

## 20 TOWARDS A CONCEPTUALIZATION OF THE NOTION OF SOLIDARITY IN THE LEGAL FRAMEWORK OF THE EU

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### **Keywords**

Concept of solidarity, principle of solidarity in EU law, theory of EU law, solidarity as a value concept

### **Abstract**

This article carries out an in-depth analysis of the complex meaning of solidarity within the EU legal framework. Solidarity is a multi-layered concept that serving as the basis for different policy-making choices of highly variable material substance, contributing significantly to the judgments of the CJEU. The point of departure in the analysis are references made to the notion of solidarity in the Founding Treaties. An important layer of its meaning derives from solidarity considered as a 'value'. Important references are made to solidarity as a 'principle' or 'spirit' and there are additional layers of its meaning in the Treaties. In secondary legislation and the institutions' communications, solidarity serves mainly as a basis for socially orientated policymaking. Following the analysis of the meaning of solidarity, I consider the notion of 'solidarity *acquis*' elaborated by Malcolm Ross that suggests that solidarity is one of the most effective tools in maintaining the consistency of the EU legal framework. Finally, the paper focuses on the case-law of the CJEU to conceptualize core legal implications of solidarity in order to establish whether solidarity may be recognized as a general principle of EU law.

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## 20.1 RETHINKING THE MEANING OF SOLIDARITY AND THE IMPORTANCE OF THE CONCEPT

There has been an extensive literature written on the concept and the precise meaning of solidarity<sup>1</sup> and its place within EU legal system<sup>2</sup> by scholars in recent years. Yet a common understanding regarding the precise meaning of solidarity has not emerged. The importance of solidarity as a point of reference increased following the adoption of the TEU and the legally binding force of the EU Charter of Fundamental Rights. The principle of solidarity is a point of reference not just in EU legislation, but also in the policy-making processes of the Union. What's more, the CJEU extensively refers to the concept in its case-law. Thus, while recognizing the increasing importance of the solidarity in the legal order of the EU, it is not clear how we are to define its precise meaning. While investigating the inherent meaning of solidarity, the question may raise whether it is, after all, a legal concept that shapes the case-law of the CJEU and the EU's constitutional framework or is it merely used as a reference for contradictory policy- and decision-making. This paper aims to examine the place of solidarity within the legal framework of the EU with an outlook on the possible dimensions of the concept.

## 20.2 THE POSSIBLE INTERPRETATIVE FRAMEWORK OF THE NOTION OF SOLIDARITY

### 20.2.1 *Solidarity as a Value Concept*

In the Founding Treaties there are altogether 17 references made to the notion of solidarity, in addition, Title IV of the Charter of Fundamental Rights is called 'Solidarity'.<sup>3</sup> As far as the Treaties are concerned, there is no crystal clear, homogeneous meaning attached to the notion of solidarity. Instead, several references are made to the notion within a broad spectrum regarding both its quality and direction. Among these references, the most explicit are those which designate solidarity as a value.<sup>4</sup> The values of the EU are listed in Article 2 TEU. Those values overlap with the principles of the EU, as they were referred

1 For a prominent theoretical analysis, see Andrea Sangiovanni, 'Solidarity in the European Union', *Oxford Journal of Legal Studies*, Vol. 33, Issue 2, 2013, pp. 213-241.

2 Ester di Napoli & Deborah Russo, 'Solidarity in the European Union in Times of Crisis: Towards "European Solidarity"?', in Veronica Federico & Christian Lahusen (eds.), *Solidarity as a Public Virtue?*, Nomos, 2018, pp. 195-248.

3 See Articles 27-38.

4 Article 2 and Article 3(5) TEU, and the Preamble of the EU Charter of Fundamental Rights.

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to before the last Treaty amendment.<sup>5</sup> These prominent notions are now called ‘values’. The wording of the second sentence of Article 2 TEU, however, differentiates somewhat between the values on which the Union is founded and the values that are common in the Member States’ societies, such as – among others – ‘solidarity’. Nevertheless, this latter group should not be distinguished from the values of the EU, but should rather be treated equally, since those values are already manifested in the Member States’ societies.<sup>6</sup> In addition, the Lisbon Treaty included the ‘solidarity clause’<sup>7</sup> into the Founding Treaties.

The values of the EU are stipulated *expressis verbis* in the first sentence of Article 2 TEU, such as the respect of human dignity, freedom, democracy, equality, the rule of law, respect of human rights, including rights of persons belonging to minorities. The societies of the Member States are shaped by the values of pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. With this wording, the Treaty puts these values into the context of Member States’ societal structures. Article 3 TEU recognizes the dynamics of Union values<sup>8</sup> and declares that the aim of the EU is, among others, to foster the values of the EU. To make further distinctions between the values and features of Member States’ societies seems unnecessary for several reasons. Both the notions of EU values and the features of Member States’ societies are considered to bear value-content and are to be maintained within the EU, both at the Union and the Member State level. Based on the wording of the Treaties as such<sup>9</sup> and the possible intent of its signatories, namely that of the Member States, Article 3(1) TEU shall be understood in a way that all values listed in Article 2 TEU are to be fostered without distinction and, consequently, solidarity is to be considered as a value.

The legal scope of Articles 2 and 3 TEU is uncertain however, and some claim that the values of the EU are to be understood as program-orientated constitutional aims only<sup>10</sup> or that they are chiefly subject to political interpretation.<sup>11</sup> Armin von Bogdandy claims that the rephrasing of the principles to values of the EU is somewhat problematic, since

5 Article 6(1) TEU: “The Union is founded on the *principles* of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” (emphasis added).

6 Christoph Vedder & Wolff Heinschel von Heinegg (eds.), *Europäisches Unionsrecht Nomos Kommentar*, Baden-Baden, Nomos, 2012, p. 49.

7 Article 222(1) TEU: “The Union 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 man-made disaster.” (emphasis added).

8 Article 3(1) TEU: “The Union’s aim is to promote peace, its values and the well-being of its peoples.”

9 The wording of the Treaty with regard to the general provisions of external action does not distinguish between values and principles, but equally uses the term of ‘principles’ in Article 21(1).

10 András Osztovits (ed.), *Az Európai Unióról és az Európai Unió működéséről szóló Szerződés magyarázata* 1. Complex, Budapest, 2011.

11 András Jakab, ‘Application of the EU Charter by National Courts in Purely Domestic Cases’, in András Jakab & Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, Oxford University Press, at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2512865](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512865).

this presupposes a certain ethical interpretation stance from the citizens and, according to von Bogdandy, a normative foundation of the EU should be established on a more palpable notion other than any kind of sociological or philosophical presumption. Von Bogdandy points out that, in a dogmatically well-founded legal framework, legal and ethical claims should be distinguished; this follows from the principle of liberty. At the same time, he adds that any discourse on the values may lead to a paternalistic approach.<sup>12</sup> Koen Lenaerts and Piet Van Nuffel take a somewhat more permissive position, since they claim that the usage of the designation values is a definite advancement.<sup>13</sup> Andrew T. Williams suggests that the designation of values of the EU in the Founding Treaties is a stabilizing step on the way to integration itself. Williams attaches paramount importance to the value-based approach that could lead to a more just institutional framework of the EU if the philosophical substance of values were formulated at a constitutional level.<sup>14</sup>

### 20.2.2 *Solidarity as a Legal Principle*

In the Founding treaties, several references were made to solidarity as a ‘principle’, or to the ‘spirit’ of solidarity.<sup>15</sup> The question arises whether solidarity should be considered a general idea or a legal principle that shapes the legal framework of the EU. According to Malcom Ross, solidarity is not just an incidental reference among the other principles that underpins the operation of the EU, but a transformative constitutional concept given its inherent methodological dimension.<sup>16</sup> Ross claims that the duty of the sincere cooperation elaborated by the Court is based on the conceptual framework of solidarity. Accordingly, solidarity is a cross-cutting principle, binding the institutions in the former pillar system<sup>17</sup> and providing an example for the conduct to be followed in the legal relationship between the Member States.<sup>18</sup> According to Ross, solidarity is a fundamental value and a tool for the reconciliation of diverse legal regimes whereby emerging conflicts and differences may remain sustainable within the legal establishment. Thus, solidarity is a cooperative, social

12 Armin von Bogdandy & Jürgen Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2011, p. 20.

13 Koen Lenaerts & Piet Van Nuffel (eds.), *European Union Law*, Sweet and Maxwell, London, 2011, p. 107.

14 Andrew T. Williams, ‘Promoting Justice after Lisbon: Groundwork for a New Philosophy of EU Law’, *Oxford Journal of Legal Studies*, Vol. 30, Issue 4, 2010, pp. 663-693.

15 Article 21(1) TEU: “principle”; Article 31(1) TEU: “spirit of mutual solidarity”; Article 80 TFEU: “principle”; Article 122(1) TFEU: “spirit of solidarity”; Article 194(1) TFEU: “spirit of solidarity”; Article 222 TFEU: “spirit of solidarity”.

16 Malcom Ross, ‘Solidarity – A New Constitutional Paradigm for the EU?’, in Malcom Ross & Youri Borgmann Prebil (eds.), *Promoting Solidarity in the European Union*, Oxford University Press, Oxford, 2010, p. 42.

17 Judgment of 16 June 2005, *Case C-105/03, Criminal proceedings against Maria Pupino*, ECLI:EU:C:2005:386, para. 41.

18 Ross 2010, p. 42.

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concept, and Ross sees its role as a more credible and capable tool for maintaining the reconciliation of regimes than the doctrine of supremacy or the harmonization of laws.<sup>19</sup>

Von Bogdandy understands solidarity as a classic principle of European constitutionalism. Driven by solidarity, the Community polity fosters cohesion between its citizens and organizes mutual cooperation between them on a higher level.<sup>20</sup> Von Bogdandy claims that solidarity should be construed with respect to the EU as an interpretive framework that facilitates the development of the EU from a form of international cooperation to a federal entity. Von Bogdandy underlines the importance of solidarity with respect to its crucial role in the Charter of Fundamental Rights and the area of CFSP. Based on these, solidarity is a key concept of the EU that, on the one hand, contributes to distinguishing it from other international organizations and, on the other hand, it emphasizes the social commitment of Europe in contrast with the US.<sup>21</sup> Similarly to the above conveyed ideas, Koen Lenaerts and Piet Van Nuffel understand the requirement of sincere cooperation between EU institutions as a form of solidarity that differs qualitatively from Member States' obligations under international law in general where they have to transpose international agreements into their domestic law only *bona fide*.<sup>22</sup>

The 'principles' of EU law have extensive literature, however, for the purpose of this paper, some distinctions may be useful. The general principles of EU law are elucidated by the CJEU in its case-law on the interpretation of EU law and, are sources of the EU law themselves. The founding principles that primarily reflect on the foundations of the EU, however, were first referred to as values of the EU in the Founding Treaties.<sup>23</sup> In the literature, there is no consensus surrounding a list of the general principles of EU law, nor is there an exhaustive list thereof. This is due to the fact that they were developed gradually in the jurisprudence of the CJEU. However, there is a common understanding on the issue of what the most significant general principles are. Subsidiarity, proportionality, legal certainty, equality and the protection of human rights are textbook examples of the general principles of EU law. These principles are also referred to as constitutional principles or principles regarding the scope of the EU law.

As described above, solidarity is considered to be a value of the EU, by all means, but further examination is necessary to elaborate whether solidarity is a general principle of the EU law and, as such, a source of EU law itself. To answer this question, the point of departure is Article 4(3) TEU, *i.e.* the loyalty clause that serves as a basis of several judgments of the CJEU that transformed the obligation of loyalty into a principle that funda-

19 Id.

20 Bogdandy & Bast (eds.), 2011, p. 53.

21 Id.

22 Lenaerts & Van Nuffel (eds.), 2011, p. 147.

23 A Treaty establishing constitution for Europe, at [https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty\\_establishing\\_a\\_constitution\\_for\\_europe\\_en.pdf](https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf).

mentally contributed to the legal framework of the EU. This provision is also referred to as the solidarity clause<sup>24</sup> that binds both the Member States and the institutions of the EU. It is driven by solidarity as a factor of cohesion, mandating either an active or a passive stance of the Member State or institution, depending on the subject matter at hand. Following Ross' approach by pointing to solidarity as the main underlying concept behind Article 4(3) TEU, it is important to note that the CJEU used the solidarity clause as a reference point in developing the concepts of both direct effect and indirect effect. The solidarity clause also served as a basis for the liability of Member States for breaching EU law.<sup>25</sup> Some scholars argue that the provision in the Treaties regarding the services of general economic interest (Article 107 TFEU) are also based on solidarity which were enacted as a part of the shared values of the Union. As a consequence of the above, Ross may validly claim that solidarity is a constitutional principle greatly affecting the whole legal framework of the EU.

### 20.2.3 Further Aspects of the Notion of Solidarity

References in the Founding Treaties do not give further guidance on the substance of solidarity but refer to the notion as a stand-alone one.<sup>26</sup> There are also references to solidarity in the Treaties with additional meanings such as political solidarity.<sup>27</sup> The concept of solidarity in a normative sense refers primarily to the relationship between the Member States; yet, several further meanings of solidarity are also represented in the Treaties: solidarity between generations,<sup>28</sup> solidarity [...] among peoples,<sup>29</sup> solidarity which binds Europe and the overseas countries,<sup>30</sup> solidarity between Member States, which is fair towards third-country nationals [...] stateless persons shall be treated as third-country nationals.<sup>31</sup> The different perspectives of solidarity expressed in the Treaties adumbrate the complex meaning of solidarity that, at the same time, allows for a wide scope of interpretation.

Wolfram Lamping emphasizes the significance of the concept of 'welfare state' in interpreting the meaning of solidarity. The core constitutive elements of the welfare state are the benefits that the state provides for its citizens by way of reallocation systems and public services that cannot be made equally available to everyone due to their costs but

24 Malcom Ross, 'Promoting Solidarity: From Public Services to the European Model of Competition', *Common Market Law Review*, Vol. 44, Issue 4, 2007, p. 1060.

25 Judgment of 19 November 1991, *Joined Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and Others v. Italian Republic (Francovich)*, ECLI:EU:C:1991:428, para 36.

26 Preamble of TEU, Article 3(3) TEU, Article 24(3) TEU, Preamble of TFEU, Article 67(3) TFEU.

27 Article 24(2) and (3) TEU that are among stipulation of the specific provision for the CFSP.

28 Article 3(3) TEU.

29 Preamble of TEU, Article 3(5) TEU.

30 Preamble of TEU.

31 Article 67(2) TFEU.

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only to a certain community. In the welfare state, common identity is taken for granted based on the common language, cultural and historical heritage; thus, citizens undertake the additional costs of maintaining the social benefit systems. However, as Lamping points it out, overemphasizing the social element of the EU may entail risks. Given that the EU aims to achieve some of its socially orientated development of welfare state standards without the same level of cohesion within the EU, some justification may be necessary.<sup>32</sup> Similarly to Lamping, Clemens M. Rieder also raised the question of maintaining solidarity in a sustainable way in respect of health care services.<sup>33</sup>

According to the understanding of solidarity described above, if the level of solidarity increases within a given community, the ability of solidary commitment will decrease towards the members of other communities. Strengthening the relationship within a community may lead to isolation from the external environment.<sup>34</sup> The more the resources and possibilities are utilized in order to facilitate the process within the community, the fewer opportunities will be made available outside the community. In my view, the inward dynamics of solidarity could work the other way around as well. There may be a situation where, if the level of solidarity rises in a given community, it may result in a stronger capability of responsibility sharing with others.<sup>35</sup> Thus, if a relationship of strong solidarity develops among the EU Member States, it may render the EU more capable of cooperating in policy areas for the benefit of other regions such as overseas countries, third countries or even undocumented persons. Solidarity is also mentioned as a basis for the EU external relations. The EU's solidarity towards certain regions of the world, such as development cooperation,<sup>36</sup> humanitarian aid<sup>37</sup> and the EU's conflict prevention and peacemaking missions in the framework of the CFSP,<sup>38</sup> requires solidarity between the Member States as a prerequisite. This kind of solidarity could manifest itself in many different ways such as financial solidarity or building the common military command chain. We should note, however, that solidarity may operate differently since certain directions of development mutually reinforce each other or lead to mutual decline. It would be hardly sustainable for

32 Wolfram Lamping, 'Limits and Perils of Institutionalising Post-National Social Policy', in Ross & Prebil (eds.), 2010, pp. 46-48.

33 Clemens M. Rieder, 'When Patients Exit, What Happens to Solidarity?', in Ross & Prebil (eds.), 2010, pp. 122-135.

34 Id. pp. 134-135.

35 See the *solidarity clause* enacted in the Lisbon Treaty, Article 222 TFEU: "The Union 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 man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States [...]" (emphasis added).

36 Articles 208-210 TFEU.

37 Article 214 TFEU.

38 Articles 41-42 TFEU.

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example, to provide equal access to the most developed health care service to everyone while maintaining its quality and standard at the same time.<sup>39</sup>

To answer all the questions in connection with the possible interpretations and the limitations of solidarity is beyond the scope of this paper, yet to understand solidarity exclusively from the perspective of access to benefits of the welfare state leads to a restrictive interpretation. In my view, focusing on the value element of solidarity instead, is what would be beneficial for European integration.

### 20.3 THE APPLICATION OF THE SOLIDARITY PRINCIPLE IN EU LAW

#### 20.3.1 *References to the Principle of Solidarity in the Communication of the Institutions and the Meaning Thereof*

In the documents of the institutions, the meaning of solidarity is a complex notion, as we have seen on the example of the Founding Treaties. In the Commission's communications, solidarity is mainly related to the social dimension of the EU and, lately, the emphasis shifted towards the solidarity between the Member States in the wake of the migration crisis. Two communications of the Commission deal directly with the potential of solidarity regarding social aspects within the EU. In its communication issued in November 2007,<sup>40</sup> the Commission takes the first step to create the vision of a social Europe, while in its communication issued in July 2008,<sup>41</sup> the Commission already provides an action plan for building a social agenda. Both documents are rich in interpreting the meaning of solidarity and contain a diverse solidarity-concept,<sup>42</sup> mainly referring to it in relation to opportunities and access. The latter communication points out that the shared societal values play an important role in strengthening European identity – itself an important element of the European project from its very inception. According to the Commission's position, the renewed social agenda is based on a threefold, mutually interconnected aim of creating

39 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled 'Solidarity in Health: Reducing Health Inequalities in the European Union', COM(2009) 567 final.

40 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled 'Opportunities, access and solidarity: towards a new social vision for 21st century Europe', COM(2007) 726 final.

41 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe', COM(2008) 412 final.

42 Catharine Barnard distinguishes between the following solidarity notions used by the Commission in the communications: solidarity as an aim, interpretative medium, notion, process and tool. See Catherine Barnard, 'Solidarity and the Commission's "Renewed Social Agenda"', in Ross & Prebil (eds.), 2010, pp. 94-98.



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opportunities, providing access and demonstrating solidarity. In line with the directions of solidarity as gleaned from the Founding Treaties, the Commission articulates that

“Europeans share a commitment to social solidarity: between generations, regions, the better off and the less well-off and wealthier and less wealthy Member States. Solidarity is part of how European society works and how Europe engages with the rest of the world.”<sup>43</sup>

Regarding the notion itself, the Commission emphasizes that

“[s]olidarity means action to help those who are disadvantaged – who cannot reap the benefits of an open, rapidly changing society. It means fostering social inclusion and integration, participation and dialogue and combating poverty. It means giving support to those who are exposed to temporary, transitional problems of globalization and technological change.”<sup>44</sup>

Accordingly, the concept of solidarity in the Commission’s understanding is not a community or societal organizing principle, rather a moral commitment expressing mainly social-oriented aspects.

The Commission refers to solidarity also in its communication that aims to give an adequate answer to the challenges that workers face in the wake of global challenges.<sup>45</sup> In line with the ‘Renewed Social Agenda’, the document summarizes the possibilities for helping workers adjust to changes and lists the tasks for the re-training of workers in a vulnerable position. In line with this policy the decision for establishing a Community Program for Employment and Social Solidarity, called ‘Progress’ was adopted.<sup>46</sup> The Program aims to fund the implementation of EU objectives in the fields of employment and social affairs, as set out in the Commission Communication on the Social Agenda, thereby contributing to the achievement of the Lisbon Strategy goals in those fields.<sup>47</sup>

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43 See COM(2008) 412 final, p. 7.

44 Id.

45 Communication from the Commission to the European Parliament and the Council entitled ‘Solidarity in the face of Change: The European Globalisation Adjustment Fund (EGF) in 2007 – Review and Prospects’, COM(2008) 421 final.

46 Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Program for Employment and Social Solidarity – Progress. The Decision was amended by Decision No 284/2010/EU of the European Parliament and of the Council of 25 March 2010.

47 Decision No 1672/2006/EC of the European Parliament and of the Council, Article 1(1).

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Important references are included in the opinion of the European Economic and Social Committee with regard to the relationship between energy policy and solidarity.<sup>48</sup> The Committee observes that legal tensions can be expected between the EU and its Member States in view of the disjuncture between the supranational task of liberalizing and/or harmonizing key aspects of the functioning of the energy market in Europe and the national task of protecting social well-being.<sup>49</sup> However, the Commission believes the contrary, namely that cooperation between the Member States will enhance national security.<sup>50</sup> The document adopts this position and reaffirms the Commission's view by declaring

“[s]ocial cohesion must be maintained as far as possible, so as to safeguard solidarity rights as regards access to energy of both the economically weakest population groups and of vulnerable and disabled people.”<sup>51</sup>

With regard to the external relations of the EU, some further legal documents should be mentioned for taking stock when it comes to solidarity-related legal developments. The implementation of the ‘solidarity clause’<sup>52</sup> took place in a Council Decision.<sup>53</sup> Pursuant to Article 222(1) TFEU, the Union and the Member States are to 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 man-made disaster.<sup>54</sup> According to this legislative act, solidarity is the obligation of a Member State towards another Member State. A different level of solidarity is demonstrated in the communication of the Commission<sup>55</sup> reflecting on the preparatory document on the establishment of a European Voluntary Humanitarian Aid Corps (EVHAC)<sup>56</sup> after its stipulation under the Lisbon Treaty.<sup>57</sup> The Commission defines humanitarian action as “a fundamental expression of the European value of solidarity”, accordingly, the Commission sees it as a unique opportunity “to express EU citizen’s solidarity through volunteering” that “could equally contribute to the development of a more cohesive European society by creating new opportunities for participation for European citizens, especially younger

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48 Opinion of the European Economic and Social Committee on ‘The EU’s new energy policy: application, effectiveness and solidarity’.

49 Id. General Comments, 3.3.2.

50 Id.

51 Id. General Comments, 3.3.3.

52 Article 222 TFEU.

53 Council Decision No 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause.

54 Id. Article 2.

55 Communication from the Commission to the European Parliament and the Council entitled ‘How to express EU citizen’s solidarity through volunteering: First reflections on a European Voluntary Humanitarian Aid Corps’, COM(2010) 683 final.

56 Id.

57 Article 214 TFEU.

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ones.”<sup>58</sup> A new direction for the understanding of solidarity is manifested in the solidarity between generations.<sup>59</sup> It is meant foster solidarity and cooperation between generations and to pursue specific objectives related to active ageing and intergenerational solidarity.<sup>60</sup>

It is outside the scope of this paper to analyze the functioning of solidarity retrospectively in certain policy areas, nevertheless, it is necessary to underline that there are areas with respect to solidarity between the Member States that were seriously challenged following the multiple crises EU integration has experienced recently, in particular in the areas of monetary policy and asylum policy. According to Peter Hilpold’s interpretation,<sup>61</sup> solidarity is a distinctive principle-based reciprocity, in certain policy areas that are “islands of solidarity”.<sup>62</sup>

20.3.2 *The Case-Law of the CJEU*

In the case-law of the CJEU, the principle of solidarity, beyond its constitutional significance demonstrated above, is primarily relevant in the field of competition law and citizenship of the Union. Hereinafter, I provide a brief outlook on the relevant case-law and shed light on some implications of the CJEU’s understanding of solidarity.

The Court made its first reference to the principle of solidarity in an early joint case lodged for the annulment of legislation that prevented undertakings from selling below a minimum fixed price in the coal and steel industry. In this case, a fine was imposed on an undertaking for selling concrete bars below the fixed minimum prices.<sup>63</sup> With the fine, the Commission put a higher burden on the more competitive undertakings, since, according to its interpretation – confirmed by the Court in the judgment –, the fixed minimum price was justified to secure the supply. Indeed, by adopting a fixed minimum price at Community level, less competitive undertakings could survive and stay on the market. In the judgment, the CJEU found that, in the coal and steel industry, the crisis-prevention policy is underpinned by the fundamental principle of solidarity between the undertakings.<sup>64</sup> The Court

58 See COM(2010) 683 final.

59 Decision No 940/2011/EU of the European Parliament and of the Council of 14 September 2011, on the European Year for Active Ageing and Solidarity between Generations (2012).

60 Id. Article 2.

61 Peter Hilpold, ‘Understanding Solidarity within EU Law: An Analysis of the ‘Island of Solidarity’ with Particular Regard to Monetary Union’, *Yearbook of European Law*, Vol. 34, Issue 1, 2015, pp. 257-285.

62 Id. See the comprehensive analysis concerning development aid and development cooperation, cohesion policy, EU law and asylum policy, European Monetary Union.

63 Judgment of 18 March 1980, *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 (SpA Ferriera)*, ECLI:EU:C:1980:81.

64 *Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78*, 39, 31, 83 and 85/79, *SpA Ferriera*, para. 6 of the summary of the judgment.

referred to the Preamble of the ECSC Treaty that declares the principle of solidarity and, according to the CJEU, its practical implication was manifested in other Treaty articles as well.<sup>65</sup> The normative aim of Article 61 ECSC Treaty that served as a legal basis for the price determination was to help the Community to become capable of overcoming the economic crises through the application of the principle of solidarity.<sup>66</sup> In the Court's line of reasoning, solidarity should be understood as a principle competing with the principle of proportionality. Declaring that some undertakings need to bear higher burden than others, based on the European solidarity, the Court found that the Commission did not place a disproportionate burden on the plaintiffs.<sup>67</sup>

In addition, in the field of EU competition law, the principle of solidarity provides a limitation to the extensive interpretation of the concept of undertaking, thereby also limiting the scope of application of competition law.<sup>68</sup> In the *Kattner* case,<sup>69</sup> the Court declared that a body such as the employers' liability insurance association to which undertakings must be affiliated in a particular branch of industry and in a particular territory for being insured against workplace accidents and occupational diseases is not an undertaking. It fulfils an exclusively social function, since this a body operates within the framework of a scheme that applies the principle of solidarity and is subject to state supervision.<sup>70</sup> The Court examined on the application of principle of solidarity on its merits in the *Pouchet* case which related to the operation of a social security system.<sup>71</sup> The question arose whether certain entities managing the sickness and maternity insurance scheme for self-employed persons in non-agricultural occupations, qualified as an undertaking under the Treaties.<sup>72</sup> In the social security system at issue self-employed persons in non-agricultural occupations were subject to compulsory social protection, including those provided by autonomous statutory schemes, in particular the sickness and maternity insurance scheme.<sup>73</sup> The Court observed that schemes pursuing a social objective embodied the principle of solidarity.<sup>74</sup> According to the Court, the principle of solidarity within the sickness and maternity scheme

65 The Court refers to the following articles of the ECSC Treaty: Article 3 (priority accorded to the common interest, which presupposes a duty of solidarity), Article 49 (a system of financing the community-based levies), Article 55(2) (general availability of the results of research in the technical and social fields), Article 56 (reconversion and readaptation aids) and Article 53 (making financial agreements).

66 *Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79, SpA Ferriera*, para. 87.

67 *Id.* para. 119.

68 Richard Wish, *Versenyjog*, HVG-ORAC, Budapest, 2010, pp. 84-85.

69 Judgment of 5 March 2009, *Case C-350/07, Kattner Stahlbau GmbH v. Maschinenbau- und Metall- Berufsgenossenschaft (Kattner)*, ECLI:EU:C:2009:127.

70 *Case C-350/07, Kattner*, para. 1. of the summary of the judgment.

71 Judgment of 17 February 1993, *Joined Cases C-159/91 and C-160/91, Christian Pouchet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon (Pouchet)*, ECLI:EU:C:1993:63, paras. 8-12.

72 *Id.* para. 2.

73 *Id.* para. 7.

74 *Id.* para. 8.

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is manifested in the fact that the scheme is financed by contributions proportional to income, whereas the benefits are identical for all those who receive them.<sup>75</sup> In the old-age insurance scheme, solidarity is manifested in the fact that the contributions paid by active workers are used to finance the pensions of retired workers.<sup>76</sup> Finally, the Court declares that solidarity applies across the various social security schemes as well, since schemes that produce a surplus contribute to the financing of those with structural financial difficulties. The CJEU points out that solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.<sup>77</sup>

In the *Viking*<sup>78</sup> and *Laval*<sup>79</sup> cases the Court acknowledged the collective actions based on solidarity between employees and workers' unions and, quite remarkably, the CJEU accepts the right for collective action as a justification for restricting market freedoms. More precisely, the Court recognizes collective action as a competing interest to the fundamental freedoms.

In the *Grzelczyk* case<sup>80</sup> the Court assessed a national provision in connection with students' right of residence. The national legislation guaranteed a minimum subsistence allowance (minimax) only for nationals. The Court concluded that EU law

“accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.”<sup>81</sup>

Consequently, according to the judgment, making the minimax allowance for a non-national EU citizen conditional upon the worker status was a breach of EU law. This form of financial solidarity reaffirmed by the Court may entail serious financial burdens for Member States, the Court therefore further refined the content of the obligation in its case-law. In the *Bidar* case<sup>82</sup> the Court referred, on the one hand, to the *Grzelczyk* case by reaffirming that “the Member States must, in the organization and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other

75 Id. para. 10.

76 Id. para. 11.

77 Id. para. 12.

78 Judgment of 11 December 2007, *Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti (Viking)*, ECLI:EU:C:2007:772.

79 Judgment of 18 December 2007, *Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others (Laval)*, ECLI:EU:C:2007:809.

80 Judgment of 20 September 2001, *Case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (Grzelczyk)*, ECLI:EU:C:2001:458.

81 *Case C-184/99, Grzelczyk*, para. 44.

82 Judgment of 15 March 2005, *Case C-209/03, The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills (Bidar)*, ECLI:EU:C:2005:169.

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Member States”, yet it also limited the scope of application of this financial solidarity. Namely,

“it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.”<sup>83</sup>

In the *Bidar* case, the Court ruled that it is incompatible with EU law for a national provision to grant students the right to assistance covering their maintenance costs only if they are settled in the host Member State and to precluding nationals of other Member States from obtaining the status of settled person as a student. This is the case where that national is lawfully resident in the host Member State and consequently established a genuine link with the society of that State.

Finally, as far as financial solidarity of Member States with respect to the free movement of persons and EU citizenship is concerned, the Court declared that the citizen may expect “a certain degree of financial solidarity”,<sup>84</sup> and the Court established equal access to social benefits whenever there is “a certain degree of integration”.<sup>85</sup> However, in recent cases, the court seems to be setting limits to the scope of financial solidarity. In the *Dano* case,<sup>86</sup> the Court interpreted a lack of intention to integrate into the host Member State as an obstacle to the genuine link between the EU citizen and the host State, grounds for limiting the financial solidarity of the Member State. Some commentators even suggest that the clear shift in the Court’s case-law, which could be interpreted as a limitation on the level of solidarity, is a consequence of the political tension arising from the phenomenon of ‘social tourism’.<sup>87</sup>

From the numerous references made by the Advocate Generals regarding the notion of solidarity, I recall here the definition given by AG Fennelly<sup>88</sup> who observed that “[social] solidarity envisages the inherently uncommercial act of involuntary subsidization of one social group by another”.

83 *Case C-209/03, Bidar*, para. 56.

84 *Case C-184/99, Grzelczyk*, para. 44.

85 *Case C-209/03, Bidar*, para. 57.

86 Judgment of 11 November 2014, *Case C-333/13, Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

87 Dion Kramer, ‘Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed’, *Cambridge Yearbook of European Legal Studies*, Vol. 18, 2016, pp. 270-301 and 289; and Laura Gyenyey, ‘A szociális turizmus kérdése az Európai Unió Bíróságának joggyakorlatában’ *Létiünk*, Vol. 46, Issue 2, pp. 170-171.

88 Opinion of Advocate General Fennelly delivered on 6 February 1997, *Case C-70/95, Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia*, ECLI:EU:C:1997:55.

## 20.4 CONCLUDING REMARKS

In this paper, I sought to conceptualize the principle of solidarity within the legal order of the EU and to derive some general conclusions regarding the meaning of solidarity. The subject, however, needs further research, since the paper does not reflect on the significance of solidarity in the EU policy-making system. Moreover, a more complex understanding of solidarity would benefit from a theoretical assessment of the notion presented in connection with the legal implications of the principle.<sup>89</sup>

With regard to the special role of solidarity in the EU constitutional system, it is not an overstatement to speak of a so-called 'solidarity acquis' coined by Malcom Ross,<sup>90</sup> who identifies the transformative effect of solidarity in five areas: the consistent reference to solidarity by the CJEU; the implications of solidarity in fundamental rights protection; most importantly solidarity as one of the possible justifications for restricting the market freedoms; financial solidarity with regard to the citizenship of the EU; and, finally, drawing the limits of the concept of undertaking in competition law. Consequently, the main significance of the notion of solidarity is, on the one hand, to reinforce the relationship between the different levels and members of the Community as such, and to strike the balance between the market-orientated principles and the social aspects of the legal order in the common interest or for well-being of EU citizens. This is one of the substantive aims of the EU specified in the Treaties.<sup>91</sup> Moreover, solidarity may be understood as a general principle of EU law. The CJEU seems unwilling to further develop this understanding of solidarity unless Member States are clearly willing to deepen integration in most areas of cooperation. The legal basis for this would be the concept of solidarity as developed in the constitutional traditions of the Member States. While the significance of solidarity varies in the different Member States' legal traditions, solidarity is seen as an integral part of the European constitutional heritage.<sup>92</sup>

Finally, it should be noted that any research conducted in connection with the notion of solidarity is closely related to the question how the values of the EU are understood in general. Values as other identity-related issues are often cited as conditions for the success of European integration as such. Hence, further developing the understanding and appli-

89 In the field of the services of general economic interest, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 May 2004 entitled 'White Paper on services of general interest', COM(2004) 374 final, and 'A Quality Framework for Services of General Interest in Europe', COM(2011) 900 final.

90 Malcom Ross, 'Solidarity – A New Constitutional Paradigm for the EU?', in Ross & Prebil (eds.), 2010, p. 41.

91 Article 3(1) TEU.

92 Ross 2010, p. 43.

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cation of solidarity in EU law and decision-making, will be an important element in the discourse surrounding the future of the EU.