structured network of principles'.[52] What is the meaning of these words? And how, if at all, is this associated with the 'crisis of values'?

To answer these questions, it is important to have a closer look at the paragraphs of *Opinion 2/13* where the CJEU for the very first time referred to the 'structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other'.[53] In this legal structure, the Member States are viewed as engaged in a process of creating an 'ever closer union' based on Article 1(2) TEU.[54] The CJEU clarified that this legal structure is specifically founded on Article 2 TEU, which recognizes that all the Member States share common values. And it considered that this provision constitutes the fundamental premise that not only justifies the existence of mutual trust between the Member States but also that it establishes the core source of the obligation to respect the EU values implemented by EU law.[55] In addition, referring to Article 6(1) TEU, the Court emphasized that EU fundamental rights as recognized by the EU Charter lie 'at the heart' of the EU legal structure, the respect of which is a condition of the lawfulness of EU acts.[56]

The CJEU resorts only to three opening provisions of the TEU, namely Articles 1(2) TEU, 2 TEU and 6(1) TEU in order to establish the existence of this 'network of principles' that binds the Member States. There is no explicit reference to solidarity, yet solidarity does constitute a common value enshrined in Article 2 TEU. Despite there not being a specific listing of the principles forming part of this constitutional network, we can safely deduce that it is formed by the five major structural principles of EU law that ensure the 'EU rules of the game' between the Member States and institutions, namely primacy (unwritten principle), direct effect (unwritten principle), loyalty (Article 4(3) TEU), subsidiarity (Article 5(1) TEU), and proportionality (Article 5(3) TEU and unwritten

[48] See *Kadi I* (n 10) para 304.
[49] On this, see among others, Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Bloomsbury Publishing 2009) and Tridimas (n 5).
[50] See C-305/05 *Ordre des barreaux* EU:C:2007:383para 28.
[51] *Opinion 2/13* (n 10).
[52] ibid para 167.
[53] ibid.
[54] ibid.
[55] ibid para 168.
[56] ibid para 169.

principle).[57] Can it be argued that the principle of solidarity is a structural principle as well? Or is it a principle of a different kind?

All the values enshrined in Article 2 TEU, as a matter of fact, have a substantive dimension reflecting either a liberal or social facet. Most of the values listed in Article 2 TEU are liberal values – several of them affiliated to the idea of justice; solidarity, by contrast, is a value of a social nature which reflects the EU's 'social reality'. Solidarity may thus sometimes be understood as the 'reverse side of justice' or the 'other of justice'.[58] It is of common knowledge in the EU judicial and legislative landscapes that liberal values are often prevailing over social values – which are seen, perhaps unjustifiably, as secondary.[59] Nevertheless, solidarity is a founding principle of EU law and forms an integral part of Article 2 TEU. On top of that, solidarity has recently been elevated to the rank of a normative principle by the CJEU following the delivery of the *Budget Conditionality cases* discussed in the introduction of this contribution relating to the rule of law crisis.[60] In that sense, solidarity boasts a clear potential for further development in the EU and should be used, as put by Schiek, as 'supporting a more inclusive constitutional discourse on European integration than the mere reliance on liberal constitutional principles'.[61]

In practice, this can be achieved if, for instance, the CJEU relies more often on the social objectives enshrined in Article 3(3) TEU, if it ensures that the fundamental rights enshrined in the solidarity Chapter of the EU Charter are applied in a suitable manner, doing justice to its social character, and if it guarantees that the citizenship provisions of the TFEU are not devoid of any meaning by properly balancing the economic and social considerations in a given case.[62]

Importantly, both the rule of law crisis and the COVID-19 health crisis have opened the path to an increasing application of the principle of solidarity in EU legislation and adjudication.[63] This opportunity should not be missed by the EU institutions when dealing

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[57] Looking at the opening provisions of the TEU (Articles 1 to 6 TEU), it can be said that three types of constitutional principles can be discerned in the 'structure network of EU principles': interpretative principles (Articles 1 and 3 TEU), structural principles (Articles 4 and 5 TEU), and substantive principles (Article 2 and 6 TEU). This constitutional network is completed by unwritten principles of both structural (primacy and direct effect) and substantive (EU general principles based on Article 6(3) TEU) nature.

[58] See Habermas (n 34 and n 35) and Kommer (n 18).

[59] Xavier Groussot, Gunnar Thor Petursson, and Justin Pierce, 'Weak Right, Strong Court: The Freedom to Conduct Business and the EU Charter of Fundamental Rights' in Sionnah Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 326.

[60] See also the discussion on the *OPAL* cases ('Energy Solidarity') by Küçük in this Special Issue.

[61] Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice – Opportunities Missed?' in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020) 252.

[62] See e.g., Groussot et al (n 59). On the difficulties in reconciling the social with the economic, see Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou 'Introduction to Law, Solidarity and the Limits of Social Europe' 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 Publishing 2022) xvi.

[63] Although much more could have been done to mitigate the consequences of the pandemic across the Union, it has been argued that the COVID-19 crisis has offered better conditions for EU solidarity to emerge compared to other crises (see Pornshlegel n 31, 6). This is so due to the COVID-19 crisis's exogenous and absolute nature capable of initiating a form of solidarity distinct from previous cases, including the financial crisis that has mostly nurtured clashes of solidarities, i.e., clash between national solidarity and EU solidarity (see Pornshlegel n 31, 21). See also Ulla Neergaard, 'Solidarity and the Economic and Monetary Union in Times of Economic Crisis' in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020) 103.

with the polycrisis in the future. As explained in the previous section, regarding the individual as the real subject in solidarity debates is key in this respect. To explain why this is the case, we draw on the theory of Georges Scelle which appears to be useful in defining the contours of EU solidarity focusing on its interpersonal dimension.[64]

4 A SCELLIAN APPROACH TO THE STUDY OF THE CONCEPT OF EU SOLIDARITY

4.1 SCELLIAN THEORY: BASIC PREMISES

To grasp the Scellian doctrine, it is necessary to identify its basic conceptual premises which we sketch in the following paragraphs. The French jurist, Georges Scelle (1878-1961), is one of the most influential solidarists of his times.[65]

Scelle's project, a sociologically-based institutionalism, remains even today one of the basic alternatives to a liberal articulation of diplomatic practices in international law. Scelle's left solidarism based international law on the social laws of modernity itself. [66] Following Durkheim, Scelle explained social cohesion as an effect of organic solidarity, grounded in the biology of human needs and leading inexorably to federalism.[67] What premises Scelle's thought is the idea that organic solidarity or solidarity 'by division of labor' is what makes individuals indispensable to each other.[68] In Scelle's thought, solidarity gives birth to objective law ('*droit objectif*')[69] and corresponds to '*a law of integration and progress*'. Objective law, far from being the product of the will of the state, or, at the international level, the product of a confluence of states' will, develops out of society itself. '*Ubi societas, ubi ius'*. The concept of solidarity and social reality are identical in Scelle's thought; social reality ('*le fait social*') is nothing other than common interest ('*solidarité*').[70]

The second conceptual premise of the Scellian doctrine, is related to its aims. Scelle intends to deflate or 'demythologize' the state. Thus the first axiom of his legal thought is the primacy of law as an expression of social solidarity.[71] Scelle's world consisted ('ultimately') of relationships between individuals.[72] Influenced by the French Publicist Leon Duguit's doctrine on the plurality of legal orders, he takes the view that the world community consists of a plurality of communities in which individuals and groups establish mutual relations, starting with the family and moving on to local and regional groupings, up to the

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[64] The search of the interpersonal dimension of solidarity is a theme that can be found within the French institutionalist doctrine post World War II, see also e.g., the work of Georges Gurvich.
[65] Antonio Tanca, 'Georges Scelle (1878 - 1961), Biographical note with bibliography' (1990) 1 European Journal of International Law 240.
[66] Martti Koskenniemi, 'International Law as Political Theology: How to Read Nomos der Erde?' (2004) 11(4) Constellations 492.
[67] Georges Scelle, *Précis de droit des gens*: *principes et systématique* (hereinafter *Precis*) 2 Volumes (Recueil Sirey 1932, 1934) I: 2–5.
[68] Emile Durkheim, *The Division of Labour in Society / Emile Durkheim*; translated by W.D. Halls; with an introduction by Lewis Coser (Basingstoke: Macmillan 1984).
[69] Scelle, *Précis* (n 67) II: 297–99 (*hypothèse de bien légiféré*).
[70] Hubert Thierry, 'The European Tradition in International Law: Georges Scelle; The Thought of Georges Scelle' (1990) 1 European Journal of International Law 193.
[71] ibid 197-198.
[72] Georges Scelle, 'Théorie du gouvernment international' (1935) Annuaire de l'Institut de droit public, 66.

state society and at the very top, the world community.[73] Scelle admits though, that the state is '*the social milieu where the legal phenomenon is most fully realized*',[74] that is why its autonomy must be guaranteed by law.

Within these interdependent communities, says Scelle, the exercise of competences or else 'essential social functions' is taking place. For Scelle, competences are '*the socially guaranteed powers and duties of action*'. These are law-making, adjudication and enforcement endowed to individuals. The mission of individuals is basically to act as administrators reflecting what (objective) law requires.[75] This points us to Scelle's famous doctrine of 'role splitting' (*'dédoublement fonctionnel')* – the situation where an individual has been put in a position to administer two or more societies – as where national parliaments or governments also administer international society.[76] Thus, individuals act either on behalf of their state society as rulers or members of the executive, or as state officials ('agents').

Another important premise of Scelle's work is the distinction between objective law and positive law. In Scelle's thought, objective law plays the role traditionally given to natural law. Yet natural law, as it was conceived in the 18th century, is a product of reason and possesses a static, immutable character. In contrast, objective law conforms to social necessities which change with time and place; it has therefore an evolutive character. Objective law is the source of positive law, and it is the benchmark against which positive law must be assessed, and thereafter approved or rejected. As for positive law, according to Scelle, it is (or ought to be) the 'translation' of objective law. This translation is secured by governments who carry out the law-making function by means of 'role splitting'.[77] Their task is not 'to create' law but to ascertain it and express it. The role of will is therefore reduced to its most simple expression. The law-making function does not imply the settlement of conflicting interests but rather, it constitutes the expression of solidarity requirements within the international society. In this context, normative treaties, which are the outcomes of converging wills, are ways of 'ascertaining and expressing pre-existing rules of objective law, which are thus translated into normative or constructive rules of positive law'.[78]

4.2 APPLYING SCELLIAN THEORY TO THE EU'S CONSTITUTIONAL STRUCTURE

Scelle's perspectives have enormous potential for explaining the phenomenon of the EU as a community. Scelle's vision of international law, involving individuals and groups establishing mutual relations beyond national borders, is perfectly illustrated by EU law (in particular in the four freedoms: free movement of persons, goods, services and capital, and the EU citizenship provisions). The very essence of the international community, says Scelle, is constituted by dealings between individuals, and therefore, international law aims at facilitating relations between individuals. Following this line of reasoning, one cannot

[73] Georges Scelle, *Manuel de droit international public* (Domat-Montchrestien 1948), 18.
[74] Scelle, *Précis* (n 67) I: 73.
[75] Scelle, *Précis* (n 67) I: 9–14.
[76] cf. Scelle, 'Théorie du gouvernment international' (n 72) 54-57 and Antonio Cassese, 'Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law' (1990) 1 European Journal of International Law 210.
[77] Thierry (n 70) 199.
[78] Scelle, *Précis* (n 67) I: 298.

distinguish between the *interstate* dimension of solidarity on the one hand, relating to the allocation of responsibility between states; and on the other hand, the *interpersonal* dimension. For Scelle, the two levels of action are in reality inextricably bound up with each other and indeed constitute but one level of reality.[79]

As exemplified in the previous sections, EU law is becoming less concerned with interstate relations and relates more to facilitating transborder freedoms for individuals. In addition, the Union is a legal system heavily based on the use of competences that exhibits many of the characteristics of a 'suprastate community' and fulfils almost completely Scelle's 'essential social functions'. The Council and the Parliament (with input from the Commission) approximate a law-making body, and the CJEU adjudicates questions of EU law. With regard to law enforcement, this function is exercised to a lesser extent by Union institutions, i.e., the Commission and the CJEU, and relies to a greater extent on national courts and national legal systems.[80]

Similarly, Scelle puts much emphasis on the 'role splitting' concept. Individuals are the only subjects of law, and they are afforded with a dual mission: to take action both in the national legal systems and in the international legal system. This mirrors the role for example of representatives of national governments in EU institutions. National governments are called on to provide for the European system's legal functions. They must therefore assume law-making, adjudication and enforcement roles. Although Scelle did not explicitly mention this, the concept of 'role splitting' implies that when governments act as organs of the international community they are acting in its interest, and not only in their own national interest.[81] This may explain the multiple references to solidarity in the EU treaties. The drafters of the treaties can be seen as acting both on behalf of their home countries but also as agents of the Union, acknowledging the significance of solidarity responsibilities between EU Member States informed by social reality. The theory of 'role splitting' is also reflected in the TFEU by the citizenship provisions that allow the individual to be both a citizen of a Member State of the European Union and an EU citizen.

In light of the above, Scelle's approach appears suitable to explain the EU's constitutional structure primarily due to its focus on the changing relationship between the individual and the community. A Scellian perception of law, as an expression of solidarity and reflection of social reality makes even more sense, if we look at Article 2 TEU. As discussed in Sections 2 and 3, Article 2 TEU constitutes a special provision – a fundamental premise - enjoying the presumption of being in accordance with objective law or else with the socio-political reality of its time. The polycrisis with which many European states are faced today, underlines the role of solidarity as the basis for European regulation and the need of this to be achieved through a set of measures adopted by the Union. In other words, it legitimizes a set of reforms (positive law) that will contribute to the fulfilment of the objectives of the EU. For instance, if we take the COVID-19 pandemic, it can be said that it has nurtured a 'common European interest' (what Scelle would call the 'objective law'). The specific nature of the COVID-19 crisis had indeed created a suitable condition for

[79] Cassese (n 76) 211-212.
[80] ibid 231.
[81] Thierry (n 70) 203.

reliance on solidarity as a crisis-solution principle and as the basis for legislative action by EU institutions (what according to Scelle would be the 'positive law').

In this context, solidarity as a constitutional value and foundational principle of the EU is of an evolutive character, reflecting social reality and designed to address rapidly changing necessities. This explains why it has progressed in various fields of EU law including energy, asylum, free movement, environment, and labour policies from a rather moderate institutional reference to a conciliatory idea that mandates action aiming specifically at fairer patterns of distribution of responsibilities across the Union. What follows is that the implementation of Article 2 TEU should be seen as imposing a range of obligations for measures suited to each particular situation, the management of which is a law-governed process that the EU and its institutions have to guarantee. Following the Scellian thought, solidarity should be seen as the benchmark against which EU measures and national measures falling within the scope of EU law must be assessed, approved, or rejected.

5 CONCLUDING REMARKS: TOWARDS A THEORY OF CRISIS IN EU LAW?

Solidarity is a context- and circumstances-specific concept. Hence it is with no surprise that it shines in this time of polycrisis and that Article 2 TEU, where solidarity is articulated, has acquired a normative and fundamental status in EU law in the jurisprudence of the CJEU. The CJEU has concretized the application of the values enshrined in Article 2 TEU through the use of constitutional principles and more specifically by making use of its 'structured network of principles'. As shown in this contribution, solidarity has a special place in this network constituting a substantive principle that complements the liberal values enshrined in Article 2 TEU, such as the rule of law.

What this contribution has lifted is the methodological need to go beyond the dominant understanding of solidarity as addressing relationships between EU Member States towards an appreciation of the relationships between individuals ('interpersonal solidarity') and the way they shape the EU's constitutional character. Addressing the EU crisis of values, namely the tension between the economic and the social, requires reimagining EU law through the intersection of the transnational, national and local levels. In this context, the relationships between and experiences of individuals subject to EU regulation should be treated as a source of understanding EU law and of balancing conflictual interests. The future of the EU appears to depend on the ability of its institutions to give equal weight to interpersonal solidarity (or the lack thereof) as to Member States' national interests; this is likely to bring the EU closer to achieving the welfare of citizens and to addressing the democratic deficit at EU level.

The role of solidarity is therefore pivotal in EU political and legal integration.[82] Yet the question remains: how to define a theory of legal integration which is the most suitable to understand the evolution of the EU in the present context of polycrisis? This special context of crisis is recognized in the field of political integration where the so-called theory of post-functionalism has recently been developed to provide an understanding of the process

[82] See, in general, Ian Manners, 'Symbols and Myths of European Union Transnational Solidarity' in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020).

of EU integration. Lisbet Hooghe and Gary Marks[83] offer a new approach to studying the EU which has shifted from what they call a context of 'permissive consensus' to one of 'constraining dissensus'. Further research on the matter would require answering questions, such as 'what is the place of (EU) law and solidarity in the context of crisis and in relation to a 'theory of crisis' such as post-functionalism?' This contribution has shown that the concept of solidarity is central to a 'theory of crisis'; and that an institutionalist and sociological approach to law, such as the approach adopted by Georges Scelle, is of high relevance and importance for the future understanding of solidarity as a dynamic constitutional principle of the EU.

[83] See Philippe C Schmitter, 'Neo-Neofunctionalism' in Antje Wiener and Thomas Diez (eds), *European Integration Theory* (Oxford University Press 2004). See also Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39(1) British Journal of Political Science 1; Tanja A Börzel and Thomas Risse, 'Revisiting the Nature of the Beast – Politicization, European Identity, and Postfunctionalism: A Comment on Hooghe and Marks' (2009) 39(1) British Journal of Political Science 217; Hanspeter Kriesi, 'Rejoinder to Liesbet Hooghe and Gary Marks, "A Postfunctional Theory of European Integration: From Permissive Consensus to Constraining Dissensus"' (2009) 39(1) British Journal of Political Science 221, and Philippe C Schmitter, 'On the Way to a Post-Functionalist Theory of European Integration' (2009) 39(1) British Journal of Political Science 211.

LIST OF REFERENCES

Banakar R, 'Law, Love and Responsibility: A Note on Solidarity in EU Law' in Banakar R, Dahlstrand K, and Ryberg Welander L (eds), *Festskrift till Håkan Hydén* (Juristförlaget i Lund 2018)

Bast J, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law' (2016) 22(2) European Public Law 289
DOI: https://doi.org/10.54648/euro2016019

Bogojevic S and Groussot X, 'Illiberal Democracy and Rule by Law from an EU Perspective' in Rosas A, Raitio J, and Pohjankoski P (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023)
DOI: https://doi.org/10.5040/9781509955107.ch-004

Börzel TA and Risse T, 'Revisiting the Nature of the Beast – Politicization, European Identity, and Postfunctionalism: A Comment on Hooghe and Marks' (2009) 39(1) British Journal of Political Science 217
DOI: https://doi.org/10.1017/s000712340800046x

Cassese A, 'Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law' (1990) 1 European Journal of International Law 210-234.
DOI: https://doi.org/10.1093/oxfordjournals.ejil.a035763

Dorssemont F, 'Values and Objectives' in Bruun N, Lörcher K, and Schömann I (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012)
DOI: https://doi.org/10.5040/9781472565990.ch-002

Dupont C and Torney D, 'European Union Climate Governance and the European Green Deal in Turbulent Times' (2021) 9(3) Politics and Governance 312
DOI: https://doi.org/10.17645/pag.v9i3.4896

Durkheim E, *The Division of Labour in Society / Emile Durkheim*; translated by W.D. Halls; with an introduction by Lewis Coser (Basingstoke: Macmillan 1984)

Eleftheriadis P, 'The Idea of a European Constitution' (2007) 27(1) Oxford Journal of Legal Studies 1
DOI: https://doi.org/10.1093/ojls/gql022

Ewald F, *The Birth of Solidarity: The History of the French Welfare State* (Duke University Press 2020 – translation)
DOI: https://doi.org/10.1215/9781478009214

Ferrara M and Burelli C, 'Cross-National Solidarity and Political Sustainability in the EU After the Crisis' (2019) 57 Journal of Common Market Studies 106
DOI: https://doi.org/10.1111/jcms.12812

González Pascual M and Torres Pérez A (eds), *Social Rights and the European Monetary Union* (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781839105258

Goździak EM, Main I, and Suter B (eds), *Europe and the Refugee Response: A Crisis of Values?* (Routledge 2020)
DOI: https://doi.org/10.4324/9780429279317

Groussot X and Zemskova A, 'The Resilience of Rights and European Integration' in Bakardjieva Engelbrecht A and Groussot X (eds), *The Future of Europe: Political and Legal Integration beyond Brexit* (Hart Publishing 2019)
DOI: https://doi.org/10.5040/9781509923335.ch-004

Groussot X, *General Principles of Community Law* (Europa Law Publishing 2006)

Groussot X, Petursson GT, and Pierce J, 'Weak Right, Strong Court: The Freedom to Conduct Business and the EU Charter of Fundamental Rights' in Douglas-Scott S and Hatzis N (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017)
DOI: https://doi.org/10.4337/9781782546405.00025

Groussot X, Zemskova A, and Bungerfeldt K, '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
DOI: https://doi.org/10.36969/njel.v5i1.24496

Habermas J, 'Justice and solidarity: On the discussion concerning Stage 6' in Wren TE (ed), *The moral domain: Essays in the ongoing discussion between philosophy and the social sciences* (MIT Press 1990)

—, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy* (Translated by William Rehg, MIT Press 1998)

—, 'Why Europe Needs a Constitution' (2001) 11 New Left Review 5

Hartzén AC, Iossa A, and Karageorgiou E 'Introduction to Law, Solidarity and the Limits of Social Europe' in Hartzén AC, Iossa A, and Karageorgiou E (eds), *Law, Solidarity and the Limits of Social Europe Constitutional Tensions for EU Integration* (Edward Elgar Publishing 2022)
DOI: https://doi.org/10.4337/9781800885516.00007

Hayward JES, 'Solidarity: The Social History of an Idea in Nineteenth century France' (1959) 4(2) International Review of Social History 261

DOI: https://doi.org/10.1017/s0020859000001371

Hooghe L and Marks G, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', (2009) 39(1) British Journal of Political Science 1-23
DOI: https://doi.org/10.1017/s0007123408000409

Karageorgiou E, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018)

Klamert M and Kochenov D, 'Article 2 TEU' in Kellerbauer M, Klamert M, and Tomkin J (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press 2019)
DOI: https://doi.org/10.1093/oso/9780198759393.003.5

Kommer F, 'The Clash of Solidarities in the European Union: Rethinking Jürgen Habermas' Conception of Solidarity in the Transnational Context' (2018) 11(2) Fudan Journal of the Humanities and Social Sciences 175
https://doi.org/10.1007/s40647-017-0193-8

Koskenniemi M, 'International Law as Political Theology: How to Read Nomos der Erde?' (2004) 11(4) Constellations 492
DOI: https://doi.org/10.1111/j.1351-0487.2004.00391.x

Kriesi H, 'Rejoinder to Liesbet Hooghe and Gary Marks, "A Postfunctional Theory of European Integration: From Permissive Consensus to Constraining Dissensus" (2009) 39(1) British Journal of Political Science 221
DOI: https://doi.org/10.1017/s0007123408000471

Lacroix J, 'Does Europe Need Common Values?' (2009) 8(2) European Journal of Political Theory 141
DOI: https://doi.org/10.1177/1474885108100850

Leino P and Petrov R, 'Between "Common Values" and Competing Universals' (2009) 15(5) European Law Journal 654
DOI: https://doi.org/10.1111/j.1468-0386.2009.00483.x

Lenaerts K and Desomer M, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means' (2002) 27(4) European Law Review 377

Liedman SE, 'Solidarity: A Short History from the Concept's Beginnings to the Present Situation' in Krunke H, Petersen H, and Manners I (eds), *Transnational Solidarity* (Cambridge University Press 2020)
DOI: https://doi.org/10.1017/9781108766593.003

Mangiamelli S, 'The Union's Homogeneity and Its Common Values in the Treaty on European Union' in Blanke HJ and Mangiameli S (eds), *The European Union after Lisbon: Constitutional Basics, Economic Order and External Action* (Springer 2012)
DOI: https://doi.org/10.1007/978-3-642-19507-5_2

Manners I, 'Symbols and Myths of European Union Transnational Solidarity' in Krunke H, Petersen H, and Manners I (eds), *Transnational Solidarity* (Cambridge University Press 2020)
DOI: https://doi.org/10.1017/9781108766593.007

Metz KH, 'Solidarity and History. Institutions and Social Concepts of Solidarity in 19th Century Western Europe' in Bayertz K (ed), *Solidarity* (Springer 1999)
DOI: https://doi.org/10.1007/978-94-015-9245-1_10

Moreno-Lax V, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (external) Asylum Policy' (2017) 24(5) Maastricht Journal of European and Comparative Law 740
DOI: https://doi.org/10.1177/1023263x17742338

Morin E and Kern AB, *Homeland Earth: A Manifesto for the New Millennium Advances in Systems Theory, Complexity and the Human Sciences* (Hampton Press 1999)

Neergaard U, 'Solidarity and the Economic and Monetary Union in Times of Economic Crisis' in Krunke H, Petersen H, and Manners I (eds), *Transnational Solidarity* (Cambridge University Press 2020)
DOI: https://doi.org/10.1017/9781108766593.008

O'Leary S, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in de Búrca G (ed), *EU law and the welfare state: In search of solidarity* (Oxford University Press 2005)
DOI: https://doi.org/10.1093/acprof:oso/9780199287413.003.0003

Oliver P and Huhta K, 'Free Movement of Goods in the Labyrinth of Energy Policy and Capacity Mechanism' in Hancher L, de Hauteclocque A, Huhta K, and Sadowska M (eds), *Capacity Mechanisms in the EU Energy Markets: Law, Policy, and Economics* (Oxford University Press 2022) 220, 243
DOI: https://doi.org/10.1093/oso/9780192849809.003.0011

Raz J, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander Larry (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 152.

Sangiovanni A, 'Solidarity as Joint Action: Solidarity as Joint Action' (2015) 32 (4) Journal of Applied Philosophy 340
DOI: https://doi.org/10.1111/japp.12130

Scelle G, *Précis de droit des gens*: *principes et systématique* (2 Volumes) (Recueil Sirey 1932, 1934)

— —, 'Théorie du gouvernment international' (1935) Annuaire de l'Institut de droit public

— —, *Manuel de droit international public* (Domat-Montchrestien 1948)

Schiek D, 'Solidarity in the Case Law of the European Court of Justice – Opportunities Missed?' in Krunke H, Petersen H, and Manners I (eds), *Transnational Solidarity* (Cambridge University Press 2020)
DOI: https://doi.org/10.1017/9781108766593.014

Schmitter PC, 'Neo-Neofunctionalism' in Wiener A and Diez T (eds), *European Integration Theory* (Oxford University Press 2004)

— —, 'On the Way to a Post-Functionalist Theory of European Integration' (2009) 39(1) British Journal of Political Science 211
DOI: https://doi.org/10.1017/s0007123408000483

Sommermann KP, 'Some Reflections on the Concept of Solidarity and its Transformation into a Legal Principle' (2014) 52(1) Archiv des Völkerrechts 10
DOI: https://doi.org/10.1628/000389214x14056754359428

Tanca A, 'Georges Scelle (1878 - 1961), Biographical note with bibliography' (1990) 1 European Journal of International Law 240
DOI: https://doi.org/10.1093/oxfordjournals.ejil.a035766

Thierry H, 'The European Tradition in International Law: Georges Scelle; The Thought of Georges Scelle' (1990) 1 European Journal of International Law 193
DOI: https://doi.org/10.1093/oxfordjournals.ejil.a035762

Tridimas T, *The General Principles of EU Law* (2nd edn Oxford University Press 2006)

Tuori K, *European Constitutionalism* (Cambridge University Press 2015)
DOI: https://doi.org/10.1017/cbo9781316091883

Vergis F, 'European dys-integration, popular disillusionment and Brexit: could 'substantive constitutionalisation' help win back minds and hearts?' in Hartzén AC, Iossa A, and Karageorgiou E (eds), *Law, Solidarity and the Limits of Social Europe Constitutional Tensions for EU Integration* (Edward Elgar Publishing 2022)
DOI: https://doi.org/10.4337/9781800885516.00017

Von Bogdandy A and Bast J (eds), *Principles of European Constitutional Law* (Bloomsbury Publishing 2009)

Williams AJ, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010)
DOI: https://doi.org/10.1017/cbo9780511750335

Williams AT, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29(3) Oxford Journal of Legal Studies 549
DOI: https://doi.org/10.1093/ojls/gqp017

Wouters J, 'From an Economic Community to a Union of Values: The Emergence of the EU's Commitment to Human Rights' in Wouters J, Nowak M, Chané AL, and Hachez N (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020)
DOI: https://doi.org/10.1093/oso/9780198814191.003.0002

—— —, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5(1) European Papers - A Journal on Law and Integration 255

BUILDING SOCIAL SOLIDARITY THROUGH MUTUAL TRUST

MARIBEL GONZÁLEZ PASCUAL*

Cases C-156/21 and C-152/21 established that the implementation of solidarity is based on mutual trust. This reference is of significant relevance given that trust is essential when risky decisions are made in troubled times. In this context, this article analyses whether mutual trust could be decisive to tackle unexpected challenges, such as the pandemic (or the war in Ukraine). With this goal in mind, the article dwells on the role of mutual trust in the EU. The article then examines the link between mutual trust and social solidarity in the program Next Generation EU. Finally, it inquires which kind of social solidarity might derive from mutual trust. The goal is to assess if mutual trust is a transformative principle that may trigger an impulse towards social solidarity within the EU.

1 INTRODUCTION

Cases C-156/21 and C-152/21 established not only that solidarity is one of the fundamental principles of EU law, but also that the implementation of solidarity is based on mutual trust.[1] Such a statement could be simply framed as a reminder of the need to comply with the rule of law to access funds available to Member States under the COVID-19 recovery plan entitled '*Next Generation*'. In fact, scrutiny of the rule of law across the EU, as a pre-condition to cooperation based on trust, has gained terrain in the Area of Freedom, Security and Justice (AFSJ) since the Court's ruling in *LM*.[2]

However, the reference to mutual trust may also be of significant relevance given the potential of such a principle and the latest developments in Europe. Trust has a pivotal role in politics as well as in economic and trade relations, shaping the behaviour and response of the main players. Trust is also essential when it comes to the bond between the people and their representatives. Thus, it is only natural that its relevance within the EU has grown. In fact, trust is extremely relevant when risky, bold decisions are made in troubled times.

In this context, this article discusses whether mutual trust could be decisive to tackle challenges such as the pandemic (or the war in Ukraine) becoming the basis for a growing social solidarity. A solidarity within the Member States, supported by the EU, aligned with common shared goals. With this goal in mind, the article will begin by dwelling on the actual relevance of mutual trust in the EU, by focusing on both the AFSJ and the pandemic. The article will then examine the link between mutual trust and social solidarity in the program Next Generation EU. It will then inquire which kind of social solidarity might derive from mutual trust by looking particularly into the Spanish National Recovery Plan (NRP). In this

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

[2] Case C-216/18 PPU *Minister for Justice and Equality* EU:C:2018:586.

manner, the article will assess if mutual trust is a transformative principle that may trigger an impulse towards social solidarity within the EU.

2 MUTUAL TRUST: A TOOL TO TACKLE UNEXPECTED COMMON THREATS

The first explicit reference to mutual trust appeared in the context of judicial cooperation in civil matters,[3] but unsurprisingly mutual trust really blossomed in the framework of judicial cooperation in criminal matters. The criminal field raises highly sensitive issues in relation to both the national sovereignty or national identity,[4] and the mutual trust principle, which became the basis for the political (and even moral) foundations of mutual recognition. Based on mutual trust, Member States avoided harmonisation[5] and preserved broad decision-making powers in criminal matters, since it allowed criminal judicial cooperation with minimal changes in national legal systems.

Mutual trust enables cooperation among national authorities in sensitive issues. It allows Member States to apply shared conceptions on matters particularly incisive in fundamental rights, in which there is no agreement among them, and matters that feature symbolic links to the affective foundations of national identity.[6] In this context, it is not surprising that the CJEU stated that the principle of mutual trust between Member States is of fundamental importance in EU law.[7]

This salient role of mutual trust brought with it the need to dwell into the actual meaning of mutual trust. In this regard, the question has been raised whether we should talk about confidence instead of trust.[8] In line with the definition of Niklas Luhmann, confidence occurs when we rely on our expectations and do not consider alternatives, whereas trust is only possible in a situation where the potential damage may be greater than the advantage that is sought. Trust implies taking a risk, making a choice, whereas expectations involve not even considering the need of making such a choice.[9] Still, confidence and trust are intertwined and the decline in confidence eventually erodes trust.[10] The rule of law is a telling example of this link between confidence and trust also in the AFSJ. Member States assumed

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[3] François-Xavier Millet, 'The Protection of Fundamental Rights within the AFSJ: Through or Against Mutual Trust and Mutual Recognition?' in Sara Iglesias Sánchez and Maribel González Pascual (eds), *Fundamental Rights in the Area of Freedom, Security and Justice* (Cambridge University Press 2021) 60.

[4] It is worth recalling, for instance, the position of the Polish, Czech and German Constitutional Courts and the Supreme Court of Cyprus against the extraditions of nationals, as well as the judgments of the Constitutional Courts of Germany, the Czech Republic, and Romania on the Data Retention Directive.

[5] Theoretically mutual recognition maintains the differences within a system of mutual trust and cooperation, while harmonisation creates a homogeneous system with a common normative code. Although within harmonization, the unification of rules can be distinguished from their mere approximation. Massimo Fichera, 'The European Arrest Warrant and the Sovereign State; A Marriage of Convenience?' (2009) 15(1) European Law Journal 70, 74-75.

[6] Neil Walker, 'In search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Neil Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press 2004) 18.

[7] Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 EU:C:2014:2454.

[8] Iris Canor, 'My brother's keeper? Horizontal Solange: An ever-closer distrust among the peoples of Europe' (2013) 50(2) Common Market Law Review 383, 400.

[9] Niklas Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' in Diego Gambetta (ed), *Trust. Making and breaking cooperative relations* (Bodleian Library 2008) 97-98.

[10] ibid 99.

that the rule of law will be upheld throughout the EU;[11] its erosion, however, eventually impinged upon the confidence on key elements of the judicial system and, with it, triggered mistrust towards judicial cooperation.[12]

This relationship between confidence and trust can be found in the research of Ute Frevert, according to whom trust lies in the past, while confidence is looking at the future. Trust is based on expectations accepted and shared by a society, but it is also a feeling as trust is linked to our hopes and desires.[13] Hence trust requires confidence, being conditional, voluntary, and reciprocal.[14] It is based on our confidence in a system, a person, a process; however trust then goes beyond this, leading to take knowingly risky decisions. In fact, trust has a strong sentimental element to it since it conveys a shared sense of vulnerability and mutual dependency, promising fairness and empathy[15]. These are values that play a vital role since the second half of the twentieth century, accompanying processes of interaction among people beyond our family, neighbour, or city.

In this regard, it should be borne in mind that the EU has established formal institutions that offer reliable services and make predictable claims, allowing citizens to take risks, however protected by legal provisions. In a nutshell, common institutions have transformed strangers into fellows with shared common rules of conduct. Institutionalised principles enable extending trust beyond the closer circle of acquaintances. The common experiences, the shared framework, and the needs throughout the years, have engendered soil for trust. A trust that allows the EU to make new brave decisions even in matters in which an agreement was hard to imagine.

In fact, it is worth recalling that the main instrument of mutual trust in the AFSJ, the European Arrest Warrant, was born out of necessity after September 11,[16] when national governments felt that the threat of a terrorist attack required a common bold answer. The need to prevent and prosecute particularly heinous crimes beyond national borders was particularly strong in that very moment, leading to the Framework Decision on the European Arrest Warrant.[17] In a nutshell, Member States felt a mutual vulnerability that could only be dealt with by deepening the cooperation between their police and judicial systems. Still, since it was a particularly sensitive field, Member States relied on mutual trust.

This shared feeling of vulnerability was also evident during the pandemic. Initially, the pandemic hit particularly Italy and Spain, but it spread rapidly throughout the whole of the

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[11] Rule of law is essential in the building of mutual trust since the seminal case Gözutok and Brügge, in which the CJEU clearly remarked that mutual trust implies 'trust in the adequacy of one's partners' rule and also trust that these rules are correctly applied', Joined Cases C-187/01 and C-358/01 *Gözutok and Brügge* EU:C:2002:516, para 12.

[12] The initial approach of the EU legislator to mutual trust in criminal matters promoted an automatic recognition of judicial decisions based on 'blind trust'. However, the shortcomings on Fundamental Rights' protection and on the guarantees of the rule of law prompted an evolution of mutual trust in the AFSJ from blind trust to earned trust. Valsamis Mitsilegas, 'Mutual Recognition and Fundamental Rights in EU Criminal Law' in in Sara Iglesias Sánchez and Maribel González Pascual (eds), *Fundamental Rights in the Area of Freedom, Security and Justice* (Cambridge University Press 2021) 270.

[13] Ute Frevert, *Vertrauensfragen. Eine Obsession der Moderne* (C. H. Beck, 2013) 16-17.

[14] Ute Frevert, *The Moral Economy of Trust: Modern Trajectories* (German Historical Institute London, 2013) 37.

[15] ibid 40.

[16] See Conclusions and plan of action of the extraordinary European Council meeting on 21 September 2001 <https://www.consilium.europa.eu/media/20972/140en.pdf> accessed 01 August 2023.

[17] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

EU in subsequent waves. The response was to lock down countries, putting on hold national economies, a challenge that required brave common and coordinated policies. In fact, the pandemic has been characterised as a complex intergovernmental problem, requiring an unprecedented coordination among tiers of governments, while making the necessary collaboration particularly difficult to achieve.[18] This proved to be true not only at national level, the rise of enhanced coordination and harmonisation in several regional and federal states being a telling example,[19] but also at EU level.

The need to move beyond the traditional legal and economic mechanisms was blatant if the EU wanted to preserve its legitimacy within its borders and its political and economic position beyond them. Besides, there was a high degree of sympathy towards the ones that suffered most from the crisis. In this regard, given that intense emotional situations strengthen the bonds within a community[20] and that trust is fostered by a shared feeling of vulnerability, the pandemic became a powerful catalyst to reinvigorate trust among Member States.

If September 11 brought with it a rise in the cooperation in criminal matters, the pandemic paved the way for an unprecedented economic program: the Next Generation EU (NGEU).[21] Such a program was inconceivable before the pandemic, being not only a politically bold move but also a case of creative legal engineering.[22] It offers grants and loans to support reforms and investments in the Member States and will be funded through the issuance of EU debt. The strategy combines joint debt issuance and burden sharing; that is, debt mutualisation with certain caveats. Bluntly put: the NGEU is nothing short of a historic milestone.[23]

The NGEU does not yet represent a radical shift away from the economically oriented priorities of the EU. In fact, the NGEU is not only a response to overcome the economic downturn caused by the pandemic but, first and foremost, it is a mechanism to foster a structural transformation of the national economies. Still, the NGEU can become a turning point in social solidarity within the EU based on mutual trust. Mutual trust is not to be confused with blind trust,[24] as the CJEU has made clear in cases such as *N.S* and *Aranyosi and Caldararu*, neither is it altruistic. In fact, as already stated, it is voluntary, conditional, and reciprocal. Traits that can be found in the NGEU.

There is a conditionality element attached to the NGEU, since the grants and loans awarded must serve to fund measures, reforms and investments contributing to the

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[18] Mireille Paquet and Robert Schertzer, 'COVID-19 as a complex intergovernmental problem' (2020) 53(2) Canadian Journal of Political Science 343.

[19] Cheryl Saunders, 'Grappling with the Pandemic: Rich insights into intergovernmental relations' in Nico Steytler (ed), *Comparative Federalism and COVID-19: Combating the Pandemic* (Routledge 2021) 391-392.

[20] Peter Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with regard to Monetary Union' (2015) 34 Yearbook of European Law 257, 264.

[21] On the components and intricacies of NGEU, see Bruno de Witte, 'The European Union's COVID-19 Recovery Plan: the legal engineering of an economic policy shift' (2021) 58(3) Common Market Law Review 635, and from a critical stance Martin Nettesheim, 'Next Generation EU. The transformation of the EU financial Constitution' (2021) Heidelberger Beiträge zum Finanz- und Steuerrecht, Bd 16.

[22] de Witte (n 21) 638.

[23] Alicia Hinarejos, 'Next Generation EU: On the agreement of a COVID-19 Recovery Package' (2020) 4 European Law Review 451, 452.

[24] Koen Lenaerts, 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust' (2017) 54(3) Common Market Law Review 805, 840.

objectives established in the Recovery and Resilience Facility (RRF).[25] Objectives that were assessed and validated ex ante by the EU. Furthermore, the RRF, the centrepiece of the NGEU, is deeply embedded in the framework of the EU's economic governance. National authorities are requested to follow the guidance provided by the EU and implement the recommendations that are addressed under the European Semester. Besides, the disbursement of the funds might be suspended when a state does not comply with its obligations under the Stability and Growth Pact (SGP) and the macroeconomic procedure.[26] Thus, the logic of conditionality is still present,[27] but it differs deeply from the strict conditionality that inspired the Euro Crisis legislation.

During the Euro Crisis, the array of measures to tackle the crisis were, to a large extent, informed by the moral hazard that compensated for the lack of trust (even of confidence)[28] towards the Member States suffering most during the crisis. In other words, the strict conditionality attached to the financial assistance given under the Euro Crisis mechanisms mirrored the mistrust among Member States.[29] However, the pandemic was dealt with under a different paradigm. Not only did the pandemic eventually affect all the Member States, but it would have been morally unacceptable to shift the blame onto those Member States with a higher coronavirus death rate. Consequently, moral hazard was considered inapplicable.[30]

While the COVID-19 pandemic probably gave rise to a strong empathy towards the Member States where it was particularly virulent,[31] the EU was also ready for a new paradigm. When the pandemic hit, the Union was already engaged in a process of reflection about the EMU. The SGP and the EU's fiscal rulebook were under discussion and legislative proposals about new budgetary instruments were being discussed.[32] Hence, the pandemic proved a catalyst for a new paradigm.

In the decade prior to the pandemic, the EU had several severe crises, such as the sovereign crisis, the migration crisis, and the Brexit; but the COVID-19 pandemic rapidly topped them all. The health crisis was particularly risky for the EU, since it disrupted every

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[25] The Commission has established a framework for assessing the milestones and targets under the RRF Regulation, along with a methodology for the determination of payment suspension. The framework allows minimal deviations and foresees to give different weight to the specific unfulfilled targets. In this regard, the legislative reforms that address challenges identified in the Country Specific Recommendations (or other document related to the European Semester) bear particular significance since the amount to be suspended will be adjusted upward. Communication from the Commission to the European Parliament and the Council, 'Recovery and Resilience Facility: Two years on A unique instrument at the heart of the EU's green and digital transformation' COM (2023) 99 final.

[26] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23, Article 9.

[27] See Paul Dermine, 'The EU's response to COVID-19 crisis and the Trajectory of Fiscal Integration in Europe - Between Continuity and Change' (2020) 47(4) Legal issues of economic Integration 337.

[28] Hilpold (n 20) 280.

[29] Michael Ioannidis, 'Europe's new transformations. How the EU Economic Constitution changed during the Eurozone crisis' (2016) 53(5) Common Market Law Review 1237, 1247.

[30] Remarks by Mário Centeno following the Eurogroup videoconference of 24 March 2020 <https://www.consilium.europa.eu/es/press/press-releases/2020/03/24/remarks-by-mario-centeno-following-the-eurogroup-meeting-of-24-march-2020/> accessed 01 August 2023.

[31] Philipp Genschel and Markus Jachtenfuchs, 'Postfunctionalism reversed: solidarity and rebordering during the COVID-19 pandemic' (2021) 28(3) Journal of European Public Policy 350, 359.

[32] Dermine (n 27).

single policy and politics.[33] The EU had to face an unprecedented challenge and take risky innovative decisions, relying on the past while looking at the future.

3 MUTUAL TRUST AND SOCIAL SOLIDARITY IN THE NGEU

Solidarity is conditional and reciprocal and is fuelled by the bonds between subjects within a community.[34] Therefore, trust and solidarity share common traits. Still, solidarity in the EU legal order has different dimensions, being divided in solidarity between Member States, social (or domestic) solidarity, and solidarity towards third States.[35] In this context, it is my contention that the NGEU has fostered social solidarity at EU level due to a growing mutual trust, whereas the economic and financial assistance scheme of the Euro Crisis was an example of EU solidarity among Member States.

The measures adopted to tackle the Euro Crisis were informed by the solidarity among the Member States within the EU. The initiative's aids to Member States during the Euro Crisis, such as Greece, were granted as it was important for the preservation of the eurozone, which was deemed to be advantageous for all the Member States therein.[36] These measures were informed by the solidarity among Member States, with reciprocity being a salient trait of solidarity.

Reciprocity is also inherent to the NGEU. In fact, beyond the rhetoric, the NGEU does not imply a fiscal transfer between EU countries, a decisive factor to get support, particularly from the frugal four. These were granted rebates on their contributions and cuts in funding for certain policy areas to get them on board.[37] Furthermore, Article 122 TFEU was the legal basis of the main component of the NGEU,[38] ensuring that the solidarity clause receives a central role in the legal debate. Such a legal basis was particularly appealing for some of the proponents due to its temporary character.[39] In a nutshell, solidarity became the

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[33] Vivien A Schmidt, 'Theorizing institutional change and governance in European responses to the COVID-19 pandemic' (2020) 42(8) Journal of European Integration 1177, 1190.

[34] Hilpold (n 20) 264.

[35] Karl-Peter Sommermann, 'The dimensions of the principle of solidarity in the European Union' in Maribel González Pascual and Aida Torres Pérez, *Social Rights and the European Monetary Union* (Edward Elgar 2022). The threefold character of solidarity at EU level has been highlighted by several authors, even though there are different understandings of these three dimensions. Sangiovanni considers that there are national solidarity (within Member States), solidarity among Member States (Member-State solidarity), and solidarity between European residents and European citizens (transnational solidarity) - see Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) Oxford Journal of Legal Studies 213, 221. Domurath, however, maintains that there is solidarity among Member States, between Member States and individuals and between generations - see Irina Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits to the Judicial and Legal Approach' (2013) 35(4) Journal of European integration 459, 460-462. The entry into force of the EU Charter on Fundamental Rights, and the growing relevance of the European Pillar of Social Rights, listed as one of the general goals of the RRF, gives prominence to the term social solidarity since it is linked to the solidarity among citizens, and it is not necessarily limited to the national borders. On this, see Groussot and Karageorgiou in this Special Issue.

[36] Hilpold (n 20) 265.

[37] Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou, 'Introduction to Law, Solidarity and the limits of Social Europe' in Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou (eds), *Law Solidarity and the limits of Social Europe* (Edward Elgar 2022) 22.

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

[39] Michael Ioannidis, 'Between responsibility and solidarity: COVID-19 and the future of the European Economic Order' (2020) 39 MPIL Research Series.

basis of the agreement because it would not create a permanent obligation.[40] Finally, the RRF is more about resilience than about recovery.[41] Hence, reciprocity and mutual advantage played a key role.

However, the measures adopted to tackle the pandemic crisis, and the subsequent economic crisis, are indeed substantially different to the ones applied during the sovereign crisis, also from the perspective of social rights, ie, social solidarity. In the COVID-19 crisis, Member States were concerned that a major weakening of some EU economies would have a domino effect and impact on others, which could eventually cause a return of the sovereign debt problems. Still, Member States accepted not to impose too many obligations on Member States in need of support. This required a relaxing of the reciprocity and the conditionality of the measures taken as well as trust in Member States' decisions.

Member States were given a wide margin of manoeuvre due to the vagueness of the NGEU's goals, drafting their own National Plan in accordance with their preferences.[42] Consequently, there are deep differences among the different National Plans, even regarding the main goals.[43]

Thus, the EU assumed quite a high risk of fragmentation, each Member State deciding which goals to achieve and how to achieve them. Besides, in the NGEU, there is greater commitment to social solidarity within the Member States.

The RRF explicitly establishes social and territorial cohesion as goals of the NGEU. Furthermore, the twin transition (green and digital) can also be easily connected to social objectives. The digital transformation embodies social policies, for instance, by seeking to prevent further exacerbation of the digital gap between territories or individuals. Similarly, the green transformation can be easily traced back to social rights through its goals of significant improvement of living conditions in impoverished territories, shortcomings of social rights standards within the Member States, and the rights of future generations.

In contrast, during the Euro Crisis, the conditionality attached to the financial and/or assistance mechanisms led to harsh austerity measures to the extent that national social policies were unable to mitigate the resulting dramatic rise in poverty, leading to social exclusion and inequality in countries, such as Greece or Spain. The systems of the Welfare

[40] The temporary character of the NGEU was also crucial in the decision of the German Federal Constitutional Court regarding the Act Ratifying the EU Own Resources Decision ('EU Recovery Package'): 'it cannot be held that the Council manifestly exceeded the competence conferred in Art. 122(1) and (2) TFEU, provided that the EURI Regulation remains strictly tied to the historically exceptional case of "support[ing] the recovery in the aftermath of the COVID-19 crisis"[…] and "tackl[ing] the adverse economic consequences of the COVID-19 crisis.' Judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21.

[41] de Witte (n 21) 679.

[42] Even though 'The recovery and resilience plans shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester, as well as those identified in the most recent Council recommendation on the economic policy of the euro area for Member States whose currency is the euro'. Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17 (Recovery and Resilience Facility Regulation), Article 17.3.

[43] According to the data provided by the EU share of the recovery and resilience plan's estimated contribution to each policy pillar clearly differs. See European Commission, 'Recovery and Resilience Scoreboard' <https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/country_overview.html?lang=en> accessed 01 August 2023.

States were thus changed through the back door, causing substantial damage to the socio-economic fabric of several Member States.[44]

This does not mean, however, that the RRF implies a radical change regarding social rights protection. Tellingly, the main pillars of the RRF are the twin transition (green and digital transformation), sustainable and inclusive economic growth, social and territorial cohesion, children and health, economic, social, and institutional resilience.[45] A minimum of 57 per cent of the recovery and resilience plan's total allocation has been set for the twin transition, whereas no minimum percentage of the fund has been established for social policies. Moreover, the definition of social rights in the RRF is blurry, as they are also linked to a certain extent to economic or geopolitical targets.[46] In concise terms, social rights are not the primary objective of the RRF.

All in all, the NGEU grants more room for national social policies and even provides greater resources for them, if they align with the specific goals of the NGEU, a social solidarity shaped by the diversity of the EU and coherent with the growing concern of the EU for social rights.

Traditionally, social solidarity has been linked to the belonging to a community, as well as to the democratic principle. In fact, there is a symbolic link between solidarity and national identity.[47] Obviously, at EU level, social solidarity is less demanding than at national level, by virtue of the more mediated and less comprehensive nature of the goods provided at EU level.[48] However, the more the idea of a Europe of citizens has developed, the more the concept of solidarity has extended to solidarity among citizens as well, ie, to social solidarity.[49] In fact, Article 2 TEU, as introduced by the Lisbon Treaty, explicitly invokes a society in which, among other principles, solidarity prevails. It is quite telling that Chapter IV of the EU Charter enshrines social rights under the heading 'solidarity'. In a similar vein, the preamble of the EU Charter explicitly states that the EU is founded, inter alia, on solidarity. These legal provisions are a solid basis for social solidarity to become a normative principle of the EU, capable of creating obligations to be respected by the Member States.[50] A principle that could pave the way for a more nuanced interpretation of the balance between economic and social goals, strengthening thereby the protection of social rights within both the EU and the Member States.

This solidarity within the Member States is supported by the NGEU raising the enjoyment of social rights, in contrast to the measures adopted to tackle the Euro Crisis. Therefore, through the NGEU, the EU is playing a supporting role for social rights at

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[44] Maribel González Pascual, 'Social rights protection in the EU: Unlocking the social content of the EU Charter' in Maribel González Pascual and Aida Torres Pérez, *Social Rights and the European Monetary Union* (Edward Elgar 2022) 40.
[44] Sangiovanni (n 35) 223.
[45] Recovery and Resilience Facility Regulation (n 42), Article 3.
[46] It is quite significant that the aim of the pillar devoted to health, economic and social resilience is 'inter alia, increasing crisis preparedness and crisis response capacity': Recovery and Resilience Facility Regulation (n 42), Article 3.
[47] As there is such a link between criminal law and national identity. Sommermann, 2022 (n 35) 8.
[48] Sangiovanni (n 35) 223.
[49] Sommermann (n 35) 14.
[50] Xavier Groussot, Anna Zemskova, and Katarina Bungerfeldt, 'Foundational principles and the rule of law in the EU; how to adjudicate in a Rule-of-Law crisis, and why solidarity is essential' (2022) 5(1) Nordic Journal of European Law 1, 15-16.

national level, which could form the basis for a European Social Union. This is a Union of national welfare states with different legacies and institutions but with a common purpose.[51] A European Social Union that would guide and support the functioning and modernisation of national welfare states based on some common standards and shared objectives, leaving to the Member States wide margins of autonomy in the choice of ways and means.[52] A common framework, a common understanding of the roots, and a path to follow in order to foster a variety of national social policies.

4 SOCIAL SOLIDARITY IN LINE WITH THE EU: TOWARDS A COMPETITIVE SOLIDARITY

The EU's response to the pandemic, ie, the NGEU, gives due regard to the national social goals and interests. However, these must also be aligned with EU goals and interests. This implies that domestic solidarity must be compatible and coherent with the understanding of social solidarity at EU level. A social solidarity embedded in an economic integration process, striving to be more competitive at global level, particularly by fostering the digital transformation, while facing climate change and an increasing need for new sources of energy. In a nutshell, social solidarity may be enhanced if it is aligned with the EU's main goals.

This understanding of social solidarity in an EU framework, suffering from the pressure of an unprecedented competitiveness at international level has been characterised as 'competitive solidarity.'[53] Equality of citizens is pursued through the equalisation of endowments of resources amongst market participants, particularly by investing in the ability of individuals to adapt to a changing market. Social cohesion is sought through an understanding of equal opportunity, emphasising the development of skills and the facilitation of employment. Equity and efficiency are reconciled by social investment.

Such a social investment could boost employment, while at the same time lowering poverty with policy tools that include education, affordable and good-quality universities, accessible lifelong learning, active labour market programmes, individualised assistance, paid parental leave, encouragement of flexible work scheduling and public employment.[54] Complementarily, social investment also implies a minimum-income universal safety net, as social protection and economic stabilisation 'buffers' in ageing societies.[55]

This competitive solidarity, which emphasises social investment and efficiency of the public sector replacing the protective and redistributive solidarity, permeates the NGEU. In fact, even though Member States had a wide margin of manoeuvre when they drafted the

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[51] Frank Vandenbroucke, 'The Idea of a European Social Union: A Normative Introduction' in Frank Vandenbroucke, Catherine Barnard, and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 5.

[52] Maurizio Ferrara, 'The European Social Union: A missing but necessary political good' in Frank Vandenbroucke, Catherine Barnard, and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 51.

[53] Wolfgang Streeck, 'Competitive Solidarity: Rethinking the European Social Model' (1999) 99/8 MPifG Working Paper.

[54] Lane Kenworthy, 'Enabling Social Policy' in Anton Hemerijck (ed), *The Uses of Social Investment* (Oxford University Press 2017) 89.

[55] Anton Hemerijck, 'Social Investment and Its Critics' in Anton Hemerijck (ed), *The Uses of Social Investment* (Oxford University Press 2017) 5.

National Recovery Plans, they necessarily had to pay particular attention to the recommendations addressed to them in the framework of the European Semester, which in turn had increasingly included social goals.[56]

This inclusion of social goals in the Country Specific Recommendations (CSR) involved a subordination of social objectives to the goals of financial stability and economic convergence,[57] the social indicators being in all cases strongly tied to the goal of fostering competitiveness within the market of the CSR.[58] In fact, it is debatable that the European Semester may become an avenue to protect social rights given the overriding role of financial stability.[59] Be it as it may, the CSRs have increasingly displayed a more nuanced approach regarding social rights, paying more attention to measures aiming at reducing poverty and inequality,[60] while particularly emphasising the need to improve employability by enhancing social investment. Therefore, when the National Recovery Plans foresaw the fulfilment of the CSR regarding social policies, they inevitably strengthened social investment.

Furthermore, the investments that could have been included in the National Recovery Plans had several requirements that implicitly disregarded social policies based mostly on protection and redistribution. Firstly, the investments must bring about a structural change. Secondly, expenses of recurrent nature may be financed only when the Member State concerned is able to demonstrate that it will produce long-term effects, that their financing will be sustainably ensured after the duration of the NRP, and that the negative effects on the government's balance are only temporary. Finally, investments for which the implementation could not be ensured within the timespan of the Facility had to be avoided.[61]

As a result, National Recovery Plans fostered social investment. Those measures include, for instance, reforms and investments to make active labour market policies more effective, to improve access to quality education and training digital education, including upskilling and reskilling for working-age adults.[62] Indeed, the Spanish National Recovery Plan[63] included several targets regarding the modernisation and link with the labour market

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[56] Adina Maricut and Uwe Puetter, 'Deciding on the European Semester: the European Council, the Council and the enduring asymmetry between economic and social policy issues' (2018) 25(2) Journal of European Public Policy 193, 194.

[57] Mark Dawson, 'New governance and the displacement of social Europe: The case of the European Semester' (2018) 14(1) European Constitutional Law Review 191, 207.

[58] Francesco Costamagna, 'National social spaces as adjustment variables in the EMU: A critical legal appraisal' (2018) 24(2-3) European Law Journal 163, 176.

[59] Klaus Tuori and Fernando Losada, 'The emergence of the new over-riding objective of financial stability' in Maribel González Pascual and Aida Torres Pérez, *Social Rights and the European Monetary Union* (Edward Elgar 2022) 69.

[60] Jonathan Zeitlin and Bart Vanhercke, 'Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond' (2018) 25(2) Journal of European Policy 149, 167.

[61] Commission Staff Working Document Guidance to Member States Recovery and Resilience Plans, SWD (2020) 205 final. It is quite telling that the examples of specific objectives that could underpin the components of the NRP regarding social policies provided by the guidance are mostly related to improving the employability of the general population along with the protection of vulnerable groups, such as, inter alia, upskilling and reskilling of the working age population, ensuring equality for all and inclusion of persons with disabilities, strengthening the link between education and training and the labour market or developing skills for green and digital transactions.

[62] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank Annual Sustainable Growth Survey 2022, COM (2021) 740 final.

[63] Annex to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Spain {SWD(2021) 147 final}, COM (2021) 322 final.

of the vocational training and the whole education system (component 20), along with the modernisation and digitalisation of education, including a comprehensive reform of the university system (component 21). Furthermore, it also aims at the modernisation of labour market policies, the support and reskilling of workers in transition, and it encompasses training initiatives regarding the green and digital transition (component 23).

Additionally, the Spanish NRP includes a deep modernisation of the minimum vital income, which was put in place on May 2020 by the Royal Decree Law 20/2020,[64] its entry into force being one of the main milestones of the Spanish NRP (component 22). Hence, the NGEU has been an important catalyst to put forward a national minimum vital income scheme in Spain, in line with the growing relevance of a minimum income protection to tackle poverty in the EU.[65] Furthermore, the retirement system (Royal Decree Law 2/2023) and the labour market (Royal Decree Law 32/2021) have been amended to comply with the Spanish NRP.

Within the framework of the NGEU, the Spanish government has achieved a reform of the main components of the Welfare State and the approval of new social entitlements. Furthermore, the social investment has clearly gained terrain in Spain. These amendments should not be underestimated, because any reform in a welfare state is particularly intricate. Not without reason, the modern welfare states have been characterised as 'elephants on the move', as they are extremely difficult to divert from their course, even in case of a national emergency.[66] The NGEU enabled these changes, providing a unique opportunity for Member States to tackle an unexpected and severe crisis, allowing different proposals and reforms throughout Europe. Such flexibility is apt in light of European diversity and a diverse range of social policies.

Therefore, the NGEU has brought with it not only a modernisation of the social services in Spain via digitalisation, but also a different understanding of the main drivers of the Social State and the successful approval of reforms that have been repeatedly recommended by the EU.[67] In fact, during the Euro Crisis, Member States were encouraged to enact changes in their Welfare State in order to achieve modernisation thereof. Still, the

[64] Before the approval of the Royal Decree Law 20/2020, there was a regional minimum vital income scheme. Still, there were significant differences between Member States. Furthermore, the coverage and adequacy of such a scheme had been questioned by the Commission. Recommendation for a Council Recommendation on the 2020 National Reform Programme of Spain and delivering a Council opinion on the 2020 Stability Programme of Spain Brussels, COM(2020) 509 final.

[65] Council Recommendation of 30 January 2023 on adequate minimum income ensuring active inclusion 2023/C 41/01 [2023] OJ C 41/1.

[66] Francis G Castles, 'Black swans and elephants on the move: the impact of emergencies on the welfare state' (2010) 20(2) Journal of European Social Policy 91, 98.

[67] Since the Commission initiated an excessive deficit procedure regarding Spain, in April 2009, it has repeatedly insisted on the need for far-reaching reforms of the labour market and the pension system. In fact, the retirement age was extended from 65 to 67 in 2011. Furthermore, key elements of the labour market, such as the collective bargain or the dismissal conditions, were extensively amended from 2011 to 2014. On these reforms, see José Ignacio Pérez Infante, 'Las reformas laborales en la crisis económica: su impacto económico' (2015) 87(1) Ekonomiaz 246. However, these were partial reforms that did not tackle the main challenges of the labour market: the high unemployment rates (particularly among young people), the high amount of temporary employment and the sustainability of the pension system in the long term. The latest reforms, however, are extremely ambitious, touching upon elements, such as the contribution period, entitlement to a full pension, the main kinds of employment contracts (and its costs) and instruments to increase the flexibility for companies. It is quite remarkable that the labour reform was agreed with trade unions and employers. The reform of the pension system, however, was supported by trade unions and not by employers.

general impression was that those recommendations were directed by economic tools rather than social ideals.[68] The NGEU insists on the same recommendations in many cases, such as providing funds, granting a wider margin of decision to Member States, and encapsulating those measures in social goals. A strategy which has proven to be much more successful.

5 MUTUAL TRUST AS A TRANSFORMATIVE PRINCIPLE

Principles provide the legal corpus for societies under permanent change, while keeping shared convictions and common interests. Principles mirror ideas, hopes, demands; but also new ideas, new hopes, new demands. This is particularly so if we consider them as transformative principles, which do not only imply a specific meaning or content but also a probable development.[69] Such an understanding is particularly necessary in the EU as it has proven to be flexible enough for creative interpretations.

Mutual trust, as a principle of fundamental relevance in the EU, might become a useful legal basis for a deepening of solidarity among citizens.[70] A trust based on a shared sense of vulnerability and mutual dependency. A limited, conditioned, and flexible trust, but trust, nonetheless, which gives a wider margin of manoeuvre to national social policies, while aiming at fulfilling solidarity as an EU goal.

The NGEU is a litmus test for the interrelation between trust and solidarity because it supports social solidarity, while fostering a reshaping of national social policies that must be reoriented towards social investment to be funded by the EU. This idea of solidarity, coupled with mutual trust, implies a specific understanding of the EU as a 'way for member states to enhance their problem-solving capacities in an era of globalization, while indemnifying each other against the risks and losses implicit in integration.'[71] Solidarity requires common targets and interests, along with the feeling of belonging to the same community. A belonging that requires trust in the support of the community in case of an emergency. This belonging is not any longer limited to the boundaries of the nation State in the EU.[72] Besides, Member States currently rely on the EU to respond to dire needs of their citizens, such as tackling a pandemic or facing a war on European soil.

However, given the narrow competences of the EU in the field of social policy, any EU measure in this area must leave room for diversity. Flexibility is essential.[73] Besides, the balance between the market and the social side must be struck by a process, characterised as inclusive, representative, democratic and legitimate.[74] Flexibility and an inclusive and democratic process can only be achieved by giving due regard to both the common interests

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[68] Ulla Neergard, 'When Poverty comes in at the Door, Love flies out the Window' (2016) 7(2) European Labour Law Journal 168, 199.

[69] Armin von Bogdandy, *Strukturwandel des öffentlichen Recht* (Suhrkamp 2022) 152-153.

[70] Thus, mutual trust and solidarity are legally interdependent principles, which part of a network of principles that creates 'an ever closer union among the peoples of Europe'. Opinion 2/13 (n 7) para 167. A strong bond between mutual trust and solidarity that the CJEU explicitly verbalizes in the budget conditionality cases. See Case C-156/21 *Hungary v Parliament and Council* (n 1) para 129 and Case C-157/21 *Poland v Parliament and Council* (n 1), para 147.

[71] Sangiovanni, 2013 (n 35) 241.

[72] Ingolf Pernice, 'Solidarität in Europa' in Christina Callies (ed), *Europäische Solidarität und nationale Identität (*Mohr Siebeck 2013) 28.

[73] Ane Aranguiz, *Combating poverty and social exclusion in European Union Law* (Routledge 2022) 168.

[74] Sacha Garben, 'The Constitutional (Im)balance between the market and the social in the European Union' (2017) (13) European Constitutional Law Review 23, 60.

of the EU and the Member States, and to national specific needs, expectations, and democratic decision-making processes. A reciprocal, conditional and voluntary mutual trust can pave the way to solve such a conundrum as mutual trust encourages Member States to work (and invest) in a coordinated way,[75] while giving them sufficient leeway to decide if, how, and when, to achieve common social goals.

Hence, mutual trust emerges as an apt principle to trigger social solidarity, in a similar way as it has been an enabler of cooperation in criminal matters. In both areas, Member States were supposed to achieve key goals themselves and close to their national identity (such as public security and social solidarity). However, as the integration process evolved, the national response became insufficient, even if not incompatible with the EU integration process. Furthermore, in both cases, the EU and the Member States had to take risky decisions when confronted with their shared and innate vulnerabilities. This required negotiations to accept basic common rules and, also, limits to it: confidence cannot be broken, goals and interests must be aligned, a wide national margin of manoeuvre must be kept, and moving forward implies a negotiation.

For such a move forward, the EU not only needs trust but has also provided it. A trust that has led to the nuanced conditionality of the NGEU; the EU trusts that Member States will implement the NRP as agreed, whereas Member States trust that the EU provides better alternatives to unexpected problems. A trust that is flexible and can have setbacks[76] but that opens new avenues for the construction of a society in Europe in which solidarity prevails (Article 2 TEU).

6 CONCLUDING REMARKS

Trust is based on our expectations but it also has a strong sentimental element, a feeling of mutual dependency and shared vulnerability. Unsurprisingly, trust has proven to be a powerful tool in the EU to face unexpected new challenges by fostering the cooperation among Member States, even in sensitive areas.

The pandemic created a strong bond of shared vulnerability and empathy among Member States, which paved the way for a creative and bold program, the NGEU. A historic economic program, which is simultaneously apt as an instrument to increase social solidarity within the EU based on mutual trust. Member States could draft their NRPs in accordance with their preferences and foster social goals, if they wanted, with the support of the EU.

Still, this social solidarity must be embedded in an economic program, the NGEU, whose main goal is to foster a structural transformation of national economies at an increasingly competitive international level. Therefore, social solidarity provided by the NGEU has to be reconciled with the competitive solidarity that permeates the EU.

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[75] Paul de Grauwe, 'The Crisis as a Paradigm Shift' in Anton Hemerijck, Ben Knapen, and Ellen van Doorne (eds), *Aftershocks. Economic Crisis and Institutional Choice* (Amsterdam University Press 2009) 88.

[76] In fact, currently the Commission is conducting an in-depth review of the actual fulfilment of three milestones of the NRP agreed by the Italian government. By now, the evaluation period has been extended and the payment of EUR 19 billion to Italy has been postponed. BUDG-ECON Committee meeting on 17 April 2023, 'Recovery and Resilience Dialogue with the European Commission' <https://www.europarl.europa.eu/RegData/etudes/IDAN/2023/741506/IPOL_IDA(2023)741506_EN.pdf> accessed 01 August 2023.

Consequently, Member States have particularly displayed programs fostering social investment.

Spain is a telling example. Not only is social investment being fostered in Spain by far-reaching and long-awaited reforms of the main pillars of the Social State, such as the labour market and the retirement system, they have also been successfully amended within the framework of the NRP. This transformation has been achieved with the help of mutual trust, which has proven to be a transformative principle responding to new challenges.

The malleability of mutual trust is key as it leaves room for diversity of national Social States, reshaping them in accordance with the EU understanding of solidarity. Therefore, mutual trust and solidarity are greatly interlinked, and their common reading could be the solid basis for a stronger future of social solidarity within the EU.

LIST OF REFERENCES

Aranguiz A, *Combating poverty and social exclusion in European Union Law* (Routledge 2022)
DOI: https://doi.org/10.4324/9781003222125

Canor I, 'My brother's keeper? Horizontal Solange: An ever-closer distrust among the peoples of Europe' (2013) 50(2) Common Market Law Review 383
DOI: https://doi.org/10.54648/cola2013054

Castles FG, 'Black swans and elephants on the move: the impact of emergencies on the welfare state' (2010) 20(2) Journal of European Social Policy 91
DOI: https://doi.org/10.1177/0958928709358793

Costamagna F, 'National social spaces as adjustment variables in the EMU: A critical legal appraisal' (2018) 24(2-3) European Law Journal 163
DOI: https://doi.org/10.1111/eulj.12278

Dawson M, 'New governance and the displacement of social Europe: The case of the European Semester' (2018) 14(1) European Constitutional Law Review 191
DOI: https://doi.org/10.1017/s1574019618000081

de Grauwe P, 'The Crisis as a Paradigm Shift' in Hemerijck A, Knapen B, and van Doorne E (eds), *Aftershocks. Economic Crisis and Institutional Choice* (Amsterdam University Press 2009)

de Witte B, 'The European Union's COVID-19 Recovery Plan: the legal engineering of an economic policy shift' (2021) 58(3) Common Market Law Review 635
DOI: https://doi.org/10.54648/cola2021046

Dermine P, 'The EU's response to COVID-19 crisis and the Trajectory of Fiscal Integration in Europe - Between Continuity and Change' (2020) 47(4) Legal issues of economic Integration 337
DOI: https://doi.org/10.54648/leie2020020

Domurath I, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits to the Judicial and Legal Approach' (2013) 35(4) Journal of European integration 459
DOI: https://doi.org/10.1080/07036337.2012.704630

Ferrara M, 'The European Social Union: A missing but necessary political good' in Vandenbroucke F, Barnard C, and De Baere G (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017)
DOI: https://doi.org/10.1017/9781108235174.003

Fichera M, 'The European Arrest Warrant and the Sovereign State; A Marriage of Convenience?' (2009) 15(1) European Law Journal 70
DOI: https://doi.org/10.1111/j.1468-0386.2008.00451.x

Frevert U, *The Moral Economy of Trust: Modern Trajectories* (German Historical Institute London, 2013)

— —, *Vertrauensfragen. Eine obsession der Moderne* (C. H. Beck, 2013)
DOI: https://doi.org/10.17104/9783406656101

Garben S, 'The Constitutional (Im)balance between the market and the social in the European Union' (2017) (13) European Constitutional Law Review 23
DOI: https://doi.org/10.1017/s1574019616000407

Genschel P and Jachtenfuchs M, 'Postfunctionalism reversed: solidarity and rebordering during the COVID-19 pandemic' (2021) 28(3) Journal of European Public Policy 350
DOI: https://doi.org/10.1080/13501763.2021.1881588

González Pascual M, 'Social rights protection in the EU: Unlocking the social content of the EU Charter' in González Pascual M and Torres Pérez A, *Social Rights and the European Monetary Union* (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781839105258.00008

Groussot X, Zemskova A, and Bungerfeldt K, 'Foundational principles and the rule of law in the EU; how to adjudicate in a Rule-of-Law crisis, and why solidarity is essential' (2022) 5(1) Nordic Journal of European Law 1
DOI: https://doi.org/10.36969/njel.v5i1.24496

Hartzén AC, Iossa A, and Karageorgiou E, 'Introduction to Law, Solidarity and the limits of Social Europe' in Hartzén AC, Iossa A, and Karageorgiou E (eds), *Law Solidarity and the limits of Social Europe* (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781800885516.00007

Hemerijck A, 'Social Investment and Its Critics' in Hemerijck A (ed), *The Uses of Social Investment* (Oxford University Press 2017)
DOI: https://doi.org/10.1093/oso/9780198790488.003.0001

Hilpold P, 'Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with regard to Monetary Union' (2015) 34 Yearbook of European Law 257
DOI: https://doi.org/10.1093/yel/yev020

Hinarejos A, 'Next Generation EU: On the agreement of a COVID-19 Recovery Package' (2020) 4 European Law Review 451

Ioannidis M, 'Between responsibility and solidarity: COVID-19 and the future of the European Economic Order' (2020) 39 MPIL Research Series
DOI: https://doi.org/10.2139/ssrn.3725458

Ioannidis M, 'Europe's new transformations. How the EU Economic Constitution changed during the Eurozone crisis' (2016) 53(5) Common Market Law Review 1237
DOI: https://doi.org/10.54648/cola2016115

Kenworthy L, 'Enabling Social Policy' in Hemerijck A (ed), *The Uses of Social Investment* (Oxford University Press 2017)
DOI: https://doi.org/10.1093/oso/9780198790488.003.0007

Lenaerts K, 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust' (2017) 54(3) Common Market Law Review 805
DOI: https://doi.org/10.54648/cola2017061

Luhmann N, 'Familiarity, Confidence, Trust: Problems and Alternatives' in Diego Gambetta (ed), *Trust. Making and breaking cooperative relations* (Bodleian Library 2008)

Maricut A and Puetter U, 'Deciding on the European Semester: the European Council, the Council and the enduring asymmetry between economic and social policy issues' (2018) 25(2) Journal of European Public Policy 193
DOI: https://doi.org/10.1080/13501763.2017.1363271

Millet FX, 'The Protection of Fundamental Rights within the AFSJ: Through or Against Mutual Trust and Mutual Recognition?' in Iglesias Sánchez S and González Pascual M (eds), *Fundamental Rights in the Area of Freedom, Security and Justice* (Cambridge University Press 2021)
DOI: https://doi.org/10.1017/9781108769006.006

Mitsilegas V, 'Mutual Recognition and Fundamental Rights in EU Criminal Law' in in Iglesias Sánchez S and González Pascual M (eds), *Fundamental Rights in the Area of Freedom, Security and Justice* (Cambridge University Press 2021)
DOI: https://doi.org/10.1017/9781108769006.016

Neergard U, 'When Poverty comes in at the Door, Love flies out the Window' (2016) 7(2) European Labour Law Journal 168
DOI: https://doi.org/10.1177/201395251600700202

Nettesheim M, 'Next Generation EU. The transformation of the EU financial Constitution' (2021) Heidelberger Beiträge zum Finanz- und Steuerrecht, Bd 16
DOI: https://doi.org/10.11588/hfst.2021.16.84345

Paquet M and Schertzer R, 'COVID-19 as a complex intergovernmental problem' (2020) 53(2) Canadian Journal of Political Science 343
DOI: https://doi.org/10.1017/s0008423920000281

Pérez Infante JI, 'Las reformas laborales en la crisis económica: su impacto económico' (2015) 87(1) Ekonomiaz 246

Pernice I, 'Solidarität in Europa' in Christina Callies (ed), *Europäische Solidarität und nationale Identität (*Mohr Siebeck 2013)

Sangiovanni A, 'Solidarity in the European Union' (2013) 33(2) Oxford Journal of Legal Studies 213
DOI: https://doi.org/10.1093/ojls/gqs033

Saunders C, 'Grappling with the Pandemic: Rich insights into intergovernmental relations' in Steytler N (ed), *Comparative Federalism and COVID-19: Combating the Pandemic* (Routledge 2021)
DOI: https://doi.org/10.4324/9781003166771-27

Schmidt VA, 'Theorizing institutional change and governance in European responses to the COVID-19 pandemic' (2020) 42(8) Journal of European Integration 1177
DOI: https://doi.org/10.1080/07036337.2020.1853121

Sommermann KP, 'The dimensions of the principle of solidarity in the European Union' in González Pascual M and Torres Pérez A, *Social Rights and the European Monetary Union* (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781839105258.00007

Streeck W, 'Competitive Solidarity: Rethinking the European Social Model' (1999) 99/8 MPifG Working Paper

Tuori K and Losada F, 'The emergence of the new over-riding objective of financial stability' in González Pascual M and Torres Pérez A, *Social Rights and the European Monetary Union* (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781839105258.00010

Vandenbroucke F, 'The Idea of a European Social Union: A Normative Introduction' in Vandenbroucke F, Barnard C, and De Baere G (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017)
DOI: https://doi.org/10.1017/9781108235174.002

von Bogdandy A, *Strukturwandel des öffentlichen Recht* (Suhrkamp 2022)

Walker N, 'In search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Walker N (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press 2004)
DOI: https://doi.org/10.1093/acprof:oso/9780199274659.003.0001

Zeitlin J and Vanhercke B, 'Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond' (2018) 25(2) Journal of European Policy 149
DOI: https://doi.org/10.4324/9781351025621-2

SOLIDARITY AND THE BOND OF NATIONALITY IN UNION CITIZENSHIP LAW

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While solidarity as an ideal in the legal relationship between a host Member State and the non-national Union citizen has all but vanished from the discourse of EU free movement law, it has resurged in another line of case law concerning Union citizenship. The relationship between the Member States and their own nationals is at the centre of the case law on loss of Union citizenship rights under Article 20 TFEU. The bond of nationality between the individual and the state is there designated as one of 'solidarity' and 'good faith'. This article argues that solidarity, as an ideal, is also relevant for understanding the case law dealing with returning, or naturalising Union citizens who have made use of freedom of movement under Article 21 TFEU. The article provides a discussion on the various expressions of solidarity as a component of the ideal bond of nationality between a Union citizen and their home Member State. Conclusively, it is argued that the meaning of the bond of nationality will continue to develop together with the legal evolution of Union citizenship.

1 INTRODUCTION

Whether it is a legal concept, a value, or even a principle, 'solidarity' appears in various places in Union law.[1] In the area of Union citizenship, it has been known to figure in the case law of the Court of Justice of the European Union (the Court) on Union citizens' use of the right to freedom of movement under Article 21(1) TFEU. The right to non-economically motivated freedom of movement, read together with the principle of non-discrimination on grounds of nationality in Article 18 TFEU, have been referred to by the Court to designate a host Member State's obligations to show some degree of solidarity with resident non-national Union citizens.[2] However, in the last 10-15 years, the judicial discourse on solidarity in this area has been replaced with that of the host Member State's legitimate interest to protect their public finances from being burdened as a result of non-national Union citizens use of freedom of movement (see section 2 below).[3]

Instead, the Court has more recently, and repeatedly, referred to solidarity in the line of case law concerning Union citizenship and denationalisation. 'Solidarity' and 'good faith'

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[1] See analyses by Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25(3) Maastricht Journal of European and Comparative Law 310; Floris De Witte, *Justice in the EU: the Emergence of Transnational Solidarity* (1st edn, Oxford University Press 2015); Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017).

[2] Case C-184/99 *Grzelczyk* EU:C:2001:458; Case C-456/02 *Trojani* EU:C:2004:488.

[3] Case C-140/12 *Brey* EU:C:2013:565, para 54. See more recently, Case C-709/20 *The Department for Communities in Northern Ireland* EU:C:2021:602, para 80 and the case note by Maria Haag, 'The Coup de Grâce to the Union Citizen's Right to Equal Treatment: CG v. The Department for Communities in Northern Ireland' (2022) 59(4) Common Market Law Review 1081.

appear together when the Court refers to the quality of the Member State's relationship to their *own* nationals under the Union law rule that creates the status of Union citizenship; Article 20 TFEU. Solidarity is there an ideal, designating the 'bond of nationality' between the individual and the Member State of nationality. In the Court's reasoning, the sanctity of this bond of nationality legitimises that the Member States might enforce their competence in the field of their respective nationality legislation.[4] Albeit that this competence must be exercised with due regard to Union law, specifically, the fundamental rights of the EU's Charter of Fundamental Rights (the Charter), and the principle of proportionality (see section 3).[5]

The purpose of this article is to explore this relatively recently developed aspect of Union law governing Union citizenship, to which solidarity, as part of the 'bond of nationality', has become increasingly relevant. Leaving behind the right to equal treatment and the issue of the non-national Union citizen in relation to their *host* Member State of residence, the article discusses how Union citizenship law in other ways fosters the ideal of solidarity. Specifically, what solidarity might mean for the bond between Union citizens and their *home* Member State of nationality. It will be argued that Union law places obligations that embody an ideal of solidarity on the Member States in their relationship to their own nationals (section 4). Solidarity, as a premise for the national bond between the citizen and the State makes the circular, or returning, Union citizen's use of freedom of movement under Article 21 TFEU interact with the issue of the individual's loss of Union citizenship rights under Article 20 TFEU (section 5).

2 THE IDEAL OF SOLIDARITY IN UNION CITIZENSHIP LAW

In EU legal studies, 'solidarity' has often been associated with the issue of equal treatment rights in the context of freedom of movement of non-economically active persons.[6] In cases from the early 2000's, such as *Grzelczyk* and *Trojani*, the Court provided the interpretation that the Member States, when participating in the legal regime that is the internal market, must accept to receive and care for other Member State nationals, in their capacity as Union citizens who are making lawful use of freedom of movement, with a 'certain degree of financial solidarity'.[7]

Some scholars pointed out the potential disharmony between those belonging to the vast majority of the European population who remain 'static', and those who are 'moving' Union citizens. This could happen if the 'static', who never come within the scope of EU free movement law, are forced by a top-down pressure from Union law to include the

[4] Case C-118/20 *Wiener Landesregierung (Révocation d'une assurance de naturalisation)* EU:C:2022:34, para 52; Case C-221/17 *Tjebbes and Others* EU:C:2019:189, para 33; Case C-135/08 *Rottmann* EU:C:2010:104, para 51.
[5] Case C-118/20 *Wiener Landesregierung* (n 4), paras 58-61 and case law cited there.
[6] See, for example, Catherine Barnard, 'EU Citizenship and the Principle of Solidarity' in Eleanor Spaventa and Michael Dougan (eds), *Social Welfare and EU law* (Hart Publishing 2005); Catherine Jacqueson,'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27 European Law Review 260.
[7] Case C-184/99 *Grzelczyk* (n 2) para 44; Case C-209/03 *Bidar* EU:C:2005:169, para 56.

'moving' Union citizens into their local solidarity circles without perceiving that they themselves get anything from this supranational system in return.[8]

Such concerns should arguably have faded given the Court's more recent case law interpreting the principle of non-discrimination on grounds of nationality as expressed in Article 24 in Directive 2004/38 (the Free Movement Directive).[9] The exigence of a 'certain degree of financial solidarity' has largely been replaced by the requirement that the individual fulfils the conditions for residence and equal treatment laid down in the Free Movement Directive.[10] Some scholars deplore this vanishing of solidarity in individual cases where it could have been both a legitimate and proportionate demand on host Member States vis-à-vis a resident, non-economically active, Union citizen.[11] Nevertheless, the legal development in this area has shifted from focussing on the effectiveness and the protection of the individual's free movement rights to that of the legitimate interest of host Member States not having to accept non-national Union citizens becoming a burden on their social assistance system.[12] The legitimisation of this Member State interest, which the case law affirms that the Free Movement Directive protects, has largely disqualified the Union citizen's expectations of some degree of solidarity based on an individual assessment when making use of freedom of movement as a non-economically active person.[13] Instead, it is presumed that the conditions for residence and equal treatment rights in the Free Movement Directive strike the proportionate balance between the host Member State's and the individual's respective interests.[14]

3 THE SHIFT IN FOCUS: FROM THE *HOST* TO THE *HOME* MEMBER STATE

In the case law development of freedom of movement of non-economically active Union citizens, solidarity in the legal relationship between a *host* Member State and the non-national

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[8] See in general Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 European Law Review 787; Gareth Davies, 'The Humiliation of the State as a Constitutional Tactic' in Fabian Amtenbrink and Peter A J van den Berg (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010).

[9] Case C-333/13 *Dano* EU:C:2014:2358; Case C-67/14 *Alimanovic* EU:C:2015:597; Case C-299/14 *García-Nieto and Others* EU:C:2016:114; Case C-709/20 *The Department for Communities in Northern Ireland* EU:C:2021:602.

[10] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77. On this point, see analysis by Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

[11] See, among others, Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) Common Market Law Review 889; Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom' (2017) 54(1) Common Market Law Review 209; Anastasia Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The Alimanovic Judgment' (2016) 53(4) Common Market Law Review 1007.

[12] Case C-140/12 *Brey* (n 3), para 47; Case C-67/14 *Alimanovic* (n 9), para 44; Case C-483/17 *Tarola* EU:C:2019:309 paras 50-51.

[13] See in general, Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) Common Market Law Review 17.

[14] Spaventa (n 10).

Union citizen has all but vanished from the judicial discourse. As an ideal, it has instead resurged in the case law concerning Union citizens' bond to their *home* Member State.

3.1 NATIONALITY AS THE GATE TO UNION CITIZENSHIP

The individual's steps towards naturalisation in a Member State require that he or she consents to fulfil certain legally determined conditions for belonging, oftentimes through language tests, knowledge tests, or declarations of loyalty. The Member State, on the other hand, will have to assume a solidaristic inclusion of that individual into its circle of 'insiders' once the naturalisation process is completed.[15] A state therefore needs to uphold their side of the bargain in the social contract that nationhood forms – a contract that, for EU Member States, is shaped in part by the legal concept of Union citizenship, and therefore is also a matter of Union law. The Member States' privileged role as the gatekeepers of Union citizenship acquisition, since the route towards that status goes exclusively via national citizenship, also creates Member State obligations under Union law.[16] Under Article 20 TFEU, these obligations have become apparent with regards to Member State measures that cause the loss of Union citizenship status and/or rights.

3.2 FORMAL OR EFFECTIVE LOSS OF UNION CITIZENSHIP RIGHTS

There is by now a small streak of cases from the Court concerning the interpretation of Article 20 TFEU as protection against the *formal* loss of Union citizenship. Typically, this happens through the home Member State's measure of denationalisation of one of their ownnationals. In turn, this case law on *de jure* loss of Union citizenship, mirrors the considerably vaster case law on *de facto* loss of Union citizenship rights. The latter concerns Article 20 TFEU's protection against the *effective* loss of 'the genuine enjoyment of the substance of rights conferred' under Union citizenship. The famous *Ruiz Zambrano* judgment from 2011 started the de facto line of case law, centrering on the individual's loss, in practice, of his or her rights as a Union citizen. In *Ruiz Zambrano*, a child with Union citizenship status was at risk of being forced to leave the EU unless his third-country national parents were granted a right of residence in the child's home Member State Belgium.[17] As with the de jure cases, there was no clear element of freedom of movement to the situation in *Ruiz Zambrano*. Instead, Article 20 TFEU was triggered by the home Member State's measure that might result in forcing the child out of the EU, thereby threatening the child's potential use and enjoyment of his Union citizenship rights.

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[15] See in general, Liav Orgad, 'Naturalization' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

[16] See in general, Francesca Strumia, 'Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States' (2020) 45 European Law Review 507.

[17] Case C-34/09 *Ruiz Zambrano* EU:C:2011:124. See also Case C-133/15 *Chavez-Vilchez and Others* EU:C:2017:354 and more recently, Joined Cases C-451/19 and C-532/19 *Subdelegación del Gobierno en Toledo (Séjour d'un membre de la famille - Ressources insuffisantes)* EU:C:2022:354.

Essentially, both lines of Article 20 TFEU case law, the de jure and the de facto situations, affect the same objective: to protect the individual against either formal or effective loss of their Union citizenship rights.[18]

The case law on de jure loss of Union citizenship to date consists of three judgments, while a fourth is currently pending before the Court.[19] In the following, it will be argued how the commonalities in the Court's legal reasoning in all three de jure judgments, suggest the forming of a specific jurisprudence in this area, in which the ideal of national solidarity echoes throughout.

4 'THE 'BOND OF NATIONALITY' – AFFIRMING THE MEMBER STATES' COMPETENCE IN THE AREA OF NATIONALITY LAW

The *Rottmann* judgment in 2010 established a new frontier of the jurisdictional scope of Union law, in that Article 20 TFEU (formerly Article 17 EC) took effect in a legal situation with no clear cross-border element.[20] It would be followed by the 2019 case of *Tjebbes and Others*, and more recently, the *JY* case in 2022.

4.1 CREATING A JURISPRUDENCE ON THE FORMAL LOSS OF UNION CITIZENSHIP

In *Rottmann*, the Court found that a Member State measure of revoking national citizenship was an issue of Union law insofar as it placed the applicant: '[…] in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto [...]'.[21]

Rottmann concerned an active measure of denationalisation. Germany, as the home Member State that had granted Mr. Rottmann naturalisation, decided to revoke their naturalisation decision when it surfaced that he had given fraudulent information in his nationality application. In its judgment, the Court highlighted the importance of the Member State having due regard to what it would mean for the individual to lose his Union citizenship, as a direct consequence of the revoked naturalisation decision. The principle of proportionality should be respected when assessing whether the fraudulent behaviour of the applicant should rightfully lead to his loss of nationality.[22]

By contrast, the *Tjebbes and Others* judgment in 2019 dealt with a different issue of denationalisation.[23] Here, the national law at stake was Dutch nationality law, which

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[18] See Opinion of AG Szpunar in Case C-118/20 *Wiener Landesregierung (Révocation d'une assurance de naturalisation)* EU:C:2021:530, para 69.
[19] A fourth case is currently pending at the Court of Justice - Case C-689/21 *X v Udlændinge- og Integrationsministeriet*. See Opinion of AG Szpunar to the case from 26 January 2023 EU:C:2023:53.
[20] C-135/08 *Rottmann* (n 4). See case note by Dimitry Kochenov, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) Common Market Law Review 1831.
[21] C-135/08 *Rottmann* (n 4), para 42.
[22] ibid para 55.
[23] Case C-221/17 *Tjebbes and Others* (n 4). See case note by Hanneke van Eijken, 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, *M.G.*

ordained, as an automatic consequence of long-term passivity to renew Dutch passports, that Dutch nationals, living in a third country, would experience that their Dutch nationality 'expired'. The loss of nationality was in these cases not due to an active measure by the Member State to revoke it, but by the *automatic* operation of law. It was not caused by the individual's fraudulent behaviour, but rather, an automatised consequence of the individual's passivity. Again, the Court could see an applicability of Union law, in that Article 20 TFEU was activated because of the risk the concerned individuals faced, alongside losing their Dutch nationality, to also lose their Union citizenship.[24] In *Tjebbes*, the Court was clear on that the procedural workings of the Dutch nationality law at issue were off quilt with the requirements of Union law and the principle of proportionality. It was notably the lack of judicial review that the Court criticised:

> The loss of the nationality of a Member State by operation of law would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law.[25]

In addition, the judgment provided what factors should be included in an individual assessment of the consequences of a formal loss of Union citizenship. Elements to consider would be the limitations to the person's possibility to make use of freedom of movement, including difficulties to re-enter the home Member State or other EU Member States for the purpose of maintaining links with members of his or her family or for the pursuit of professional activity.[26] In this context, the protection of family life of the EU Charter's Article 7, and, where minors were concerned, the best interest of the child in the Charter's Article 24(2), should inform the assessment.[27]

The third judgment to date in the line of cases on de jure loss of Union citizenship is the *JY* judgment of 2022.[28] Here, the loss of Union citizenship was due to Austria's decision to withdraw an assurance of naturalisation that the state had given to a nationality applicant. Austria had given its assurance of future naturalisation into Austrian nationality with the condition that the applicant must firstly renounce her original, Estonian nationality. This was because Austrian nationality law did not recognise the holding of multiple nationalities for persons who were naturalising. As a result, the applicant herself had to initiate the loss of Union citizenship (and thus became stateless) by giving up her original Member State nationality. As per her request, Estonia renounced her Estonian nationality, causing her, it was thought only temporarily, to lose her Union citizenship. When Austria later decided to withdraw their previously made assurance, and deny her naturalisation in what should have become her new *home* Member State, her loss of Union citizenship became permanent. The

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Tjebbes and Others v *Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189' (2019) 15(4) European Constitutional Law Review 714.

[24] Case C-221/17 *Tjebbes and Others* (n 4), para 32.

[25] ibid para 41.

[26] ibid para 46.

[27] ibid paras 46-48.

[28] Case C-118/20 *Wiener Landesregierung* (n 4). See case note by Katarina Hyltén-Cavallius, 'Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises: ECJ 18 January 2022, Case C-118/20, *Wiener Landesregierung (Revocation of an Assurance of Naturalisation)*, ECLI:EU:C:2022:34' (2022) 18(3) European Constitutional Law Review 556.

reasoning Austria gave for disqualifying the applicant from attaining Austrian nationality was due to her having committed a number of minor traffic offences, resulting in only pecuniary penalties. The Court called the Austrian measure out as being clearly disproportionate. The permanent loss of Union citizenship could not be motivated by the Member State's reasons for changing its mind *after* an assurance had been given to the applicant.[29] Even though *JY* was already stateless when Austria withdrew the assurance of naturalisation, it was the Austrian naturalisation process as a whole that caused her the definite loss of Union citizenship.[30] In that light, Austria was acting in the role of the *home* Member State that had caused their own (prospective) national to lose her Union citizenship.

4.2 'SOLIDARITY' AS 'THE BEDROCK OF THE BOND OF NATIONALITY'

In all three cases above, the Court, while enforcing the applicability of Article 20 TFEU, also had to determine the Member States' sphere of competence and discretion in this area. Since nationality law, governing the acquisition and loss of national citizenship, is itself a national competence, the demands of Union law should arguably show a relative high degree of respect.[31] In all three cases, the Court found that the Member States' respective measures against the individuals concerned were in and of themselves legitimate. This was so, since 'it is legitimate for a Member State to wish to protect the special relationship of *solidarity* and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'.[32]

'Solidarity' thereby, together with 'good faith' in the cases on the de jure loss of Union citizenship, is a qualitative component of the ideal nationality bond formed between a state and its national. The reasoning in all three judgments affirm that the Court accepts that the bond of nationality is the Member States' prerogative to define and regulate. The ideal of solidarity embedded therein is thereby one of *national* solidarity, between a state and its nationals.[33] From the point of view of Union law, the importance of the bond of nationality legitimises the public interest of the Member State in some cases to dissolve that bond. At issue before the Court has been, respectively, the measure to revoke a naturalisation that has been granted based on the fraudulent information of the applicant (*Rottmann*); to revoke naturalisation when the individual's attachment to the Member State has been lost (*Tjebbes*), and; to deny naturalisation for an applicant who no longer is deemed to fulfil the national requirements for naturalisation (*JY*). However, despite affirming the legitimacy of the public interest of the Member States to regulate for both naturalisation and denationalisation in their nationality laws, the Court has made clear that these rules, as well as their procedures, must respect Union law. As pointed out in the judgments discussed above, the principle of

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[29] Case C-118/20, *Wiener Landesregierung* (n 4), para 73.
[30] On this point, see analysis by Ilaria Gambardella, 'JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built up by the CJEU on Nationality and EU Citizenship' (2022) 7 European Papers 399.
[31] HU Jessurun d'Oliveira, Gerard René de Groot and Anja Seling, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, *Janko Rottman v. Freistaat Bayern Case Note 1* Decoupling Nationality and Union Citizenship? *Case Note 2* The Consequences of the *Rottmann* Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) 7(1) European Constitutional Law Review 138, 148.
[32] Case C-118/20 *Wiener Landesregierung* (n 4), para 52; Case C-221/17 *Tjebbes and Others* (n 4), para 33, Case C-135/08 *Rottmann* (n 4), para 51 (emphasis added).
[33] See Gill-Pedro in this Special Issue.

proportionality as well as the Charter are of central importance. Notably, this concerns the Charter's Articles 7 and 24(2), respectively the right to respect for private and family life and the protection of the best interests of the child.[34]

Solidarity, as an aspect of the bond of nationality also appears in the application for a preliminary reference made by the High Court of Eastern Denmark (*Østre Landsret*) to the Court on the interpretation of Article 20 TFEU in a currently pending case.[35] In the application, the referring court, as well as the parties, variously refer to 'solidarity', 'loyalty', and 'good faith' when designating the 'genuine link' between a citizen and their state of nationality. The phrasing is equally adopted by Advocate General Szpunar in his Opinion to the pending case, thereby affirming 'solidarity' as an established piece of the legal language that describes 'the bond of nationality' in Union citizenship law.[36]

4.3 RESPECTING NATIONALITY LAW BUT PROTECTING UNION CITIZENSHIP

As argued above, Union citizenship law respects the particularities of nationality law. This follows what has been recognised in international law, notably in the well-known judgment by the International Court of Justice (ICJ) in the 1955 case of *Nottebohm*.[37] With that judgment, the ICJ affirmed the sovereign right of each state to enact its own laws on who may become, and remain, its nationals.[38] However, in the EU Court's interpretation, this competence is constrained by the legal exigences that Union law puts on the Member States in the light of Union citizenship being 'the fundamental status' of the nationals of the Member States.[39]

A clear obligation that the protection of Union citizenship requires from the home Member State is to respect their *right of redress* against a Member State decision to dissolve that very bond. This was a central component to the Court's judgment in *Tjebbes and Others*, and will surely be as central in the forthcoming judgment in *X v. Udlændinge- og Integrationsministeriet*. Not only should the individual be able to demand a reassessment of a decision to be excluded from belonging to the nation. Union law also requires that the Member State provides for judicial review, specifically considering what a denationalisation decision means for the individual's belonging to the supranational status of Union citizenship.[40]

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[34] Case C-118/20 *Wiener Landesregierung* (n 4), para 61 and case law cited there.
[35] See Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, made by Østre Landsret (Denmark) on 16 November 2021 in Case C-689/21 *X v Udlændinge- og Integrationsministeriet*.
[36] See Opinion of AG Szpunar in Case C-689/21 (n 19), paras 52, 55, 57-58.
[37] ICJ, *Nottebohm* judgment (*Lichtenstein* v. *Guatemala*), 6 April 1955, Second Phase, Judgments [1955] ICJ 1, *ICJ Reports 1955*, 4. On the link between the Article 20 TFEU jurisprudence and *Nottebohm*, see also Katja Swider, 'Legitimizing Precarity of EU Citizenship: Tjebbes Case C-221/17, M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken, Judgment of the Court (Grand Chamber) of 12 March 2019, EU:C:2019:189' (2020) 57(4) Common Market Law Review 1163, 1168-1169.
[38] Orgad (n 15) 348.
[39] Case C-184/99 *Grzelczyk* (n 2), para 31.
[40] Case C-221/17 *Tjebbes and Others* (n 4), para 42 and Case C-689/21 *X v Udlændinge- og Integrationsministeriet*. See Opinion of AG Szpunar in Case C-689/21 (n 19), para 46.

5 THE UNION LAW IDEAL OF THE BOND OF NATIONALITY

Based on the discussion above, the ideal bond of nationality in the Court's case law on de jure loss of Union citizenship, consists of two stilts: that of *solidarity* and *good faith* between an individual and a state. These are the factors that may result in a successful naturalisation process under the state's nationality laws. Conversely, the lack thereof, due to the individual's fraudulent or unlawful behaviour, as in *Rottmann* and *JY*, or to the individual's perceived lack of attachment to the Member State, as in *Tjebbes* and the currently pending *X v Udlændinge- og Integrationsministeriet*, may justify a measure to respectively, revoke a decision of naturalisation or of promised naturalisation, or by the operation of law automatically dissolve nationality.

5.1 THE INDIVIDUAL'S ROLE IN THE BOND OF NATIONALITY

By confirming the legitimacy of these Member State measures – without necessarily finding them to be proportionate in each case – the Court, in its judgments, is also giving away an implicit definition of what the bond of nationality requires from the individual. The applicant in *Rottmann* had failed in the practice of solidarity and good faith by providing false information in his naturalisation application.[41] Honesty is therefore a component of what the bond of nationality should require from the individual in his or her dealings with the state, and the lack thereof might result in the dissolving of that bond. As for *JY*, the Court recognised that the individual's unlawful conduct may legitimately result in the Member State's denial of naturalisation, albeit that in the case at hand, it was deemed to be a disproportionate measure.[42]

The situation in *Tjebbes and Others*, similar to that of the currently pending *X v. Udlændinge- og Integrationsministeriet*, points to another component; that of the individual's manifest interest in maintaining a nationality link with a Member State. The Court finds it legitimate that a Member State requires from its nationals that, if they move out of the EU, it is up to each person to maintain an active relationship to their Member State of nationality. If not, the bond of nationality may, under certain conditions, lawfully be dissolved.[43] In *Tjebbes and Others*, the act of renewal of passport through contacts with consular bodies of the Member State in third states, would have been the way for the individual to maintain and preserve their bond of nationality.

However, there is something uneven in the assessment of the bond of nationality in these cases. In the judgments so far, the Court has focussed on the ways in which, *the individual* may fail in maintaining the bond of nationality, which in turn legitimises the Member State's wish to cut them off from their nationality link. It can be asked wherein the bond of nationality the expression of solidarity directed *from* the Member State towards their nationals is found. The following is a reflection on how the ideal of national solidarity is implied also in what Union law requires from the Member States in their relationship to their own nationals, in the name of Union citizenship.

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[41] Case C-135/08 *Rottmann* (n 4), paras 50-51.
[42] Case C-118/20 *Wiener Landesregierung* (n 4), para 57.
[43] Case C-221/17 *Tjebbes and Others* (n 4), paras 37-38.

5.2 THE MEMBER STATE'S ROLE IN THE BOND OF NATIONALITY

While the de jure case law highlights the procedural requirements for the lawfulness of denationalisation, the de facto case law on Article 20 TFEU also embodies the ideal of national solidarity. In the following, it will be argued that 'solidarity' can also be said to characterise the home Member State's obligations under Union law towards its returning nationals, who have made use of freedom of movement under Article 21 TFEU. In turn, this links the logic of the home Member State's obligations in relation to their own nationals under freedom of movement to its obligations to their own nationals under Article 20 TFEU.

5.2[a] The solidaristic reception of the returning Member State national and his or her family members

The judgment in *Eind* affirmed how Union law protects the Union citizen's right to return to their Member State of nationality as an integral part of their use of freedom of movement.[44] While a Member State's respect for their own nationals to leave and re-enter the state's territory stems from international law obligations, Union law ensures additional protection of these rights. The expression of a solidaristic bond between the Member State and its national in this regard lies in the very unconditional nature of the Union citizen's right to return after exercising freedom of movement. As was the situation in *Eind*, the national citizen cannot be demanded to return as an economically active person, nor as having sufficient resources not to be a financial burden on the state's public finances.[45] While these are legitimate and lawful requirements for the *non-national* Union citizen, who wishes to establish residence in a host Member State, the national citizen cannot be required to do so, but should be received and re-accepted by the home Member State upon return. For this reason, free movement law also aims to strike down any indirect discrimination that a Member State exerts on one of its returning national citizens, as a result of them having made use of freedom of movement.[46] Unequal treatment between 'static' nationals and 'moving' nationals must be justified and proportionate or is otherwise unlawful under Article 21 TFEU.

The absolute right to return to the home Member State is essential as the safety net for the Union citizen whose use of freedom of movement to a host Member State does not work out. If residence in a host Member State cannot be maintained, for economic reasons, or because of the individual's conduct, the home Member State must re-accept the individual into its national solidarity circle.

In addition, and what is perhaps an even more powerful demand that Union law puts on their Member States in their relation to their returning nationals, is to solidarically receive the returning nationals' family members. As is clear from the reading of *Eind*, together with *O and B*, the Member State of nationality must accept not only the right to return of their national, but also the rights of his non-national family members. As the Court reasoned in *Eind*, the continuation of the derived residence rights of such family members, which have been established in a host Member State, must be valid *per analogy*, when the family comes

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[44] Case C-291/05 *Eind* EU:C:2007:771. See also Case C-456/12 *O. and B.* EU:C:2014:135.
[45] Case C-291/05 *Eind* (n 44), para 32.
[46] See judgments like Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger* EU:C:2013:524, Case C-224/98 *D'Hoop* EU:C:2002:432; Case C-224/02 *Pusa* EU:C:2004:273.

back to settle in the Union citizen's home Member State.[47] Union citizens would be deterred to leave their home Member State and pursue freedom of movement elsewhere, if they were not sure that they could return to their home Member State with their close family members who might have joined them in the host Member State.[48] In the *O and B* case, the reasoning from Eind was held to be relevant also for Union citizens who have only resided as non-economically active persons in a host Member State. So long as their residence has been 'sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State', their right of residence in the host Member State should apply by analogy in the home Member State.[49] This right to family reunification in the Union citizen's home Member State upon return may not be conditioned by demands of economic activity or resourcefulness, as this would render the right to return itself conditional and might dissuade the Union citizen from making use of freedom of movement in the first place.[50]

5.2[b] The acceptance of the naturalising Union citizen's continued right to family reunification

Following a similar logic to that which applies to circular freedom of movement, the Court in the case of *Lounes* extended a protection for continued derived residence rights of third-country national family members, when the primary rights-bearer, the Union citizen in the family, naturalises in the host Member State. In *Lounes*, a Union citizen with permanent residence status chose to naturalise and become a national in her host Member State.[51] According to the nationality law's conditions, she had fulfilled her part for the bond of nationality to be formed between her and the host Member State, so as to make this state her new *home* Member State. However, her act of naturalisation challenged the validity of her third-country national spouse's derived residence rights that had been established when she was a non-national Union citizen, exercising her right to freedom of movement. The Court could not accept a loss of family reunification rights as being a consequence of a Union citizen's choice to take the most definitive step of integration in a host Member State after permanent residence status, namely to naturalise into one of the Member State's own nationals. This was according to the 'underlying logic of gradual integration that informs Article 21(1) TFEU', to facilitate and encourage the integration of Union citizens and their family members in their host Member States.[52] As a result, when accepting the resident Union citizen as one of its own nationals, the Member State must accept the rights of family reunification that the citizen has already been granted under Union law based on freedom of movement.

The solidaristic expression in the newly formed bond of nationality between a Union citizen and the Member State that goes from being *host* to *home* lies in the obligation to accept

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[47] Case C-291/05 *Eind* (n 44), para 39. See also Case C-456/12 *O. and B.* (n 44), para 50.
[48] Case C-291/05 *Eind* (n 44), paras 35-39.
[49] Case C-456/12 *O. and B.* (n 44), para 51.
[50] Jeremy B Bierbach, 'The Reality Test of Residence Goes through the Looking Glass: Court of Justice of the European Free Trade Association States (EFTA Court), Judgment of 26 July 2016, Case E-28/15, *Yankuba Jabbi* v *The Norwegian Government, Represented by the Immigration Appeals Board*' (2017) 13(2) European Constitutional Law Review 383, 395-396.
[51] Case C-165/16 *Lounes* EU:C:2017:862.
[52] ibid para 58.

the accompanying third-country national family members' continued right of residence as rights that have already been created under Union law.

Through the moving Union citizen's naturalisation in the host Member State, the connection between EU free movement law and Union citizenship status comes full circle and the rights incurred under Article 21 TFEU meet the exigences of Article 20 TFEU. Solidarity on behalf of the home Member State vis-à-vis its own national and their third-country national family members is an implicit ideal also in the line of case law on *de facto* loss of Union citizenship rights.

5.2[c] Member State solidarity and de facto loss of Union citizenship rights under Article 20 TFEU

The *Ruiz Zambrano* line of cases concerns the effective, practical loss of the 'genuine enjoyment' of the rights attached to Union citizenship.[53] For the purpose of protecting against the disproportionate risk of such effective loss of Union citizenship rights, the home Member State must, into its solidarity circle, accept the third country national family members of their own national Union citizens where there is such a relationship of dependency that the Union citizen would be compelled to depart from the EU if the third country national was not granted residence rights in their home Member State.[54] The home Member State must welcome those third country national family members that are necessary for their own national to be able to enjoy their Union citizenship rights and to remain within the EU.

It is, to that end, the home Member State's role in the bond of nationality to solidaristically provide a legal space for their national Union citizen's third-country national family member, so they can reside lawfully and be the necessary support for the Union citizen that the latter depends on. Any restriction of this right of the Union citizen to reside in their Member State of nationality with their essential family members must be proportionate and respect the fundamental rights standards of the Charter.[55]

While the de jure loss of Union citizenship may be caused mostly by the individual's own behaviour, the de facto loss of Union citizenship or the restrictions posed to freedom of movement under Article 21 TFEU are due to the behaviour of the home Member State in its relationship to its own, national Union citizens .

6 CONCLUSION

If 'solidarity' has lost its legal spark for the relationship between the Union citizen and their *host* Member State, it remains relevant to the continuous legal development of the exigences of Union citizenship and EU free movement law on the *home* Member State's relationship to its nationals. When enacting a formal loss of Union citizenship by its nationality laws, Union law requires that the Member States provide judicial review of the consequences that loss will have for the individual whose nationality bond the state wishes to dissolve. In addition, as an obligation stemming from international law, the home Member State is where a Union

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[53] Case C-34/09 *Ruiz Zambrano* (n 17), para 42.
[54] See recent judgment in Joined Cases C-451/19 and C-532/19 *Subdelegación del Gobierno en Toledo* (n 17), paras 83-86.
[55] ibid.

citizen must always have an unconditional right to return to, after having made use of freedom of movement and under Article 21 TFEU. The ideal of national solidarity is here embedded in the Union law requirement that the Union citizen and the family members which they have established a family life with in a host Member State must be welcomed into the national solidarity circle as well. Likewise, Article 20 TFEU, with its demand of the effectiveness of the 'genuine enjoyment' of Union citizenship rights, requires that, if a Union citizen cannot make use of freedom of movement to achieve family reunification with their third country national family member upon whom they depend, the Member State of nationality must allow for that family member to reside in that state together with the national Union citizen. This constitutes part of the responsibility that the Member States have undertaken when forming the status of Union citizenship and adopting Article 20 TFEU. In the years ahead, the material requirements encircling the solidarity constituting the Member States' bond of nationality to their own nationals will likely receive evermore attention in Union law.

LIST OF REFERENCES

Barnard C, 'EU Citizenship and the Principle of Solidarity' in Eleanor Spaventa and Michael Dougan (eds), *Social Welfare and EU law* (Hart Publishing 2005)
DOI: https://doi.org/10.5040/9781472563385.ch-008

Bierbach JB, 'The Reality Test of Residence Goes through the Looking Glass: Court of Justice of the European Free Trade Association States (EFTA Court), Judgment of 26 July 2016, Case E-28/15, Yankuba Jabbi v The Norwegian Government, Represented by the Immigration Appeals Board' (2017) 13(2) European Constitutional Law Review 383
DOI: https://doi.org/10.1017/s1574019617000104

Butler G, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25(3) Maastricht Journal of European and Comparative Law 310
DOI: https://doi.org/10.1177/1023263x18769207

Davies G, 'The Humiliation of the State as a Constitutional Tactic' in Amtenbrink F and van den Berg PAJ (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010)
DOI: https://doi.org/10.1007/978-90-6704-445-5_7

De Witte F, *Justice in the EU: the Emergence of Transnational Solidarity* (1st edn, Oxford University Press 2015)
DOI: https://doi.org/10.1093/acprof:oso/9780198724346.001.0001

Gambardella I, 'JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built up by the CJEU on Nationality and EU Citizenship' (2022) 7 European Papers 399

Haag M, 'The Coup de Grâce to the Union Citizen's Right to Equal Treatment: CG v. The Department for Communities in Northern Ireland' (2022) 59(4) Common Market Law Review 1081
DOI: https://doi.org/10.54648/cola2022073

Hyltén-Cavallius K, 'Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises: ECJ 18 January 2022, Case C-118/20, Wiener Landesregierung (Revocation of an Assurance of Naturalisation), ECLI:EU:C:2022:34' (2022) 18(3) European Constitutional Law Review 556
DOI: https://doi.org/10.1017/s1574019622000219

Iliopoulou-Penot A, 'Deconstructing the Former Edifice of Union Citizenship? The Alimanovic Judgment' (2016) 53(4) Common Market Law Review 1007
DOI: https://doi.org/10.54648/cola2016091

Jacqueson C, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27 European Law Review 260

Jessurun d'Oliveira HU, de Groot GR and Seling A, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottman v. Freistaat Bayern Case Note 1 Decoupling Nationality and Union Citizenship? Case Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) 7(1) European Constitutional Law Review 138
DOI: https://doi.org/10.1017/s1574019611100073

Kochenov D, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) Common Market Law Review 1831
DOI: https://doi.org/10.54648/cola2010075

O'Brien C, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom' (2017) 54(1) Common Market Law Review 209
DOI: https://doi.org/10.54648/cola2017007

Orgad L, 'Naturalization' in Shachar A et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017)
DOI: https://doi.org/10.1093/oxfordhb/9780198805854.013.15

Shuibhne NN, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) Common Market Law Review 889
DOI: https://doi.org/10.54648/cola2015074

Somek A, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 European Law Review 787

Spaventa E, 'Earned Citizenship: Understanding Union Citizenship Through Its Scope' in Kochenov D (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017)
DOI: https://doi.org/10.1017/9781139680714.009

Strumia F, 'Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States' (2020) 45 European Law Review 507

Swider K, 'Legitimizing Precarity of EU Citizenship: Tjebbes Case C-221/17, M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken, Judgment of the Court (Grand Chamber) of 12 March 2019, EU:C:2019:189' (2020) 57(4) Common Market Law Review 1163
DOI: https://doi.org/10.54648/cola2020719

Thym D (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017)
DOI: https://doi.org/10.5040/9781509914678

— —, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) Common Market Law Review 17
DOI: https://doi.org/10.54648/cola2015002

van Eijken H, 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, M.G. Tjebbes and Others v Minister van Buitenlandse Zaken, ECLI:EU:C:2019:189' (2019) 15(4) European Constitutional Law Review 714
DOI: https://doi.org/10.1017/s1574019619000385

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),[1] especially in regard to border checks, asylum and immigration where crisis and emergency situations are more likely to emerge;[2] (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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[1] Article 67 TFEU.

[2] Article 80 TFEU.

products;[3] (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;[4] 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.[5]

Against this background, this contribution seeks to explore the legal interaction between loyalty and solidarity at EU level,[6] 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,[7] that principle has evolved over time into a veritable cornerstone of the EU legal order.[8] It is often listed among the constitutional principles of the Union,[9] and has been labelled by some authors as the most important general principle of EU law.[10] This follows foremost from its internal structure: while it has been raised specifically that it

[3] Article 122 TFEU.
[4] Article 194 TFEU.
[5] Article 222 TFEU.
[6] 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.
[7] 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.
[8] cf Marc Blanquet, *L'article 5 du Traité CEE. Recherche sur les obligations de fidélité des États members de la Communauté* (LGDJ 1994) 1; Loïc Azoulai, '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.
[9] 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.
[10] 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,[11] especially from the *pacta sunt servanda* provision of the 1969 Vienna Convention on the Law of Treaties,[12] 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.[13]

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,[14] its direct effect,[15] and the principle of *effet utile*.[16] 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*,[17] 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.[18]

This linkage has been reaffirmed later on in the opinion on the *EU's Accession to the European Convention of Human Rights*[19] and further elaborated, more recently, in the *Achmea* ruling,[20] 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

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[11] 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]'.
[12] 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.
[13] Klamert, *The Principle of Loyalty in EU Law* (n 7) 47–61.
[14] 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.
[15] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd* EU:C:1990:257, para 19.
[16] 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.
[17] Case C-2/88 *Imm. J.J. Zwartveld* EU:C:1990:315.
[18] ibid paras 16–17.
[19] Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, paras 168 and 173.
[20] 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*.[21] 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.[22] 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,[23] 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'.[24] For the present purposes, it will suffice to

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

[22] See also Loïc Azoulai, '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.

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

[24] 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 Bourgmann-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* (Dalloz

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]'.[25] For the Court, at least in this judgment, solidarity and loyalty are thus intrinsically connected, representing the foundations of the supranational legal order.[26] 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.[27]

Solidarity is often considered as a constitutional (or fundamental) principle of the EU legal order,[28] underpinning the legal system of the Union as a whole.[29] 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.[30] Not surprisingly, that difficulty has led to argue the existence of an 'idea of solidarity between the Member States'.[31]

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.[32] 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

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).

[25] 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'.

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

[27] 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.

[28] 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* (Dalloz 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.

[29] Case 848/19 P *Germany v Commission* (n 23), para 41.

[30] 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* (Dalloz 2011) 67, and Klamert, 'Loyalty and Solidarity as General Principles' (n 6) 134.

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

[32] 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),[33] 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.[34]

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.[35] 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.[36]

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.[37] 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.[38] 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

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[33] Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 16.

[34] 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* (Dalloz 2011) 137.

[35] Verstert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9(1) European Constitutional Law Review 7, 10–11.

[36] 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.

[37] 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.

[38] 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'.[39] Here, solidarity serves as a kind of interpretive canon, recourse to which is meant to ensure a fair balance between social and economic rights;[40] a canon which, as the *Dano* overruling clearly illustrates,[41] is not immune from worries about the free movement of persons in the EU, particularly in times of budgetary constraints.[42]

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.[43] 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*.[44] 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.[45]

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

[39] Case C-184/99 *Grzelczyk* 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.

[40] 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.

[41] 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.

[42] See also the contribution by Katarina Hyltén-Cavallius, in this Special Issue.

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

[44] See *supra*, Section 2.

[45] '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.[46]

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'.[47] 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.[48]

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.[49] Others claimed that solidarity appears in the jurisprudence in the form of the joint concept 'solidarity-loyalty'.[50] 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 intertwinement 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'.[51] 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.[52] Similarly, Article 31(1) TEU combines solidarity with the negative duties stemming from the Loyalty Clause,[53] 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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[46] Case 848/19 P *Germany v Commission* (n 23), para 49.
[47] ibid para 53.
[48] See *supra*, Section 2.
[49] Berramdane (n 30) 74–75; Boutayeb (n 24) 13.
[50] 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.
[51] 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.
[52] 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'.
[53] 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'.[54] Quite significantly, however, the Court has also specified that the solidarity principle is mentioned in Article 2 TEU.[55] 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 Juízes 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'.[56] 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'[57] 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.[58] 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.[59] 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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[54] cf Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97, para 129.
[55] ibid.
[56] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 32.
[57] Klamert, 'Loyalty and Solidarity as General Principles' (n 6) 128.
[58] Borger (n 35) 14.
[59] 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.[60] But this is not enough to conclude that only Article 4(3) TEU should govern their functioning.[61] 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.[62]

To put this in more general terms, solidarity duties in the EU Treaties – solidarity *stricto sensu* – seem to be particularly invokable in crisis or emergency situations.[63] 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.[64] 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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[60] 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.

[61] For a contrary view, see Blanquet (n 8) 233.

[62] 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.

[63] 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.

[64] 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[65] 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.[66] 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.[67] 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 conjuction with Article 4(2) TEU. By indirectly relying on the 'framing of powers' doctrine,[68] 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.[69] Indeed, '[t]he recognition of such and exception […] might impair the binding nature of European Union law and its uniform application'.[70] 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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[65] 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.

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

[67] ibid paras 87 and 93.

[68] See *supra*, Section 2.

[69] 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.

[70] 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.[71] 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.[72]

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[73] – and further confirmed by the Court of Justice in the appeal brought by the Federal Republic of Germany[74] – 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'[75] and giving expression to the constitutional framework of the Union.

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[71] Casolari, *Leale cooperazione tra Stati membri e Unione europea* (n 6) 182–210.

[72] 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.

[73] 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'.

[74] See *supra*, Section 3.

[75] Case C-284/16 *Achmea BV* (n 20) para 33.

LIST OF REFERENCES

Azoulai L, '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

— —, 'Structural Principles in EU Law: Internal and External' in Cremona M (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018)
DOI: https://doi.org/10.5040/9781782259985.ch-002

Bast J, 'Deepening supranational integration: interstate solidarity in EU migration law' in Biondi A et al (eds), *Solidarity in EU Law — Legal Principle in the Making* (Edward Elgar Publishing 2018)
DOI: https://doi.org/10.4337/9781783477784.00011

Berramdane A, 'Solidarité, loyauté dans le droit de l'Union européenne' in Boutayeb C (ed), *La solidarité dans l'Union européenne — Éléments constitutionnels et matériels* (Dalloz 2011)

Bieber R and Maiani F, '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

Blanquet M, *L'article 5 du Traité CEE. Recherche sur les obligations de fidélité des États members de la Communauté* (LGDJ 1994)

Borger V, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9(1) European Constitutional Law Review 7
DOI: https://doi.org/10.1017/s1574019612001022

Boutayeb C, 'La solidarité, un principe immanent au droit de l'Union européenne — Éléments pour une théorie' in Boutayeb C (ed), *La solidarité dans l'Union européenne — Éléments constitutionnels et matériels* (Dalloz 2011)

Casolari F, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi* (Editoriale Scientifica 2020)

— —, 'Inter se Agreements between Member States, and the Outer Limits of the Court's Jurisdiction in Infringement Proceedings: *Slovenia v Croatia*' in Butler G and Wessel RA (eds), *EU External Relations Law. The Cases in Context* (Hart Publishing 2022)
DOI: https://doi.org/10.5040/9781509939725.ch-090

Castellarin E, 'General Principles of EU Law and General International Law' in Andenas M et al (eds), *General Principles and the Coherence of International Law* (Brill 2019)
DOI: https://doi.org/10.1163/9789004390935_011

Coicaud JM, 'Conclusion: Making Sense of National Interest and International Solidarity' in Coicaud JM and Wheeler NJ (eds), *National Interest and International Solidarity — Particular and Universal Ethics in International Life* (United Nations University Press 2008)

Croci F, *Solidarietà tra Stati membri dell'Unione europea e governance economica europea* (G Giappichelli Editore 2020)

Dagilyte E, 'Solidarity: a general principle of EU law? Two variations on the solidarity theme' in Biondi A et al (eds), *Solidarity in EU Law — Legal Principle in the Making* (Edward Elgar Publishing 2018)
DOI: https://doi.org/10.4337/9781783477784.00009

De Baere G and Roes T, 'EU Loyalty as Good Faith' (2015) 64(4) International and Comparative Law Quarterly 829
DOI: https://doi.org/10.1017/s0020589315000421

Eggett C, 'Solidarity as an International Legal Norm' in Kassoti E and Idriz N (eds), *The Principle of Solidarity. International and EU Law Perspectives* (T.M.C. Asser Press 2023)
DOI: https://doi.org/10.1007/978-94-6265-575-1_3

Gerbrandy A and Scholten M, 'Core Values: Tensions and Balances in the EU Shared Legal Order' in van den Brink T et al (eds), *Sovereignty in the Shared Legal Order of the EU — Core Values of Regulation and Enforcement* (Intersentia 2015)

Gestri M, 'EU Disaster Response Law: Principles and Instruments' in de Guttry A et al (eds), *International Disaster Response Law* (T.M.C. Asser Press 2012)
DOI: https://doi.org/10.1007/978-90-6704-882-8_5

Groussot X and Zemskova A, 'The Resilience of Rights and European Integration' in Bakardjieva Engelbrekt A and Groussot X (eds), *The Future of Europe. Political and Legal Integration Beyond Brexit* (Hart Publishing 2019)
DOI: https://doi.org/10.5040/9781509923335.ch-004

Guastaferro B, 'Sincere Cooperation and Respect for National Identities' in Schütze R and Tridimas T (eds), *Oxford Principles of the European Union. Volume I: The European Union Legal Order* (Oxford University Press 2018)
DOI: https://doi.org/10.1093/oso/9780199533770.003.0013

Klamert M, *The Principle of Loyalty in EU Law* (Oxford University Press 2014)
DOI: https://doi.org/10.1093/acprof:oso/9780199683123.001.0001

— —, 'Loyalty and Solidarity as General Principles' in Ziegler KS et al (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022)
DOI: https://doi.org/10.4337/9781784712389.00014

Kuijper PJ and Paasivirta E, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Evans M and Koutrakos P (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013)
DOI: https://doi.org/10.5040/9781472566430.ch-002

Lang JT, 'Article 10 EC—The Most Important "General Principle" of Community Law' in Bernitz U et al (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008)

Levade A, 'La valeur constitutionnelle du principe de solidarité' in Boutayeb C (ed), *La solidarité dans l'Union européenne — Éléments constitutionnels et matériels* (Dalloz 2011)

Mengozzi P, *L'idea di solidarietà nel diritto dell'Unione europea* (Bologna University Press 2022)
DOI: https://doi.org/10.30682/sg320

Miglio A, 'Solidarity in EU asylum and migration law: A crisis management tool or a structural principle?' in Kuzelewska E et al (eds), *Irregular Migration as a Challenge for Democracy* (Intersentia 2018)
DOI: https://doi.org/10.1017/9781780687025.004

Neframi E, '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
DOI: https://doi.org/10.54648/cola2010017

— —, 'La solidarité et les objectifs d'action extérieure de l'Union européenne' in Boutayeb C (ed), *La solidarité dans l'Union européenne — Éléments constitutionnels et matériels* (Dalloz 2011)

Neuvonen PJ and Ziegler KS, 'General Principles in the EU Legal Order: Past, Present and Future Directions' in Ziegler KS et al (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022)
DOI: https://doi.org/10.4337/9781784712389.00007

Oliva AM, 'Solidarité et construction européenne' in Beguin JC et al (eds), *La solidarité en droit public* (L'Harmattan 2005)

Picheral C, 'La solidarité dans la Charte des droits fondamentaux de l'Union' in Boutayeb C (ed), *La solidarité dans l'Union européenne — Éléments constitutionnels et matériels* (Dalloz 2011)

Roes T, 'Limits to Loyalty. The Relevance of Article 4(3) TEU' (2016) 52(1) Cahiers de droit européen 253

Ross M, 'Solidarity — A New Constitutional Paradigm for the EU?' in Ross M and Bourgmann-Prebil Y (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199583188.003.0002

Sharpston E, 'Thinking About Solidarity and EU Law' in Kassoti E and Idriz N (eds), *The Principle of Solidarity. International and EU Law Perspectives* (T.M.C. Asser Press 2023)
DOI: https://doi.org/10.1007/978-94-6265-575-1_8

Stjernø S, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005)
DOI: https://doi.org/10.1017/cbo9780511490378

Tridimas T, *The General Principles of EU Law* (Oxford University Press 2006)

von Bogdandy A, 'Constitutional Principles' in von Bogdandy A and Bast J (eds), *Principles of European Constitutional Law* (Hart Publishing 2009)

Zorzi Giustiniani F, *International Law in Disaster Scenarios. Applicable Rules and Principles* (Springer Cham 2021)
DOI: https://doi.org/10.1007/978-3-030-50597-4

EU RULEMAKING IN RESPONSE TO CRISIS: THE EMERGENCE OF THE PRINCIPLE OF ENERGY SOLIDARITY AND ITS USE

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This article presents an overview of the legal development in the energy market, within the general EU internal market, and focuses on the emergence of the principle of energy solidarity. The process has been premised on the inclusion of Article 194 TFEU in 2009 and the resulting shift of legal basis, from Article 114 TFEU. But the significant stages are more recent. The analysis takes its starting point in the ruling by the EU Court of Justice (Grand Chamber) in Case C-848/19 P, where the Court declared the existence of a principle of energy solidarity that both EU institutions and Member States must take into account in the normal operation of the internal market. Then, the article proceeds with an empirical assessment how that ruling has been exploited by the EU Commission and Legislature. The overall conclusion is that the principle defined by the Court in the context of Article 194 TFEU has enabled the EU Legislature to push the confines of its competences and, in that way, to respond to the energy crisis.

1 RESEARCH CONTEXT

The present text builds on some of the results of an interdisciplinary project that has studied rulemaking in the EU internal market after the global financial crisis 2008. It was called *A Centralisation of Rulemaking in Europe? The Legal and Political Governance of the Financial Market;* the results of which are published in several books, articles and reports.[1] The text takes a starting point in my own research within this project and some of the ideas that I have continued to explore. They relate to the fact that the reform of the financial market departed from traditional rulemaking in the internal market. To some extent, this must be explained by the context that the changes were introduced in response to crisis. But irrespective of that, they were also the results of a critique of traditional rulemaking and enforcement of EU legal acts, and designed to come to terms with a perceived lack of cohesiveness.[2]

Against this background, I suggest that the reform of the financial market constitutes a structural shift: from a reactive model based on enforcement of EU legal acts that give Member States responsibility for transposition (and room for interpretation) to a proactive

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[1] See in particular Carl Fredrik Bergström and Magnus Strand (eds), *Legal Accountability in EU Markets for Financial Instruments: The Dual Role of Investment Firms* (Oxford University Press 2021); Adrienne Heritiér and Johannes Karremans (eds), *Regulating Finance in Europe: Policy Effects and Political Accountability* (Edward Elgar Publishing 2021); and Adrienne Heritiér and Magnus Schoeller (eds) *Governing Finance in Europe: A Centralisation of Rulemaking?* (Edward Elgar Publishing 2020).

[2] See Report of the High-Level Group on Financial Supervision in the EU (2009) (De Larosière Report), 27 <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf> accessed 01 August 2023.

model based on coordination of national authorities and uniform application of EU legal acts across all Member States. The new model is not easy to reconcile with the institutional framework in the EU Treaties or, indeed, the provisions relating to rulemaking, legal acts and enforcement. Therefore, it affects the balance of powers in the EU legal and political system. At the same time, the changes contribute to a dynamic development with new forms of interaction, interest representation and legal acts. To understand this better, I now ask myself whether a similar shift can be observed in other areas of the EU internal market.

The legal concept of the internal market was inserted through amendments of the EC Treaties in 1987 and is said to comprise 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties' (Article 26 TFEU). None of all competences that relate to the internal market has been more important than Article 114 TFEU (originally Article 100a TEEC). It enables the EU Legislature to adopt 'measures for approximation' of national law which have as their object 'the establishment and functioning of the internal market'. The inclusion of Article 114 TFEU created more generous preconditions for rulemaking relating to the free movement of goods, persons, services and capital. Put into historical context, the introduction of the internal market represents a watershed in the integration process. Before, there had been limited political progress with respect to the free movement of goods, persons, services and capital. But after 1987, the situation changed. The most visible step was taken by the EU Commission through the launch of its internal market programme.[3]

The original internal market model was based on the existing institutional framework and supported by changes to the Treaties: the new competence in Article 114 TFEU and better preconditions for delegation of rulemaking powers to the EU Commission. The significance of the Treaties was clearly manifested in the internal market programme, which included a package of proposals for legal acts to be adopted by the EU Legislature over an intense period expiring 1993. Most of these legal acts were to have the form of directives, addressed to the 'Member States' and required to leave them the 'choice of form and methods' (Article 288 TFEU). The realisation of the directives – their transposition into national law – was to be safeguarded by the Commission itself, through enforcement actions against Member States, represented by their Governments (Article 258 TFEU).

The internal market programme became a political success and cemented the notion of 'harmonisation' based on the use of directives. This in turn influenced the nature of EU law; typically focusing on legal principles and procedures that should ensure directives' effectiveness in Member States. Since then, the original internal market model has been reinforced by several subsequent reforms of the Treaties. Most important are improvements relating to enforcement actions; introducing fines for Member States (1993) and simplifying the procedure before the EU Court of Justice (1997 and 2009). But there have also been changes relating to rulemaking: encouraging the EU Legislature to delegate more powers to the EU Commission and reminding all Member States of their duty to adopt the measures necessary to implement EU legal acts (2009).

[3] See Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985), COM (1985) 310 final.

For a long time, the process for integration of the financial market was consistent with that of the internal market in general. But after the financial crisis the development in the financial market took a different direction. Most significantly, the use of directives was shifted to a use of 'directly applicable' regulations that are binding in their entirety (Article 288 TFEU).[4] This in turn made it possible for the EU Legislature to establish new EU agencies, most notably the European Securities Market Authority (ESMA) in Paris, and empower them to operate inside the Member States, in interaction with national financial authorities but also firms and other stakeholders. The basic idea was that the EU agencies and their counterparts in the Member States 'must be independent from possible political and industry influences, at both EU and national level'.[5]

Now there are several signs of a similar development in the energy market. Also this time in the context of a major crisis. In this text, I will briefly present an overview of the legal development in the energy market. Then, I will focus my assessment on the emergence of the principle of energy solidarity and seek to identify how that principle is being used. The assessment will combine a legal dogmatic method with a legal historical method and a legal empirical method.

The integration of the financial market was one of the objectives encompassed by the original EEC Treaty and one of the priority areas of the internal market programme. But for the energy market, there was no visible ambition until 1993, when a reference to 'measures in the sphere of energy' was inserted into the EC Treaty's general list of activities.[6] Before that, the European Council had 'urgently appealed' to the EU Legislature to step up its efforts for completion of the internal market in all areas where progress had not been so rapid and expressly included energy.[7] This had resulted in two directives intended to open up for cross-border trade between transmission grids for electricity and natural gas (Directive (EEC) 1990/547 and Directive (EEC) 1991/296).[8]

The more ambitious development was initiated in 1996, with the adoption by the EU Legislature of the First Energy Package. This added two new directives that required the Member States to open up their monopolies to competition (Directive (EC) 1996/92 and Directive (EC) 1998/30).[9] Like the initial directives, these had a legal basis in Article 114 TFEU (then Article 100a TEEC). In 2000, the European Council called – again

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[4] See Carl Fredrik Bergström, 'EU Rulemaking in the Internal Market after the Financial Crisis' in Carl Fredrik Bergström and Magnus Strand (eds), *Legal Accountability in EU Markets for Financial Instruments: The Dual Role of Investment Firms* (Oxford University Press 2021).

[5] See Carl Fredrik Bergström, 'EU Resilience within the Internal Market after the Financial Crisis: Political Resolution and Legal Responsiveness' in Antonia Bakardjieva Engelbrekt et al (eds), *Routes to a Resilient European Union* (Palgrave MacMillan 2022). Quotation from the De Larosière Report (n 2), 47.

[6] See Article 3 TEC as amended by Article G(3) TEU and also the inclusion of the new competence on energy in Article 130s TEC, with a reference to 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' (point 2).

[7] See Conclusions of the European Council Presidency in Rhodes 2-3 December 1988 <https://www.europarl.europa.eu/summits/rhodes/rh1_en.pdf> accessed 01 August 2023.

[8] See Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids [1990] OJ L313/30, and Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids [1991] OJ L147/37.

[9] See Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20, and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1. The legal basis was Article 114 TFEU (then Articles 95 TEEC) in combination with Articles 53 and 62 TFEU (then Articles 47 and 55 TEEC).

– for rapid work to speed up the process. This led to the adoption of the Second Energy Package. The central acts were two directives with common rules for electricity and natural gas (Directive (EC) 2003/54 and Directive (EC) 2003/55).[10] They replaced all previous directives. A central feature was the introduction of a legal separation of transmission systems operators (TSOs), ensuring a long-term ability of the system, and distribution system operators (DSOs), managing energy to the final consumers. Following the implementation, consumers in Europe were entitled to choose their energy suppliers and all Member States compelled to designate national authorities responsible for monitoring of the energy market.[11]

But it was soon concluded that the changes were insufficient and the European Council called for a true Energy Policy for Europe. This should enhance the functioning of the internal market and also enable 'an external policy conducted in a spirit of solidarity and intended to ensure reliable, affordable and sustainable energy flows into the Union'.[12] In response to the European Council, the EU Commission presented a set of proposals that included a reform of the rulemaking architecture. First, the Member States' monitoring authorities should be empowered and turned into National Energy Regulators (NRAs), which were 'legally distinct and functionally independent from any other public or private entity'.[13] Then, a preexisting advisory group composed of representatives from the same NRAs should be transformed into an EU agency that should coordinate their rulemaking and complete it.[14] Finally a permanent network should be established for cross-border cooperation between the TSOs.

The proposals led to the adoption by the EU Legislature of the Third Energy Package. Also this time the acts included were based on Article 114 TFEU (then Article 95 TEC) and they entered into force in 2009, two months before the Lisbon Treaty. The central acts were two directives with rules for the generation, transmission, distribution, supply and storage of electricity and natural gas (Directive (EC) 2009/72 and Directive (EC) 2009/73). Linked to them was a regulation (Regulation (EC) 2009/713) establishing the Agency for the Cooperation of Energy Regulators (ACER) in Ljubljana.[15] Essentially,

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[10] See Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37 (Directive 2003/54/EC) and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57. See also Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L176/1, and Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks [2005] OJ L289/1.

[11] Quote from Directive 2003/54/EC, Article 23.

[12] See Conclusions of the Brussels European Council (15 and 16 June 2006), point 22 <https://www.cvce.eu/en/unit-content/-/unit/b9fe3d6d-e79c-495e-856d-9729144d2cbd/9548f704-90e6-4432-8882-d36341449556#a9c3ae4a-5b2c-4bb9-a59e-34252456e799_en&overlay> accessed 01 August 2023.

[13] Quote from Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55 (Directive 2009/72/EC), Article 35.4.a.

[14] See 2003/796/EC: Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas [2003] OJ L296/34.

[15] Directive 2009/72/EC; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94; and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1. The legal basis was Article 114 TFEU in combination with Articles 53 and 62 TFEU (then Articles 47 and 55 TEEC).

the regulation authorised ACER to coordinate the NRAs and to monitor the performance of the new European Network of Transmission System Operators (ENTSO).[16] The legal acts that ACER could make use of were non-binding opinions, recommendations and guidelines, but also binding decisions (that were subject to control by an internal board of appeal whose assessments could be reviewed by the EU Court of Justice).

There are striking similarities between this rulemaking architecture and that which was introduced, more or less simultaneously, in the financial market.[17] At the root was a wish to secure market confidence and, therefore, to ensure that national authorities did 'not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks'.[18]

Parallel to the above development, the Lisbon Treaty entered into force. This was obviously relevant for several reasons. But most importantly, now, a new competence on energy was established in Article 194 TFEU and, at the same time, an explicit reference to energy was added to the existing competence on economic policy in Article 122 TFEU (see below).

After it was inserted, Article 194 TFEU came to replace Article 114 TFEU as the principal legal basis for the energy market.[19] This far Article 194 TFEU has been used by the EU Legislature for the adoption of 9 directives and 19 regulations, which in turn has given rise to numerous implementing and delegated acts from the EU Commission. In 2019 a Fourth Energy Package was presented. Like before the central acts were two directives updating the common rules for electricity and natural gas (Directive (EU) 2019/944 and Directive (EU) 2019/692)[20] and an adjusted regulation (Regulation (EU) 2019/942) for ACER, intended to increase clarity after amendments and pave the way for changes ahead.[21]

The competence in Article194 TFEU has often been perceived as a mere formality; an adjustment to the text reflecting the progress in the energy market that started more

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[16] See also Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15, and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36.

[17] See Carl Fredrik Bergström, 'EU Rulemaking in the Internal Market after the Financial Crisis' (n 4).

[18] See e.g., Articles 35 and 36 of Directive 2009/72/EC with its *travaux préparatoires* and Case C-718/18 *Commission v Germany* EU:C:2021:662, para 108. Cf now Articles 57 and 58 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/25 (Directive (EU) 2019/944).

[19] See e.g., Kaisa Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' (2021) 70(4) International and Comparative Law Quarterly 991.

[20] See Directive (EU) 2019/944, and Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas [2019] OJ L117/1. See also Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) [2019] OJ L158/54, replacing Regulation (EC) 2007714 (supra note 15).

[21] See Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) [2019] OJ L158/22 and the Preamble, recitals 1-3: 'It is anticipated that the need for coordination of national regulatory actions will increase further in the coming years. The Union's energy system is in the middle of its most profound change in decades. More market integration and the change towards more variable electricity production require increased efforts to coordinate national energy policies with neighbours and increased efforts to use the opportunities of cross-border electricity trade'.

than ten years before Article 194 TFEU was introduced, through use of Article 114 TFEU.[22] To some extent this is true. The wording of Article 194 TFEU resembles that of Article 114 TFEU: it connects to 'the establishment and functioning of the internal market' and it enables the EU Legislature to adopt unspecified 'measures' using the ordinary legislative procedure. Another important similarity with Article 114 TFEU is the explicit exemption for fiscal measures. In Article 194 TFEU, this can be seen in paragraph 3, which permits the EU Legislature to adopt measures that are 'primarily of a fiscal nature' but only if using a special legislative procedure; giving each Government a veto in the Council and restricting the formal influence of the European Parliament (cf Article 114(2) TFEU that excludes fiscal measures altogether).

But in contrast to Article 114 TFEU, the measures that the EU Legislature adopts under Article 194 TFEU have to be 'necessary to achieve' objectives that are more specific than those of the internal market (Article 26 TFEU):

a) to ensure the functioning of the energy market;
b) to ensure security of energy supply;
c) to promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
d) to promote the interconnection of energy networks.

It is in this context the principle of energy solidarity presents itself. According to Article 194 TFEU, the objectives of the EU energy policy should be sought to achieve in a 'spirit of solidarity' between Member States. The same expressions appear in Article 122 TFEU, which enables the EU Legislature – here the Council alone – to take measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products and 'notably in the area of energy' (point 1). The provision in itself was inserted by the Maastricht Treaty (1993) but the reference to 'energy' and 'the spirit of solidarity' was added by the Lisbon Treaty, together with Article 194 TFEU.

How can this focus on energy in the Lisbon Treaty and the references to a 'spirit of solidarity' in the context of energy be explained?

There was no mention of 'solidarity' in treaty provisions until the Maastricht Treaty, which inserted a few general references (Article 1 TEU and 3 TEC) and some specific ones relating to the new common foreign and security policy (Articles 11 and 23 TEU). But after the Lisbon Treaty there were many more and in more areas. Most notably, solidarity was mentioned in Article 2 TEU that established, for the first time, the common values and the societal characteristics of the EU and its Member States. This and other references to solidarity had been envisaged already in the Constitutional Treaty (2004). But this was not so with the references to solidarity in Articles 194 TFEU and 122 TFEU. These were instead 'modifications' introduced after consultations held with the Member States just before the start of the intergovernmental conference that led to the Lisbon Treaty (2007).[23]

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[22] See for example the Swedish Government proposition 2007/08:168, pp 29, 51-52 and 199-200.
[23] See Council of the European Union, IGC 2007 Mandate, Brussels 26 June 2007 (11218/07), points 4 and 19 <https://www.cvce.eu/en/unit-content/-/unit/b9fe3d6d-e79c-495e-856d-9729144d2cbd/c940ecf0-f040-4644-b190-e0e4000e6116#f373c9eb-5bef-4773-a2fc-62122bf88394_en&overlay> accessed 01 August 2023. The new competence on energy was envisaged already in the Constitutional Treaty (Article III-256 CT)

The reason for this was an emerging security crisis. Since 2006 Russia had begun to cut off gas to its largest pipeline to Europe, the Bratstvo pipeline running through Ukraine. The crisis did not only expose the vulnerability of Central and Eastern Europe but also the inability of the EU to provide a coordinated response. For these reasons, Poland threatened to veto the Lisbon Treaty, if that treaty would not enhance energy solidarity.[24]

2 JUDICIAL RECOGNITION OF THE PRINCPLE OF ENERGY SOLIDARITY

In the EU official database EUR-Lex, the 'principle of energy solidarity' is first mentioned in an opinion of the European Economic and Social Committee from 2009 and then again in 2016, in a resolution of the European Parliament.[25]

The principle makes its entry into the EU Court in 2017, in an action brought by the Polish state gas company Polskie Górnictwo Naftowe i Gazownictwo (PGNiG) against the EU Commission (Case T-130/17).[26] PGNiG claimed that the General Court should annul a decision by the Commission that gave the German Energy Regulator permission to grant the Russian state gas company Gazprom full access to the new OPAL pipeline – connecting to the Nord Stream in the Baltic Sea – and, as a result, reduce transport through the Bratstvo pipeline (and also the Yamal pipeline). The decision was taken within the framework of Directive (EC) 2009/73. According to PGNiG, the decision meant that gas users in Central and Eastern Europe had become exposed to the risk of a lack of supply and that the decision, therefore, constituted an infringement of 'the principle of energy solidarity' (eleventh plea in law).

The action was dismissed by the General Court as inadmissible (for lack of standing) and nothing was said about the principle. But the case provides a vital background to the subsequent recognition by the EU Court of Justice of the principle of energy solidarity in 2021.

After the failure of PGNiG to challenge the decision favouring Gazprom, a more or less identical action was brought against the EU Commission by the Polish Government, supported by the Latvian Government and the Lithuanian (Case T-883/16). The applicant relied on several pleas in law, the first – and decisive – being infringement of 'the principle of energy solidarity' in Article 194 TFEU. In response to this, the Commission submitted that energy solidarity was merely 'a political notion that appears in its communications and documents' whereas the decision was adopted in compliance with the legal criteria of

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but the words 'notably in the area of energy' in Article 122 TFEU (and the fourth objective in Article 194 TFEU) were also among the modifications.

[24] See Sami Andoura, 'Energy Solidarity in Europe: From Independence to Interdependence' (2013) Studies & Reports No 70 - Notre Europe, 30 and 34 <https://institutdelors.eu/wp-content/uploads/2020/08/energysolidarity-andoura-ne-ijd-july13-1.pdf> accessed 01 August 2023.

[25] See Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation concerning the notification to the Commission of investment projects in energy infrastructure within the European Community and repealing Regulation (EC) 1996/736, COM(2009) 361 final, point 1.6 European Parliament resolution of 25 October 2016 on EU strategy for liquefied natural gas and gas storage [2018] OJ C215/133.

[26] See the application in Case T-130/17 *PGNiG v Commission* [2017] OJ C121/4. Cf also Case T-616/18, *PGNiG v Commission* [2022] OJ C128/15.

Directive (EC) 2009/73 (and consistent with the EU priority project of the Nord Stream).[27] The Commission did not contest the existence of a principle of solidarity in Article 194 TFEU but argued that it was only addressed to the EU Legislature – not to the executive – to be used in a situation of crisis.

The General Court found that the decision was, indeed, adopted in breach of the principle of energy solidarity in Article 194 TFEU. Reaching its conclusion, the General Court stated that the 'spirit of solidarity' referred to in Article 194 TFEU was a specific expression of the general principle mentioned in several treaty provisions and that this principle entails a general obligation for the EU and the Member States 'to take into account the interests of the other stakeholders and to balance those interests where there is a conflict'.[28] Since the Commission had failed to do this, the decision was annulled.[29]

This led the German Government to make an appeal, seeking to have set aside the judgment of the General Court on grounds related to the nature of the principle of energy solidarity. Most importantly, it was submitted that the principle of energy solidarity in Article 194 TFEU was 'an abstract, purely political notion and not a legal criterion for the assessment of the validity of an act of an EU institution' and it was 'only by the adoption of more specific rules in secondary legislation that such a principle could become a legal criterion to be implemented and applied by the executive'.[30]

The case was tried by the EU Court of Justice in Grand Chamber (Case C-848/19 P).[31] In its judgment of 15 July 2021, the Court rejected all grounds and consequently dismissed the appeal in its entirety. For anyone interested in the EU principle of solidarity, this is a case that should be studied carefully.[32] Not only the findings of the Court, the arguments of the parties, and the Opinion of Advocate General Campos Sánchez-Bordona, but also the political context: the contested decision was taken two years *after* the Russian invasion of the Crimean Peninsula in 2014 and the German Government, supported by the Commission, was still fighting to make Europe more dependent on Russian gas.

The final judgment was passed a few months before the start of the war against Ukraine. The current account will only highlight those aspects of the judgment that concern the recognition of the principle of energy solidarity.

First, the Court confirmed that the spirit of solidarity mentioned in Article 194(1) TFEU constituted 'a specific expression' of the fundamental principle of solidarity, which was also referred to in other provisions (such as Article 122(1) TFEU).[33] This principle, the Court said, 'underpins the entire legal system of the European Union' and is closely linked to the principle of sincere cooperation in Article 4(3) TEU.[34]

Then, it concluded that the General Court had been right to hold that

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[27] See para 65.
[28] See in particular paras 69, 70 and 77; and cf Case C-848/19 P *Germany v Commission* EU:C:2021:598, para 20.
[29] See the excellent contribution by Federico Casolari in this Issue.
[30] See para 27.
[31] See Case C-848/19 P (n 28).
[32] See in particular the parallel rulings in Case C-156/21 *Hungary v European Parliament and Council* EU:C:2022:97, and in Case C-157/21 *Poland v European Parliament and Council* EU:C:2022:98.
[33] See paras 38-40.
[34] See para 41 with references to Case 39/72 *Commission v Italy* EU:C:1973:13, para 25, and Case 128/78 *Commission v United Kingdom* EU:C:1979:32, para 12.

> the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.[35]

For this reason, the Court said, acts adopted by the EU institutions under the energy policy, 'must be interpreted, and their legality assessed, in the light of the principle of energy solidarity'.[36] This meant that the EU institutions must 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'.[37]

Finally, it shall be observed that the German Government (like the EU Commission) complained that the principle of energy solidarity was supposed to be an emergency mechanism and therefore to be used only in a situation of crisis. But once again the Court reverted to the wording of Article 194 TFEU and concluded that the EU institutions and the Member States must take the principle of energy solidarity into account in the normal operation of the internal market, by ensuring security of energy supply, 'which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations'.[38]

The implications of the judgment are far reaching yet far from clear. To what extent does the principle of energy solidarity extend to other areas and how does it influence the understanding of solidarity in EU law? There is already an important example of the EU Court of Justice – in plenary – making reference to the judgment 'by analogy' in a situation that had nothing to do with energy or indeed the internal market; to sustain the existence of a 'fundamental principle' of solidarity (with a horizontal basis in Article 2 TEU).[39] To what extent are the obligations that the principle of energy solidarity confers on the EU institutions and the Member States reflected by rights for private actors? None of these questions will be sought to answer here. In the following, focus will be set, instead, on a brief empirical assessment of the way in which the judgment has been used by the EU Legislature in the context of the energy crisis caused by the Russian war against Ukraine.

3 POLITICAL EXPLOITATION OF THE PRINCPLE OF ENERGY SOLIDARITY

It was noted above that the EU Commission did not contest the existence of the principle of solidarity in Article 194 TFEU but argued that it was only addressed to the EU Legislature, to be used in a situation of crisis. This was later repeated by the German Government. Even if the Court took the principle far beyond that point, the reality has been such that the EU Legislature has been given no room for not acting in response to crisis.

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[35] See para 49.
[36] See paras 43-44.
[37] See paras 51-53.
[38] See paras 67 and 69.
[39] See the parallel rulings of 16 February 2022, in Case C-156/21 and in Case C-157/21 (n 32) paras 129 and 147 respectively.

Little more than six months after the judgment that acknowledged the legal principle of energy solidarity, on 24 February 2022, Russia started its full-scale war against Ukraine. This, in turn, exposed Europe's over-dependence on gas and other fossil fuels, and drove energy prices to extreme levels. But the situation was significantly better than it would have been without the persistence of Poland and the perceptiveness of the EU Court(s).

In its response to the aggression, the European Council called upon the EU Commission to rapidly put forward a plan how to free all Member States from Russian energy.[40] The result was presented by the Commission in its REPowerEU plan.[41] The basic idea was to fast forward the existing package of proposals for EU transition to renewable energy sources (Fit for 55) and support this with specific action. Parallel to the REPowerEU Plan, a new strategy was formulated for the EU external energy policy.[42]

Since the launch of the REPpowerEU Plan, several regulations have been adopted by the EU Legislature (and some decisions, but no directives). But only one of them has had a legal basis in Article 194 TFEU.[43] The remaining five have had a legal basis in Article 122 TFEU and, interestingly, each of them explicitly purports to implement the fundamental principle of energy solidarity 'stated by the EU Court of Justice' in Case C-848/19 P. The reference to the ruling can be found in the explanatory memorandum of each underlying proposal and sometimes also in the preamble of the final act.[44]

In terms of substance, the principle of energy solidarity has been used to introduce a number of temporary measures intended to increase security of EU energy supply: a common platform for purchase of gas; a correction mechanism for transactions; an emergency intervention to mitigate consumers' cost for electricity; and a targeted support for new technologies with high potential for quick deployment.[45]

In terms of procedure, the principle of energy solidarity has, typically, been used in the assessment by the EU Commission of subsidiarity, to explain the need for a

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[40] See Conclusions of the European Council in Brussels 24 and 25 March 2022, points 15-19 <https://data.consilium.europa.eu/doc/document/ST-1-2022-INIT/en/pdf> accessed 01 August 2023.
[41] See Communication of the Commission of 18 May 2022: REPowerEU Plan, COM/2022/230 final <https://eur-lex.europa.eu/resource.html?uri=cellar:fc930f14-d7ae-11ec-a95f-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 01 August 2023.
[42] See Joint Communication of the Commission and the High Representative of the EU for Foreign Affairs and Security Policy of 18 May 2022: EU External Energy Engagement in a Changing World, JOIN/2022/23 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022JC0023&from=EN> accessed 01 August 2023.
[43] See Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) 2009/715 with regard to gas storage [2022] OJ L173/17.
[44] See e.g. the preamble of Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36 (Council Regulation 2022/2577), recital 22: 'The principle of energy solidarity is a general principle under Union law as stated by the European Court of Justice in its judgment of 15 July 2021, in Case C-848/19 P, Germany v Poland and it applies to all Member States. In implementing the principle of energy solidarity, this Regulation allows for cross-border distribution of the effects of faster deployment of renewable energy projects'.
[45] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L206/1; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L261I/1; Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders [2022] OJ L335/1; Council Regulation 2022/2577; and Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices [2022] OJ L335/45.

coordinated approach and sustain its conclusion that the objectives of a specific proposal for a legal act 'cannot be sufficiently achieved by the Member States' (Article 5.3 TEU). Also, this can be found in the explanatory memorandum of the proposal, under the regular sub-title on 'subsidiarity' or, most recently, a new sub-title on 'solidarity' (appearing before the regular sub-title on subsidiarity).[46]

In addition to the above, two more observations should be made. First, the choice of instrument – regulations over directives – has invariably been motivated by 'the dimension of the energy crisis' and the corresponding need for 'a swift, uniform and Union-wide cooperation mechanism'. Second, two of the regulations include a number of provisions that entrust ACER with more power and, that way, enhance its position in the rulemaking architecture (without formal amendments of Regulation (EU) 2019/942).[47]

4 CONCLUSIONS

Looking at its historical and political context, it seems clear that the principle of energy solidarity is an offspring of foreign and security policy. The judgment that launched the principle was given in the context of an approaching crisis and its subsequent use by the EU Legislature was crucial for the response to this crisis.

The principle of energy solidarity framed by the EU Court was used by it to annul the validity of a decision from the EU Commission – addressed only to one of the Member States – since it had not taken into account the interests of the other Member States and of the European Union as a whole. In more general terms, the Court introduced a requirement that all legal acts adopted by the EU institutions under the energy policy 'must be interpreted, and their legality assessed, in the light of the principle of energy solidarity'.[48]

Since it was framed by the EU Court, the principle of energy solidarity has been used by the EU Legislature to exploit its competence to adopt legal acts and push the confines. Most obviously, the principle of energy solidarity has been invoked to counterbalance the principle of subsidiarity. To some extent, this has made it possible to build further on the new rulemaking architecture and, in particular, entrust ACER with more power. This conclusion gives some support for the idea that the EU Legislature has instrumentalised the principle of energy solidarity, to support an ongoing structural shift in the energy market, similar to the shift in the financial market. But this will need more study.

Two additional observations.

The principle of energy solidarity is more than likely to spill over into other areas. It has been noted that there is already an important example of the EU Court making reference to its judgment 'by analogy' in a situation that had nothing to do with energy or indeed the internal market.[49] But a closer consideration of the way in which the principle has been used by the EU Legislature reveals that there has also been an important spillover in the context of energy policy: a legal principle recognised within Article 194 TFEU has been used to adopt legal acts within Article 122 TFEU. Even if there are similarities between them, the competence in Article 122 TFEU has a much broader scope and its

[46] See, for the latter, the Proposal for Council Regulation (EU) 2022/2578 (ibid), COM/2022/668 final.
[47] See Council Regulation (EU) 2022/2576 and Council Regulation (EU) 2022/2578 (n 45).
[48] See n 36.
[49] See n 39.

'spirit of solidarity' is not confined to energy. Therefore, the principle from Article 194 TFEU, as interpreted by the EU Court in Case C-848/19 P, has already been imported in other areas.

The most controversial act adopted by the EU Legislature this far, is Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices.[50] The significance of this regulation in the context of the energy crisis has been enormous. Still, several Member States have expressed concerns with respect to its legal basis. The main reasons for this are found in the fact that the regulation is, clearly, a fiscal measure and, therefore, such that its adoption would normally require unanimity in the Council (cf Article 194(3) TFEU). Under Article 122 TFEU, the Council was able to force it through with qualified majority voting (cf Article 16(3) TEU). At least one of the Member States, Hungary, would have been likely to use its veto to block the measure, had it been given the chance.[51] Since then, the same kind of protests are being voiced by ExxonMobil and other companies 'with activities in the crude petroleum, natural gas, coal and refinery sectors' whose profits are targeted by the 'solidarity contribution' in Council Regulation (EU) 2022/1854.[52] There are currently five actions for annulment pending before the EU General Court.[53] They will teach us all more about the principle of energy solidarity.

[50] See n 45.

[51] See Council General Secretariat Communication on the written procedure opened by CM 4714/22 of 6 October 2022, 2022/0289(NLE) <https://data.consilium.europa.eu/doc/document/CM-4715-2022-INIT/en/pdf> accessed 01 August 2023.

[52] See in particular Articles 14-18.

[53] See Case T-802/22: Action brought on 28 December 2022, *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council* [2023] OJ C54/23; and Case T-759/22: Action brought on 2 December 2022, *Electrawinds Shabla South EAD v Council* [2023] OJ C71/32; Case T-775/22: Action brought on 12 December 2022, *TJ and Others v Council* [2023] OJ C54/19; Case T-795/22: Action brought on 20 December 2022, *TV and TW v Council* [2023] OJ C54/20; and Case T-803/22: Action brought on 30 December 2022, *TZ v Council* [2023] OJ C63/64.

LIST OF REFERENCES

Bergström CF and Strand M (eds), *Legal Accountability in EU Markets for Financial Instruments: The Dual Role of Investment Firms* (Oxford University Press 2021)
DOI: https://doi.org/10.1093/oso/9780192849281.001.0001

Bergström CF, 'EU Resilience within the Internal Market after the Financial Crisis: Political Resolution and Legal Responsiveness' in Bakardjieva Engelbrekt A et al (eds), *Routes to a Resilient European Union* (Palgrave MacMillan 2022)
DOI: https://doi.org/10.1007/978-3-030-93165-0_8

Bergström CF, 'EU Rulemaking in the Internal Market after the Financial Crisis' in Bergström CF and Strand M (eds), *Legal Accountability in EU Markets for Financial Instruments: The Dual Role of Investment Firms* (Oxford University Press 2021)
DOI: https://doi.org/10.1093/oso/9780192849281.003.0001

Heritiér A and Karremans J (eds), *Regulating Finance in Europe: Policy Effects and Political Accountability* (Edward Elgar Publishing 2021)
DOI: https://doi.org/10.4337/9781800379596

Heritiér A and Schoeller M (eds) *Governing Finance in Europe: A Centralisation of Rulemaking?* (Edward Elgar Publishing 2020)
DOI: https://doi.org/10.4337/9781839101120

Huhta K, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' (2021) 70(4) International and Comparative Law Quarterly 991
DOI: https://doi.org/10.1017/s0020589321000269

SOLIDARITY THROUGH THE LENS OF FUNCTIONAL CONSTITUTIONALISM

EDUARDO GILL-PEDRO*

This article investigates solidarity as a concept and/or a norm of EU law from the perspective of functional constitutionalism. It asks how solidarity fits within the normative framework of the EU legal order if we understand this framework as being founded on a functional constitution. Under functional constitutionalism, the EU is understood as a purposive polity and the authority of the legal order is justified, not by reference to popular sovereignty and individual rights, but from the functional requirements ordained by the purposes, or objectives, of that polity. From this perspective, the normative value of solidarity in EU law is contingent on effectiveness. Where the effective achievement of EU objectives requires Member States to act in solidarity to each other, or to exercise transnational solidarity towards citizens of other Member States, then EU law will impose a duty on them to do so. Conversely, if the exercise of national solidarity within the Member State undermines the effective achievement of EU objectives, then EU law will impose a duty on those Member States not to allow such exercise. The article concludes that, through the lens of functional constitutionalism, solidarity has a purely instrumental value within the EU normative order.

1 INTRODUCTION

In this article, I explore the concept of solidarity in EU law through the lens of 'functional constitutionalism'. Functional Constitutionalism is a theoretical framework to think through the nature of the EU as a polity and as a legal order, most systematicly presented by Turkuler Isiksel.[1] However, I rely on my own take of functional constitutionalism, which does not necessarily follow closely Isiksel's approach, but it may be helpful to refer to her in order to help locate the theoretical framework relied on here. The task of this article is to try to understand solidarity as a concept and/or a norm of EU law within the framework of functional constitutionalism. In other words, how does solidarity fit within the normative framework of the EU legal order if we understand this framework as being founded on a functional constitution?

The article will set out a brief outline of functional constitutionalism as a theoretical framework which seeks to explain the EU legal and political order. It will then sketch out solidarity as a concept in legal and political discourse. Finally, it will assess the normative nature of different conceptions of solidarity, in the different contexts in which it is applicable – Member State solidarity, transnational solidarity and national solidarity. The article concludes that, through the lens of functional constitutionalism, solidarity has a purely instrumental value within the EU normative order.

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[1] Turkuler Isiksel, *Europe's Functional Constitution* (Oxford University Press 2016). Note that this approach should not be confused with *neo-functionalism*, the theory of European integration developed by Haas, Burley and Mattli, Stone Sweet and others.

2 FUNCTIONAL CONSTITUTIONALISM

Functional constitutionalism holds that the EU amounts to a supranational constitutional system because it 'guides, constrains and enables the domestic institutions of the Member States'.[2] Whilst the EU may have emerged as a result of treaties between states under international law, it has developed in a way which establishes a 'new configuration of political authority',[3] which cannot be reduced to the simple exercise of delegated powers by an international organisation acting as agent for the Member States.[4] The EU legal order can be described in constitutional terms because it constitutes this new configuration of political authority. Crucially, this configuration is autonomous of both the legal orders of the Member States, and of the international legal order under which the treaties were made.[5] As Tuori puts it: 'Through this claim to normative autonomy, a legal order asserts exclusive power to identify the norms it comprises, and to determine their legal effects and relations to other normative orders'.[6]

It should be clear that functional constitutionalism should not be confused with 'neo-functionalism', the influential political scientific theory advanced by Haas and others, which describes the project of European integration as a strategic choice by national elites, to transfer policy competences to the European institutions,[7] and the development of institutional dynamics within those European institutions.[8] In contrast to neo-functionalism, the ambition of functional constitutionalism is not to describe causal relations between political, social and economic forces that lead to European integration, but to describe a 'normative pattern of justification' for the European project.[9]

This constitutional practice is, however, qualitatively different from the one that operates in the Member States. The authority of the constitution is not justified 'by reference to the principles of popular sovereignty and individual liberty', as national constitutions, but rather 'from the claim to govern effectively'.[10] Functional constitutionalism thus describes 'the teleological re-purposing of constitutional rule'.[11] Functional constitutionalism recognises that the European Union is what Gareth Davis called a 'purposive polity'.[12] The Member States conferred a number of competences on the EU in order to achieve the objectives set out in the Treaties.[13] Central among these objectives is the establishing of an internal market. Flanking this central objective are the objectives to establish an economic and monetary union, to 'offer its citizens' an area of freedom, security and justice, as well as more nebulous aims to promote peace, its values and the well-being of its people. The EU

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[2] Isiksel (n 1) 6.
[3] ibid 72 ff.
[4] cf. Peter L Linseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press 2010).
[5] As the Court of Justice emphasised already in Case 6/64 *Costa v ENEL* EU:C:1964:66.
[6] Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 53.
[7] Ernst Haas, *The Uniting of Europe: Political, Social and Economic Forces* (first published 1958, University of Notre Dame Press 2004) esp 17- 19.
[8] ibid esp. 299 ff. See also Alec Stone Sweet and Wayne Sandholtz, 'European Integration and Supranational Governance' (1997) 4(3) Journal of European Public Policy 297.
[9] Isiksel (n 1) 73.
[10] ibid 7
[11] ibid.
[12] Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21(1) European Law Journal 2.
[13] Article 5(1) TEU.

is afforded the competences necessary to achieve those objectives. As Davies points out, these are purposive competences – defined as 'powers to take measures to achieve a particular goal [or goals]'[14] - rather than sector specific competences. The purposive nature of these competences entails that, while the EU is constrained to follow the specified objectives set out in the Treaties, it is not constrained in respect of the subject matter at issue, nor the breadth of the impact of EU measures – the EU will have competence to regulate any and all areas of the Member States' legal orders, provided such regulation is necessary to achieve the specified objectives. As Lenaerts observes: 'There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the [Union]'.[15]

Of course, this competence to legislate, to positively harmonise the laws of the Member States, is conditioned by the principles of subsidiarity and proportionality.[16] Under the principle of subsidiarity 'the Union shall act only, and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States'.[17] However, in a large range of policy areas, Member States acting alone cannot achieve the objectives, because the objective is precisely to harmonise the laws of the Member States, something which individual Member States, by definition, cannot do. Subsidarity therefore plays a limited role in constrainging the legislative competence of the EU.[18] Proportionality, which requires Union action to be no more than necessary to achieve the objectives of the Treaty,[19] may seem more promising, but the Court grants considerable discretion to the Union legislator to determine what measures may be necessary.[20]

This peculiar, functional, nature of the European constitution requires us to pay due attention to what Neil Walker called 'the problem of translation'.[21] The constitutional nature of the EU does not correspond to that of its Member States, and normative concepts that emerged and are part of national constitutional frameworks may not be applicable in the same way in the context of a transnational functional constitution. In fact, the Court of Justice of the EU has confirmed that normative concepts within EU law must be understood and applied in relation to the objectives of the EU project. As the Court put it first in *Internationale Handelsegeselschaft,*[22] and then, 44 years and one day later, in *Opinion 2/13*, norms of EU law[23] 'must be ensured within the framework of the structure and objectives of the [Union]'.[24] The Court went on to note in Opinion 2/13 that

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[14] Davies 'Democracy and Legitimacy in the Shadow of Purposive Competence' (n 12) 3.
[15] Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism* (1990) 38(2) The American Journal of Comparative Law 205, 220. So even in sectors where the member sought to limit the competence of the EU, such as public health, wage setting or direct taxation, the EU has been able to intervene, both through positive and negative harmonisation, in order to ensure the effective functioning of the internal market.
[16] Article 5(1) TEU.
[17] Article 5(3) TEU.
[18] For an elabortion of this argument, see Gareth Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43(1) Common Market Law Review 63.
[19] Article 5(4) TEU.
[20] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12(3) German Law Journal 827.
[21] Neil Walker, 'Postnational constitutionalism and the problem of translation' in Joseph H H Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Presss 2001).
[22] Case 11/70 *Internationale Handelsgeselschaft* EU:C:1970:114.
[23] In the specific case the Court was referring to fundamental rights as general principles of EU law.
[24] Case 11/70 *Internationale* (n 22), para 4; *Opinion 2/13* of 18 December 2014 EU:C:2014:2454, para 170.

> The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration, which is the *raison d'etre* of the EU itself.[25]

The Court thus makes it clear that the EU constitutional structure is designed and guided by the achievement of the objectives of (primarily economic) integration. Norms of EU law, including fundamental norms of the EU which grant rights to individuals, derive their normative status not on account of their moral salience, but because 'they are indispensable to forging an economic union among Member States'.[26]

3 THE CONCEPT OF 'SOLIDARITY'

Before exploring the place of solidarity within the framework of the structure and objectives of the EU, it will be necessary to briefly sketch out solidarity as a concept, as it has evolved in European political thought. There is a peculiar elusiveness and ambiguity to solidarity. It is often used in a descriptive sense, to refer to shared practices, attitudes or feelings that pertain within a specific group or community, but it carries with it normative connotations which are not always made explicit.[27] As Bayertz puts it, 'a wavering, inexact and often suggestive use of the term is […] dominant […] in the literature'.[28] The ambition of this article is to try to provide a more minimalistic account of solidarity as a concept, without loading it with normative connotations.[29] To this end, Rainer Forst provides a helpful framework with which to approach the concept of solidarity.[30] He notes that, while there may be many *conceptions* of solidarity, it is possible to delineate the essential features of the

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[25] *Opinion 2/13* (n 24), para 172.

[26] Isiksel (n 1) 96. See also Daniel Augenstein, 'Disagreement—Commonality—Autonomy: EU Fundamental Rights in the Internal Market' (2013) 15 Cambridge Yearbook of European Legal Studies 1.

[27] Lawrence Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows' (2007) 9(1) Journal of British Politics and International Relations 171.

[28] Kurt Bayertz, 'Four Uses of "Solidarity"' in Kurt Bayertz (ed), *Solidarity. Philosophical Studies in Contemporary Culture* (Springer 1999) 4.

[29] This can be contrasted with other proposals for a concept of solidarity that vest the concept with quite extensive normative criteria. Stjernø asserts that 'solidarity can most fruitfully be defined as the preparedness to share resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organised by the state' (Steinar Stjernø, 'The Idea of Solidarity in Europe' (2011) 3 European Journal of Social Law 156). Sangiovanni intends to provide an account of solidarity that can explain how solidarity can give rise to genuine moral obligations, and in particular an account of solidarity that will 'inform a defence of social justice' (Andrea Sangiovanni, 'Solidarity as Joint Action' (2015) 32(4) Journal of Applied Philosophy 340). On a similar vein Gould links solidarity to a shared commitment to the elimination of suffering (Carol C Gould, 'Transnational Solidarities' (2007) 38(1) Journal of Social Philosophy 148). These may all be valid accounts of specific *conceptions* of solidarity, but are too narrow and normatively loaded to function as a suitable *concept* of solidarity.

[30] Rainer Forst, 'Solidarity: Concept, Conceptions and Context' (2021) Normative Orders Working Paper 02/2021 <https://publikationen.ub.uni-frankfurt.de/opus4/frontdoor/deliver/index/docId/60890/file/Rainer-Forst_Solidarity-Concept-Conceptions-and-Contexts.pdf> accessed 01 August 2023.

concept of solidarity in a way which is reasonably intelligible, and which is applicable to all the different conceptions of solidarity which have been developed in different contexts, both historical and contemporary.

First, the concept of solidarity 'refers to a particular practical attitude of a person towards others'.[31] This practical orientation is very important. As Prainsack and Buyx insist, solidarity is not merely a sentiment or a feeling, but is necessarily connected to action. According to them, solidarity entails '[s]hared practices reflecting a collective commitment to carry "costs" (financial, social, emotional or otherwise) to assist others'.[32] This does not mean that solidarity only manifests itself in action. Solidarity is the *commitment* to act, a particular attitude towards others which Forst described as 'a form of standing by'.[33]

Second, the commitment is based on a particular normative bond with others (in respect of whom one has committed to act). According to Forst, this normative bond consists of either a common cause or a shared identity, or both.[34] Sangiovanni's account of the concept of solidarity asserts that solidarity is additionaly linked to 'shared experience of adversity'.[35] It may well be that a shared identity is forged through a shared experience of adversity. But linking solidarity necessarily to shared adversity risks introducing extraneous normative connotations.[36] To be sure, a shared experience of adversity may give rise to a shared identity – the biblical account of the Jewish exodus from Egypt providing a striking example of how the experience of bondage under the tyrannical pharaohs helped forge the identity of the Jewish people.[37] It may also have united them in the common goal of reaching the promised land. But a shared experience of adversity reflects a particular *conception* of solidarity, it is not a necessary element of the *concept* of solidarity.[38]

Third, solidarity requires a member to commit to carry costs even where this may not be in the narrow self interest of that particular member.[39] Whilst there may be an element of reciprocity involved in solidarity, in that all members share equally the commitment to further the common cause, or to uphold the shared identity, solidarity requires members to act even where there is no immediate *quid pro quo* from the other members.

Fourth, solidarity may require members to act, and to carry costs, to assist another member, even where that other may not be in a position to reciprocate.[40] Nonetheless, even where there are asymmetric burdens imposed on members, the relationship is still a

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[31] Forst (n 30).
[32] Barbara Prainsack and Alena Buyx, 'Solidarity in Contemporary Bioethics – Towards a New Approach' (2012) 26(7) Bioethics 343.
[33] Forst (n 30) 4.
[34] ibid 3.
[35] Sangiovanni, 'Solidarity as Joint Action' (n 29).
[36] And indeed Sangiovanni, as already indicated above, intends to provide a specific conception of solidarity that will 'inform a defence of social justice' (ibid 356). Forst intends to provide a more general account of the concept of solidarity.
[37] Kimberly B Stratton, 'Narrating Violence, Narrating Self: Exodus and Collective Identity in Early Rabbinic Literature' (2017) 57(1) History of Religions 68.
[38] One can speculate that the Egyptian overlords displayed solidarity towards each other in ensuring that any runaway Jewish slaves were brought back to the 'rightful' owners. Indeed, many have commented on how, in modern capitalist societies, the rich appear to display greater class solidarity than the working class.
[39] Forst (n 30) 4.
[40] ibid 5.

reciprocal relationship between two subjects of solidarity, rather than one where one is the subject and the other merely the object – such as charity and altruism.[41]

Finally, and this is a point which Forst is not clear on, solidarity is not to be equated with justice. There may, of course, be occasions where not to comply with an obligation imposed by solidarity would result in injustice. And there may be bonds of solidarity centred on a common cause which strives for justice[42] - but the relationship between solidarity and justice is contingent, not necessary. This implies that solidarity imposes duties to act to the benefit of someone even where this person does not, from a justice perspective, have a *right* to that benefit.[43]

This outline of the concept of solidarity described by Forst is 'normatively promiscuous':[44] it can be applied in many different settings, in pursuit of different ends, and it is not necessarily connected with a particular moral, political or ethical value. Whilst solidarity has the clang of a positive virtue, normatively, it does not necessarily have a positive valence. A member of a criminal gang may engage in shared practices which reflect their commitment to carry costs to assist others, by not informing on other gang members when arrested by the police, even if it means a higher sentence to them. Understood from the internal perspective of the criminal gang, this will be valuable; but from a societal perspective, it can be extremely harmful.[45]

This means that, in order to look at different conceptions of solidarity, and the normative implications that they carry, it will be necessary to examine the *context* of solidarity. Forst claims that contexts of solidarity specify:

1. The *normative nature* of the solidarity bond. What is the point of this bond – what common identity does it uphold, what common cause does it further.
2. The *community* of solidarity. Who is tied together by the bonds of solidarity.
3. The *context of justification* within which solidarity applies. How are the reasons which justify the solidarity obligations determined and assessed within the community of solidarity. This plays out both at the general level, in respect of the entire community and at the particular level – how is an individual obligation of solidarity in a specific case determined.

If we follow Forst, then we can see that it may not be very helpful to approach solidarity in the EU legal order as a single monolithical phenomenon. We will need to examine the particular conceptions of solidarity by reference to the contexts within which they are operationalised. This is perhaps particularly true in respect of solidarity in the EU

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[41] As Prainsack and Buyx put it 'solidarity assumes symmetryin the respect which is relevant', Prainsack and Buyx (n 32).

[42] Forst describes this context of solidarity as a *political social* form of solidarity, and gives the examples of movements that struggle for gender and racial equality.

[43] Véronique Munoz-Dardé notes that solidarity and fraternity do not 'sit comfortably in the logic of individual rights' (Véronique Munoz-Dardé, 'Fellow Feelings: Fraternety, Equality and the Origin of Stability and Justice' (2018) sup. 7, Daimon: Revista Internacional de Filosofia 107, 108).

[44] Forst (n 30) 5.

[45] Nonetheless, even from this empirical perspective, there are strong arguments that successful societies require a high degree of solidarity between its members. Bo Rothstein, 'Creating a Sustainable Solidaristic Society: A Manual' (2011) QoG Working Paper 2011:07, <https://www.gu.se/sites/default/files/2020-05/2011_7_rothstein.pdf> accesed 01 August 2023.

legal and political order. EU solidarity displays what Karageorgiou describes as its diachronical nature[46] in the Treaties themselves. It manifests both as phenomenon that pertains to the functioning of the Member States' societies, and as a norm that regulates the relations between those Member States. Sangiovanni provides a helpful taxonomy which encompasses three contexts of solidarity within the normative framework of the EU.[47] *National solidarity*, that is to say, solidarity between the citizens and residents of the Member States, *Member State solidarity,* which refers to solidarity between the Member States themselves, and *transnational solidarity* – solidarity between EU citizens *qua* EU citizens.

This article will now examine the conceptions of solidarity that pertain to these three different contexts of solidarity, through the perspective of functional constitutionalism.

3.1 MEMBER STATE SOLIDARITY

In respect of relations between Member States, solidarity, as Karageorgiou notes, has come to be understood as an expression of the principle of equality between Member States of the EU.[48] In this context of solidarity, the *community* of solidarity are the Member States. The *normative bond* which links this community together are the common objectives set out in the treaties. If all Member States have an equal interest in achieving the objectives set out in the Treaty, then they all have an equal duty to cooperate sincerely in discharging the tasks required to achieve those objectives.[49] Karageoriou highlights the distinction between sincere cooperation (or loyalty) and solidarity, in that the former governs the relations between Member States and the Union and the latter 'mainly refers to relations between Member States'.[50] Nevertheless, in both cases the focus is on the need for all countries to 'put their shoulder to the wheel'. A Member State that fails to do its share in achieving the objectives of EU law breaches solidarity.[51] As the Court put it, 'in permitting Member States to profit from the advantages of the community, the Treaty imposes on them also the obligation to respect its rules'.[52] States that do not follow the rules where this does not suit their national interest are 'free-riders' and fail to show solidarity with the other Member States.

From the perspective of functional constitutionalism, this understanding of solidarity makes perfect sense. It reflects what Karageorgiou terms the 'governing-by-goals logic' under which solidarity serves as a 'guiding principle for the effective and efficient pursuit of goals'.[53]

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[46] Eleni Karageorgiou E, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018).
[47] Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) Oxford Journal of Legal Studies 213.
[48] Karageorgiou (n 46) 67.
[49] The principle of sincere cooperation is set out in Article 4(3) TEU, and stipulates that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties'.
[50] Karageorgiou (n 46). See also Casolari's contribution in this Special Issue for an exploration of the relationship between solidarity and loyalty as EU principles.
[51] This implies that the duties of solidarity pertain only to those countries that are committed to Treaty objectives and to the project of European integration, and who have the shared identity of EU Member States. So called 'third countries', who are not committed to the same objectives and do not identify as EU Member States will not be subject to Member State solidarity (though they may be attached by other bonds of solidarity, there is evidence that European countries share bonds of solidarity with Ukraine in the face of Russian aggression, for example).
[52] Case 39/72 *Commission v Italy (Slaughterhouse Premium)* EU:C:1973:13.
[53] Karageorgiou (n 46) 209.

Understood in this way, the value of solidarity as a normative principle of EU law is entirely instrumental to the goals of the EU, and thereby contingent on the value of those goals.[54]

There is a range of provisions in the Treaties requiring Member States to act in solidarity with each other in the context of energy policy,[55] economic policy[56] and asylum, immigration and border policy,[57] and common foreign and security policy.[58] These provisions refer to different *contexts of justification*, but they are all clearly linked to specific common objectives of the EU, with a clear link between the common objective as the normative bond uniting the members of the community of solidarity, and the obligations which solidarity imposes.

The specificity of the community of solidarity, and the limited and focused nature of the duties that arise from solidarity, was made apparent in the case of *XXXX.*[59] The case concerned the interpretation of the Standards Directive.[60] The Member State concerned intended to refuse an application for subsidiary protection by XXXX, even though he had two young daughters resident in that Member State, who had already received subsidiary protection. Refusing the application would interfere with the right to respect for the family life both of XXXX and of his daughters, as well as being contrary to the best interests of the child in respect of his daughters.[61] Nonetheless, the Grand Chamber held that the duty of solidarity of the Member State was towards the other Member States, and towards the common objective of creating an area of freedom, security and justice, based on mutual trust between the Member States. There was no question that solidarity imposed any kind of duty on Member States to ensure that children lawfully resident in the respective territory were able to be joined by their father.[62]

This case can be contrasted with the earlier case of *N.S.*[63] where the Court held that the Member State concerned was under a duty *not* to remove the asylum seeker to 'the member state responsible' under the Dublin Regulation, where there are systemic deficiencies in that other Member State which would lead to a real risk that the asylum seeker be subject to inhuman or degrading treatment. The Court referred to solidarity and burden sharing, implying, as Karageorgiou points out, that Member States 'can use the discretion

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[54] In Case 39/72 *Commission v Italy* (n 52), the goal was the reduction in the overall production of milk in the EEC, under the CAP. Therefore solidarity required Italy to pay a premium to farmers who slaughtered their milk cows. In *Zaizoune* the goal was the establishment of an effective removal and repatriation policy in respect of third country nationals. Therefore, solidarity required Spain to carry out the removal of Mr. Zaizoune promptly (Case C-38/14 *Extranjería v Samir Zaizoune* EU:C:2015:260).

[55] Article 194 TFEU.

[56] Article 122 TFEU.

[57] Article 80 TFEU.

[58] Article 24 TEU.

[59] Case C-483/20 *XXXX v Commissionaire Général aux Réfugiés apatrides* EU:C:2022:103

[60] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

[61] Opinion of AG Pikamäe in Case C-483/20 *XXXX* EU:C:2021:780. These are rights protected under Article 7 and 24 of the Charter.

[62] The Court noted the requirement that the common policy on asylum and immigration be 'fair' towards third country nationals, but did not refer to solidarity as extending beyond the obligations of the member state towards other Member States (para 28).

[63] C-411/10 *N. S. v Secretary of State for the Home Department* EU:C:2011:610.

offered by the sovereignty clause in the Regulation for solidarity reasons'.[64] One of the Member States, Greece, was experiencing particular difficulties in complying with the obligations entailed by the implementation of the Common European Asylum System.[65] In such a case, solidarity required other Member States to process the asylum claim domestically, instead of removing asylum seekers back to Greece. Following this case, and in light of the difficulties which Italy and Greece in particular were facing in dealing with processing asylum applications in their respective territories, the EU enacted Decision 2015/1601,[66] with the express intention of reinforcing solidarity towards frontline Member States. When some Member States challenged this decision, they were implicitly chided by the Court for failure to show solidarity towards the other Member States.[67]

These two cases show that Member State solidarity operates both as 'one for all' logic, where Member States are required to act in order to achieve the common objective, and the 'all for one' logic where Member States are required to act in order to support a specific state that is faced with particular difficulties. In her contribution to this issue, Kücük[68] highlights a recent case of the court in the field of energy policy, *OPAL,*[69] where the Court annulled a decision by the Commission on the basis that it failed to sufficiently take into account the interests of one Member State (Poland) in respect of security of gas supply. By failing to properly consider the interests of this Member State, the Commission had breached the principle of energy solidarity. But even in these types of 'all for one' cases, the reasoning of the court links the obligation to respect solidarity to the objectives of the EU, rather than to any conception of a common identity of the Member States. As the Court put it:

> in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, European Union policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market, ensure security of energy supply in the European Union [.][70]

The obligation of solidarity in respect of the particularly vulnerable individual Member State ('all for one' solidarity) is a corollary of the common objective, shared by all the EU Member States. In *OPAL*, the common objective was a functioning energy market, and more broadly, the establishment and functioning of the internal market. In *N.S.* the common objective was the Common European Asylum System, and more generally the creation of an area of freedom, security and justice. In all cases, the normative nature of Member State solidarity is based on the achievement of common objectives agreed on by the Member States.

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[64] Karageorgiou (n 46) 157.
[65] Case C-411/10 *N.S.* (n 63) para. 90.
[66] 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.
[67] Case C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the EU* EU:C:2017:631. Advocate General Bot, in his Opinion, was more explicit in affirming that 'solidarity between the Member States when one of them is faced with an emergency situation […] is the the quintessence of what is both the *raison d'être* and the objective of the European project' (Opinion of AG Bot in Case C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the EU* EU:C:2017:618).
[68] See Küçük's contribution in this Special Issue.
[69] Case C-848/19 P *Germany v Commission* (*OPAL)* EU:C:2021:598.
[70] ibid para 37.

3.2 TRANSNATIONAL SOLIDARITY

Transnational solidarity is described as 'the fair return owned by EU citizens to one another'. According to Sangiovanni, this aspect of solidarity has its clearest expression in the rules governing EU citizenship and allows nationals of one Member State to live, reside and receive social assistance in another Member State.[71] The rationale is that, when a Member State extends rights which are normally provided to its own nationals and also to citizens of other Member States, this is an expression of 'Solidarity with all citizens [of the EU]'.[72]

This conception of transnational solidarity should be distinguished from the universalistic understanding of solidarity which would bind the whole of mankind – what Bayertz terms 'moral solidarity' which 'renders the entire moral world one big whole, in which each individual is "co-responsible" […] for every other individual'.[73] Rather, transnational solidarity presupposes '[t]hicker relationships [which] embody the idea of mutual aid and support'.[74] It is therefore closer to Bayertz conception of 'social solidarity' between members of a limited community (EU citizens) who stand in a relation of mutual dependency with each other. This 'social solidarity' is close in spirit to Durkheim's conception of 'organic solidarity' – solidarity between autonomous individuals, who are not embedded in traditional communities, but instead are bound by interdependent relations of production with others.[75]

This would seem to imply that the community of solidarity, the persons who owe each other solidarity, are the individual EU citizens. As Gould points out, the people engaged in solidaristic relations are 'reciprocally concerned about each other and mutually disposed to aid each other when required'.[76] If transnational solidarity is, in Sangiovanni's account 'the fair return owned by EU citizens *to one another*',[77] this implies that EU citizens owe obligations of solidarity directly towards each other. However, EU law does not impose duties on individual citizens. Whilst some areas of EU law impose duties directly on individual undertakings,[78] the EU imposes duties on the Member States, who in turn impose duties on individuals. As Barnard put it:

> the Union gives rights but […] demands little by way of duties from its citizens (e.g. to pay taxes, to participate in the defence of the country, to obey the law, the vote, willingness to work, etc.). These duties are owed to Member States.[79]

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[71] Sangiovanni, 'Solidarity in the European Union' (n 47) 233.
[72] Malcolm Ross, 'Solidarity: A new constitutional paradigm for the EU' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the EU* (Oxford University Press 2010) 16, addressing specifically EU rules prohibiting discrimination.
[73] Bayertz (n 28).
[74] Arto Laitinen, 'From Recognition to Solidarity: Universal Respect, Mutual Support and Social Unity' in Arto Laitinen and Anne Birgitta Pessi (eds), *Solidarity: Theory and Practice* (Lexington Books 2014) 145.
[75] For an overview see Gould (n 29).
[76] ibid 154.
[77] Sangiovanni, 'Solidarity in the European Union' (n 47).
[78] Specifically in the context of competition law provisions, as well as directly applicable regulations that impose duties directly on market actors in some areas of regulatory law.
[79] Catherine Barnard, *The Substantive Law of the EU* (4th edn, Oxford University Press 2013) 436. On a similar note, Weiler states that 'EU citizenship is a category which comes with rights, but no active (or even passive) duties'. (Joseph H H Weiler, 'Individuals and Rights - the Sour Grapes' (2013) 21(2) European Journal of International Law 277, 278).

There is therefore a lack of a direct reciprocal relationship between EU citizens that could be seen as an expression of the kind of transnational solidarity which would link all EU citizens to a common project, or to a common identity. What we have instead are obligations imposed on Member States to ascribe rights to EU citizens from other Member States. Transnational solidarity in the context of the EU legal order is therefore not the solidarity of EU citizens towards each other, but the requirement that Member States display solidarity towards the citizens of other Member States present in their territory.

Approaching this understanding of transnational solidarity through the lens of functional constitutionalism, the first question to ask will be – what objective or objectives is the EU pursuing in the area of free movement of citizens? In the early caselaw of the EU, whilst the EU was still a European Economic Community and the central objective was the creation of a common market, the rights to move, reside and receive social advantages were only extended to those who were workers or otherwise economically active, as well as their family members. The requirement of Member States to express solidarity with nationals of other Member States only applied where this would contribute to the common market objective. *Lebon* provides a stark illustration.[80] Ms. Lebon, a French national who resided in Belgium for many years, but was economically inactive, could not call on the solidarity of the Belgium social security system. Her father, a worker also resident in Belgium could call on that solidarity, on behalf of his daughter. Providing social assistance to the dependents of workers contributes to the common market objective, whereas facilitating the movement of non-economically active persons does not.

As the EU objective evolved from a common market into an internal market, accompanied by an area of freedom, security and justice, so the range of right holders expanded. The Member States of the EU have agreed to achieve a common objective, of creating not just an internal market where the free movement of factors of production is guaranteed, but also an internal area of free movement, in which the free movement of nationals of the Member States is ensured.[81] In order to achieve this objective, the status of 'EU citizen' is introduced, and individuals holding that status are given rights to move and reside in the territory of other Member States. However, unlike the common market objective, where the obligation to facilitate free movement only applies in respect of economically active persons, as demonstrated in *Lebon*, the objective of creating an AFSJ may require Member States to provide rights to EU citizens resident in their territory, even where those citizens are not economically active. In the seminal case of *Martinez Sala*[82] the CJEU held that: 'As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope ratione personae of the provisions of the Treaty on European citizenship'.[83] As such, the Member State in question was not entitled to discriminate against Ms Martinez Sala in respect of the grant of a child-raising allowance. The allowance was a social advantage that seemed suitable to facilitate mobility within the Union, Ms. Martinez Sala had exercised her mobility, so to deny her that allowance would hinder free movement.

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[80] Case 316/85 *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* EU:C:1987:302.
[81] Article 3(2) TEU.
[82] Case C-85/96 *María Martínez Sala v Freistaat Bayern* EU:C:1997:335.
[83] ibid para 61.

The obligation to provide financial support to non-economically active citizens is not unconditional, and Member States are not required to provide such support where this entails an unreasonable burden on them. But Member States are expected to show 'a certain degree of solidarity' towards nationals of other Member States.[84] Moreover, and crucially for the purpose of this article, the obligation only exists where this will be necessary to achieve the objective. There is no general duty on Member States to display solidarity to EU citizens present in their territory, except where this is necessitated by the EU objective. This was made evident in the subsequent case of *Danó*.[85] This case concerned Ms Danó, a national of one Member State (Romania) lawfully resident[86] in another Member State (Germany). She applied for a benefit which the CJEU considered fell within the material scope of EU law.[87] According to its previous caselaw,[88] Germany should have had an obligation not to discriminate against Ms Danó, and it would be up to the Member State to show that denying her the benefit was necessary and proportionate in order to prevent her being a burden on its social assistance.

The CJEU did not follow its previous caselaw. Instead, the it did a 'teleological twist […] which […] effectively reversed the objective of the CRD [Citizens' Rights Directive]'.[89] Whereas, as indicated above, the CJEU had previously held that the CRD should be identified in light of its objective of facilitating free movement of citizens. Now the CJEU held that it must be interpreted in light of its objective of 'preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State'.[90] If the objective is to protect the social assistance systems of Member States, then the Member State has no obligation to display a 'certain degree of solidarity' towards her.

The implications for transnational European solidarity is that it is, as Brunkhorst notes, an asymmetric solidarity, secured from above.[91] EU citizens are not consociates engaged in a common project, or sharing a common identity. They are passive recipients of rights, which are provided by the Member States in accordance with the functional imperatives of European integration, but they are merely the addressees of the law, not its co-authors.[92]

3.3 NATIONAL SOLIDARITY

Within those national legal, political and social orders, the question of solidarity assumes a central practical political dimension. It is, as Bayertz insists 'the question as to how the

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[84] Case C-184/99 *Rudy Grzelczyk* EU:C:2001:458. For an exploration of the nature of this solidarity, see Stefano Giubboni, 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the EU* (Oxford University Press 2010).

[85] Case C-333/13 *Elisabeta Dano, Florin Dano v Jobcenter Leipzig* EU:C:2014:2358.

[86] She had been issued by the German authorities with a residence certificate of unlimited duration (ibid para 36).

[87] ibid para 55.

[88] Such as *Martinez Sala*, as discussed above.

[89] Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) Common Market Law Review 17.

[90] Case C-333/13 *Dano* (n 85) para 74.

[91] Hauke Brunkhorst, *Solidarity* (MIT Press 2005) 172.

[92] For a more expansive understanding of individuals in EU law and of interpersonal solidarity, see Groussot and Karageorgiou in this Special Issue.

cohesion of society can be promoted and consolidated'.[93] Solidarity here operates in what Forst classifies as the 'ethical-political context'. It refers to 'national bonds and a shared history, or perhaps even an ethnic-historical identity interpreted as a political identity and as a project to be pursued and continued'.[94] This would seem to tie solidarity to some idea of nationalistic or identitarian politics. That is not necessarily so. Any form of political community entails a common conception of shared life form within which each person must take responsibility for the other.[95]

According to Habermas, discourse ethics stipulates that both human rights and democracy co-originate from a discursive process in which legal subjects can understand themselves as both authors and addressees of those rights and that democracy. But this process cannot arise among a random collection of atomised individuals, but requires a value orientation of citizens, a certain attitude of citizens towards their fellow citizens.[96] This attitude is one of solidarity. Solidarity, in this ethical-political context, is thus a moral demand, that members of the political community adopt a particular attitude towards their fellow members, and as such, it is applicable only within a bounded political community.[97]

These processes, institutions and normative demands, within which national solidarity is secured, either in its factual or normative dimension, do not seem to have a place within the normative framework of the EU's functional constitution. At best, they are a purely internal matter, which is the matter for the Member States within their individual spheres of competence,[98] or a national interest which can be relied on to justify derogating from obligations arising out of EU law.[99]

At worst, they may be regarded as protectionist or nationalistic, and as obstacles to be overcome. Indeed, the process of European integration has been described as precisely aimed at loosening such national ties in order to make space for individual self-determination.[100] As Munch puts it: 'European law is a major force in advancing individual autonomy by emancipating the individual from traditionally established national constraints'.[101]

Even if one does not accept that the *objective* of the EU project is the weakening of national solidarity, there are good arguments that the *effects* of EU law, in particular internal market law, in practice, undermine national solidarity. As Scharpf describes,[102] the

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[93] Bayertz (n 28) 13.
[94] Forst (n 30) 10.
[95] Jürgen Habermas, 'Justice and Solidarity: on the discussion concerning Stage 6' (1989) 21(1) Philosophical Forum 32.
[96] ibid.
[97] Indeed, as Pierce notes, the moral demand of solidarity is a necessary condition for the flourishing, and perhaps for the very existence, of democratic political communities (Andrew J Pierce, 'Justice without Solidarity? Collective Identity and the Fate of the 'Ethical' in Habermas' Recent Political Theory' (2018) 26(1) European Journal of Philosophy 546).
[98] E.g., Case C-67/96 *Albany International BV* EU:C:1999:430.
[99] See, tangentially, Case C-699/17 *Allianz Vorsorgekasse AG* EU:C:2019:290.
[100] Loïc Azoulai, 'The European Individual as Part of Collective Entities' in Loïc Azoulai, Ségolène Barbou des Places, and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016).
[101] Richard Münch, 'Constructing a European Society by Jurisdiction' (2008) 14(5) European Law Journal 519.
[102] Fritz W Scharpf, 'Legitimacy in the Multi-level European Polity' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010).

mechanism of negative integration, underpinned by directly effective individual rights and the principle of supremacy, have a corrosive effect on the systems of mutual solidarity constructed within Member States' legal orders.[103]

4 SOLIDARITY AS THE TELOS OF THE EU

Another possible locus of solidarity within the EU legal order, conceived as a functional constitution, is as the telos of European integration. On this view, solidarity is not another norm, or principle, of EU law, but is the raison d'etre of the European project.[104] This would reflect the famous statement in the Schuman declaration that: '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'.[105]

As such, the objectives set out in the Treaties are not ends in themselves, but are merely means to achieve the ultimate goal of European solidarity. In this vein, and as already pointed out above, Advocate General Bot, in his Opinion in *Slovakia and Hungary v Council*, asserts that, when referring to solidarity as a cardinal value of the European Union, one refers to 'the quintessence of what is both the raison d'être and the objective of the European project'.

The question that arises is: what is the normative effect of European solidarity? To put it in arithmetic terms, if European solidarity is the sum of the objectives set out in the treaty, then what is the difference between those objectives and solidarity - in other words, if one subtracts the objectives from solidarity, what is Europe left with? Solidarity entails an obligation to act. To what end are Member States required to act? In order to create solidarity? The formulation of 'an ever closer union', if taken as the *finalité politique* of the European project becomes an empty tautology,[106] and solidarity is demanded solely for solidarity's sake.

5 CONCLUSION

This article sought to analyse solidarity as a concept of EU law in light of a functional constitutionalist understanding of the EU legal order. It started with a concept of solidarity stripped, to the extent possible, of any normative connotations and substantive assumptions, in order to identify that role that solidarity plays in the various contexts in which it arises within the EU legal framework.

The conclusion is that, from this perspective, the normative value of solidarity in EU law is contingent on effectiveness. Where the effective achievement of EU objectives requires Member States to act in solidarity to each other, or to exercise transnational solidarity towards citizens of other Member States, then EU law will impose a duty on them to do so. Conversely, if the exercise of national solidarity within the Member State undermines the

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[103] For an exposition of this effect in respect of national democracy see Eduardo Gill-Pedro, *EU Law, Fundamental Rights and National Democracy* (Routledge 2019).
[104] Echoing the language of the Court in *Opinion 2/13*.
[105] Schuman Declaration of 9 May 1950 <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en> accessed 16 May 2023.
[106] Michelle Everson and Christian Joerges, 'Facticity as validity: the misplaced revolutionary praxis of European law' in Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019).

effective achievement of EU objectives, then EU law will impose a duty on those Member States not to allow such exercise.

This may not be a very satisfying conclusion for those who would wish the EU to represent the embodiment of higher values or nobler principles. But a functional constitutionalist perspective takes seriously the purposive nature of the EU legal order. The EU has no competence to impose duties on Member States or on EU citizens to act in solidarity with others, except where such solidarity facilitates the achievement of EU objectives.

LIST OF REFERENCES

Augenstein D, 'Disagreement—Commonality—Autonomy: EU Fundamental Rights in the Internal Market' (2013) 15 Cambridge Yearbook of European Legal Studies 1
DOI: https://doi.org/10.5235/152888713809813549

Azoulai L, 'The European Individual as Part of Collective Entities' in Azoulai L, Barbou des Places S, and Pataut E (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016)
DOI: https://doi.org/10.5040/9781782259367.ch-009

Barnard C, *The Substantive Law of the EU* (4th edn, Oxford University Press 2013)
DOI: https://doi.org/10.1093/he/9780199670765.001.0001

Bayertz K, 'Four Uses of "Solidarity"' in Bayertz K (ed), *Solidarity. Philosophical Studies in Contemporary Culture* (Springer 1999)
DOI: https://doi.org/10.1007/978-94-015-9245-1_1

Brunkhorst H, *Solidarity* (MIT Press 2005)

Davies G, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43(1) Common Market Law Review 63
DOI: https://doi.org/10.54648/cola2005083

— —, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21(1) European Law Journal 2
DOI: https://doi.org/10.1111/eulj.12079

Everson M and Joerges C, 'Facticity as validity: the misplaced revolutionary praxis of European law' in Christodoulidis E, Dukes R, and Goldoni M (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019)
DOI: https://doi.org/10.4337/9781786438898.00030

Gill-Pedro E, *EU Law, Fundamental Rights and National Democracy* (Routledge 2019)
DOI: https://doi.org/10.4324/9780429329142

Giubboni S, 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice' in Ross M and Borgmann-Prebil Y (eds), *Promoting Solidarity in the EU* (Oxford University Press 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199583188.003.0009

Gould CC, 'Transnational Solidarities' (2007) 38(1) Journal of Social Philosophy 148
DOI: https://doi.org/10.1111/j.1467-9833.2007.00371.x

Haas E, *The Uniting of Europe: Political, Social and Economic Forces* (first published 1958, University of Notre Dame Press 2004)

Habermas J, 'Justice and Solidarity: on the discussion concerning Stage 6' (1989) 21(1) Philosophical Forum 32.

Isiksel T, *Europe's Functional Constitution* (Oxford University Press 2016)
DOI: https://doi.org/10.1093/acprof:oso/9780198759072.001.0001

Karageorgiou E, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018)

Laitinen A, 'From Recognition to Solidarity: Universal Respect, Mutual Support and Social Unity' in Laitinen A and Pessi AB (eds), *Solidarity: Theory and Practice* (Lexington Books 2014)

Lenaerts K, *Constitutionalism and the Many Faces of Federalism* (1990) 38(2) The American Journal of Comparative Law 205
DOI: https://doi.org/10.2307/840100

Linseth PL, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780195390148.001.0001

Münch R, 'Constructing a European Society by Jurisdiction' (2008) 14(5) European Law Journal 519
DOI: https://doi.org/10.1111/j.1468-0386.2008.00428.x

Munoz-Dardé V, 'Fellow Feelings: Fraternety, Equality and the Origin of Stability and Justice' (2018) sup. 7, Daimon: Revista Internacional de Filosofia 107
DOI: https://doi.org/10.6018/daimon/333881

Pierce AJ, 'Justice without Solidarity? Collective Identity and the Fate of the 'Ethical' in Habermas' Recent Political Theory' (2018) 26(1) European Journal of Philosophy 546
DOI: https://doi.org/10.1111/ejop.12273

Prainsack B and Buyx A, 'Solidarity in Contemporary Bioethics – Towards a New Approach' (2012) 26(7) Bioethics 343
DOI: https://doi.org/10.1111/j.1467-8519.2012.01987.x

Ross M, 'Solidarity: A new constitutional paradigm for the EU' in Ross M and Borgmann-Prebil Y (eds), *Promoting Solidarity in the EU* (Oxford University Press 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199583188.003.0002

Sangiovanni A, 'Solidarity in the European Union' (2013) 33(2) Oxford Journal of Legal Studies 213
DOI: https://doi.org/10.1093/ojls/gqs033

Sangiovanni, A.. 'Solidarity as Joint Action' (2015) 32(4) Journal of Applied Philosophy 340
DOI: https://doi.org/10.1111/japp.12130

Scharpf FW, 'Legitimacy in the Multi-level European Polity' in Dobner P and Loughlin M (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199585007.003.0005

Stjernø S, 'The Idea of Solidarity in Europe' (2011) 3 European Journal of Social Law 156

Stone Sweet A and Sandholtz W, 'European Integration and Supranational Governance' (1997) 4(3) Journal of European Public Policy 297
DOI: https://doi.org/10.1080/13501769780000011

Stratton KB, 'Narrating Violence, Narrating Self: Exodus and Collective Identity in Early Rabbinic Literature' (2017) 57(1) History of Religions 68
DOI: https://doi.org/10.1086/692318

Thym D, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) Common Market Law Review 17
DOI: https://doi.org/10.54648/cola2015002

Tuori K, *European Constitutionalism* (Cambridge University Press 2015)
DOI: https://doi.org/10.1017/cbo9781316091883

Walker N, 'Postnational constitutionalism and the problem of translation' in Weiler JHH and Wind M (eds), *European Constitutionalism beyond the State* (Cambridge University Presss 2001)
DOI: https://doi.org/10.1017/cbo9780511495106.003

Weatherill S, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12(3) German Law Journal 827
DOI: https://doi.org/10.1017/s2071832200017120

Weiler JHH, 'Individuals and Rights - the Sour Grapes' (2013) 21(2) European Journal of International Law 277
DOI: https://doi.org/10.1093/ejil/chq043

Wilde L, 'The Concept of Solidarity: Emerging from the Theoretical Shadows' (2007) 9(1) Journal of British Politics and International Relations 171
DOI: https://doi.org/10.1111/j.1467-856x.2007.00275.x

THE CONSTITUTIONAL CONCEPT OF SOLIDARITY IN EU LAW: SOME REFLECTIONS ON THE INTERRELATIONSHIP BETWEEN SOLIDARITY, CONSTITUENT POWER, AND NON-DOMINATION

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The notion of solidarity is a key constitutional concept in EU law, but its exact meaning remains somewhat vague. What, if anything, is 'constitutional' about solidarity we may readily ask? It could be argued that solidarity is connected to the structure of EU law and linked to the very idea of trust, loyalty, and interdependence between the Member States. Moreover, solidarity appears to have many traits that are similar to the notions of fairness and justice, and values in the EU. In this article, I will trace and discuss the similarities between solidarity on the one hand and other constitutional concepts such as the idea of a 'constituent power' and non-domination on the other in order to further clarify their meaning and interdependence.

1 INTRODUCTION

The idea of solidarity is a key concept in EU law, but what does it mean to refer to this concept? And what, if anything, is 'constitutional' about solidarity we may readily ask? It could be argued that solidarity is linked to the structure of EU law and as such connected to the very idea of trust, loyalty, and interdependence between the Member States. Moreover, as an EU constitutional concept, solidarity appears to have many traits that are similar to the notions of fairness and justice, and values.[1] For example, Rainer Forst has argued that a natural duty of justice highlights a kind of solidarity based on justice and that 'Solidarity expresses a willingness to act with and for the sake of others based on the motive of affirming the collective bond', i.e., of furthering the common cause or the shared identity, when this is required.[2]

In EU law, solidarity is commonly linked to the idea of EU citizenship, where the notion of solidarity is central as one of the founding themes.[3] In addition, the enforcement of EU law through the template of mutual recognition is constitutionally challenging and interesting, as it is based upon solidarity and trust across European traditions. The history of mutual recognition is interesting as it meant that when goods existed in the common market

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[1] See also articles by Casolari, Gill-Pedro and González Pascual in this Special Issue.

[2] Rainer Forst, 'A Critical Theory of Transnational (In-) Justice: Realistic in the Right Way' in Thom Brooks (ed), *The Oxford Handbook of Global Justice* (Oxford University Press 2021) 451-472.

[3] See also articles by Hyltén-Cavallius in this Special Issue. See also Sandra Mantu and Paul Minderhoud, 'EU citizenship and social solidarity' (2017) 24(5) Maastricht Journal 703, and Siofra O'Leary, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in Gráinne de Búrca (ed), *EU law and the welfare state: In search of solidarity* (Oxford University Press 2005).

there would be no other cross-border obstacles and thus 'trust' also became a key concept in European integration law based on a loose, albeit founding idea of solidarity. More recently, in the Budget Conditionality Case,[4] concerning the lack of compliance in Hungary and Poland with the rule of law and values and whether these countries would be disqualified for funding, the AG was quite clear about the need to respect EU values Article 2 TEU. Specifically, AG Campos Sánchez-Bordona held that in the specific case of Hungary:

> Financial conditionality establishes a link between solidarity and responsibility. The European Union transfers funds from its budget to Member States provided that the money is spent responsibly, which means spending it in accordance with EU values, such as the rule of law. Only if the budget is implemented in accordance with EU values will there be sufficient mutual trust between Member States [.][5]

In other words, the idea of solidarity is also linked to the EU values and the responsibility of the Member States to uphold these values.

The aim of this article is to elucidate the multifaceted notion of solidarity. While the notion of solidarity is mentioned several times in the Treaty, it seems clear that solidarity has a broader conceptual meaning than simply that of a technical legal concept. In this article, I will examine the constitutional meaning of solidarity by first discussing the concept of solidarity properly and thereafter looking at its similarities with other constitutional notions, such as the question of constituent power and that of the broader constitutional question of non-domination.

In other words, the article aims to discuss the constitutional meaning of solidarity and try to pinpoint overlaps between solidarity and other constitutional theory concepts.

The article is structured as follows. The second section looks at solidarity as a constitutional concept and tries to briefly trace its origin and address the question as to why solidarity is an important constitutional principle. The third part moves on and discusses the idea of constituent power and non-domination in the broader context of solidarity. These concepts are relevant in the context of solidarity, as they both concern the wider question of a collective and what the collective ought to do respectively. The fourth part concludes with some reflections on the similarities between solidarity and the debate on constituent power and non-domination respectively.

2 SOLIDARITY AS A CONCEPT

What is meant by solidarity as a concept in EU law? According to Andrea Sangiovanni, solidarity in the EU could be divided into roughly two parts. The first part defines principles for relations between Member States (Member State solidarity), and the second part governs our relations with European citizens and residents (transnational solidarity).[6] For instance,

[4] Opinion of AG Campos Sánchez-Bordona in Case C-156/21 *Hungary v Parliament and Council* EU:C:2021:974; Opinion of AG Campos Sánchez-Bordona in Case C-157/21 *Poland v Parliament and Council* EU:C:2021:978. See case note Andi Hoxaj, 'The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget' (2022) 5(1) Nordic Journal of European Law 131.

[5] Opinions of AG Campos Sánchez-Bordona in cases C-156/21 and C-157/21 (n 4).

[6] Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) Oxford Journal of Legal Studies 213.

Sangiovanni mentions social insurance schemes are an example of social justice systems. The principle of solidarity is also a vertical notion. For example, the question of Member States' responsibility qua not only to the EU but also vis-à-vis other Member States is reflected in the EU's defense policies as well as broader questions pertaining to the EU's migration and climate policies and sustainability (turning on the question what the EU *should do*). One of the most interesting references in a constitutional context is Article 222 TFEU. This provision stipulates that the EU and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or manmade disaster. Another key provision concerning solidarity is Article 80 TFEU which states that solidarity should guide the EU's action in the area of asylum law.[7] Also Article 67 TFEU uses the vocabulary of solidarity, and states inter alia, that the EU shall 'ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'. The idea of solidarity was highlighted in the Covid pandemic which was considered as a successful experiment, centered on the practical and symbolic reconstruction of cross-national solidarity and bonding.[8] Thus, the notion of solidarity is central across many EU policy fields such as in EU migration polices, in EU defence policies and also EU energy policies (Article 194 TEU).[9]

At the macro level, Margret Kohn has described solidarity as a civic virtue.[10] Likewise, Lawrence Wilde observes that '[i]n essence, solidarity is the feeling of reciprocal sympathy and responsibility among members of a group which promotes mutual support'.[11] Wilde discusses the potential of the EU in extending solidarity and points at the central place of solidarity in the writings of Jürgen Habermas, who pointed at the EU as a potential for developing a post-national conception of citizenship.[12] For Habermas, solidarity is the reversed side of justice and a realization of a general will formation.[13] Solidarity in the EU framework seems to relate to the EU itself: the Member States are required to show solidarity towards the EU. In this context it is often difficult to clearly discern solidarity and the principle of loyalty.[14] Solidarity then, like loyalty, becomes a governance technique in the EU.[15] For example, loyalty in EU governance is often described as a system-building component based on identity, solidarity and trust.[16] Moreover, the EU Court has for a long

[7] See Eleni Karageorgiou, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018).
[8] Maurizio Ferrera, 'The European Union and cross-national solidarity: safeguarding 'togetherness' in hard times" (2023) 81(1) Review of Social Economy 105.
[9] See the article by Bergström, in this Special Issue.
[10] Margaret Kohn, 'Radical republicanism and solidarity' (2022) 21(1) European Journal of Political Theory 25.
[11] Lawrence Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?' (2007) 9(1) The British Journal of Politics and International Relations 171.
[12] ibid, and Jürgen Habermas, 'Justice and solidarity: On the discussion concerning Stage 6' in Thomas E Wren (ed), *The moral domain: Essays in the ongoing discussion between philosophy and the social sciences* (MIT Press 1990).
[13] ibid.
[14] See e.g., Marcus Klamert, 'Loyalty and Solidarity as general principles' in Katja S Ziegler, Päivi J Neuvonen, and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022).
[15] On governance as a technique, see e.g., Paul James Cardwell, 'Governance as the meeting place of EU law and politics' in Paul James Cardwell and Marie-Pierre Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar 2020).
[16] Göran von Sydow, 'Trust and Crises in the EU: Exit, Voice and Loyalty' in Antonina Bakardjieva

time been an active player with regard to determining the values to be promoted by the EU, where non-discrimination and dignity have played a crucial role.[17] The EU Court has read values into the idea of loyalty as a holistic mechanism for maintaining and establishing continuing European integration. Many commentators point at the similarities between loyalty and solidarity. Yet, while loyalty is codified in Article 4(3) TEU, it is also a general principle of EU law and, as such, impacts almost all EU law. Solidarity is also a value of the EU, as such it is mentioned in Article 2 TEU. According to Marcus Klamert, solidarity is more horizontal in its application as compared to loyalty.[18] While solidarity is also a vertical concept in connection with the Rule of Law crisis in the EU, we have seen a discussion of the lack of solidarity.[19] For example, in the *Commission v Poland* case concerning refugee quotas, the Court points at the importance of the principle of solidarity and fair sharing of responsibilities between the Member States.[20]

Interestingly, as Luigi Corriras has explained it, the basic idea underlying solidarity is usually traced back to Roman law, i.e. much longer back in history than that of the French revolution or the writings of Emile Durkheim in the 1890s.[21] While Durkheim famously developed solidarity as a sociological concept, HLA Hart criticized Durkheim and compared his notion of solidarity to Lord Devlin's enforcement of morals.[22] Hart criticized Durkheim's claims that 'mechanical solidarity', springs from men's resemblances and the other, 'organic solidarity', from their differences and interdependence.[23] Interestingly, Hart dismissed solidarity as a moral principle that is not useful in his view, although we may actually ask what is so different from his rule of recognition. Solidarity in the periphery, we can call it, as the duty to obey the law, relies on the fact that others comply with the law.

Yet the idea of solidarity is not new. In Roman Law, the *obligatio in solidum,* each person was individually responsible for the liability of the group; i.e., everybody was liable *in solidum* (= for the whole).[24] Solidarity in this regard means that the EU Member States are expected to show solidarity towards the EU and towards one another. Recently, Eleni Karageorgiou and Gregor Noll have interestingly characterized solidarity as an alignment principle, which reaffirms the hard borders of the EU where solidarity is linked to the idea of a 'we against

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Engelbrekt, Niklas Bremberg, Anna Michalski, and Lars Oxelheim (eds), *Trust in the European Union in Challenging Times* (Palgrave Macmillan 2019).

[17] See, for example, Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd. v Grogan* EU:C:1991:378; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bon*n EU:C:2004:614; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* EU:C:2010:806.

[18] See Klamert (n 14) 124-125.

[19] Xavier Groussot and Johan Lindholm, 'General principles: taking rights seriously and waving the rule of law stick in the European Union' in Katja S Ziegler, Päivi J Neuvonen, and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022).

[20] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* EU:C:2020:257.

[21] On mechanical and organic solidarity in Durkheim's theory see Jeannette L Nolen, 'Mechanical and organic solidarity' (Encyclopaedia Britannica) <https://www.britannica.com/topic/mechanical-and-organic-solidarity>accessed 24 April 2023. See also Luigi Corrias, 'Solidarity and Community' (2021) 50(2) Netherlands Journal of Legal Philosophy 129.

[22] HLA Hart, 'Social Solidarity and the Enforcement of Morality' (1967) 35(1) The University of Chicago Law Review 1.

[23] ibid 5.

[24] ibid.

them', i.e., the outsiders.[25] Relatedly, Mette Eilstrup-Sangiovanni has pointed out that the growing politicization of immigration and asylum policies and fueled fears of terrorism and transnational crime, there is no 'European fortress'.[26] Instead, she argues that there are 27 fortresses behind which individual Member States are increasingly barricading themselves, so in this context not showing solidarity towards the EU nationalistic selfishness. So, while solidarity as understood in sociology as a community concept based on integration, solidarity in EU law seems simultaneously to be a concept for further EU integration.

Moreover, it has been suggested that the pursuit of human solidarity would also require an explicit ethical movement, and points at the idea proposed by Zygmunt Bauman and others of a search for a common humanity.[27] In the specific context of the EU this approach has been criticized by more statist oriented theorists suggesting that a cosmopolitan approach which places solidarity in a common humanity disregards the importance of nations as a basis of solidarity.[28] Conversely it could be argued that the whole point of solidarity in the context of the EU is that it exists across the borders.[29]

3 CONSTITUENT POWER AND NON-DOMINATION

In what follows, I will engage with the idea of constituent power that is often considered an important part of constitutional law theory. Constituent power, however, speaks about the people which is a major question and highly important with regard to solidarity.

As noted above, the idea of a community is central when discussing solidarity. In the classic constitutional debate, the starting point for discussing 'constituent power' is 'We the people', where the collective self is exactly the agency that the constitutive power claims to exhibit.[30] According to the idea of constituent power, such power is superior to the constitution and any constituted powers and may subvert or alter them at any time.[31] The concept refers to some special type of collective agency, and we may therefore ask what this might mean beyond the nation state. For example, Peter Niesen explains how the constituent power in state federations lies with the peoples of their constituent states.[32] The idea of constituent power is the original, democratic power of the people who confer all authority upon the constitution and, directly or indirectly, on all subsequent legislation. Others, such as Corrias, refer to the doctrine of constituent power to grasp the founding potential of solidarity and where solidarity is born in the smallest actions that slowly but steadily build an atmosphere of trust.[33] For Hans Lindahl, for example, constituent power is a theory that acknowledges that the question about the authority of a constitution can never be fully

[25] Eleni Karageorgiou and Gregor Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4(2) Jus Cogens 131.
[26] Mette Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective Action Barriers to "Fortress Europe"' (2021) 28(3) Journal of European Public Policy 447.
[27] Zygmunt Bauman, *Community: Seeking Safety in an Insecure World* (Polity 2002). Also cited in Wilde (n 11).
[28] Damian Chalmers, 'Constituent Power and the Pluralist Ethic' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).
[29] Indeed, this was something that Ruti Teitel argued, in the context of international law, in her book on Humanity's Law already in 2011, Ruti G Teitel, *Humanity's Law* (Oxford University Press 2011).
[30] ibid.
[31] ibid.
[32] Peter Niesen, 'Two Cheers for Lost Sovereignty Referendums: Campaigns for Independence and the Pouvoir Constituant Mixte' (2022) 23(1) German Law Journal 44.
[33] Corrias (n 21).

dissociated from the question about its genetic conditions.[34] In the context of the EU, this is interesting from the perspective of solidarity and the EU values as well as the question as to what community we are discussing. The second question I will focus on in this section is that of republican theory and the question of non-domination more specifically, which seems highly relevant with regard to transnational relations based on solidarity.

3.1 CONSTITUENT POWER

The idea of constituent power has to do with the origin of the constitution and where the idea of a 'pouvoir constituent' signals the historicity of the constitution.[35] For Mattias Kumm, 'the idea of constituent power as a normative concept has a limited but important justificatory role to play within the context of a post-national and post-positivism conception of constitutionalism'.[36] So how relevant is the concept of constituent power today? David Dyzenhaus for example, claims that understanding the authority of law as internal to the legal order means that constituent power does not add much.[37] Yet Alexander Somek argues that "'constituent power" explains how a constitution can be "mine" or "yours" [; it] goes to the heart of self-determination'. [38] In this way, constituent power is a shared exercise of both the nation state and the international community.[39]

Moreover, the infamous jurist Carl Schmitt, has had a huge impact on the interpretation of constituent power as he saw it as no different from sovereignty (and therefore the question of exception) and which has cast a shadow on the concept of a constituent power.[40] Interestingly, constituent power is important for Emilios Christodoulidis' in his recent work on what it means to have a redress of law.[41] Specifically, Christodoulidis turns to Antoni Negri, who argued that constituent power poses a 'radical question', 'insofar as it constitutes the political from nothingness'.[42] Christodoulidis points at Schmitt who stressed the formless nature of constituent power, as this power can 'change its forms and continually give itself new forms of political existence'.[43] From the perspective of a redress of law it makes it impossible to clarify what exactly it entails. Christodoulidis intends to adopt a radical take, but it is unclear to me what is radical with constituent power if it is a redress of law that is sought after. A 'redress of law', one would assume, would turn on what it means to have a due process in the present.

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[34] Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018) 401. Also discussed in Ester Herlin-Karnell, Gerard Conway and Aravind Ganesh, *European Union Law in Context* (Hart Publishing 2021), Chapter 2.
[35] Alexander Somek, 'Constituent power in National and Transnational contexts' (2012) 3(1) Transnational Legal Theory 31.
[36] Mattias Kumm, 'Constituent power, cosmopolitan constitutionalism and post-positivist law' (2016) 14(3) International Journal of Constitutional Law 697.
[37] David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent power' (2012) 1(2) Global Constitutionalism 229, also discussed in Kumm (n 36).
[38] Somek (n 35).
[39] Kumm (n 36).
[40] Joel I Colón-Ríos et al, 'Constituent power and its institutions' (2021) 20(4) Contemporary Political Theory 926.
[41] Emilios Christodoulidis, *The Redress of Law* (Cambridge University Press 2021), Chapter 2.
[42] ibid. See also Massimo Fichera, 'The Idea of Discursive Constituent Power' (2021) 3(2) Jus Cogens 159.
[43] Benjamin Ask Popp-Madsen, 'Non-domination and constituent power: Socialist republicanism versus radical democracy' (2022) Philosophy and Social Criticism <https://journals.sagepub.com/doi/10.1177/01914537221107401> accessed 24 April 2023.

While these are broad questions, and more concretely in the context of the EU, Marcus Patberg has argued that constituent power is a democratic category of crucial importance for our understanding of legitimate constitution making and constitutional change.[44] For Patberg, constituent power stands for the democratic entitlement and capacity of the people to give themselves a constitution, and, in this way, to determine the structure and competencies of public authorities. As such, it describes a dimension of popular sovereignty, which, as a whole, includes democratic control of both constitutional and normal politics. Patberg claims that although the EU has clearly taken on a constitutional character this is not reflected in the institutional setup or the possibility of citizens having any real impact. On the contrary, the phenomenon of constitutional mutation increasingly deepens the decoupling of the EU's constitutional development from democratic control. This, he argues, leads to a growing dissatisfaction with and resistance to European integration; this can be seen, for example, with Brexit and the rule of law crisis in Poland and Hungary.[45] The logic of popular sovereignty is that the people are the source of all political authority in the polity; therefore, the right to rule derives from subjects being part of a collective.[46] And this very collective is interesting and relevant with regard to the EU's ambition of creating solidarity and upholding EU values in the Member States.

More specifically, why is constituent power still interesting in the context of constitutionalism and the EU? I argue that the question of constitutionalism in the framework of EU is better understood through the notion on non-domination, which allows for a clearer link with solidarity and EU values.

3.2 DOMINATION AS SUCH

The idea of non-domination is particularly interesting in the context of constitutionalism. How can there be a model of political constitutionalism that is not constrained to the nation state? For Kumm, 'any claim by a state to authoritatively and unilaterally settle justice sensitive externalities in relation to other states amounts to domination if it does not accept a system of international law with a sufficiently robust structure'.[47] In other words, there would be a duty to enter into an international community. Kumm calls this the notion of reciprocal compliance.[48] Likewise, Sangiovanni mentioned above, links the question of solidarity to the question of fair return as a question of reciprocity and trust.

Thus, in Philip Pettit's terms, domination means something along the lines of 'living under any agent who possesses the capacity to interfere with choices in an arbitrary manner'.[49] To be free, therefore, requires one to consciously have the personal, natural, and social resources necessary to be able to satisfy one's will. With arbitrary power, Pettit does not mean a decision that is based upon the subjective judgment or preference of the agent, as such, but rather one based solely upon the agent's pleasure.[50] This approach has recently

[44] Markus Patberg, *Constituent Power in the European Union* (Oxford University Press 2020).
[45] ibid.
[46] Jan Pieter Beetz and Enzo Rossi, 'The EU's democratic deficit in a realist key: multilateral governance, popular sovereignty and critical responsiveness' (2017) 8(1) Transnational Legal Theory 22.
[47] Kumm, 2016 (n 36).
[48] ibid.
[49] Philip Pettit, *On the People's Terms* (Cambridge University Press 2012), Chapter 1.
[50] ibid.

been criticized by Michael Thompson who suggested that the classic focus on arbitrariness as the central element of domination is mistaken, and what is needed is a Weberian view of domination as informed by societal strictures and centered on his distinction between the ordinary and the extraordinary.[51] In addition, Thompson argues that domination in the modern world is often not arbitrary, but very strategic and routinized.[52]

While many scholars have criticized the republican take on freedom — that is, democracy as grounded in freedom defined as non-domination, rather than equality — more recently, the question of non-domination has reached the limelight anew, as a more general stricture for understanding power structures.[53] Pettit suggests an 'eye-ball test' as a criterion for social non-domination, i.e., depending on social context, we can look people in the eyes without the need for ingratiation or deterrence.[54] He is criticized for not taking into consideration the complex reality of choice and thereby fails to sufficiently consider how choice itself may, in some cases, be an important aspect of dominating structures.[55] Viewed from the lens of law, this debate seems to be related to the discussion on the value of constitutionalism, as such, where for instance constitutionalism denotes a justificatory approach which does not justify constitutions merely by pointing out the desirability of the contingent desirable outcomes of constitutions.[56] Furthermore, Martti Koskenniemi has noted that 'what is important is the use of the constitutional vocabulary to express a fundamental critique of present politics'.[57]

In addition, the idea of non-domination has a social dimension that connects to solidarity. After all, going back to Rousseau, republicanism was to constitute a kind of politics, culture, and consciousness wherein relationships based on domination were to be eliminated. But for Rousseau, as Benjamin Popp-Madsen explains, domination was not simply an analytic category, but rather was inherent in socio-historical constructions of social formations and concerns hierarchical–structural relationships.[58] In the framework of the EU, this power relationship seems contingent on the principle of proportionality and solidarity. Proportionality is a tool for checks and balances; if the legislator has not done its job properly proportionality is important as an extra safeguard.[59] Surely, one would not like to have coercive sanctions or intrusive security measures without the principle of proportionality. Without going into the well-trodden debate on proportionality, my point here is concerning the relationship between solidarity and non-domination. Again, what exactly is solidarity? In order to constitute a robust concept in EU law it cannot be utilized in a dominating or a

[51] Steven Klein, 'Between Charisma and Domination: On Max Weber's Critique of Democracy' (2017) 79(1) The Journal of Politics 179.
[52] Michael J Thompson, 'Reconstructing Republican Freedom: A Critique of the Neo-republication Concept of Freedom as Non-domination' (2013) 39(3) Philosophy and Social Criticism 277.
[53] ibid.
[54] Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (Norton 2014).
[55] Thompson (n 52).
[56] Alon Harel, 'Constitutionalism and Justice' in Ester Herlin-Karnell, Matthias Klatt, and Héctor A Morales Zúñiga (eds), *Constitutionalism Justified* (Oxford University Press 2019).
[57] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2006) 8(1) Theoretical Inquiries in Law 9, 35-36; also discussed in Vicki C Jackson, 'Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges' (2010) 8(3) International Constitutional Law Journal 517.
[58] Popp-Madsen (n 43).
[59] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012).

disproportionate manner. In other words, solidarity in the EU needs to be in line with the EU values and employed in a non-dominating way (encompassing also proportionality).

This brings us back to the question of solidarity and the external dimension. The EU seeks to promote its values abroad, Article 3(5) TEU. It is only internally that solidarity appears as a constitutional duty. Likewise, in the name of solidarity, Member States are expected to help through various means in the situation of armed aggression, terrorist attack, or a natural disaster (Article 222 TFEU and also Article 42 (7) TEU), as mentioned above. Finally, the whole EU is underpinned by a claimed solidarity principle, but in practice, the idea of solidarity is varied and used inconsistently even if the EU Court insists that it is a justiciable principle. The EU values and objectives tell us that not only shall the EU and its various policies be based on solidarity and trust but the EU should also promote its values abroad. Thus, EU Member States owe solidarity toward one another if taking the Treaty seriously, and externally they shall promote it as one of the values of the EU.

4 CONCLUDING REMARKS

The idea of solidarity is central in EU law both as a constitutional concept and as a governing device. Therefore, the ideal and practices of solidarity must be utilized in a non-dominating way in order to ensure freedom and equality for both EU Member States and their citizens. In EU constitutional theory, we use many concepts such as solidarity, constituent power, and non-domination, but we seldom discuss what the notions are taken to mean, how they are related, and how they should be understood. This article has tried to offer a conceptualization of these notions. The most important message seems to be that the rhetoric of solidarity should not serve as a smokescreen for excessive EU action but should mean something. And this 'something' needs to be in line with the EU's values and idea of fairness and justice. Moreover, the idea of the collective is reflected in both the solidarity principle and the question of constituent power. In the case of the EU however, the constituent power concept has become somewhat redundant and, as is argued in this article, the interesting question lies elsewhere, namely the interconnection between solidarity and non-domination.

LIST OF REFERENCES

Barak A, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012)
DOI: https://doi.org/10.1017/cbo9781139035293

Bauman Z, *Community: Seeking Safety in an Insecure World* (Polity 2002)

Beetz JP and Rossi E, 'The EU's democratic deficit in a realist key: multilateral governance, popular sovereignty and critical responsiveness' (2017) 8(1) Transnational Legal Theory 22
DOI: https://doi.org/10.1080/20414005.2017.1307316

Cardwell PJ, 'Governance as the meeting place of EU law and politics' in Cardwell PJ and Granger MP (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar 2020)
DOI: https://doi.org/10.4337/9781788971287.00010

Chalmers D, 'Constituent Power and the Pluralist Ethic' in Loughlin M and Walker N (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008)
DOI: https://doi.org/10.1093/acprof:oso/9780199552207.003.0016

Christodoulidis E, *The Redress of Law* (Cambridge University Press 2021)
DOI: https://doi.org/10.1017/9781108765329

Colón-Ríos JI et al, 'Constituent power and its institutions' (2021) 20(4) Contemporary Political Theory 926
DOI: https://doi.org/10.1057/s41296-021-00467-z

Corrias L, 'Solidarity and Community' (2021) 50(2) Netherlands Journal of Legal Philosophy 129
DOI: https://doi.org/10.5553/njlp/221307132021050002003

Dyzenhaus D, 'Constitutionalism in an Old Key: Legality and Constituent power' (2012) 1(2) Global Constitutionalism 229
DOI: https://doi.org/10.1017/s2045381712000032

Eilstrup-Sangiovanni M, 'Re-bordering Europe? Collective Action Barriers to "Fortress Europe"' (2021) 28(3) Journal of European Public Policy 447
DOI: https://doi.org/10.1080/13501763.2021.1881585

Ferrera M, 'The European Union and cross-national solidarity: safeguarding 'togetherness' in hard times" (2023) 81(1) Review of Social Economy 105
DOI: https://doi.org/10.1080/00346764.2021.2024872

Fichera M, 'The Idea of Discursive Constituent Power' (2021) 3(2) Jus Cogens 159
DOI: https://doi.org/10.1007/s42439-021-00042-5

Forst R, 'A Critical Theory of Transnational (In-) Justice: Realistic in the Right Way' in Brooks T (ed), *The Oxford Handbook of Global Justice* (Oxford University Press 2021)
DOI: https://doi.org/10.1093/oxfordhb/9780198714354.013.22

Groussot X and Lindholm J, 'General principles: taking rights seriously and waving the rule of law stick in the European Union' in Ziegler KS, Neuvonen PJ, and Moreno-Lax V (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022)
DOI: https://doi.org/10.4337/9781784712389.00026

Habermas J, 'Justice and solidarity: On the discussion concerning Stage 6' in Wren TE (ed), *The moral domain: Essays in the ongoing discussion between philosophy and the social sciences* (MIT Press 1990)

Harel A, 'Constitutionalism and Justice' in Herlin-Karnell E, Klatt M, and Morales Zúñiga HA (eds), *Constitutionalism Justified* (Oxford University Press 2019)
DOI: https://doi.org/10.1093/oso/9780190889050.003.0010

Hart HLA, 'Social Solidarity and the Enforcement of Morality' (1967) 35(1) The University of Chicago Law Review 1.
DOI: https://doi.org/10.2307/1598946

Herlin-Karnell E, Conway G, and Ganesh A, *European Union Law in Context* (Hart Publishing 2021)

Hoxaj A, 'The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget' (2022) 5(1) Nordic Journal of European Law 131
DOI: https://doi.org/10.36969/njel.v5i1.24501

Jackson VC, 'Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges' (2010) 8(3) International Constitutional Law Journal 517
DOI: https://doi.org/10.1093/icon/moq031

Karageorgiou E and Noll G, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4(2) Jus Cogens 131
DOI: https://doi.org/10.1007/s42439-022-00059-4

Karageorgiou E, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018)

Klamert M, 'Loyalty and Solidarity as general principles' in Ziegler KS, Neuvonen PJ, and Moreno-Lax V (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022)

DOI: https://doi.org/10.4337/9781784712389.00014

Klein S, 'Between Charisma and Domination: On Max Weber's Critique of Democracy' (2017) 79(1) The Journal of Politics 179
DOI: https://doi.org/10.1086/687323

Kohn M, 'Radical republicanism and solidarity' (2022) 21(1) European Journal of Political Theory 25
DOI: https://doi.org/10.1177/1474885119881313

Koskenniemi M, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2006) 8(1) Theoretical Inquiries in Law 9
DOI: https://doi.org/10.2202/1565-3404.1141

Kumm M, 'Constituent power, cosmopolitan constitutionalism and post-positivist law' (2016) 14(3) International Journal of Constitutional Law 697
DOI: https://doi.org/10.1093/icon/mow050

Lindahl H, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018)
DOI: https://doi.org/10.1017/9781316819203

Mantu S and Minderhoud P, 'EU citizenship and social solidarity' (2017) 24(5) Maastricht Journal 703
DOI: https://doi.org/10.1177/1023263x17741271

Niesen P, 'Two Cheers for Lost Sovereignty Referendums: Campaigns for Independence and the Pouvoir Constituant Mixte' (2022) 23(1) German Law Journal 44
DOI: https://doi.org/10.1017/glj.2022.7

O'Leary S, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in de Búrca G (ed), *EU law and the welfare state: In search of solidarity* (Oxford University Press 2005)
DOI: https://doi.org/10.1093/acprof:oso/9780199287413.003.0003

Patberg M, *Constituent Power in the European Union* (Oxford University Press 2020)
DOI: https://doi.org/10.1093/oso/9780198845218.001.0001

Pettit P, *On the People's Terms* (Cambridge University Press 2012)
DOI: https://doi.org/10.1017/CBO9781139017428

— —, *Just Freedom: A Moral Compass for a Complex World* (Norton 2014).
Popp-Madsen BA, 'Non-domination and constituent power: Socialist republicanism versus radical democracy' (2022) Philosophy and Social Criticism

<https://journals.sagepub.com/doi/10.1177/01914537221107401> accessed 24 April 2023
DOI: https://doi.org/10.1177/01914537221107401

Sangiovanni A, 'Solidarity in the European Union' (2013) 33(2) Oxford Journal of Legal Studies 213
DOI: https://doi.org/10.1093/ojls/gqs033

Somek A, 'Constituent power in National and Transnational contexts' (2012) 3(1) Transnational Legal Theory 31
DOI: https://doi.org/10.5235/tlt.3.1.31

Teitel RG, *Humanity's Law* (Oxford University Press 2011)
DOI: https://doi.org/10.1093/acprof:oso/9780195370911.001.0001

Thompson MJ, 'Reconstructing Republican Freedom: A Critique of the Neo-republication Concept of Freedom as Non-domination' (2013) 39(3) Philosophy and Social Criticism 277
DOI: https://doi.org/10.1177/0191453712473081

von Sydow G, 'Trust and Crises in the EU: Exit, Voice and Loyalty' in Bakardjieva Engelbrekt A, Bremberg N, Michalski A, and Oxelheim L (eds), *Trust in the European Union in Challenging Times* (Palgrave Macmillan 2019)
DOI: https://doi.org/10.1007/978-3-319-73857-4_10

Wilde L, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?' (2007) 9(1) The British Journal of Politics and International Relations 171
DOI: https://doi.org/10.1111/j.1467-856x.2007.00275.x