

GIUSEPPE MORGESE
(a cura di)

La solidarietà europea

**Avanzamenti, arretramenti
e prospettive a 15 anni dalla
riforma di Lisbona**



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LA SOLIDARIETÀ EUROPEA

*Avanzamenti, arretramenti e prospettive
a 15 anni dalla riforma di Lisbona*



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*A mia madre.
Vienimi a trovare ogni volta che puoi
e fammi una carezza.
A farti sorridere ci penso io.*

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FEDERICO CASOLARI*

THE INTERACTION BETWEEN LOYALTY AND SOLIDARITY IN THE EU LEGAL ORDER

SUMMARY: 1. Introduction. – 2. Supranational Loyalty and the EU Constitutional Framework. – 3. The Interplay between Loyalty and Solidarity in Securing the EU Constitutional Framework. – 4. Loyalty and Solidarity in Times of Crisis. – 5. Conclusion.

1. Introduction

Over the last decades, the European Union (EU) and its Member States have increasingly been facing global emergencies, 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.

However, another concept is strictly linked to the EU's involvement in addressing global emergencies. Indeed, crisis scenarios in the post-Lisbon legal framework often evoke the need for solidarity among the Member States and *vis-à-vis* the Union. More precisely, the Treaties expressly recognise that a spirit of solidarity should guide how actions are framed and carried out in (a) the Area of Freedom, Security, and Justice (AFSJ),¹ especially regarding

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¹ Article 67 TFEU.

border checks, asylum, and immigration where crises and emergencies are more likely to emerge;² (b) the EU economic policy, when Member States are in difficulty or threatened with severe difficulties about the supply of products;³ (c) the EU energy policy to address 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 explores the legal interaction between loyalty and solidarity at the EU level.⁶ Section 2 identifies the major features of the principle of loyalty – known today as the principle of sincere cooperation – and briefly illustrates the principle's role 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 how loyalty and solidarity may interact in crisis scenarios. The significant findings of the analysis are summarized in Section 5.

2. Supranational Loyalty and the EU Constitutional Framework

Before considering the interaction between loyalty and solidarity, the role of the loyalty principle in the EU legal order is first illustrated. Enshrined in EU primary law, particularly in Article 4(3) TEU,⁷ that principle has evolved into a veritable cornerstone of the EU legal order.⁸ It is often listed among

² Article 80 TFEU.

³ Article 122 TFEU.

⁴ Article 194 TFEU.

⁵ Article 222 TFEU.

⁶ See also F. CASOLARI, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, Napoli, 2020, pp. 65-72; M. KLAMERT, "Loyalty and Solidarity as General Principles", in K. S. ZIEGLER, P. J. NEUVONEN, V. MORENO-LAX (eds.), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe*, Cheltenham, 2022, p. 118 ff.

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-216/01, Opinion of Advocate General Tizzano, 22.5.2003, *Budvar*, para 150; Case C-459/03, 30.5.2006, *Commission v Ireland*, para 169. See also M. KLAMERT, *The Principle of Loyalty in EU Law*, Oxford, 2014, pp. 13-19.

⁸ M. BLANQUET, *L'article 5 du Traité CEE. Recherche sur les obligations de fidélité des États membres de la Communauté*, Paris, 1994; L. AZOULAI, "Structural Principles in EU Law: Internal and External", in M. CREMONA (ed.), *Structural Principles in EU External Relations Law*, Oxford-Portland, 2018, p. 32 ff.; B. GUASTAFERRO, "Sincere Cooperation and Respect for National Identities", in R. SCHÜTZE, T. TRIDIMAS (eds.), *Oxford Principles of the European Union: The European Union Legal Order*, I, Oxford, 2018, p. 354 ff.

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 explicitly raised that it 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

Loyalty's fundamental aim – the fulfilment of the EU objectives and obligations – illustrates the importance of the principle for developing the EU legal order. Its substantive role in the European integration process is primarily 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

⁹ A. VON BOGDANDY, “Constitutional Principles”, in A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, Portland, 2009, pp. 49-51; M. KLAMERT, *supra* n. 7; A. GERBRANDY, M. SCHOLTEN, “Core Values: Tensions and Balances in the EU Shared Legal Order”, in T. VAN DEN BRINK, M. LUCHTMAN, M. SCHOLTEN (eds.), *Sovereignty in the Shared Legal Order of the EU. Core Values of Regulation and Enforcement*, Cambridge, 2015, p. 20 ff.; T. ROES, “Limits to Loyalty. The Relevance of Article 4(3) TEU”, in *Cahiers de droit européen*, 1/2016, pp. 253, 256.

¹⁰ J. TEMPLE LANG, “Article 10 EC - The Most Important ‘General Principle’ of Community Law”, in U. BERNITZ, J. NERGELIUS, C. CARDNER (eds.), *General Principles of EC Law in a Process of Development*, Alphen aan den Rijn, 2008, p. 75 ff.

¹¹ See Case C-203/07 P, Opinion of Advocate General Mazák, 8.5.2008, *Hellenic Republic v Commission of the European Communities*, para 33 and 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 Article 4(3) TEU]”.

¹² M. KLAMERT, *supra* n. 7, p. 46 ff.; G. DE BAERE, T. ROES, “EU Loyalty as Good Faith”, in *International and Comparative Law Quarterly*, 2015, p. 829 ff.; T. ROES, *supra* n. 9, p. 268 ff.

¹³ M. KLAMERT, *supra* n. 7, pp. 47-61.

¹⁴ Case 6/64, 15.7.1964, *Costa v Enel* and, with regard to the doctrine of consistent interpretation, Case 14/83, 10.4.1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, para 26.

¹⁵ Case C-213/89, 19.6.1990, *Factortame*, para 19.

¹⁶ E. NEFRAMI, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations”, in *Common Market Law Review*, 2010, pp. 323-359.

¹⁷ Order of the Court in Case C-2/88, 13.07.1990, *J. J. Zwartveld and Others*.

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 Rights¹⁹ 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 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, but the EU Institution has also relied on the principle to limit (without undermining) the Member States’ prerogatives when preserving the EU law effectiveness is at stake. Advocate General Pikamäe named this 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 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. 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*

¹⁸ *Ibid.*, paras 16-17.

¹⁹ Opinion of the Court 2/13, 18.12.2014, *Accession of the European Union to the ECHR*, paras 168 and 173.

²⁰ Case C-284/16, 6.3.2018, *Slowakische Republik v Achmea BV*, para 34.

²¹ Case C-457/18, Opinion of Advocate General Pikamäe, 11.12.2019, *Slovenia v Croatia*, para 138.

²² See also L. AZOULAI, “The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?”, in *European Journal of Legal Studies*, 2/2011, p. 192; F. CASOLARI, “Inter se Agreements between Member States, and the Outer Limits of the Court’s Jurisdiction in Infringement Proceedings: *Slovenia v Croatia*”, in G. BUTLER, R. A. WESSEL (eds.), *EU External Relations Law. The Cases in Context*, Oxford, 2022, p. 981 ff.

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 light of the foregoing, it is not surprising that the loyalty principle has become an essential "balance factor" between the Member States' national interests and EU common interests, thus paving the way for a sound legal integration at the 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 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 to the

²³ Case 848/19 P, 15.7.2021, *Federal Republic of Germany v European Commission*, para 41.

²⁴ M. KLAMERT, *supra* n. 6, p. 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”. For further discussion, see A. M. OLIVA, “Solidarité et construction européenne”, in J. C. BEGUIN, P. CHARLOT, Y. LAIDIÉ (dirs.), *La solidarité en droit public*, Paris, 2005; S. STJERNØ, *Solidarity in Europe: The History of an Idea*, Cambridge, 2005; M. ROSS, “Solidarity – A New Constitutional Paradigm for the EU?”, in M. ROSS, Y. BOURGMANN-PREBIL (eds.), *Promoting Solidarity in the European Union*, Oxford, 2010; C. BOUTAYEB, “La solidarité, un principe immanent au droit de l’Union européenne. Éléments pour une théorie”, in C. BOUTAYEB (ed.), *La solidarité dans l’Union européenne. Éléments constitutionnels et matériels*, Paris, 2011; E. SHARPSTON, “Thinking About Solidarity and EU Law”, in E. KASSOTI, N. IDRIZ (eds.), *The Principle of Solidarity. International and EU Law Perspectives*, Den Haag, 2023.

²⁵ Joined Cases 6/69 & 11/69, *Commission of the European Communities v France Republic*, 10.12.1969, para 16. See also Joined Cases C-715/17, C-718/17 & C-719/17, Opinion of Advocate General Sharpston, 31.10.2019, *European Commission v Republic of Poland and Others*, paras 246-255, arguing that “solidarity is the lifeblood of the European project”.

²⁶ See also Case 39/72, 7.2.1973, *Commission of the European Communities v Italian Republic*, para 25.

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 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 challenging to pin down the exact legal status of the corresponding principle.³⁰ Not surprisingly, that difficulty has led to arguing the existence of an "idea of solidarity between the Member States."³¹

More to the point, solidarity serves 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 In this respect, Article 2 TEU 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 individuals in society (or rather, in the Union),³³ on the other. It goes without saying that manifestations

²⁷ See Joined Cases C-643/15 & C-647/15, Opinion of Advocate General Bot, 6.9.2017, *Slovak Republic and Hungary v Council of the European Union*, paras 17-21. See also S. VILLANI, *The Concept of Solidarity within EU Disaster Response Law. A Legal Assessment*, Bologna, 2021, p. 75 ff.

²⁸ See Case C-370/12, View of Advocate General Kokott, 26.10.2012, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, paras 142-144; Case C-226/16, Opinion of Advocate General Mengozzi, 26.7.2017, *ENI SpA*, para 33; *Germany v Commission* Case, para 41. See also the Regulation (EU) 2019/1896 of 13 November 2019, on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, where reference is made to "the overarching principle of solidarity" (Recital 9). See also, in this regard, M. ROSS, Y. BOURGMANN-PREBIL, *supra* n. 24; A. LEVADE, "La valeur constitutionnelle du principe de solidarité", in C. BOUTAYEB, *supra* n. 24, p. 41 ff.; E. DAGILYTE, "Solidarity: A general principle of EU law? Two variations on the solidarity theme", in A. BIONDI, E. DAGILYTÉ, E. KÜÇÜK (eds.), *Solidarity in EU Law – Legal Principle in the Making*, Cheltenham, 2018, p. 61 ff.

²⁹ *Federal Republic of Germany v European Commission* Case, para 41.

³⁰ A. BERRAMDANE, "Solidarité, loyauté dans le droit de l'Union européenne", in C. BOUTAYEB, *supra* n. 24, p. 67 ff.; M. KLAMERT, *supra* n. 6, p. 134 ff.

³¹ *ENI SpA* Opinion.

³² See *Slovak Republic and Hungary v Council* Opinion, para 19: "Solidarity (...) continues to form part of a set of values and principles that constitutes 'the bedrock of the European construction'".

³³ T. TRIDIMAS, *The General Principles of EU Law*, Oxford, 2006, p. 16 ff.

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 between *de facto* and normative solidarity must be drawn. While the former hinges on a factual interdependence among EU actors, particularly among the Member States, the latter implies the existence of specific legal duties to achieve common goals and/or protect common interests.³⁵ Interestingly, such a 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 the 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

³⁴ The external dimension of the EU solidarity is stressed by E. NEFRAMI, “La solidarité et les objectifs d’action extérieure de l’Union européenne”, in C. BOUTAYEB, *supra* n. 24, p. 137 ff.

³⁵ V. BORGER, “How the Debt Crisis Exposes the Development of Solidarity in the Euro Area”, in *European Constitutional Law Review*, 2013, pp. 7, 10-11.

³⁶ R. M. RIZKI, *Human Rights and International Solidarity*, UN Human Rights Council, UN Doc. A/HRC/9/10, 15 August 2008, para 6. See also F. ZORZI GIUSTINIANI, *International Law in Disaster Scenarios. Applicable Rules and Principles*, Cham, 2021, p. 147 ff.; C. EGGETT, “Solidarity as an International Legal Norm”, in E. KASSOTI, N. IDRIZ (eds.), *supra* n. 24, p. 29 ff.

³⁷ J. M. COICAUD, “Conclusion: Making Sense of National Interest and International Solidarity”, in J. M. COICAUD, N. J. WHEELER (eds.), *National Interest and International Solidarity – Particular and Universal Ethics in International Life*, New York, 2008, pp. 288, 297.

³⁸ As recognized by the Court of Justice in the leading Case 26/62, 5.2.1963, *van Gend & Loos*.

(Article 37), and consumer protection (Article 38). In this sense, the term 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 when enforcing 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.

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.⁴² 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*.⁴³ 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 be inferred from the wording of the Loyalty Clause enshrined in Article 4(3) TEU, whose second and third indents directly link positive and negative loyalty duties and the EU objectives.⁴⁴

³⁹ Case C-184/99, 20.9.2001, *Grzelczyk*, para 31. In *Brey* Case, 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, Case C-140/12, 19.9.2013, *Brey* Case, para 72.

⁴⁰ C. PICHÉRAL, “La solidarité dans la Charte des droits fondamentaux de l’Union”, in C. BOUTAYEB, *supra* n. 24, p. 93 ff.

⁴¹ Case C-333/13, 11.11.2014, *Dano*. See D. THYM, “The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive EU Citizens”, in *Common Market Law Review*, 1/2015, pp. 17-50.

⁴² *Commission v France* Case, para 16. For further discussion, see A. BERRAMDANE, *supra* n. 30.

⁴³ See Section 2.

⁴⁴ “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”. See also *supra*, Section 2.

As evident from the subsequent analysis, the interaction between the loyalty principle and solidarity seems more ambiguous. Today, the starting point of every discussion on such an interaction is represented by the ruling in the *OPAL pipeline* case, where the Court of Justice has further stressed the fundamental nature of the solidarity principle and recognised its justiciability before the EU judges for the first time. Two elements of the Court's argumentation deserve to be mentioned for our purposes. First, it is noteworthy that the Court recognizes the mutual nature of the solidarity principle. Precisely 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 between themselves and about the common interest of the European Union and the policies pursued by it".⁴⁵

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* case, 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 of the Member States and the European Union as a whole".⁴⁶ It is difficult not to see in this passage some traces of the doctrine elaborated by the EU judges regarding loyalty duties, implying the need to find a fair balance among the EU's and Member States' interests in fulfilling the Union's objectives.⁴⁷

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.⁴⁸ Others claimed solidarity appears in jurisprudence through the joint concept

⁴⁵ *Germany v Commission* Case, para 49.

⁴⁶ *Ibid.*, para 53.

⁴⁷ See Section 2.

⁴⁸ A. BERRAMDANE, *supra* n. 30, pp. 74-75; C. BOUTAYEB, *supra* n. 24, p. 13.

of “solidarity-loyalty”.⁴⁹ Similar arguments could be made in the light of some Treaty provisions that 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”.⁵⁰ Solidarity and loyalty are thus needed to achieve the EU objectives in that domain, ensuring appropriate measures are adopted to fulfill relevant obligations, echoing the positive loyalty duties enshrined in Article 4(3) TEU.⁵¹ Similarly, Article 31(1) TEU combines solidarity with the negative duties stemming from the Loyalty Clause,⁵² 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.

A further level of ambiguity in discussing 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”.⁵³ Quite significantly, however, the Court has also specified that the solidarity principle is mentioned in Article 2 TEU.⁵⁴ In other words, the Court seems to imply that EU solidarity is mainly to be understood as a fundamental value of the Union. This value obtains a concrete expression using the budgetary obligations imposed upon Member States. Importantly, this approach echoes the argument elaborated by the Luxembourg judges in *Associação Sindical dos Juizes Portugueses*, where it was maintained that Article 19 TEU “gives concrete expression to the value of the rule of law states in Article 2 TEU”.⁵⁵ It goes without saying that such

⁴⁹ R. BIEBER, F. 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”, in *Revue trimestrielle de droit européen*, 2012, pp. 295-297.

⁵⁰ P. J. KUIJPER, E. PAASIVIRTA, “EU International Responsibility and its Attribution: From the Inside Looking Out”, in M. EVANS, P. KOUTRAKOS (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Oxford, 2013, p. 35 ff.

⁵¹ Which provides that “[T]he 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”.

⁵² Pursuant to the last indent of Article 4(3) TEU, “[T]he 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”.

⁵³ See in particular Case C-156/21, 16.2.2022, *Hungary v European Parliament and Council of the European Union*, para 129.

⁵⁴ *Ibid.*

⁵⁵ Case C-64/16, 27.2.2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, para 32.

a reading seems to undermine the solidarity principle's capacity to represent 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"⁵⁶ does not mean that Member States' solidarity duties cannot in any way be identified. On closer inspection, 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 impossible here to enter into an in-depth analysis of every provision mentioned at the beginning of this contribution. It suffices to say that what emerges from the (somewhat limited) practice related to those provisions is that such duties generally "*reinforce*" the cooperation required under the loyalty principle. More precisely, these duties mean that the 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.⁵⁷ This argument finds its basis in the passage of the 1969 *Commission v France* ruling, where the Court of Justice explicitly linked solidarity to loyalty.⁵⁸ This judgment was made in the context of the mutual assistance provided by former Article 108 EEC Treaty, 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. It has been argued that if Article 4(3) TEU can be invoked to identify the legal foundations of the assistance duties flowing from Article 143 TFEU, the same should be possible about Article 122 TFEU. By analogy, this reasoning could then be extended to all the other TFEU provisions that mention specific solidarity duties.

However, there are limits to this legal option. In particular, the interpretative construction does not seem entirely 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, except the solidarity

⁵⁶ M. KLAMERT, *supra* n. 6, p. 128.

⁵⁷ V. BORGER, *supra* n. 35, p. 14.

⁵⁸ *Commission of the European Communities v France Republic Case*, para 16.

clause enshrined in Article 222 TFEU, are directly or indirectly aimed at ensuring the effectiveness of EU law.⁵⁹ But this is not enough to conclude that only Article 4(3) TEU should govern their functioning.⁶⁰ On the contrary, the reference to solidarity in the Treaties suggests that, in some circumstances, the Union and its Member States may be asked to adopt measures beyond what may generally 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 concerned State in the Union, thus limiting the effectiveness of EU law. In other words, a similar scenario is likely to have consequences for all the different Member States and the Union.⁶¹

In light of the above, solidarity duties in the EU Treaties – solidarity *stricto sensu* – seem particularly invocable in crisis or emergency situations.⁶² Of course, when a crisis or an emergency arises, the loyalty principle informs 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 an additional point, the loyalty principle is functional in properly applying 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 Article 1 TEU.⁶³ When no crises or emergencies arise, invoking specific solidarity duties

⁵⁹ M. GESTRI, “EU Disaster Response Law: Principles and Instruments”, in A. DE GUTTRY, M. GESTRI, G. VENTURINI (eds.), *International Disaster Response Law*, The Hague, 2012, pp. 105, 109-115.

⁶⁰ For a contrary view, see M. BLANQUET, *supra* n. 8, p. 233 ff.

⁶¹ 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, 18.3.1980, *SpA Ferriera Valsabbia and others v Commission of the European Communities*, para 59; Case 263/82, 14.12.1983, *Klöckner-Werke AG v Commission of the European Communities*, para 17.

⁶² For a contrary view, see A. MIGLIO, “Solidarity in EU Asylum and Migration Law: A Crisis Management Tool or a Structural Principle?”, in E. KUZELEWSKA, D. KLOZA, A. WHEATERBURN (eds.), *Irregular Migration as a Challenge for Democracy*, Louvain-la-Neuve, 2018, p. 23 ff.; F. CROCI, *Solidarietà tra Stati membri dell’Unione europea e governance economica europea*, Torino, 2020; P. MENGGOZZI, *L’idea di solidarietà nel diritto dell’Unione europea*, Bologna, 2022. See also Section 5.

⁶³ See also J. BAST, “Deepening Supranational Integration: Interstate Solidarity in EU Migration Law”, in A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK, *supra* n. 28, p. 114. For further development on the “Ever Closer Union” perspective, see X. GROUSSOT, A. ZEMSKOVA, “The Resilience of Rights and European Integration”, in A. BAKARDJEVA ENGELBREKT, X. GROUSSOT (eds.), *The Future of Europe. Political and Legal Integration Beyond Brexit*, Oxford, 2019, p. 97 ff.

seems 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; as a result, loyalty duties may ensure the proper functioning of relative EU tools and arrangements.

These observations are not questioned because Member States have not fully implemented the Treaty provisions mentioning solidarity. Instead, 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 is the implementation of the so-called Dublin Regulation⁶⁴ 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.⁶⁵ 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 challenging to follow EU rules on asylum procedures, for instance, due to a massive inflow of irregular migrants.⁶⁶ The judgment aimed to compensate for 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 the Court of Justice gave in the migration domain. In the *Relocation scheme* infringement procedure, Poland and Hungary maintained their right to disapply the EU Relocation scheme – which was adopted to share among the EU States the pressure on local reception and asylum systems – in light of their prerogatives in the field of public and national security under Article 72 TFEU, read in conjunction with Article 4(2)

⁶⁴ 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. 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.

⁶⁵ Joined Cases C-411/10 and C-493/10, 21.12.2011, *N.S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner*, para 94.

⁶⁶ *Ibid.*, paras 87 and 93.

TEU. By indirectly relying on the “framing of powers” doctrine,⁶⁷ the Court rejected the plea in defence derived by Poland and Hungary. To the Court, such Member States’ prerogatives cannot be considered an “inherent general exception” to EU law.⁶⁸ Indeed, “[t]he recognition of such and exception [...] might impair the binding nature of European Union law and its uniform application”.⁶⁹ As is evident in this case, the Member States’ loyalty duties are functional to preserve the solidarity obligations enshrined in the EU scheme concerned.

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 the EU Member States, contributing to identifying corresponding positive and negative duties that have led, in turn, to affirm the existence of a structural principle of loyalty at the 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.⁷⁰ That said, it is 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 an EU principle of solidarity, imposing specific obligations upon 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.⁷¹

⁶⁷ See Section 2.

⁶⁸ Joined Cases C-715/17, C-718/17 and C-719/17, 2.4.2020, *European Commission v Poland and Others*, para 143.

⁶⁹ *Ibid.*

⁷⁰ F. CASOLARI, *supra* n. 6, pp. 182-210.

⁷¹ M. KLAMERT, *supra* n. 6, p. 134. On the supranational methods leading to the identification of general principles, see P. J. NEUVONEN, K. S. ZIEGLER, “General Principles in the EU Legal Order: Past, Present and Future Directions”, in K. S. ZIEGLER, P. J. NEUVONEN, V. MORENO-LAX, *supra* n. 6, pp. 15-17; E. CASTELLARIN, “General Principles of EU Law and General International Law”, in A. TANZI, M. ANDENAS, J. WOUTERS, M. FITZMAURICE, L. CHIUSI CURZI (eds.), *General Principles and the Coherence of International Law*, Leiden-Boston, 2019, p. 131 ff.

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* case⁷² – and further confirmed by the Court of Justice in the appeal brought by the Federal Republic of Germany⁷³ – the most relevant solidarity duties so far invoked are mainly restricted to emergency situations and scenarios, reducing thus significantly the operational scope of a principled approach to solidarity. Time will tell if the interaction between solidarity and loyalty will evolve in a way leading to more explicit 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”⁷⁴ and giving further expression to the constitutional framework of the Union.

ABSTRACT ENG: This contribution seeks to explore the legal interaction between loyalty and solidarity at the EU level. Section 2 identifies the major features of the principle of loyalty – also known today as the principle of sincere cooperation – and briefly illustrates the principle’s role 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 how loyalty and solidarity may interact in crisis scenarios. The significant findings of the analysis are summarized in Section 5.

ABSTRACT ITA: Questo contributo si propone di esplorare l’interazione giuridica tra lealtà e solidarietà a livello UE. La Sezione 2 identifica le principali caratteristiche del principio di lealtà – oggi noto anche come principio di leale cooperazione – e ne illustra brevemente il ruolo nell’ordinamento giuridico dell’UE. Dopo aver sottolineato la natura multiforme del concetto di solidarietà nell’ordinamento giuridico dell’UE, la Sezione 3 discute le possibili interazioni che questo concetto può avere con la lealtà nel garantire il quadro costituzionale dell’Unione. La Sezione 4 illustra come lealtà e solidarietà possano interagire in scenari di crisi. I risultati più significativi dell’analisi sono riassunti nella Sezione 5.

⁷² Case T-883/16, 10.9.2019, *Republic of Poland v European Commission*, 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”.

⁷³ See Section 3.

⁷⁴ *Achmea BV* Case, para 33.

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