Leiden University

# Conceptualisation of Solidarity in EU law

**Master Thesis**


**Pedro Ricardo Bouza da Costa (s2099632)**

**Supervisor : Prof. Dr. J. Oster**

**Word count (excluding Bibliography): 15.457 words**

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## 1. Introduction

The succession of crises that have struck the European Union in recent times, beginning with the sovereign debt crisis of 2008 and in later years the migrant crisis demanded a coordinated response of the European countries. The common efforts which were needed to overcome these adverse conditions brought the idea of solidarity back to the forefront of European discussion. One could say that the concept of solidarity lies at the very heart of the project of the European Union. Since the beginning, the idea that states have to overcome their own national interests in order to create a peaceful and prosperous community is part of the European rationale. As Robert Schuman said, in what is considered by many to be the founding speech of the European Union: '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.'(Schuman, 1950)

Once this notion was verbalised by Schuman, the various succeeding treaties and also the case law of the European Court of Justice have continuously referred to it. Most importantly, with the inclusion of solidarity provisions in the Treaty of the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and also the European Charter for Fundamental Rights (ECHR or the Charter), the concept was conceded primary law status. Despite this broad use of the term by the EU legislator, the wording of these norms leaves much open to interpretation. Sometimes, formulations like 'indivisible and universal value' (preamble of ECHR), or 'in a spirit of solidarity' (article 194 TFEU), seem to attribute only guiding functions to solidarity. Nevertheless, there are also situations where the EU legislator gives concrete legal consequence to the concept. The most obvious example for this is article 80 of the TFEU. The mentioning of 'appropriate measures' imposes solidarity on the Member States when it comes to 'asylum, immigration and border check activities' and seems to be passible of producing direct legal consequence.

As can be seen from the above, the approach and scope given to solidarity varies immensely throughout the European legal order. The aim of this research will be to give clearer contours to the concept of solidarity. Thus this paper locates itself in the realm of conceptual jurisprudence and is guided by the following research question:

***RQ:*** *How is solidarity to be conceptualised in EU law?*

While most of the solidarity scholars have been concerned to conceptualise solidarity either as a guiding value, a principle or a general principle, a different conceptual category will be presented in the following. The main reference for this conceptualisation will be the distinction made by Dworkin (1997) between rules, principles and policies. While it is quite simple to infer that solidarity is not a rule, since it is not applied in an 'all or nothing fashion' (Dworkin, 1997) it is not as easy to draw the line between principles and policies. Nevertheless, it is argued in this research that the thin line between principles and policies elaborated by Dworkin is able to capture the nature of solidarity as a legal concept in European Union law. More specifically, it will be argued that solidarity should be conceptualised as a policy in the Dworkinian sense. Operating more as a vehicle to overcome crisis and as a tool to reach community objectives than a principle as conceived by Dworkin.

This theoretical framework will be tested around a selection of cases of the European Court of Justice (ECJ) which evolved around questions of solidarity. The case selection will be conducted by filtering out cases where the term solidarity appeared in the Courts reasoning's, special emphasis will be given to cases where solidarity figured as main *ratio decidendi* of the Court. The content of the case law will be selected and analysed manually.

The paper is structured as follows: firstly the general traits of solidarity will be presented. It will be shown how legal theorists have been inspired by sociological theories in order to conceptualise solidarity in EU law. Subsequently an overview will be given of the current state of the art regarding the legal conceptualisation of solidarity. Once the literature on this topic is presented one can move to a more specific normative discussion of solidarity. This normative discussion will serve as a basis to justify the conceptualisation suggested in this paper. In a final part it will be analysed how the theory matches the practice. This will be done by analysing if the presented theoretical framework is reflected in the case law of the ECJ.

## 2. Literature review

If there is one thing to which all the literature on EU solidarity can agree is that solidarity is a rather vague legal concept and that conceptual confusion arises when its role within EU law is analysed. The fragmented appearance of solidarity in primary, secondary as well as ECJ case law, leaves questions open regarding its legal nature and applicability. The following chapter will present an overview of the literature on solidarity and pave the way for an own conceptualisation. The first part of this chapter will take a more sociological and linguistic perspective. The aim shall be to see how conceptions and misconceptions of solidarity reflect on its legal nature. Once these conceptions are clarified it will be possible to move on to a deeper understanding of solidarity as a legal concept in European Union law. This deeper understanding will be gained from the discussion about the normative character of solidarity. Essentially, on the question of whether solidarity is to be conceptualised simply as a guiding value or instead as a more palpable principle of EU law. Once these different dimensions of solidarity are presented an alternative conceptualisation will be suggested.

### 2.1 Mechanic vs Organic

Émile Durkheim, named by many the 'architect of modern social science' (Calhoun, 2002) presents one of the eldest and most influential accounts on social solidarity. His model of 'mechanic' versus 'organic' solidarity was used by several scholars which reworked it and applied it to the European reality.

In his writings Durkheim distinguishes two models to explain how solidarity operates in societies. The first one – mechanic solidarity – takes a small and very homogenous community as a starting point (Durkheim, 1972). In this community every individual shares the same cultural and emotional bonds, therefore it is more likely that individuals have an emotional reaction to someone's ill-being and react in a solidary way. This response is altruistic since there is a genuine concern about the other, based on the same cultural background and shared ideals.

His second model – organic solidarity – describes a bigger society which is characterised by diversity and division of labour (Durkheim, 1972). The society is now more diverse, different values and beliefs come together in a community, where everyone has to

contribute in order to keep society working. This gathering of very different individuals, who work and specialise in order to pursue the common good is also characterised by interdependence. The different individuals need each other, because the contributions of the single individualities all matter to the common goal, a well-functioning society. Thus, a solidary reaction in the organic model is not so much based on altruism but driven by self-interest. The single individuals don't share common values anymore but they know that they need the others so that their society keeps functioning. This second model is better applicable to modern societies and therefore to the reality of the European Union. Furthermore, according to Durkheim (1972), the bonds of mechanic solidarity are more difficult to break than the ones of organic solidarity, since the emotional response in homogenous societies is stronger. To summarise, two distinct forces drive solidarity in the models presented above. While mechanic solidarity is genuine and driven by altruism, organic solidarity is functional and motivated by self-interest.

This important distinction is also developed by Habermas in *Im Sog der Technokratie* (Habermas, 2015). Here Habermas argues that the concept of solidarity should be used in a 'genuinely political way'. In doing so Habermas distinguishes the political obligation to show solidarity from legal and moral obligations. The political act of showing solidarity is never driven by what he calls 'a form of moral selflessness' (Habermas, 2015). This 'moral selflessness', Habermas equivalent to altruism, would be out of place in a political context (Habermas, 2015). Habermas proceeds in explaining what could be called the relative weight of solidary obligations. In order to do so he gives the example of 'relatives, neighbours or colleagues' which all can expect different kinds of assistance from each other, especially when compared to strangers. The intensity of the assistance that can be expected and the resulting 'specific duties', depend on the 'frequency and importance of the corresponding social relations' (Habermas, 2015). A 'distant cousin' in need of financial aid could never ask his family for help based on a – 'universally valid - moral obligation'. The obligation to help a distant cousin in distress would be based on family ties and of an 'ethical' and not moral nature. It would be based on what Hegel calls *Sittlichkeit* (Habermas, 2015). Nevertheless, Habermas argues, the mere existence of family ties isn´t sufficient to motivate solidarity. The rest of the family will only feel obliged to solidarity if it can expect that, in a similar situation, the cousin would also support them. In other words, they expect a certain return, or what Habermas calls 'predictable reciprocity'. It is important to note that the cousin is 'distant'. Since as closer the family ties are the more 'mechanic' solidarity becomes and the less reciprocity

is demanded. Habermas proceeds in explaining the reasons for abiding either to moral, legal or ethical obligations. Moral norms are respected for their inherent 'universal' value, while legal norms are abided out of the fear of coercion. Contrary to their moral and legal counterparts - ethical obligations – such as solidarity, can neither be 'enforced nor categorically required' (Habermas, 2015). They are respected because of 'trust-founded *Sittlichkeit*', which is object to the demands of 'predictable reciprocity' and on the confidence that this reciprocity will endure over time (Habermas, 2015). Thus, Habermas departs from a more 'organic' *Sittlichkeit* to explain the demands of reciprocity imposed by solidarity in contexts which are 'legally organized and in this sense artificial'. From the familiar to the politically complex, both contexts describe a 'network of social relations' and its inherent interest for the 'integrity of a shared form of life' (Habermas, 2015).

## 2.2 Reciprocity

The idea of reciprocity as a condition for solidarity echoes throughout the literature. Hilpold, for example, states that: 'Solidarity expects Solidarity' (Hilpold, 2015). In his work Hilpold elevates reciprocity to principle status and again stresses that solidarity should never be interpreted as an 'obligation for altruistic redistribution of resources' (Hilpold, 2015). While some policy areas of the EU may have altruistic elements, the main reason to integrate is 'insurance'. Hilpold perceives solidarity as an 'insurance device', which permits member states to safeguard against 'individually incalculable' risks. Even areas like 'international humanitarian aid' which seem to be exclusively altruistic, may reveal traits of reciprocity after closer inspection. Such as the proliferation of EU values like democracy and rule of law to developing countries. Moreover, Hilpold transfers the earlier introduced idea of relative weight of solidarity to the national / supranational division of the European Union. According to which it is easier to introduce altruistic elements in policies at the national level. This suggests that 'solidarity is higher developed at the national than the international level' (Hilpold, 2015). Meaning that solidarity is 'easier to organise', due to closer bonds and greater homogeneity. An observation which again is based on Durkheims, 'mechanic' and 'organic' models. Nevertheless, Hilpold contends that 'European integration itself can be seen as an expression of insights into the merits of solidarity' (Hilpold, 2015). Consequently within the EU there are what Hilpold calls – islands of solidarity. Provisions like 'development assistance, asylum policy, cohesion policy' and also some aspects of the European

monetary union may seem to have a purely altruistic rationale but according to Hilpold they never lose their reciprocal nature. Hilpold goes further, stating that the European law has an overall reciprocal nature and that therefore, solidarity always has to be circumscribed by reciprocity.

In *Solidarity in the European Union,* Sangiovanni inquires if there are any 'obligations of distributive justice among Europeans' (Sangiovanni, 2013). Like Hilpold, Sangiovanni also represents European solidarity as an 'insurance decision'. Whereby the different member states act in a consorted way in order to achieve common goals, while 'pooling' the risks inherent to integration. This idea of insurance, once again underlines the notion of European solidarity as a 'kind of reciprocity' among member states. What Sangiovanni calls the expectation of a 'fair return' describes precisely the above mentioned demand for reciprocity. Looking specifically at the Union's reality, Sangiovanni argues that the 'principles of Solidarity' will be less challenging at the supranational level. The reason for this is the 'more mediated and less comprehensive nature of collective goods' created by the EU (Sangiovanni, 2013). An observation which again can be followed back to the notion of solidarities' relative weight. When analysing the costs and benefits which come with European integration, Sangiovanni describes a 'constitutional asymmetry'. This asymmetry is created through an uneven relationship between the economic and social rationale of European policies. In summary, Sangiovanni argues that the 'long-term effects of integration on growth and problem-solving capacity are uncertain'. It is exactly against this uncertainty and possible uneven distribution of both positive and negative aspects of integration that solidarity is supposed to insure. As Sangiovanni writes, European citizens have agreed to 'share on another's fate', through the doings of solidarity.

A further definition of solidarity, which includes the notion of reciprocal obligation, is provided by Domurath (2013). According to her, solidarity is primarily based on the 'sameness of individuals who share a common interest' (Domurath, 2013). This sameness means that individuals are seen as 'equals' and can therefore expect support when needed. The condition of being the 'same' not only creates the expectation of receiving support when needed, but also obligates to help when other individuals are in need. The obligation is therefore reciprocal. When analysing the different dimensions of solidarity at a European level, Domurath notes that the notion of sameness is too simplistic to explain how solidarity operates in a 'sociologically heterogeneous construction', such as the EU. Therefore, she argues that 'the acceptance of differences'

is in fact what moves Member States to act in a solidary way. For more powerful member states this means to act according to an 'enlightened self-interest'. If combined, the two premises offer a definition whereby solidarity is: 'reciprocal support and cooperation within a community of interest which can be based on sameness within homogenous societies or the acceptance of differences in heterogeneous societies' (Domurath, 2013). Again, the distinction between 'sameness' and 'acceptance of differences' makes reference to the mechanic and organic societies theorized by Durkheim. Furthermore, Domurath stresses the point made by Durkheim whereby mechanic solidarity (based on sameness) prevails over organic solidarity (based on acceptance of differences). Domurath uses the premise as a starting point to explain why the absence of 'reciprocal relationships' and 'individually enforceable rights' limits 'environmental and intergenerational solidarity' (Domurath, 2013). According to Domurath solidarity is most developed when 'supported by individual rights'. Taking as an example the ECJ's case law on inclusion of economically inactive EU citizens in national welfare systems, Domurath concludes that solidarity can only really be enforced when backed up by individual rights and within a reciprocal relationship. For this reason, fields such as inter-generational and environmental solidarity are 'underdeveloped'. This is so because in the absence of enforceable individual rights, solidarity considerations become permeable to member state sovereignty claims and are also subject to an economic rationale. Meaning that 'environmental and sustainable development' are not goals in themselves, they must be 'integrated' in Union policies. As a result they are not autonomous policy goals and can be subjected to an 'economic bias', as argued by Domurath (2013).

From the above, one can make the following general observations on solidarity. Solidarity has to be conceptually separated from altruism. While altruism is based on selflessness, solidarity is always partly driven by self-interest. The literature has described this self-interest as reciprocity. Reciprocity 'circumscribes 'solidarity and is always part of it (Hilpold, 2015). Without reciprocity solidarity would turn into altruism. Furthermore this division between actions driven by self-interest and uninterested or selfless actions can help to describe how solidarity operates in societies. A society in which people have developed a collective identity is a more fertile ground for solidarity. Solidarity is more efficiently 'organised' because people see each other as 'same'. On the other hand, more complex societies with different and possibly conflicting interests are likely to restrain solidarity. This observation can be transposed to the political and legal space of the European Union. Policies and laws imposing solidarity have an easier implementation on

a national level. On a European level, the vast amount of different and possible conflicting interests make it difficult for solidarity to operate. This can be said to be the consequence of a still underdeveloped European identity, the absence of a real feeling of ‘sameness’ (Domurath, 2013).

For solidarity as a concept of European Union law these observations showcase the limitations that it faces. The following section will focus more on the normative character of solidarity. Once an overview of the discussion on solidarities position in the normative spectrum is given, an alternative conceptualisation will be presented.

### 2.3 Solidarity – between values and principles

In *Solidarity in EU law – An elusive political statement or a legal principle with substance?* – Esin Küçük (2016) argues that solidarity is to be defined as a legal principle. As a consequence, she contends that solidarity can have ‘binding legal implications’ and therefore ‘normative effect’. However this palpable legal consequence can only arise in relationships of reciprocal nature. Küçük describes these relationships as scenarios where all participants both contribute and benefit. Only then, can ‘strict solidarity obligations arise’. Two examples given by Küçük are article 80 TFEU and the preamble of the European Charter of Fundamental rights (the Charter), where solidarity is described as an ‘indivisible and universal value’. According to Küçük, Article 80 imposes a clear obligation on the Union to respect the principle of solidarity when legislating in asylum and immigration matters. Furthermore, it can be used as an ‘effective legal tool’ to enact secondary legislation in order to enforce a ‘fair sharing of responsibilities’ in cases of emergency. In other words, it is passible of having direct legal implications and therefore has 'normative effect’. This normative effect is just possible because the creation of a ‘borderless Europe’ also implies joint-solutions regarding asylum, immigration and border check activities. When it comes to common solutions for migration issues, all the Member States are ‘beneficiaries as well as contributors’ (Küçük, 2016). The same cannot be said about the solidarity chapter of the Charter. According to Küçük, these provisions are stripped of a ‘normative element and according judicial enforceability’. The general nature of the provisions doesn´t allow to extract palpable legal consequence. In summary, Küçük affirms that solidarity can only have ‘firm normative foundations’ in reciprocal relationships. The enforceability of solidarity is therefore circumscribed to its ‘functional role’. It is described by Küçük as a tool to pursue common interests. The collective

interest, a situation where ‘all parties are beneficiaries as well as contributors’ (Küçük, 2016), defines the limits of solidarity.

In summary, while describing the limits that reciprocity impose to solidarity and its intrinsic functional nature, Küçük still conceptualises solidarity as a legal principle.

Other authors are more reluctant to give principle status to solidarity. Pieter Van Cleynenbreugel, for example, argues that solidarity is to be conceptualised as a ‘more abstract value benchmark’, as opposed to a ‘concrete principle of law’ (Van Cleynenbreugel, 2018). The author describes solidarity as a rather ‘abstract’ and ‘fragmented’ concept capable of ‘inspiring’ policy makers but without the legal force of a principle. The typology presented by Van Cleynenbreugel, distinguishes between ‘liberalising, redistributive, constitutive and administrative solidarity’. These different types of ‘solidarities’ do not form a substantive scope of a legal principle, since they always need to be materialised by regulative measures. Meaning that solidarity, as conceptualised by Van Cleynenbreugel, has no normative substance. It is rather a ‘policy guidance tool’ which inspired a ‘variety of mutual recognition schemes, regulatory standards, fundamental rights and mixed administration techniques’ (Van Cleynenbreugel, 2018).

Also Eglé Dagilyté questions solidarities conceptualisation as a legal principle. In *Solidarity: a general principle of EU law? Two variations on the solidarity theme*, Dagilyté discusses if solidarity is ought to be conceptualised either as a ‘foundational value’, or instead, as a general principle of EU aw, ‘ie legal principle’. Dagilyté concludes that while operating as a ‘foundational value’, solidarity is not yet ought to be conceptualised as a legal principle. When analysing solidarity in EU law, Dagilyté distinguishes between ‘inter-personal solidarity’ and ‘inter-governmental solidarity’. While the latter one concerns solidarity amongst people the former describes solidarity between states, and also the European Union (Dagilyté, 2018). In a first step of her analysis Dagilyté tests if solidarity can be conceptualised as a fundamental value which incorporates the two above mentioned types of solidarity. In order to do so she lists three characteristics which define ‘Union values’. A Union value ‘cannot be directly observed’, it has to ‘engage moral considerations’ and it has to be a ‘conception of the desirable’ (Dagilyté, 2018). Dagilyté argues that solidarity meets all these requirements. At this point it is important to note that also Dagilyté, makes reservations towards an exclusively moral motivation for solidarity. While solidarity is perceived as a ‘conception of the desirable’ it can also be driven by rather egoistic or ‘pragmatic’ motivations. This point

of view meets common grounds with the notions of reciprocity and 'enlightened self-interest' introduced before. Dagilyté proceeds observing that solidarity is even enshrined at a constitutional level and that it's 'underpinning nature' and inspirational function is unquestionable. Once Dagilyté established the guiding and inspirational importance of solidarity she proceeds asking if solidarity as an EU value can also be characterised as a norm or principle (Dagilyté, 2018). Also for general principles of EU law, Dagilyté deducts four defining criteria. General principles have 'constitutional status', they are of 'general application', they assist judicial interpretation ('gap-filling and interpretative functions') and they are 'enforceable' in litigation (Dagilyté, 2018). Dagilyté argues that solidarity in EU law does not fulfil all the above mentioned criteria. Regarding the first criteria – constitutional status – there seems to be no issue. Solidarity is enshrined both in the case law of the ECJ as well as in primary in secondary sources of EU law (Article 2 TFEU and article 3(3) of the Charter). Nevertheless, Dagilyté argues that in article 2(2) TEU, solidarity is included into the 'non-justiciable second half of the provision'. Furthermore, it is argued that these solidarity provisions lack 'general applicability', which corresponds to the third criteria. The example given to justify this statement is financial solidarity. This type of solidarity only applies to specific situations. Meaning that member states are only obliged to a 'certain-degree of solidarity'. In summary, Dagilyté argues that European solidarity lacks general applicability and that its '*rationae materiae*' only covers fragmented fields of EU law. The last two criteria listed by Dagiylté establish that if solidarity is ought to be conceptualised as a principle it has to be 'binding' and 'enforceable'. Meaning that solidarity has to be concretised either through 'legislation or via judicial interpretation' (Dagilyté, 2018). Regarding the former, Dagilyté argues that solidarity obligations are only legally binding when they exactly define the 'right-holders and duty-bearers'. This is usually done through secondary legislation that specifies the scope of solidarity as applied to a certain domain. Thus, creating 'specialised principles' to function in their respective 'islands', as Hilpold (2015) put it. Dagilyté thus argues that there has not been a uniform and general application of the principle of solidarity. It has rather been fragmented and *ad hoc*.

The latter criteria is also not sufficiently met. Meaning that the Court interpretation of solidarity has not been consistent in any way. This lack of consistency when it comes to defining solidarity weakens its ability to serve as an 'interpretative tool', able of 'gap filling'. For the reasons mentioned above, Dagilyté concludes that solidarity

fails to meet the mentioned requirements and therefore cannot be considered a general principle of EU law.

As was demonstrated above the literature agrees on a possible legal relevance of solidarity but disagrees on where to place it on a normative scale. While some conceptualise it as a legal principle, capable of enacting concrete legal consequence, others describe it as a mere interpretative beacon within EU law and policy. The next chapter will further engage in literature, but this time with the goal of finding a theoretical framework which is able to find a compromise between the conflicting conceptualisations described above. The compromise, as this research maintains, can be found in a Dworkinian conception of a 'policy' as opposed to the one of legal principle. It is found that the distinction made by Dworkin between principles and policies is capable of reconciling the different conceptualisations of solidarity described in this chapter.

## 3. Theoretical framework

### 3.1 Of rules, principles and policies

One of the main tasks of legal theorists has been the conception of what could be called a normative spectrum. This normative spectrum allows to identify and organise different kinds of norms and rank them according to their importance in the respective legal order. While it can be said the 'norm' is the general term which encompasses all sorts of legal provisions, scholars differ when it comes to further categorisation. This results out of the fact that different legal schools conceive diverse legal universes and therefore diverging normative spectrums. In the following, different schools of thought and their respective spectrums will be presented. The confrontation of some of the most prominent conceptualisations will allow to conceive the theoretical framework for this research and help to reconcile some of the conceptualisation presented in the preceding chapter.

The first spectrum to be presented is the one of legal positivism. For legal positivism the normative universe is dominated by 'rules'. Any provision which cannot be considered a rule is not legal. Legal positivism, is here chosen as a starting point since it provoked further literature. It is precisely the clash between legal positivism and Dworkins theories that provide fruitful grounds for a conceptualisation of European solidarity.

In *taking rights seriously* Dworkin (1997) starts his analysis with a critique towards what he calls the 'ruling theory'. According to Hart's general analysis of rules, the authority of legal norms derives from a distinction between being 'obliged' and being 'obligated' (Dworkin, 1997). The former condition describes a situation whereby a subject is coerced to abide a certain order. Hart calls this the 'law of the gunmen', since the subject only follows the order to avoid harm. The condition of being 'obligated' differs from this in the sense that the condition is brought upon the subject through a rule. An 'obligated' subject is bound by a rule. The normative character of rules has a different 'call' on its subjects, a call that goes beyond mere coercion. This 'call' and also the authority to issue such rules can have two possible sources.

The first source for a rules authority is its 'acceptance' by a group of people (Dworkin, 1997). This group of people recognizes that a certain behaviour is worth following and that a deviation to it should be condemned. The second source of authority is 'validity'. Valid rules are binding because they have been validated by some other rule in the legal order. Thus, the proposed legal system consists of both 'primary rules' and

‘secondary rules’ (Dworkin, 1997). Primary rules have as an authoritative source acceptance, since the members of a community accept the obligations which such rules impose. Secondary rules confer authority to issue primary rules and also stipulate how primary rules can be ‘formed, recognized, modified or extinguished’ (Dworkin, 1997). This conceptualization creates a chain of validation which, if followed back, has at its inception what Hart calls ‘the rule of recognition’. This rule of recognition, which is developed by a certain community and allows to identify other legal rules, represents the genesis of that legal order. Hart’s rule of recognition can be illustrated as the sun of a positivist legal universe.

Dworkins main objection to this theoretical construct is that the chain of validation excludes the possibility of ‘prior rights of individuals’.

According to Harts positivism if a right is not stipulated by a rule then it is not valid and therefore has no place in the legal order. Dworkins concept of ‘trump rights’ rejects this, by affirming that individuals ‘may have legal rights other than those positivized by ‘explicit decision or practice’(Dworkin, 1997). These rights can serve as ‘trumps’, in the sense that they may confer legal protection to individuals in situations where ‘a collective goal is not a sufficient justification for denying them what they wish’ (Dworkin, 1997). In order to justify these prior rights Dworkin also conceptualizes a fundamental norm. What he calls the ‘abstract right to concern and respect’ is the moral justification for these rights. According to this fundamental norm, every individual has a ‘right to equal liberties’. While both authors use a fundamental norm as a conceptual cornerstone, Dworkin argues that the rule of recognition creates a conceptual gap. Meaning that the exclusive focus on rules and the validation chain omits legal standards which differ from rules. Dworkin therefore suggests that the positivist spectrum should be expanded, so that it can also include prior individual rights, which may not been concretised into positive law. He presents an alternate normative universe, which should be divided between rules, principles and policies.

Most of Dworkins argumentation on these different legal standards evolves around the conceptual opposition between rules and principles. While this is the main distinction he makes, he also suggests a more subtle distinction between principles and policies, which is of fundamental importance for this work.

Dworkin describes rules and principles as standards which both ‘point out’ decisions for problems of legal obligation, but which find very different ways to do so (Dworkin, 1997). Rules are standards which are applied in an ‘all or nothing fashion’.

Therefore, in cases where the facts correspond with the legal provision of a rule, there are two possible outcomes. The first one is the case where the rule is considered to be valid and the decision it indicates has therefore to be accepted. The second case corresponds to a situation where the rule is considered not to be valid and its decision is therefore rejected. The first case is the most important to understand the nature of rules, since it demonstrates the automaticity that the validity of a rule implies. If a rule is valid then it has direct legal consequence which 'follow automatically when the conditions provided are met' (Dworkin 1997). This concreteness of outcome is what distinguishes rules from principles. The factual correspondence of a case with the legal prediction of a rule activates immediate legal consequence. A deviation from this can only be an exception, which can be included in the provision of the rule, or the invalidity of the rule for the scenario in question.

Principles, on the other hand, point to a particular direction but lack the mentioned concreteness of outcome. Meaning that they have a guiding function but lack 'immediate legal consequence'. The example given by Dworkin in *taking rights seriously* illustrates this perfectly. While the principle which establishes that 'no man may benefit from its own wrong', is part of the American legal order, this does not mean that there are no legally valid situations where one can actually profit form its own wrong. In order to illustrate this Dworkin mentions 'adverse possession', whereby one can acquire legal ownership over land if one trespasses it for a 'sufficient amount of time' (Dworkin, 1997). Nevertheless, since this principle does not 'set out conditions that make its application necessary', it is not automatically invalidated in situations where another legal value takes precedence over it.

This leads Dworkins argumentation to the situations of 'collision', where the difference between rules and principles crystalizes. If two principles collide, the conceptual tool to decide prevalence is 'weight'. Meaning that in the particular case a judge has to decide, considering the particular circumstances, which principle has greater 'weight' and therefore deserves precedence. Nevertheless, the greater weight of a principle does not mean that the other principle is invalid. Principles which lose precedence in this 'balancing' act 'survive when they do not prevail' (Dworkin, 1997). Meaning that due to their 'open texture' a collision does not question their *ratio* (Alexy, 2002). Considering that rules do not possess the dimension of 'weight', they cannot be considered less important than other rules. Therefore, 'if two rules conflict, one of them has to be invalid'. Rules don´t possess inherent factors which determine their precedence.

A legal system can solve such situations with other rules which determine conditions for prevalence (for example *lex posterior derogate priori*) but this is always done by considerations which are exterior to rules themselves (Dworkin, 1997).

While emphasising the differences between rules and principles, Dworkin insists that they should be given equal treatment. He rejects the positivist approach that principles have no binding character and insists that adjudication has to take both standards into account.

Dworkin justifies this through the example of 'hard cases'. In cases in which there is no obvious answer to which legal standards should be applied, a positivist approach gives the judge the freedom to reach beyond the existing legal framework to solve the situation in question. This freedom manifests itself in the 'discretion doctrine'. A judge's discretion allows him to reach for 'extra-legal principles' to solve hard cases (Dworkin, 1997). Dworkin opposes this view stating that judges confronted with hard cases should instead apply principles which are already part of the legal system. He argues that the application of 'extra-legal principles' would imply two sorts of problems.

The first derives from Democracy itself. A community should be ruled by democratically elected officials. If judges were to have discretion to create new law at will (through the application of extra judicial principles), then they would technically be in control of the legislative power.

The second problem relates to legal certainty. Meaning that the application of extra-legal principles would signify a retroactive application of new law (Dworkin, 1997). This becomes particularly clear with the example of criminal law. The reaching out for extra-legal principles in criminal law can be especially disadvantageous for the accused, since he or she would be punished for a duty that was created in a discretionary manner by the judge. Therefore, the accused could not have predicted this duty and adapted its behaviour to it. For these reasons Dworkin is of the opinion that judges should be as 'unoriginal as possible' when deciding hard cases (Dworkin, 1997).

This line that should separate the judicial from the legislative power is further illustrated by the distinction that Dworkin draws between principles and policies.

Dworkin defines policies as a 'standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community.' (Dworkin, 1997). These societal goals are elaborated according to a utilitarian 'balancing act', whereby the greatest amount of preferences should be taken into account (Regan, 1978). Dworkin admits that hard cases can theoretically motivate both 'arguments of

principle', which protect certain individual rights, or 'arguments of policy', which pursue societal goals. Nevertheless, with his plea for unoriginality, Dworkin argues that judges should ideally limit their reasoning to 'arguments of principle'.

In his work *Glosses on Dworkin,* Regan explains Dworkins plea for unoriginality with the concept of 'consistency' (Regan, 1978). In order to describe why there is a greater expectation on judges to be consistent than there is on the legislature, Regan introduces two distinct hypothetical legislative programmes. The first one is an 'economic recovery programme', whereby 10 % of the citizens receive a certain amount of money. This money is allocated randomly and the sole goal of the measure is to stimulate the economy. The second legislative programme is aimed at protecting 'free-speech'. The hypothetical legislator decides that free speech is worthy of protection but does so in the same terms as he did with the economic recovery programme. Meaning that only a randomly selected fraction of the population is entitled to free speech. Regan argues that the rationality of the first programme could not be questioned while the second would be considered 'unfair' and stripped of any rationality. He illustrates this with the concepts of 'index-dependent' and 'index-free' reasons (Regan, 1978). The reason to give money to citizens is intrinsically tied to the goal of overcoming an economic recession. Thus, 'the strength of the reason for giving money to any particular subject depends on the number of other subjects to whom it has already been decided that money shall be given' (Regan, 1978). Nevertheless, the strength of this reason only endures as long as the goal of economic recovery is not achieved. Once this is achieved the reason to give money to citizens disappears. Therefore, the reason to give money to citizens is 'index-dependant' (Regan, 1978).

On the other hand, the recognition of the right to free speech means that each individual subject is worthy of protection when it comes to his 'desire to speak'. This 'individual-centred reason for protecting speech' makes it irrational to protect only 10% of the population, while excluding the other part. The reason to protect speech does not diminish as more and more citizens are protected, it is therefore an 'index-free' reason (Regan, 1978). According to Regan the recognition of this 'individual-centred' reasons to protect create also a 'positive obligation' for judges to do so when the factual situations are similar. Meaning that if judges recognise a right and then later on refuse to confer protection in a similar situation there will be an 'oddity' in the legal system. It is exactly to avoid this 'oddity' that judges seek consistency. It is also because of this reason that judges ought to be as 'unoriginal as possible' (Dworkin, 1978).

In summary, Dworkin, as explained by Regan, divides possible reasons for judicial sentences as motivated by principle or policy. The former ones have an inherent value since they protect an 'individual-centred reason', which is already recognised by the legal system. Such reasons do not require further justification since they are 'index-free'. The latter ones, on the other hand, always require a new 'inquiry on the force of that particular reason' (Regan, 1978). An inquiry which, according to Dworkin, the legislative power is better equipped to perform.

For the purpose of this work this distinction between index-free principles and index-dependant policies is of great importance. This is so, because this research assumes that the ECJ does not restrict its action to 'arguments of principle'. It is what literature calls an 'activist court' and therefore also considers policy in its decisions. Due to this activism, it can be said that the European Court of Justice does not seem to follow the pattern suggested by Dworkin and its plea for unoriginality. Rather, it is argued, that the ECJ has approached solidarity as a legal good which protection it considers 'index-dependant'. Meaning that solidarity is never an end in itself, it is auxiliary to other Union goals. It is further argued that this auxiliary nature of solidarity grows out of the fact that legally there is no 'positive obligation' on the European adjudicator to protect it. Contrary to principles in a Dworkinian sense, such as, 'free-speech', for example, it does not entail demands of consistency and can therefore be applied in a rather flexible way.

### 3.2 Disagreeing with Dworkin

The following section will put Dworkins conceptualisation into context. It will do so by presenting a competing normative universe, with both convergences and divergences. Furthermore, it will be analysed how Dworkin's conceptualisation relates to the terminology used in EU primary law. Subsequently, a justification of the theoretical framework will be provided, which will pave the way to the analysis of ECJ case law.

In his work *A Theory of Constitutional Rights,* Robert Alexy (2002) divides the universe of constitutional rights into principles and rules. The characteristics he attributes to both converges mostly with the distinction that Dworkin draws between those standards. Alexy establishes a 'qualitative difference' between the two standards, whereby rules can always either be 'fulfilled or not', while principles are norms which should be 'realized to the greatest extent possible given the legal and factual possibilities' (Alexy, 2002). While this division is very similar to the one drawn by Dworkin, Alexy develops it further with his conceptualisation of principles as 'optimization requirements' (Alexy, 2002).

Principles, according to Alexy, can have different 'degrees of satisfaction'. This degree of satisfaction does not only depend on the factual circumstances but also on what is 'legally possible' (Alexy, 2002). The dimension of the legally possible is established with the opposition of principles and rules. Like Dworkin, Alexy also illustrates the 'qualitative difference' between principles rules with the example of norm collision.

When two rules 'conflict', one has to be invalid. Once again, the invalidity of a rule has to be determined through exterior 'maxims' such as *lex posteriori derogate legi priori* or *lex specialis derogate legi generali.* Alexy's 'law of competing principles' solves the problem of competition between principles by attributing a 'conditional relation of precedence'. Thus, arriving at the same conclusion as Dworkin when it comes to the 'balancing' of principles and the fact that principles 'survive' when they do not take precedence (Dworkin, 1997). Furthermore, Alexy describes the same absence of 'immediate legal consequence', which is characteristic to Dworkinian principles. He does so in stating that when a principle takes precedence, it 'constitutes the condition of a rule which has the same legal consequence as the principle taking precedence' (Alexy, 2002). Meaning that even when a principle takes precede over another one, it can only have

concrete legal consequence when consummated by a rule. This phenomenon relates to the 'definite character of rules' versus the *prima facie* character of principles.
While Dworkin, does not describe the 'direct legal consequence' of a principle as a rule, the absence of concrete outcome points to the same conclusion.

Despite of all these similarities there are also conceptual differences between the two authors. One of them is the distinction that Dworkin draws between principles and policies. According to Alexy, principles can be related either to 'collective interests' or 'individual rights'. An assumption that differs from principles in a Dworkinian sense, which can only flow out of individual rights. Alexy argues that this distinction is too narrow and that what Dworkin calls 'policies' should be included in a wider category of principles. This is due to the 'common logical characteristics', which crystallise when principles compete making the distinction superfluous.

### 3.3 Principles and policies in the Charter

The underlying assumption of this research was that there was a certain confusion regarding the legal concept of solidarity in EU law. This confusion can be illustrated by the terminology used in the European Charter of fundamental rights, when compared to the conceptualisation offered by Dworkin. As noticed by Oster (2015) in *Media Freedom as a Fundamental Right,* the terminology used in the Charter does not coincide with Dworkins conceptual division of principles and policies. The notion of 'rights' in the Charter coincides with Dworkin notion of principles, while 'principles' correspond to policies in the Dworkinian sense (Oster, 2015). This can be exemplified by article 11 of the Charter. The first paragraph of this article describes the 'right' to freedom of expression. The reason to protect this right is 'index-free', it is a 'requirement of justice or fairness or some other dimension of morality' (Dworkin, 1997).

The second paragraph of the same article can be fitted in another conceptual category. The formulation of the article does not mention any particular right. Article 11 (2) postulates that signing members should 'create and maintain conditions' which make freedom and pluralism of the media possible. The legislator sets out 'a goal to be reached'. Thus, freedom and pluralism of the media is not a mean in itself, it is auxiliary to the right codified in paragraph one of the same article. As Oster put it, media pluralism is a 'cultural policy' which is auxiliary to freedom of expression. It is auxiliary because it is too broad to be considered a 'subjective, individual right'. In summary, freedom and plurality of the media is a policy in the Dworkinian sense. Therefore, it is not a mean in itself, its

application is always tied to the principle of media freedom. It can either restrict or expand the scope of media freedom. The former happens when it constitutes an 'unwritten legitimate aim justifying an interference with media freedom' (Oster, 2015).

The distinction drawn here by Oster showcases that terminology used by the European Union legislator does not coincide with Dworkins conceptualization. Nevertheless, there are valid reasons to depart from a Dworkinian perspective to conceptualise solidarity in EU law. The following section will justify the choice of this theoretical framework.

### 3.4 Justification of the theoretical framework

The first assumption which underlies the attempt to conceptualise solidarity is that it is a norm. A norm is the broadest possible denominator for a legal standard. This is something to which all the above mentioned scholars could agree. Nevertheless, if one wants to conceptualise solidarity in EU law, it is necessary to go further. As a first step one could say that it is rather easy to infer that solidarity, as codified in EU legislation, can never be a rule. As Dworkin put it, the 'all or nothing' fashion in which rules are applied is not suitable to describe the way in which solidarity operates. Expressions such as 'in a spirit of Solidarity' (article 194 TFEU) showcase the guiding nature that solidarity can have in EU law. Therefore, Hart's conceptualisation of law, which has at its gravitational centre rules, can be excluded as a possible conceptual framework. The distinction between principles and policies describes in a more accurate form the ways in which solidarity can operate. This is so because it is argued in this paper that the European Court of Justice is not a mere adjudicative body. It is argued that 'law is codified policy' and that the ECJ has a political agenda, to which it often subordinates its decisions. For this reason the theory of Alexy, while in many points similar to the one of Dworkin, cannot be used as a framework. The fact that Alexy does not separate conceptually principles from policies is the reason for its exclusion as a theoretical framework. Especially since this paper will attempt to prove that solidarity should be conceptualised as a policy in a Dworkinian sense. The tool that will be used to demonstrate this is the notion of 'index-dependant reasons' (Regan, 1978). Meaning that it is argued that solidarity in the European Union was never an end in itself but operated more as a problem solver or performed an auxiliary function to greater Union goals.

The distinction between index-dependant and index-free reasons, explains solidarities lack of 'general applicability' (Dagilyté, 2018). Since the reason to protect

solidarity is index-dependant, its scope has to be circumscribed to the specific reason to which it is ‘dependant’ to. Its ‘dependency’, justifies and limits the scope of solidarity as a legal concept. For this reason, solidarities conceptualisation as a policy explains why Küçük describes solidarity as ‘a functional instrument in pursuing the collective interest’ (Küçük, 2016). Solidarities functional dependency and its inability to stand alone as a source of direct legal consequence, justify its conceptualisation as a policy and not a principle. Furthermore, solidarities conceptualisation as a policy also explains why Dagilyté and Hilpold describe the application of solidarity as ‘fragmented’. Once the common goal of a policy is identified, secondary legislation has to substantiate it. This substantiation is always tailor-made, which makes a uniform application of solidarity as a general principle impossible. Dworkin wrote that a policy ‘sets out a goal to be reached’, a goal which is never sufficient in itself to produce concrete legal consequence. It is because of this rather mediate importance of solidarity, that it ought to be conceptualised as a Dworkinian policy.

## 4. Analysis

### 4.1 Solidarity as an acceptable restriction

One could say that the policy field firstly associated to solidarity is the one of social policy. While differently organised, all European states incorporate the idea of redistribution of welfare in their social systems. The power to decide which standards this redistribution has to follow has been one of the strongholds of national sovereignty. Nonetheless, the competence to define social policies is shared between the Member States and the UE, as can be seen in article 4. 2) b) of the TFEU. While the treaty and also posterior legislation try to give a clearer outline to this shared competence there remain a number of grey areas in need of further clarification. The following chapter will present a body of case law where solidarity appears as an instrument to secure the sovereignty of Member States to define their own social policies, while respecting standards imposed by the European legal framework. The Courts interpretation of solidarity, for this typology of cases, seems to establish how far a state can go to protect entities which they consider essential to the architecture of their social systems. Therefore, the tension present in this body of cases is the clash of fundamental freedoms established by the single market, most importantly the freedom to provide services, and the right of Member States to organise their own social systems. As was already stated by Davies, solidarity appears as a possible 'justification' for 'restrictive measures' (Davies, 2010) imposed by Member States to the single market and the fundamental freedoms it stands for.

Basilar cases for this matter are the joined cases *Poucet and Pistre* (C-159/91). Both cases concerned the French social system, more precisely two citizens which refused to contribute to it. Christian Poucet, refused to pay several contributions related to a 'sickness and maternity insurance scheme'. Daniel Pistre also objected payments to French social institutions, in his case the 'National Independent Old-Age Insurance Fund for Craftsmen'. The argumentation presented by both parties rested on competition law, more precisely, it was claimed that the social institutions in question were violating competition law. This violation rested on the fact that those institutions benefitted from a 'dominant position' in the French market, which permitted them to demand social contributions without any rivalry. The parties argued that this dominant position was in breach with European competition law. The Court also replied in terms of competition law, essentially its argumentation focused on the notion of 'undertaking', as defined in the treaty. According to the ECJ, the institutions in question could not be classified as

undertakings in the terms of articles (85 and 86 EC treaty). The Court justified this by classifying the activity of the French social institutions as 'not economic' (Paragraph 19 of the decision). The notion which permitted to reject the economic nature of such institutions was precisely the one of solidarity. According to the ECJ the 'exclusively social function' and the fact that their activity was based on 'the principle of national solidarity' and was 'entirely non-profit making' revealed the 'non-economic character' of the activities in question (Paragraph 19).

A similar weight was given to solidarity in the *Brentjens* (C-115/97) case. This case concerned the Dutch pension system. A system, based on three pillars (Paragraph 3 of the decision), which permitted the creation of sectoral pension funds in order to complement the rather reduced 'statutory basic pension' (Paragraph 4). These 'sectoral funds', normally resulted out of a collective agreement between management and labour. If such an agreement was reached, Dutch public authorities could make affiliation to such funds compulsory.

For Mr. Brentjens, in particular, this meant that he could not opt for a more beneficial private insurance company, since he was legally obliged to opt for the sectoral fund in question. At the heart of this dispute was once again the collision between private autonomy and the authority of member states to organise their own social systems. As in *Poucet and Pistre,* this legal dispute was also fought on the grounds of competition law. Brentjens contended that 'compulsory affiliation' to such a fund would be in violation of European competition law. Nevertheless, the Courts reasoning differed from *Poucet and Pistre* in the sense that the sectoral fund in question was considered to be an 'undertaking' and therefore its activities were deemed to be of an 'economic nature'. This was so because the fund functioned on the basis of the 'capitalisation principle', meaning that benefits where directly linked to the financial investment made by the fund. While the sectoral fund was categorised as an 'undertaking', the Court found that the collective agreement in question fell 'outside of the scope' of article 81 TFEU (ex article 85 EC treaty) and therefore was not undermining the single market (Paragraph 57). The justification it presented was based on 'the social function' of the agreement. In the words of the Court, the 'weight of solidarity' had to be assessed. The Court found that the sectoral fund in question contributed to the 'management of the public social security service', especially because it was a fruit of social dialogue between management and labour. Furthermore, the fact that it was 'non-profit making' and that both management and labour were represented in its administration highlighted the present solidarity

(Paragraph 74). In its next paragraph the Court lists several criteria which permit to assess or 'weigh' elements of solidarity in the fund. Examples for this are, for example: 'the obligation to accept all workers without a prior medical examination', or the 'absence of any equivalence, for individuals, between the contribution paid (...) and pension rights, which are determined by reference to an average salary' (Paragraph 75). Regarding Brentjens argument that the desired level of social protection could be achieved without 'compulsory affiliation', the Court stressed once again that it was for the Member state to organise their pension systems and that the 'exclusive right' given to the sectoral pension fund was essential for its proper functioning and the realization of the societal goal it pursued.

While the argumentation differed in some points it is noticeable that the thin line which made this 'restrictive measure' admissible for EU competition law was again brushed by solidarity.

In the *Sodemare* case (C- 70/96), the ECJ reiterated that Member States have the power to organize their 'social security systems'. Here, a law governing 'social welfare services' in Lombardy, precluded profit-making private operators from participating in its social welfare system (Paragraph 21). It did so by only allowing 'non-profit-making private operators' to be reimbursed for 'costs of providing social welfare services of a health care nature' (Paragraph 21). The Courts decision underlined that this kind of measure was not in breach of competition law. It stressed again that it was for the Member State to decide which kind of entities best pursued the objectives it had outlined for its social system. Furthermore, it added that the fact that only 'non-profit' operators were admitted left national 'profit-making operators' in the same situation as foreign operators, therefore no discriminatory effect was created.

In *Cisal* (C-218/00), the Courts reasoning of *Poucet and Pistre* was repeated. This time the main proceedings had at their centre the Italian 'system of compulsory insurance for workers against accidents at work and occupational diseases'. This insurance was run by INAIL, a state institution with a legally implemented monopoly of administration of all the funds related to this kind of insurance. In this case a managing partner of an insurance company - Mr. Battistello, preferred the services of his own insurance company to the ones to which he was legally obliged to contribute to (INAIL). Competition law was again invoked and the 'compulsory affiliation', deemed to be an abuse of a dominant position. The Court was again, essentially asked if INAIL could be deemed to be an undertaking and if the monopoly of this institution was contrary to competition law. In

its findings, the Court stressed once again the liberty that Member states enjoyed to organize their own social systems. Furthermore, it argued, that the characteristics of INAIL evidenced an exclusively social function which demonstrated that the system applied the 'principle of solidarity' (Paragraph 38). These elements are listed in paragraphs 39 and 40 of the decision, and essentially rest on a disconnection between the contributions and the benefits granted (Paragraph 42), thus implementing a redistribution of resources which did not follow a merely economic rationale. Another solidarity embedded element mentioned by the Court was the fact that benefits could be granted even when payments were still due. Finally the Court observed that INAIL was under direct control of the Italian state, which through it pursued its own social goals. Due to this exclusively social function, manifested through solidarity and the right of the Italian state to design its own social system, INAIL was considered not to be interfering with the single market.

At the beginning of this chapter, the collection of cases discussed above was referred to as a body. This is so because the Court operationalised solidarity in a rather consistent way. When it came to social systems the Court maintained that it was for the Member States to organize them, as long as they really pursued a social purpose and not a hidden economic agenda. The instrument which could separate these waters was precisely solidarity. Elements such as the disconnection between contributions and benefits, the right to benefits despite of missing contributions or the non-profit character of social institutions incarnated solidarity. As long as, what can be called elements of solidarity were present, restrictions to the freedom to provide services was deemed admissible. A thin line brushed by solidarity and guided by the Courts notion of it.

### 4.2 Solidarity to foster European Citizenship

While in the body of cases analyzed in the preceding chapter emphasis was given to the right of Member States to organize their own social systems, even if sometimes this meant restricting the rights conceded to individuals by the single market, there are other examples were such individual rights were upheld against Member States. The following chapter will present, yet another variation of the Courts operationalization of solidarity.

A decision of paramount importance for this next body of cases is *Grzelczyk* (C-184/99). This case regarded a French national, which took up residence in Belgium, in order to pursue his studies (Paragraph 10 of the decision). While during an initial period he paid for his own 'maintenance, accommodation and studies', he eventually applied for the Belgian minimum subsistence allowance (*Mininmex*). Initially this legislation only applied to Belgian nationals but was later on extended to 'workers', within the meaning of Regulation EEC nº1612/68. Since Mr. Grzelczyk, was not a worker, within the meaning of that regulation, French authorities decided that the Minimex should not be granted to him. Nevertheless, the Belgian Court questioned the ECJ, if this exclusion was contrary to Community law, in particular to the principles of European Citizenship and non discrimination, enshrined in article 6 and 8 of the EC treaty (Preliminary Question, nr.1). The Court answered positively, arguing that a Belgian student, in the same position as Grzelczyk, would indeed be able to obtain the *Minimex*. Thus creating a situation where Mr. Grzelczyk was discriminated on grounds of his nationality (Paragraph 29 of the decision). Such a discrimination could not be justified, since Union citizenship, demanded that the nationals of different member states received the 'same treatment in law' (Paragraph 31). Subsequently, the treaties conferred Mr. Grzelczyk the right to move to and reside in Belgium, therefore shielding him from any kind of discrimination on grounds of nationality (Paragraph 36). The Court further elaborated, evoking Directive 93/96 (Paragraph 39). This Directive allows Member States to make the conferral of the right of residence to foreign student's dependant on three criteria. The first one is that the student has enough funds to cover his costs and doesn't become a 'burden to the social system' of the receiving Member State; the second and third one oblige students to prove that they are enrolled in an university and covered by health insurance (Paragraph 38). While the Court accepted these conditions and stressed that Member States are not obliged to pay maintenance grants to foreign students, it also stated that the Directive did not preclude foreign students to apply for social benefits (Paragraph 39). The Court also

accepted the authority of Member States to withdraw residence permits in cases where one of those requirements was not respected, but it stressed that this withdrawal could never be an 'automatic consequence' of a foreign students attempt to access the host Member State's social system (Paragraph 43). The Court added that European Directives, such as Directive 93/96 accepted a 'certain degree of financial solidarity' between Member States.

Grzelczyk was very much in line with the previous, and also groundbreaking, *Martinez Sala* (C-85/96) case. This case concerned a Spanish citizen, which after living and working in Germany for several years applied for a 'child-raising allowance'. Mrs. Martinez Sala had no German citizenship and had only been granted temporary residence permits, which expired by the time of her application. Nevertheless, the German Court established that Mrs. Martinez Sala could not be deported (Paragraph 14). Considering that Mrs. Martinez Sala did not possess German citizenship and did not have a valid residence permit, her application for the allowance was rejected. Essentially, the referring German Court, wanted to know if Mrs. Martinez Sala could benefit from European Legislation in order to receive the allowance, despite of not having a valid residence permit, as demanded by the German social system. The ECJ stressed that making the success of the application dependant on a residence permit amounted to 'unequal treatment' (Paragraph 54). Especially since this permit was to be issued by the same authorities which were in charge of analysing the application. The fact that Mrs. M. Sala, was allowed to stay in Germany, and still had to obtain a residence permit resulted in a situation of discrimination.

Another case which fits in this body of cases is the *Tas-Hagen* (C-192/05) case. This case concerned two Indonesian citizens, which after moving to the Netherlands acquired Dutch nationality. Upon termination of their work contracts, due to incapability, both of them decided to move to Spain. Once in Spain both of them applied for a social benefit implemented by the Dutch *Law on Benefits for Civilian War Victims*. While both applicants were considered to be 'civilian war victims', their applications were rejected on the grounds that, at the time of the applications, none of them was actually residing in the Netherlands. The referring Court asked the ECJ if such a territorial condition was admissible or instead violated the freedom to move and reside freely.

The Court started by establishing its own competence for the case. While admitting that the attribution of social benefits was in the sphere of competence of Member States, such an attribution always had to respect EU law. It argued that since the

decision of the applicants to move to Spain, using their right of movement, had as a direct consequence the non-attribution of the Dutch social benefit, the matter could not be 'purely internal' (Paragraph 28). Once this was established, the ECJ analysed if the 'residence condition' established by the *Law on Benefits for Civilian War Victims*, was a restriction of the right to move and reside freely in the EU. The Court answered this positively since the Dutch national legislation created a 'disadvantage' for the applicants which resulted merely of the fact that they moved to Spain (Paragraph 31). Such a disadvantage could 'dissuade' Dutch nationals to exercise their freedom to move and reside outside of the Netherlands and therefore was in breach with EU law (Paragraph 32). Once the restriction was identified, the ECJ proceeded in analysing if it could be justified. According to previous case law it could only be justified if it resulted out of a 'consideration of public interest', if it was 'independent of nationality' and 'proportionate' (Paragraph 33). The Court found that while the 'residence requirement' could be said to result out of a 'consideration of public interest', it was not proportionate. It could be explained with a public interest logic, since the residence requirement could limit solidarity with 'civilian war victims', to those who actually 'had links with the Dutch population during and after the war'. Thus expressing how connected civilian war victims were with Dutch society (Paragraph 34). Nevertheless, the Court found that the criterion of residence was not a 'satisfactory indicator' of the 'degree of connection'. Since it could lead to situations where citizens with comparable degrees of connection to Dutch society, received different legal treatment, just because one of them decided to move out of the Netherlands (Paragraph 38). Therefore, the Court found, that a residence criterion which was only based on the date of the application was not sufficient to describe the attachment to Dutch society (Paragraph 39). Thus being, the 'residence criterion' failed to comply with the 'principle of proportionality' and was therefore inadmissible (Paragraph 39).

As had already happened in *M. Sala* and *Grzelczyk*, the Court favored individual rights to access welfare over the right of Member States to organize their own social systems. While in the previous body of cases the Court recognized such a right and recognized national solidarities, it appears more proactive in this chapter's body of cases. The premise set in *Grzelczyk* of guaranteeing a 'certain degree' of solidarity in Europe was further pursued in *Tas Hagen*. The more proactive role of the Court can be explained by its critical assessment of requirements demanded by Member States to attribute certain social benefits. In *Tas Hagen* the Court basically decided over what was worthy of solidarity and what not. The fact that the Court considered the 'degree of connection'

which could enact solidarity reactions in form of social benefits illustrates its efforts to try to release social system from a too nationalistic and territorial perspective.

Another case where the ECJ seemed to encourage what can be called a transnational access to welfare systems, based on individual rights, was the *D'Hoop* case (C-224/98). While Solidarity was not explicitly mentioned in this decision, it still shares the underlying logic of the previous cases. This case regarded a Belgian national (Ms D'Hoop), who completed her secondary education in France. Subsequently Ms D'Hoop went back to university in Belgium and then applied for a 'tideover allowance', a Belgium social benefit which has the purpose of assisting young people in their transition to working life. Belgium authorities rejected her application, with the sole justification that her secondary education diploma was not obtained in Belgium. The referring Court wanted to know if such a rejection was precluded by Community law. The Court found that such a rejection penalised Ms D'Hoop for having moved to France. A Belgian national with a Belgium Diploma would have been successful in obtaining the allowance. Thus being, the requirement of a Belgium Diploma constituted a restriction of the right to move and reside freely within the EU and an inadmissible discrimination. Furthermore, there was no justification for this restriction. The Court found that a 'single condition concerning the place where the diploma of completion of secondary education was obtained' was too 'general and exclusive in nature' (Paragraph 39). The fact that a diploma was obtained in Belgium was not representative of a real connection between the citizen and the country. Therefore it went beyond 'what is necessary' and was not proportional (Paragraph 39). Other cases of similar factual context and legal outcome are: *Bickel and Franz* (C-274/96) and *Singh* (C-370/90).

At this point it is pertinent to make some observations on the body of cases presented in this chapter. It can be said that solidarity was operationalised differently than in the cases analysed in the previous chapter. It is argued here, that with the implementation of EU citizenship, solidarity as a legal concept gained a new dimension. While in the previous chapter the ECJ only recognised, what could be called 'national solidarities', it went further in this body of cases. One could argue that European citizenship was the first step towards what one day could be a European social system, based on European Solidarity. The fact that the ECJ moved away from a paradigm which only conceded legal protection to 'economic factors' towards a system which protected students, pensioners, unemployed, opened the doors for a discussion of a possible European social system (Giubboni, 2010). As Giubboni wrote about *Grzelczyk*, the case

introduced a 'new paradigm of social solidarity', incorporated by the 'fundamental status' of European citizenship, which expanded the scope of social solidarity, beyond the 'traditional beneficiaries of economic freedoms established in the treaty'(Giubboni, 2010).

While never questioning the monopoly of Member States to design their own social systems, the ECJ admitted that in some cases individual rights may be opposed to such sovereign, social architectures. The reason behind a triumph of individual rights in such a sovereign sensitive issue was solidarity. It could also be argued, that such a development resulted out of a political need to advance with European integration through the consolidation of European Citizenship.

### 4.3 Single market over Solidarity?

While in the preceding body of cases the Court seemed to distance itself from a too economic perspective, focusing on individual rights and maybe even champion for what one day could be a European social system, it later on returned to a more economic approach. In the following cases the ECJ opposed a form of transnational solidarity incarnated by international collective action. The arguments presented by the Court to do so were mainly economic and subordinated collective action to the imperatives of the single market.

The *Viking* case (C-438/05) concerned a ferry, owned by a Finnish shipping company (Viking line), which operated between Finland and Estonia. The ship (Rosella) flew a Finnish flag. All the members of the crew were part of the Finnish Seamen's Union (FSU), which was associated to the International Transport Workers Federation (ITF), an international federation which represented 600 workers from 140 different countries (Paragraph 7 of the decision). The management of Viking line decided to reflag Rosella with an Estonian flag, in order to negotiate a collective agreement with Estonian trade unions and employ an Estonian crew with cheaper wages. In response, the ITF contacted its affiliates and urged them to refrain from negotiating with Viking line. As a result Viking line was not able to negotiate any agreement with Estonian trade unions. Furthermore, the FSU announced a strike and demanded a new collective agreement, in line with Finnish employment law, and guaranteeing that the Finnish crew would not be laid off. Viking line responded with a law suit before the High Court of Justice (England and Wales), arguing that the ITF was restricting their right of establishment and that

therefore it should withdraw its circular and stop the strike, which restricted Viking lines fundamental freedoms (Paragraph 22). Firstly the Court established that the scope of article 43 EC treaty, which prohibited any kind of restrictions on the freedom of establishment, also applied to collective action initiated by a trade union or group of trade unions 'which seeks to induce an undertaking' to enter into a collective agreement (Paragraph 90). The ECJ also recognised the right to take collective action as a fundamental right and therefore integral part of the general principles of EU law (Paragraph 43 and 44). Nevertheless, while recognising collective action as a fundamental right the Court also admitted that in some circumstances such a right had to be reconciled with the fundamental freedoms of the internal market and therefore be 'subject to certain restrictions' (Paragraph 44). Regarding Viking line's claim, the Court confirmed that article 43 EC had 'horizontal direct effect' and therefore could confer rights to private entities which could oppose them to associations of trade unions (Paragraph 66). The ECJ went on examining if the measures taken by the ITF and FSU could indeed be considered 'restrictive' in nature. The Court answered this positively since the circular and the strike made Viking line's exercise of the right of establishment 'less attractive, or 'even pointless' (Paragraph 72). They therefore constituted a restriction to Viking line's freedom of establishment. The final step taken by the Court was to analyse if such a restriction could be justified. In summary the ECJ argued that such a restriction could be justified, as long as it obeyed to certain standards. Firstly, it would have to be proven that the 'jobs or conditions of employment of the members of the trade union employed by Viking line were genuinely jeopardised or under serious threat'. Secondly, the measure would have to be proportional and not go beyond what was strictly necessary to achieve the social goal which justified the restriction in the first place (Paragraph 90). The assessment of these requirements was referred back to the national court in question.

Only seven days after the Viking case, the ECJ delivered its decision on the very similar *Laval* (C-341/05) case. Here, the Court also essentially ruled on the 'relationship between fundamental rights and the principles of free movement within the internal market' (EC legal service). This case concerned a Latvian construction company (*Laval un Partneri*) which had won the tender for several construction sites in Sweden. Laval established a subsidiary in Sveden (*L&P Baltic Bygg AB*), posting several Latvian workers to Sweden. After initiating talks with the Swedish building workers union, the negotiations were interrupted, since Laval was not willing to maintain the payment rates laid down by Swedish labour law. Subsequently it signed an agreement with the Latvian

union for the same sector, which represented 65 % of the workers posted from Latvia to Sweden (EC legal service). In response, the Swedish union mobilised and initiated 'collective action', which blocked Lavals working sites and eventually led to the bankruptcy of its subsidiary (*L&P*). Laval answered with a lawsuit, 'contesting the legality of the collective action' and asking compensation for the economic loss (EC legal service). The referring court asked the ECJ if it was legal for the trade union to use a blockade in order to force Laval to accept the Swedish collective agreement. The Courts answer was negative. The reason for this was Directive 96/71/EC, on posted workers. Article 3. 1) of this Directive, lays down the minimum conditions of employment that a 'host member state' has to guarantee to posted workers. As is laid down in recital 13 of that Directive, Member States are obliged to guarantee a 'nucleous of mandatory rules for minimum protection'. The material content of such regulation is not harmonised. Thus being, it is also possible to set the minimum standards through a collective agreement. The specific situation in Sweden was that regarding the construction sector, wage rates were negotiated on a 'case by case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned' (Paragraph 69). Thus being, a collective agreement regulating such pay rates, would never be 'universally' applicable as required by the directive. Consequently, the Court found that such a 'case by case' collective agreement could not be forced upon a foreign undertaking in the framework of 'transnational provision of services'. Essentially, the Court reasoned that it was too burdensome for a foreign undertaking to engage in such a case by case negotiation and that the more favourable terms demanded by the Swedish trade union went beyond the 'nucleous of mandatory rules of minimum protection' demanded by the Directive. As in the Viking case the ECJ recognised the fundamental right of collective action but stressed the fact that in some situations it had to be reconciled with the single markets fundamental freedoms. It also categorised the blockade as a restrictive measure, since it made Laval's business 'less attractive', 'or more difficult'. Regarding a possible justification the Court argued that while the blockade could be said to purse a public interest, it went beyond what was necessary. Enough protection was conceded by the Directive and the *ad hoc* collective agreements were too burdensome for the foreign undertaking, therefore stripping the blockade of its justifiability.

A similar decision was taken in two other cases: *Rüffert* (C-346/06) and *Commission v. Luxembourg* (C-319/06). Also in these cases the Court found that, national legislation went beyond what was imposed by the Directive and placed an unnecessary

burden on undertakings exercising their freedom of establishment and provision of services.

Taking into consideration the above analyzed body of cases, one could say, that the Court decided to restrict solidarity, between workers of different Member States, in order to favor the single market and the free provision of services and establishment.

### 4.4 Solidarity for crisis management

The next body of cases will consider decisions where solidarity, even if not always explicitly mentioned, was used to overcome scenarios of extreme economic and political urgency. The European sovereign debt crisis, which had its outbreak in 2008, was such a scenario and the European policy response originated in a case brought before the Court of Justice. In *Pringle* (C-370/12), a member of the Irish Parliament, contested that the European Stability Mechanism (ESM), which added a new provision to the TFEU, was unlawful (Press release, 154/12). Mr. Pringle, essentially argued, that it was inadmissible that such a treaty modifying provision was implemented via the simplified procedure. The granting of financial assistance provided by the ESM, even if only in urgent situations and considering its requirement of 'strict conditionality', was deemed to be an alteration of EU competences and inconsistent with TFEU provisions of 'economic and monetary policy and general principles of EU law' (Press release, 154/12). The ECJ disagreed with this argumentation and stated that Decision 2011/199, implementing the ESM, was not incompatible with EU law. Considering the political importance of this judgment, the Court decided to apply the accelerated procedure and to convey the full Court with its 27 judges.

The first part of the judgment pondered whether Decision 2011/199 could be implemented via the simplified procedure. The simplified procedure, which excluded 'representatives of national parliaments', 'heads of state or governments of the Member States' and the European Commission and Parliament of the decision process, could only be admissible under certain conditions. The provision in question had to be an 'internal policy or action of the EU, and could not increase the competences conferred to the EU' (Press release, 154/12). The ECJ found these conditions to be satisfied by the ESM. The Court argued that the ESM could not be considered a monetary policy and therefore of exclusive competence of the EU. While the primary goal of monetary policy is the one of 'price stability', the ESM intended to 'safeguard the stability of the euro area as a whole'. This rather general goal distinguished it from a more specific monetary policy. The

indirect effects that the ESM could have on European price stability were not sufficient to classify the instrument as one of monetary policy. According to the ECJ, the ESM was to be located within the 'framework for strengthened economic governance of the EU' (Press release, 154/12). This framework, which ought to prevent 'debt crises' and create conditions for a 'consolidation of macroeconomic stability and the sustainability of public finances'; shares these objectives with the ESM and clearly puts it in the realm of 'economic policy' (Press release, 154/12). Additionally, the Court did not consider that the instrument in question affected the EU's primary competence of 'coordinating the economic policies of the Member States' (Press release, 154/12). The reasoning was that if the treaties did not specifically attribute competence to the EU to establish such mechanisms, then Member States were free to do so amongst themselves (Press release, 154/12). Furthermore, the Court found that ESM's criteria of 'strict conditionality', guaranteed the non violation of EU law in general and specifically norms concerning 'coordination of the Member States economic policies'. Regarding the accusation that the ESM would create new competences for the EU, the Court argued that the instrument did not create a 'legal basis' for further institutional action. Meaning that the mechanism was restricted to its purpose and could not be used for further action.

The Court continued dismantling the accusations made by Mr. Pringle and focused mainly on the argument that the ESM constituted a financing mechanism and not a mean to coordinate Member States economic policies (Press release, 154/12). The strict conditionality criteria evidenced this and made sure that the mechanism did not violate community law. Such a strict conditionality prevented further a violation of the 'no bail out clause', implemented by article 125 of the TFEU. According to the Court, the *ratio* of this norm was to assure Member States would follow a 'sound budgetary policy' (Press release, 154/12). It did not intend to prohibit any kind of financial assistance. Such assistance was allowed as long as the 'logic of the single market' was respected and the assisted Member State remained 'liable for its commitments to its creditors' (Press release, 154/12). In summary, financial assistance was allowed, as long as it laid down the conditions for the assisted Member State to pursue a 'sound budgetary policy'. The 'conditionality clause' underlined that this assistance was 'reciprocal', meaning that assisted Member States remained liable debtors. Hilpolds notion of 'reciprocal solidarity' is clearer in this case than in any other. At this point it has to be noticed that while this case is without doubt a case where the Court decided on inter-state solidarity, the concept was only mentioned once during the whole document. The only explicit reference to

solidarity was made in paragraph 115, when the Court made reference to article 122 TFEU.

Other examples for this crisis-tackling function of solidarity, were the joined cases *N.S* (C-411/10) and *M.E*. (C-493/10). The background to these cases was the influx of migrants which hit Europe around 2004 and persists until today. More specifically the joined case regarded the Dublin II regulations (No 343/2003), which regulated the attribution of responsibility to examine third-country national's asylum requests. British and Irish authorities rejected applications from third-country nationals coming from Afghanistan, Iran and Algeria, arguing that according to the 'Dublin system', Greece was the responsible Member State to analyze their request (Paragraph 22 of the Decision). The asylum seekers opposed these decisions, arguing that a return to Greece would subject them to a serious risk of suffering 'inhuman and degrading treatment', as prohibited by article 4 of the Charter of Fundamental Rights (Paragraph 86). The international principle of *non-refoulement* prohibited the return of the asylum seekers to Greece. The Court confirmed this argumentation and used the word 'solidarity' five times during the judgment to prove its point. Council Directive 2001/55/EC, was also evoked by the Court. This Directive permits that 'solidarity mechanisms' may be developed in situations of 'mass influx' (Paragraph 20 of the decision). Furthermore, the Directive has a whole chapter entitled 'Solidarity'. Essentially, the Courts argumentation evolved around the fact that while the Common European Asylum System is built upon mutual trust and a presumption of the respect for human rights, there could be situations were such blind trust had to be questioned. The fact that 90 % of illegal migrants were entering Europe through Greece in 2010 (Paragraph 87) and the resulting deterioration of Greek reception conditions, was such a situation. The Court found that the massive influx of people caused a 'systemic deficiency' in the Greek asylum system. Returning Member States could not ignore such deficiencies if they did not want to be responsible for consequent human rights violations. Furthermore, the influx caused a 'disproportionate burden' for Greece, which should activate solidarity action of other Member States. In summary, the Court justified its decision, combining the obligation of Member States to act according to the 'principle of solidarity', in situations of 'mass influx', with their obligation to respect human rights.

A judgment which cannot be left out in this study and which is also related to the migration crisis is the one of *Slovakia and Hungary v Council* (Joined Cases C-643/15 and C-647/15). This case resulted out of Council decision (EU) 2015/1601), which

established a relocation mechanism in order to ease the burden of the countries which were most affected by the 2015 peak of the migration influx. This mechanism predicted that, out of solidarity, other European Countries should take in a quota of people 'in need of international protection'. Slovakia and Hungary which had voted against this decision in the Council, argued that the decision should be annulled since it had procedural flaws and was 'neither suitable nor necessary' to tackle the migration crisis (Press release No 91/17). The legal basis for the decision was article 78 TFEU. This article establishes the goal of a 'common policy on asylum'. Furthermore, its third paragraph permitted the creation of 'provisional measures', in order to aid Member States in an urgent situation, caused by a 'sudden inflow' of migrants, as long as the Parliament was consulted on the matter.

The first procedural flaw pointed out by Slovakia and Hungary was that the decision should have been implemented as a legislative act and accordingly involved not only the Council, but also the Commission and Parliament. The Court rejected this, stating that the provision only mentioned a 'consultation' of the Parliament and did not contain a 'specific reference to the legislative procedure' (Press release No 91/17). Thus, the decision in question was a 'non-legislative act'. The Court argued further that, if urgency required it, such acts could 'derogate' existent legislation as long as 'the material and temporal scope were circumscribed' and as such did not intend to substitute legislative acts (Press release No 91/17). Since the decision was temporarily circumscribed (25 September 2015 to 26 September 2017) The Court found such requirements to be met (Press release No 91/17). Other procedural flaws indicated by the applicants were also rejected by the Court. Essentially, the Court argued that although the decision was not approved unanimously and there were substantial amendments during the process, the decision respected all the requirements of a 'non-legislative act' and should therefore not be annulled. Regarding a possible 'inappropriateness' of the decision, the Court also disagreed with the applicants. Even if *a posteriori* it was found that the decision was not efficient, this did not make it illegal. The Council had to take action in a certain moment in time to face the crisis, as long as this action was not 'manifestly incorrect in the light of the information available'; it had to be deemed legal (Press release No 91/17). Furthermore, the Court stated that a possible inefficiency of the decision had to be linked to a 'lack of cooperation on the part of certain Member States'. Regarding 'less restrictive measures', the Court found the decision in question proportional, since it considered a 'voluntary' relocation scheme insufficient to tackle the problem.

While the clarification of procedural aspects was an important aspect of the judgment, one could say that solidarities weight in this case was heavier than ever. The word solidarity was mentioned 15 times during the judgment and it was the main argument favoring and justifying the decision in question.

## 5. Conclusions

As was stated in the chapter concerning the justification of the theoretical framework, it is argued in this paper that solidarity in European Union law can best be conceptualised as a Dworkinian policy. The conception of a policy which is not universally applicable but instead can vary according to a certain political need in a particular moment in time makes the rather volatile use of solidarity in European Union law more understandable. The purpose of the preceding chapters was exactly to demonstrate how, in time, solidarity has been conceptualised and used in different, sometimes even contradictory ways by the ECJ.

In the first body of cases the Court emphasised the liberty of Member States to design their own social systems, even if in some situations this meant restricting the single market. As long as the entities chosen by member states exclusively pursued social goals and did not have a 'hidden economic agenda', they could, in some situations, restrict the fundamental freedoms of the single market. While in earlier case law, the Court seemed to be stern about such restrictions, it yielded to Member States sovereignty to design their own social systems. Thus, the approach of the Court in this body of cases was one of recognizing what could be called different national solidarities. The limits of such restrictions were set by the concept of solidarity. Only if certain requirements, demonstrating solidarity and not economic interest were respected, the restriction on the single market could be acceptable.

The next body of cases represented a step towards a more transnational notion of solidarity. The paradigmatic sentence of 'a certain degree of solidarity' (Grzelzyk case), paved the way to a change in discourse. A discourse which went beyond national borders and for the first time looked at solidarity from a European perspective. The political and legal instrument to do so was the one of European Citizenship. One could argue that the implementation of European Citizenship induced a shift in orientation which moved away from the previous, more economic, single market focused approach (Giubboni, 2010). One could also argue that this shift was induced intentionally by the European Court of Justice, which sought to tackle Euro sceptic tendencies and strengthen integration through the consolidation of EU citizenship. Thus, admitting a 'certain degree of solidarity', in order to achieve the broader end of consolidating European citizenship and consequently reaching further integration.

Nevertheless, the Court did not seem to accept all forms of transnational solidarity. Viking, Laval and similar cases (Rüffert) demonstrate that the logic of the single market

was not put into the background. Freedom of movement and to provide services appeared as principles which, somehow, were considered to outweigh the right to transnational collective action. If one does consider the right to collective action as an emanation of solidarity, then this is telling about the weight given by the Court to a theoretical principle of solidarity.

The last body of cases seems to be the one where solidarity had its greatest positive expression. While in *Pringle* solidarity was not explicitly mentioned, the ESM was without doubt a solidarity mechanism. One could therefore argue that the Courts silence about the concept of solidarity in this case evidenced its political weight. In such a political sensitive situation, it was not convenient to emphasize the concept of solidarity. The Court emphasized instead, 'strict conditionality' in order to underline the 'reciprocal' nature of the financial assistance.

In the cases relating to the migration crisis, the concept of solidarity was handled more openly. The explicit mentioning of solidarity and solidarity mechanisms grew out of the fact that the migration crisis was politically more favourable to the concept of solidarity. One could argue, that the fact the crisis was induced by exterior factors and not a possible poor management of finances eased the way for an argumentation of solidarity. What is certain is that these cases had concrete legal consequence. Such consequence did not flow out of a generally applicable legal principle but rather of a political need in a certain moment in time.

In summary, it is found that the analysed case law is in line with the proposed conceptualisation. Solidarity, as a European Union law concept, seems to lack the general applicability of a legal principle. Rather, it seems that the applicability of solidarity always depends on an intrinsic political goal. The more urgent such a political goal is, the easier it becomes to apply solidarity and extract concrete legal consequence out of it.

While only a selection of cases could be analysed within the scope of this dissertation, this study draws a link between the already existing literature on the matter and provides a starting point for future research. Future studies could attempt to provide a more comprehensive analysis of the underlying political context. This may be a particularly interesting route for further enquiry, due to the finding that only a joint perspective of both legal and political contexts is able to provide real insights into the conceptualisation of European solidarity.

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