



POSITION PAPER

**Towards a de-facto solidarity in the
aftermath of the Covid-19 pandemic**

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L'obiettivo generale del progetto è quello di valutare l'impatto delle misure adottate in reazione alla crisi scatenata dalla pandemia Covid-19 sulla governance, sull'ordinamento dell'Unione europea e, in ultima analisi, sul processo di integrazione europea.

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The project assesses the substantive impact of the measures adopted as a reaction to the Covid-19 crisis on the governance and the law of the European Union, and ultimately on the process of European integration.

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Towards a de-facto solidarity in the aftermath of the Covid-19 pandemic

1. Introduction

Solidarity is a founding principle of the EU legal and political system and a driver of the process of European integration. Back in 1950, the Schuman declaration already contained the aspiration to a de-facto European solidarity, to be realized through concrete achievements: "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"¹.

Thus, solidarity, as a key value of the European legal order enshrined in Art. 2 TEU, is fulfilled when it integrates the "concrete" policies of the Union. Yet, over seventy years after the Schuman declaration, precisely this de-facto solidarity within the Union is contested. In fact, in recent crisis faced by the EU the principle of solidarity has not always translated into de-facto solidarity. Suffice here to think of the 2008 Euro-crisis and of the austerity measures imposed on several Member States, or else of the 2014 refugee crisis, when the Union was not able to find agreement on a burden-sharing mechanism nor to reform its asylum policies in a spirit of solidarity, as in fact set out in the Treaties (Art. 80 TFEU).

Against this background, the Covid-19 pandemic has brought about path-breaking developments. Differently from precedented crisis, the management of the pandemic was informed by a redistributive logic, which built upon a solidaristic approach of mutual support between Member States. This short paper thus analyses in how far the measures adopted to contrast the Covid-19 crisis have shifted the meaning of solidarity in the EU towards a more concrete implementation of a de-facto solidarity.

2. Solidarity as fundamental - yet undetermined - principle of EU law

According to the Court of Justice of the European Union (CJEU), the principle of solidarity is "one of the fundamental principles of EU law"². Yet, what is the actual meaning of this principle? In which fields does it apply? And who are its addressees? The Treaties repeatedly use formulations such as "in a spirit of solidarity", hinting to a sort of duty of Member States to take solidarity into account in their action³. However, there is no uniform approach to solidarity in the Treaties nor a definition of what the principle concretely prescribes. Rather, the notion of solidarity seems to vary quite substantially depending on the context and policy fields.

Art. 2 TEU places solidarity among the values of the Union. Art. 3.3 TEU further states that the Union shall promote "economic, social and territorial cohesion, and solidarity among Member States". Solidarity is mentioned again in the same article in paragraph 5 in relation to the Union's external policies, which must promote "solidarity and mutual respect among peoples." Therefore, at least

¹ Schuman Declaration, 9 May 1950.

² Case C-848/19 P, Germany v. Poland, EU:C:2021:598, para 38.

³ See for instance Art. 122, Art. 194, and Art. 222 TFEU

two different notions of solidarity co-exist in art. 3, targeting respectively Member States and peoples in general⁴.

In addition to Art. 2 and 3 TEU, references to solidarity are scattered in the Treaties. Art. 194 TFEU establishes that Union policy on energy shall be conducted “in a spirit of solidarity between Member States”. According to Art. 67 and 80 TFEU, a common migration and asylum policy is to be “based on solidarity between Member States, which is fair towards third-country nationals” and “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”. Finally, the Treaties mention solidarity in the presence of emergency or exceptional circumstances, such as the solidarity clause of Art. 222 TFEU, triggered in case one of the Member States is the object of a terrorist attack or the victim of a natural or man-made disaster; or Art. 122 TFEU on financial assistance, that applies if a Member State is in difficulties “caused by natural disasters or exceptional occurrences beyond its control”.

In most of these formulations, solidarity is mainly framed as fair sharing or support between Member States. Yet, beyond that, solidarity can be a value, a guiding principle or a duty. It can target Member States, the Union, EU citizens and peoples at large. Overall, it emerges as a cross-sectoral principle with varying scope and addressees.

3. The principle of solidarity and the Covid-19 crisis

The measures adopted by the Union to contrast the Covid-19 pandemic arguably mark a shift in how solidarity is understood and implemented in decision-making. Despite some initial hesitations, the health crisis was centrally managed by the Union, to guarantee a nearly homogeneous level of assistance in the different countries. For instance, a ban on exports of personal protective equipment towards third countries was introduced and the European Commission was put in charge of the purchase and distribution of vaccines, ensuring uniform access to vaccination to all Member States.

Furthermore, at the height of the crisis in May 2020, the EU adopted SURE, the European instrument for temporary support to mitigate unemployment risks in an emergency, with the aim to provide financial assistance up to a total of 100 billion euros in the form of favourable loans to finance Member States’ unemployment schemes. Shortly thereafter NextGenerationEU (NGEU) was adopted as a temporary mechanism to finance Europe’s post Covid-19 recovery. NGEU allowed the Union to borrow a total of 750bn euros on the financial markets to support the economic recovery of the Member States. Repayment of the borrowed funds happens through the Union budget but will be spread until the year 2058, so as not to weigh on the EU budgets of the next years. These resources have been proportionally allocated to Member States based not only on their GDP and population, but also on the impact of the health crisis in the different countries. These instruments have a redistributive rationale, as financial resources are provided to Member States through the Union’s budget, thereby establishing a form of debt mutualisation between EU Member States⁵.

NGEU has indeed created the conditions for a solidaristic approach to financial assistance. No strict conditionality is attached to the disbursement of funds and the recovery facility is embedded within the Union’s cohesion policy, as it relies on Art. 175.3 TFEU. Cohesion is in essence a solidaristic EU

⁴ If not three, as Art. 3 also mentions solidarity between generations (Art. 3.3 TEU).

⁵ B. De Witte, ‘The European Union’s COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift’ (2021) 58 *Common Market Law Review* 635, 667.

policy, aiming to the convergence of economic conditions on the territory of the Union through redistributive means. Although in the long run all Member States will have to gain from convergence and economic development (through for instance the emergence of new markets), redistributive policies enhance the solidaristic understanding of belonging to the Union. In physics the term “cohesion” means “the sticking together of particles of the same substance”⁶. It conveys the idea that that we want to stick together and that we are a united whole. The Recovery Facility thus extends the solidaristic approach of cohesion policy to cover all projects financed through the National Recovery and Resilience Plans, amplifying the redistributing potential of the policy field. Is this a temporary development, or did the pandemic set the Union on a path towards a long-lasting transformation – and strengthening - of the notion of solidarity?

Arguably, the availability of a large amount of funding and the recourse to redistributive instruments have changed the attitude of citizens and governments towards the Union, and, as a consequence, towards the other Member States. In other words, the agreement on the Recovery Plan has shown that the EU and the Member States can be there to support countries in difficulties, leading the way towards that “de-facto” solidarity advocated by Schuman. According to latest surveys conducted by the EUI-YouGov ‘Solidarity in Europe’ project, the pandemic has been a significant amplifier of European solidarity⁷. The project has gathered data from 16 Member States and the UK, exploring how support for European solidarity varies across time and depending on different issues. The results show that overall support for solidarity was already high in 2020 and has further increased in 2022. Such a growth in the perception of solidarity among EU citizens can be traced back to the effects of the pandemic⁸. The outbreak of the Ukrainian war also spurred a resurgence of solidarity towards Ukrainian refugees, as well as, within the Union, the need to face the energy crisis united.

Indeed, another step towards a de-facto solidarity was enacted by the CJEU in the *Germany vs Poland* judgment of July 2022 in relation to energy solidarity (Art. 194 TFEU)⁹. In that ruling the Court recognised that solidarity is no abstract principle, but it has binding legal effects: “the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it”¹⁰. *A contrario*, Member States and EU institutions cannot engage in practices and adopt decisions undermining the principle of solidarity, which, the Court says, underpins “the entire legal system of the European Union”¹¹.

4. Yet, what type of solidarity?

These findings show that European solidarity has been reinforced by the pandemic both at the level of the EU citizens and of the Member States. However, this solidarity was induced and supported by the availability of massive funding borrowed on the capital markets. All Member States are receiving

⁶ Oxford Language Dictionary, 2023

⁷ EUI-YouGov ‘Solidarity in Europe’ (SiE) project, available at <https://europeangovernanceandpolitics.eui.eu/eui-yougov-solidarity-in-europe-project/>

⁸ A. Hemerijck, L. Russo and P. Genschel, *European solidarity: silver linings through dark clouds*, Social Europe, 6 June 2022, available at <https://www.socialeurope.eu/european-solidarity-silver-linings-through-dark-clouds>

⁹ M Münchmeyer, The principle of energy solidarity: Germany v. Poland, (2022) 59 Common Market Law Review 915

¹⁰ Case C-848/19 P, Germany v. Poland, EU:C:2021:598, para 49

¹¹ Ibid, para 39

money from the EU, without, for the moment, any obligation to pay it back because the debt will weigh on the EU budget. Eventually, if the EU resources will not suffice, Member States will have to chip in and repay it. The first question is, therefore, whether this money-induced type of solidarity will last also when the funding will be over and we will have to decide how to pay back the debt.

Furthermore, the cohesion-based type of solidarity that emerges from the crisis is mainly focused on EU internal economic and social development. SURE represented an important support to unemployment during the pandemic. NGEU provided the funding for the economic recovery. Yet, this kind of solidarity is not transactional. It does not easily spill over to other policy fields. In particular, migration remains a field in which solidarity is problematic. During the pandemic Member States attitudes towards migrants varied. The health emergency put governments under pressure to address the condition of irregular immigrants, as it exacerbated the problems linked to the lack of legal and social protection. Some Member States, such as Portugal, proceeded to collective regularisation programmes, whereas others did not¹². Support for Ukrainian refugees was high in the wake of the war, and temporary protection was activated for the first time by the Council, exceptionally granting immediate protection to Ukrainians fleeing the war.

However, neither the pandemic nor Russia's invasion of Ukraine functioned as a catalyst for systematic reform of the EU asylum policy, which remains highly divisive, amid persisting disagreement over who shall carry responsibility for rescuing migrants and treat asylum applications. Effectively, migration and asylum policies pose a double-edged challenge to the implementation of a de-facto solidarity because they demand both solidarity between the Member States, as fair sharing of responsibility as prescribed by Art. 80 TFEU, and solidarity towards refugees and migrants (Art. 67 TFEU). The new Pact on Migration and Asylum put forward by the Commission allegedly aims to strike a fair balance between collective responsibility and solidarity, yet it does not substantially overhaul the Dublin system, mainly reinforcing border management and control¹³. A so-called solidarity mechanism foresees mandatory reallocation quotas that can be replaced by a financial compensation. The Council has reached an agreement on the proposal, yet it remains to be seen whether this mechanism, which is still very contested by several countries, will survive the legislative process and how effective it would be in practice¹⁴. It rather looks like a drop in the sea of the lack of solidarity that marks the relationships between Member States in this field.

In conclusion, solidarity as social and economic cohesion within Europe seems to have been strengthened by recent developments and through the measures adopted to face the pandemic. Solidarity in this respect has acquired some determinacy as a more incisive and prescriptive principle for burden-sharing and mutual support. Yet, it remains to be seen whether the spark of de-facto solidarity that we witnessed in the aftermath of the pandemic will translate into a durable transformation, able to make the principle of solidarity a cornerstone of the EU legal and political integration in all its facets.

¹² L. Piccoli, A. Kyriazi, and M. S. Mendes, *Resurrecting taboo policies? Explaining collective regularisations for unauthorised immigrants during the Covid-19 pandemic in Southern Europe*, RSC Working Paper 2023/31

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final

¹⁴ Council of the EU, *Migration policy: Council reaches agreement on key asylum and migration laws*, Press Release, 8 June 2023, available at <https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/>