4

What Did the COVID-19 Crisis Teach Us about European Solidarity? Incomplete Integration, Conflicts of Sovereignty and the Principle of Solidarity in EU Law

LUISA MARIN*

'this crisis is no one's doing and … it should not be everyone's undoing'

European Parliament, Resolution of 17 April 2020[1]

4.1. The EU Facing 'a Human Tragedy of Potentially Biblical Proportions'[2] with the Usual Legal Toolkit

When the first wave of COVID-19 arrived in Europe, nobody was ready for the pandemic. For its account, the EU was caught in the situation of having to provide answers to such an epochal challenge with an incomplete constitution, or rather a fragmented metabolic constitution,[3] having a limited mandate in policy areas

* Marie Skłodowska-Curie Fellow at the Law Department, European University Institute. I acknowledge funding from the European Union's Horizon 2020 research and innovation programme, Marie Skłodowska-Curie grant agreement No 891762. The views I express here do not represent the funding institution. I wish to thank all the participants of the workshop 'The Day After Covid-19', held in November 2020 at the EUI, as well as Emanuela Pistoia, Giuseppe Morgese, Luigi Daniele and the editors for comments exchanged on a previous draft of this chapter.

[1] European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)) www.europarl.europa.eu/doceo/document/TA-9-2020-0054_IT.pdf.

[2] M Draghi, 'Draghi: We Face a War against Coronavirus and Must Mobilise Accordingly' *Financial Times* (London, 25 March 2020).

[3] The literature on this issue is vast. *Ex multis*, see F Snyder, 'The Unfinished Constitution of the European Union: Principles, Processes and Culture' in JHH Weiler and M Wind (eds), *European*

such as public health, crisis management and economic union, which are crucial for tackling the pandemic and its consequences.[4] This mandate originates from a complex patchwork of (different types of) competences which are intertwined with the prerogatives of the Member States. In another perspective, it should not be forgotten that protection of public health, public safety and security, and dealing with crisis situations and fiscal and economic policies, represent core state powers, and domestic governments have been and still are very clear in asserting their competences and duties in the crisis situations generated by COVID-19.

It is precisely in this scenario that the outbreak of the pandemic within the European Union, with Italy being the first and worst hit country of the first wave, drove states to act, initially, in an uncoordinated manner, triggering initiatives in many directions, some of them protectionist and selfish.[5] Within the EU, Member States acted as competing sovereign entities, in a context characterised by lack of coordination and loyal cooperation between Member States and also towards European institutions. However, after this first chaotic moment, around mid-March 2020 the Commission intervened with a view to fostering coordination and limiting the effects of the uncoordinated and protectionist approaches of the Member States; in doing so, it managed to set itself up as an actor in the governance of the crisis, rescuing its reputation and reinforcing its legitimacy.

Since March 2020, European institutions, under the leading role of the Commission, have managed to decide on a number of measures: first, on pooling medical equipment and on research on a vaccine to defeat the virus; and secondly, coordinating efforts to allow EU citizens stranded outside the EU to travel back home, and also imposing limited freedom of movement – during lockdowns – for selected categories of persons in the healthcare sector.[6] From the perspective of governance of the economic policy, the EU has taken steps to compensate the economic consequences of the pandemic, with a relaxation of state aid rules and with the suspension of the Stability and Growth Pact, alongside the financial, economic and social aspects of the crisis. Among the first measures adopted was the SURE (Support mitigating Unemployment Risks in Emergency) programme, a €100 billion 'solidarity instrument' to support workers' incomes and business in navigating through the pandemic. Additionally, the Pandemic Emergency Purchase Programme (PEPP) of the European Central Bank (ECB) guaranteed

Constitutionalism beyond the State (Cambridge University Press, 2009) 55–73; from a different perspective, focusing on the means the EU has in terms of budget and administration, see C Fasone and P Lindseth, 'Europe's Fractured Metabolic Constitution: From the Eurozone Crisis to the Coronavirus Response', LUISS Working Paper Series, SOG-WP61/2020.

[4] F Casolari, 'Prime considerazioni sull'azione dell'Unione ai tempi del Coronavirus' (2020) 1 *Eurojus* 95.

[5] AM Pacces and M Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' [2020] *European Journal of Risk Regulation* 283.

[6] G Caggiano, 'COVID-19. Competenze dell'Unione, libertà di circolazione e diritti umani in materia di controlli delle frontiere, misure restrittive della mobilità e protezione internazionale' (2020) I *Post di AISDUE* No 7, 72 (www.aisdue.eu).

liquidity for €750 billion. Alongside funds for research on a vaccine (€140 million), for the EU Civil Protection Mechanism (€125 million) and for the European Centre for Disease Prevention and Control (€3.6 million),[7] the Commission managed to propose and broker a €750 billion long-term recovery plan, called Next Generation EU, which was approved in 2020.[8]

The COVID-19 (corona) crisis is, however, not the first crisis to hit the EU. For more than a decade, the EU has been navigating through a turbulent period: first was the financial crisis, which evolved into a 'euro-crisis' (or eurozone crisis); then came the migration or refugee crisis, in addition to two major existential crises of the EU as a project: Brexit and the rule of law crisis. With the corona crisis, more recently, as with the eurozone and refugee crises, the EU has experienced a governance crisis which has been originated by an external factor. In mainstream narratives, these crises are the result of incomplete integration processes, alongside the recent emergence of competition and contestation between sovereign authorities, which is taking place since the rise of populist parties in a number of Member States.[9] To some extent, both processes (incomplete integration and competing sovereignties) feed and reinforce each other in a vicious circle, which damages the EU and the integration process. However, with the pandemic, the EU has managed to provide a timely answer to this crisis: my aim is to focus on this answer and on its lessons for the future of integration.

Against this background, the main purpose of this chapter is to analyse and assess how the EU has reacted to the pandemic, considering that no Treaty reform has been undertaken and that a pivotal role has been played by the principle of solidarity. Solidarity can assume a special role in the governance of crises. Secondly, it is precisely through the prism of solidarity that I will look at the COVID-19 crisis as a governance crisis and at its meaning for European integration. This chapter will focus on the role played by the principle of solidarity, which is one of the vectors of flexibility of the European legal system, and on how it is used to mitigate the negative effects that competing sovereignties display on the functioning of the EU. Solidarity is invoked as the principle to fix integration fractures, precisely like in the Japanese kintsugi technique, where a gold fluid is used to put together the pieces of broken ceramics; solidarity is supposed to reconcile the EU and its Member States when conflicts emerge in a traumatic manner and, consequently, to boost the legitimacy of the EU, in the sense of capacity to deliver policy reforms and public goods when needed. Solidarity is also meant to supplement the capacity

[7] France Diplomacy, 'European Solidarity in the Face of COVID-19', www.diplomatie.gouv.fr/en/french-foreign-policy/europe/news/article/european-solidarity-in-the-face-of-covid-19.

[8] For an overview, see Commission, 'Q&A: Next Generation EU – Legal Construction'.

[9] On conflicting sovereignties as expression of the political conflict between neo-sovereigntist populist parties and traditional politics, see C Bickerton, '"Parliamentary", "Popular" and "Pooled": Conflicts of Sovereignty in the United Kingdom's Exit from the European Union' (2019) 41 *Journal of European Integration* 887; see also N Brack, R Coman and A Crespy, 'Unpacking Old and New Conflicts of Sovereignty in the European Polity' in N Brack, R Coman and A Crespy (eds), *Understanding Conflicts of Sovereignty in the EU* (Routledge, 2021).

of the EU to deliver to citizens' expectations irrespective of the limited or sectoral (depending on the context considered) competences it has been vested with – an expression of the incompleteness of the integration process, which finds expression in its similarly incomplete constitution.

Having introduced the context of the research and its purpose and aim, the next section will expound on the conceptual framework underpinning it, namely discussing the incomplete integration and the conflicts of sovereignty which have emerged in a predominant manner in the last decade of integration and that are the consequences of the constitutional design of the EU. The chapter will then elaborate on the principle of solidarity as a core principle of European integration, and its function in managing crises, expounding on the challenges underpinning its achievement. In another section, the attention will turn on the solutions designed to fix the economic component of the COVID-19 crisis, focusing on the Next Generation EU to understand some lessons on how solidarity is used to ensure the achievement of a crucial target for the EU, namely recovery of the economies of the Member States,[10] before concluding with some reflections learned on the principle of solidarity as a flexibility vector of the overall open and incomplete system of integration which is the EU.

4.2. The EU and its 'Crises', between Incomplete Integration Processes and Conflicts for Sovereignty

4.2.1. Governance Crises as Side-Effects of Incomplete Integration Processes

This section elaborates on the past 'crises' of the EU as governance crises, to understand the role played by the principle of solidarity in these contexts. It is here argued that a common element of EU crises rests, primarily, in the incompleteness of the European integration processes, which has attributed to the EU legal competences that have created a system of incomplete powers to fulfil its mandate. This situation is the result of a preference – chosen since the Treaty of Maastricht – for limited transfers of sovereignty; this, in turn, creates conflicts of sovereignty, for example on the definition of the contours of these competences, as has happened with the *Gauweiler* and *Weiss* saga with the German Constitutional Court.[11] Within the EU legal system, these crises can be managed and 'composed' thanks to the overall flexibility of the system, though composition presupposes

[10] To this purpose, one could debate whether this target is a public good of the EU or of the Member States.

[11] CJEU, 16 June 2015, Case C-62/14 *Gauweiler v Deutscher Bundestag* ECLI:EU:C:2015:400; CJEU, 11 December 2018, Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

acceptance of the core values and rules of the EU: in these contexts, the principle of solidarity plays a pivotal role and is supposed to correct the dysfunctionalities of the system, as it has been designed in its legal construction, be it in primary law or in secondary law.

This situation dominated by a crisis narrative can be explained with several reasons,[12] which all relate to the overall construction of the European Union. First of all, in the design of the architecture of European integration, the decision was taken to boost integration in some policy areas, but without extending it to closely related areas. The European Monetary Union (EMU) provides a typical example of it: a political science and economic narrative explains the eurozone crisis as the effect of incomplete integration. This incompleteness also concerns the legal institutional arrangements designed to achieve the integration process, codified into an 'unfinished constitution'[13] or 'fragmented metabolic constitution'.[14] In particular, the latter interpretation explains that the EU is called on to deliver public goods without having the toolkit typical of states, namely budgetary sovereignty and taxation powers. If we look at the policy domains, the EU is getting closer to the exercise of core state powers[15] without having the mandate and toolkit that states normally have, namely the capacity to mobilise resources for fulfilment of these targets, in particular concerning budget and administration. This leads to the third aspect: in several domains which have been marked by a crisis, we must consider that the EU is made up of a complex and multi-level governance system; in these governance crises, a role has been played by Member States.[16]

Unpacking these factors, we start from the incomplete integration rationale. As has been observed by scholars across disciplines, integration processes are often incomplete.[17] For example, in the context of the EMU, the fathers of the euro have built a single currency on an incomplete post-national sovereign idea: monetary union as exclusive competence of the EU, while fiscal and economic policies are firmly left in the hands of the Member States. Rosas and Armati described it as a house built starting with the roof, ie monetary policy without laying the necessary foundations of economic policy.[18] Economic scholars alike have observed that the EMU was fabricated on wrong premises, and that it looked like 'a half-built house', in the words of the American economist Rogoff.[19] He argued it was a 'catastrophic

[12] T Haughton, 'Editorial: Is Crisis the New Normal? The European Union in 2015' (2016) 54 *Journal of Common Market Studies* 5.

[13] Snyder (n 3).

[14] Fasone and Lindseth (n 3).

[15] P Genschel and M Jachtenfuchs (eds), *Beyond the Regulatory Polity* (Oxford University Press, 2014).

[16] T Borzel, 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics' (2016) 54(S1) *Journal of Common Market Studies* 8.

[17] A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press, 2015).

[18] 'Building a House by Starting with the Roof? Economic and Monetary Policy' in A Rosas and L Armati, *EU Constitutional Law. An Introduction* (Hart Publishing, 2012).

[19] P Eleftheriadis, 'Solidarity in the Eurozone' (January 2019) Bank of Greece Working Paper No 256.

mistake to put monetary union ahead of fiscal and political union', concluding that a 'monetary union without a fiscal union is an accident waiting to happen'.[20] In similar terms, Bergsten wrote that 'the European crisis is rooted in a failure of institutional design'. In his view, the solution would be to 'rewrite the Eurozone's rule book and complete the half-built euro house'.[21] From an economic perspective, in the USA these problems are addressed through fiscal transfers. In contrast, in EU monetary governance, on the one hand, states have lost control over their monetary toolkit, while the ECB, on the other hand, is constrained by the prohibition on monetary financing laid down in Article 123 TFEU.[22]

The incompleteness of integration, in different perspectives, also applies to the refugee and rule of law crises. Though the legal and policy contexts differ from the EMU in many aspects, it is here suggested that incompleteness of the integration process is a feature that characterises asylum and migration control policies for several reasons: the EU is exercising shared competences and, though it has developed an administrative machinery which is coordinating and supporting national administrations' activities, with the EU agencies Frontex and EASO, which are increasingly gaining weight in the practice, it nevertheless requires full organisational and financial commitment from states, which are controlled and monitored in the way they comply with EU rules. Incompleteness also means a sectoral or piecemeal approach to integration, in the sense that the common external borders did not imply a supranational asylum law policy, but rather a policy coordinating competences and duties of the Member States in asylum. The system set up with the Dublin Regulation is built upon this logic, and its downsides are also affecting the Schengen area: states have reintroduced controls at internal borders, putting the Schengen system under jeopardy. The Dublin system codifies geographical disparities between frontline states and states concerned by secondary movements, and has never been radically reformed.[23] On its side, the guardian of the treaties is not taking active steps to bring legality back into the Schengen area.[24]

[20] K Rogoff, 'Crash Time', quoted by Eleftheriadis, 'Solidarity in the Eurozone' (n 19).

[21] CF Bergsten, 'Why the Euro Will Survive' (2012) 9–10 *Foreign Affairs* 216. Feldstein himself assessed the eurozone in its dynamic dimension, observing that the macroeconomic challenges and risks of the eurozone could only be exacerbated by the fact that the single currency was built upon economies which kept growing in a divergent manner even after the introduction of the euro. This review of assessments by economists on the design of the eurozone is provided by Eleftheriadis, 'Solidarity in the Eurozone' (n 19) 29ff.

[22] A Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank' (2020) 5 *European Papers* 671.

[23] The Dublin system was first thought of as a mechanism to allocate jurisdiction and therefore responsibilities for dealing with asylum applications, thus compensating for the lifting of controls at the internal borders. Because of their geographical positions, some states are more affected than others by migration.

[24] S Salomon and J Rijpma, 'A Europe without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship' (2021) 22 *German Law Journal* 1.

Incomplete integration here means that a high level of fragmentation characterises these policies,[25] as does a poor level of compliance with EU rules by (some) states. The measures of the Commission's New Pact on Migration and Asylum of September 2020 do not represent a radical change in this trend, which is worrisome as to the willingness of the EU to improve its position as a migration actor on the global stage.

This story of incompleteness could be repeated for the rule of law crisis, which concerns Eastern European states, mainly Poland and Hungary, which, after efforts and engagements in the integration path during the pre-accession phase, have turned towards illiberal avenues and are breaching the values of liberal democracies enshrined in Article 2 TEU. In this case, what has been framed as a 'nuclear weapon'[26] – Article 7 TEU – proved not to be so effective because of the required unanimity rule.[27] In this crisis, too, the governance of the EU revealed its fragility and its incompleteness, eventually undermining the whole credibility of the EU as a legal system.

Because of these choices in the constitutional setting of the EU and the context-specific policy design, integration has led to the codification of the structural disparities existing between states and has limited the options previously available to states to mitigate the negative effects of external events. At the same time, the Union is driven to react to crises with innovative policy solutions. It is precisely in this context of incompleteness that vertical conflicts for sovereignty are proliferating.

4.2.2. The Unbearable Lightness of … Incompleteness: Conflicts of Sovereignty as the Result of Incomplete Integration Processes

In this section I will expound on conflicts of sovereignty as the consequence of incomplete integration processes. The thesis argued here is that vertical conflicts of sovereignty are nurtured by incomplete integration processes. The incompleteness of integration can be worked out in multiple different perspectives: it can mean sectoral integration (EMU), fragmented integration deprived by an adequate enforcement at supranational level (asylum and migration) or integration paralysed by unanimity rules, meaning that the decision-making can be held hostage by vetoing minorities (rule of law).

[25] Borzel (n 16).

[26] D Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (Department of Law, San Domenico di Fiesole, 2017) EUI Working Papers, LAW 2017/10.

[27] K Lane Scheppele and L Pech, 'Is Article 7 Really the EU's "Nuclear Option"?' (*Verfassungsblog*, 6 March 2018).

Dialogical processes concerning core features of the EU legal system and their meaning are not new within the context of European integration.[28] However, depending on the actors, and on the quality of the interactions in each context, we can have a dialogical or a conflictual interaction, which can lead to claims touching upon core sovereignty tenets. Since the early days of European integration, the European Court of Justice and higher domestic courts have contended the boundaries of the transfer of sovereignty initiated with the integration process. At the beginning of European legal integration, the interactions between the Court of Justice of the European Union (CJEU) and higher national courts, including constitutional courts, have been centred around conceptions of supremacy of EU law and its implications on national legal orders. Several courts have engaged in this dialogue, and these interactions have proved to be fruitful for the development and consolidation of a new legal order, which did not federalise Member States and thus left supreme courts with a margin of appreciation in definition of the interactions between themselves and the supreme court of the Union, the Court of Justice.

These interactions have been rationalised in scholarship with the theories of constitutional pluralism, which had the merit to explain and compose dialogical and non-conflictual interactions between courts.[29] On its side, the Court of Justice has never written its doctrine of European sovereignty; instead, it has built a doctrine of supremacy or primacy which presupposed sovereignty of the European legal order,[30] and it has completed it with its doctrine on the autonomy of the EU legal order, expressed in Opinion 2/13.[31] This autonomy 'obsession' is, together with primacy, nothing but the sovereignty doctrine of the Court of Justice.[32]

Opposed to this, and departing from the dialogue narrative, the conflict of sovereignty is a process of competition between actors in sovereignty claims and open contestation between authorities;[33] these processes emerged dramatically after the enlargement of 2004, the Treaty of Lisbon and also as a consequence of the rise of neo-sovereigntist and populist politics, which increasingly contest

[28] B De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2021) 187.

[29] The literature is vast. For some references, see N MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259; N Walker, 'The Idea of Constitutional Pluralism' [2002] *MLR* 317; M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) 501–38; A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice' (2017) 18 *German Law Journal* 1395.

[30] G de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice' in Walker (n 29) 449–60.

[31] See, *ex multis*, D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105.

[32] C Eckes, 'EU Autonomy: Jurisdictional Sovereignty by a Different Name?' (2020) 5 *European Papers* 319.

[33] RD Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020).

the process of European integration and the EU in general. The Treaty of Lisbon provided the toolkit for the emergence of conflicts of sovereignty and processes of contestation between the supranational and national constituencies of the Union: Article 50 TEU and Article 4(2) TEU are cases in point.[34] It is not by chance that Hungary and Poland have become big sponsors of constitutional identity and constitutional pluralism, though the meanings they give to these concepts are foreign to European constitutionalism.[35]

Against this background of 'old and new sovereignisms' that are gaining ground on the political and legal stage of the EU,[36] it is argued here that the policy domains considered have become the object of conflicts of sovereignty. The element defining a conflict of sovereignty is the challenge towards the source of authority. One prime example is given by the *Weiss* judgment of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) on the Public Sector Purchase Programme (PSPP) of 5 May 2020,[37] but also the conduct of countries such as Hungary in the context of its migration control policies enacted in the aftermath of the refugee crisis represents a (politically driven) legal conflict of sovereignty.

The *Weiss* judgment of the BVerfG is a judgment of a court that is aware of creating a conflict of sovereignty, because it had declared as ultra vires and not applicable in Germany the judgment of the CJEU in *Weiss* and also the decisions adopted by the European Central Bank on the PSPP. The BVerfG used its own domestic interpretation of the principle of proportionality to question the legitimacy of the reasoning of the CJEU.[38] Secondly, the BVerfG refrained from interrogating the European Court a second time, but questioned the interpretation of the CJEU on EU law and stated that some parts of the CJEU's judgment in *Weiss* were ultra vires:[39] thus, it has approached the CJEU in a hostile way, in

[34] About Art 50 TEU, see D Dixon, 'Article 50 and Member State Sovereignty' (2018) 19 *German Law Journal* 901. About Art 4(2) TEU, see M Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance in Favour of the Member States?' (2014) 33 *Yearbook of European Law* 298.

[35] As observed, there is a growing political dimension in these conflicts. See N Brack, R Coman and A Crespy, 'Unpacking Old and New Conflicts of Sovereignty in the European Polity' (2019) 41 *Journal of European Integration* 817, 818.

[36] See G Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 *Review of Central and East European Law* 36; RD Kelemen and L Pech, 'Why Autocrats Love Constitutional Identity and Constitutional Pluralism? Lessons from Hungary and Poland' (September 2018) Reconnect Working Paper No 2.

[37] BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15, paras 1–237.

[38] This would not amount to a breach of one of the contrapunctual law principles formulated by Poiares Maduro (n 29).

[39] Section 119 states as follows: 'In its Judgment of 11 December 2018, the CJEU held that the Decision of the ECB Governing Council on the PSPP and its subsequent amendments were still within the ambit of the ECB's competences (see aa below). This view manifestly fails to give consideration to the importance and scope of the principle of proportionality (Art 5(1) second sentence and Art 5(4) TEU), which also applies to the division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of the PSPP (see bb below).

a clear denial of the CJEU's competence to interpret EU law. The uncooperative model chosen by the BVerfG makes this judgment a conflict of sovereignty. The reaction of the Court of Justice, with the most assertive press release of the story of European integration, witnesses this conflict touching upon the primacy of EU law. Recently, the Commission has initiated an infringement procedure, an approach that has been advocated in scholarship.[40] Therefore, by choosing to refrain from activating a second preliminary reference to the CJEU, the BVerfG has chosen a conflictual approach, in a clear denial of the CJEU's role as *primus inter pares*, ie as the first European law court.[41] With the judgment on the PSPP, the German Federal Constitutional Court chose an uncooperative model, and a contentious attitude towards the European higher court, unlike what has happened in the Italian *Taricco* saga, for example.[42]

In the context of new sovereigntists, instead, the challenges to the EU and its sovereignty are caused by illiberal governments, with Poland and Hungary heading the group. Populist governments challenge the core elements of the EU legal system (liberal constitutionalism, rule of law, primacy) on many occasions and aspects, be it Poland, with political control of the judiciary, or Hungary, with capture of its higher court and its approach to migration and asylum, to mention just some of the issues at stake. These states engaged in a conflictual and confrontational attitude with EU institutions, fuelling political conflicts which have been translated into legal battles.[43] In doing this, they became big sponsors of the notion of 'constitutional identity', used like a mantra to cover illiberal and unconstitutional measures, and of 'constitutional pluralism', which is deprived of its actual meaning if it lies in the hands of illiberal democracies. Domestic higher courts in these countries are now captured.[44] It is in these contexts that we observe conflicts of sovereignty, whose main explanation is to be found in a deliberate choice, by governments and (some) courts, for illiberalism and a contextual betrayal of the values of constitutionalism, both national and European.

Therefore, the Judgment of the CJEU of 11 December 2018 manifestly exceeds the mandate conferred upon it in Art 19(1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States. To this extent, the CJEU Judgment itself constitutes an ultra vires act and thus has no binding effect [in Germany] (see cc below).'

[40] European Commission, June infringements package: key decisions, 9 June 2021, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743; F Fabbrini, 'Suing the BVerfG' (*Verfassungsblog*, 13 May 2020); Kelemen et al (n 33).

[41] F Strumia, 'When Managed Recognition Turns into Outright Denial' (*Verfassungsblog*, 18 May 2020).

[42] CJEU, 8 September 2015, Case C-105/14 *Ivo Taricco and others* ECLI:EU:C:2015:555; the judgment caused the reaction of the Italian Constitutional Court (ICC), with Order No 24 of 2017; later on, the CJEU returned to its case law with CJEU, 5 December 2017, Case C-42/17 *MAS e MB* ECLI:EU:C:2017:936; the saga has been closed by the ICC with judgment No 115 of 2018.

[43] I Goldner Lang, 'No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?' (2020) 2 *European Journal of Migration and Law* 39.

[44] G Halmai, 'Dismantling Constitutional Review in Hungary' (*Rivista di diritti comparati*, 15 February 2019).

For example, in Hungary, the conflict of sovereignty which emerged in the context of the arrival of asylum seekers has been deliberately fuelled by the government, which refused to be among the beneficiaries of the relocation decisions.[45] For a long time now, the government has challenged the EU's competences – for example, with the migrant quota referendum of 2016[46] – and has not properly implemented instruments of asylum law.[47] In the Hungarian case, the refugee crisis intersects with the rule of law crisis: as well as being a by-product of incomplete integration, in the sense of a system where ultimately states are left to deal with the consequences of migration based on geographical criteria, this crisis is also a choice enabled by the incompleteness of the enforcement system of EU law, which structurally relies on Member States' bureaucracies to be implemented. Additionally, the Article 7 TEU procedure requires unanimity, with the exclusion from the vote of the Member State concerned. More recently, Poland has added an episode to the conflict of sovereignty saga with judgment K 3/21 of the Polish Constitutional Tribunal of 7 October 2021,[48] in which Poland refuses *tout court* the primacy of EU law, offering another direct challenge to EU law and a blatant conflict of sovereignty.

If this section shows that conflicts of sovereignty are increasing, concern different types of actors and are based on a multitude of rationales, it must be acknowledged that the preference expressed since the Treaty of Maastricht for limited transfers of competences to the EU, in a context of limited administrative and substantive integration, has shown some limitations: indeed, incomplete integration processes bring with them conflicts of sovereignty on the definition of the boundaries of the transfer of sovereignty, or on the implications of asymmetric integration process on a state's competences. Additionally, if incomplete integration does not replace the provision of domestic common goods with supranational ones, it might create disequilibria that could and should be fixed with the flexibility of the system, which is one of the functions performed by the principle of solidarity. The next section will elaborate on the principle of solidarity within the legal system of the EU.

[45] L Marin, 'Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation' (2019) No 1 *Freedom, Security & Justice: European Legal Studies* 55.

[46] T Gessler, 'The 2016 Referendum in Hungary' [2017] *East European Quarterly* 85.

[47] See, eg the case law of the Court of Justice on the failures of the Hungarian reception centres. See L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' in A Bufalini, G Del Turco, FL Gatta, M Savino, FV Virzì and D Vitiello (eds), *Annuario ADiM 2020: raccolta di scritti di diritto dell'immigrazione* (Editoriale scientifica, 2021) 696–705.

[48] The judgment is published in Poland's Official Gazette of 12 October 2021. See H Hofmann, 'Sealed, Stamped and Delivered. The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy as Notification of Intent to Withdraw under Art 50 TEU?' (*Verfassungsblog*, 13 October 2021).

4.3. 'One, No One and One Hundred Thousand':[49] Is There a Core Meaning for the Principle of Solidarity in EU Law?

4.3.1. What Solidarity for the EU?

The principle of solidarity is having a crucial but complex life in the context of the EU. It is a general principle of the EU, to be found in core Treaty provisions, as well as in the case law of the Court of Justice, and it is invoked by political actors and policymakers during crises. Yet its precise legal meaning as a general principle of EU law is not fully clear; this affects its justiciability. At the same time, in the last few years we have been able to observe difficulties in translating this legal principle into solidarity-driven policies and legal instruments. Though it is acknowledged that solidarity policies and practices can be contingent upon context-related factors,[50] it is here suggested that the COVID-19 crisis can be considered a learning point for European governance and can teach us something new as to the nature of the principle of solidarity within the EU.

The principle of solidarity permeates the founding provisions of EU law, since it is enshrined in the Treaties and in the Charter of Fundamental Rights, as one of the overarching themes inspiring the rights of the Charter. Together with fairness, (mutual) trust and loyal cooperation, it is a core principle and rule governing the European legal system, not only as a legal principle, but also as a social value of the European construction and integration.[51]

In the Treaties, solidarity finds its place among the founding values of the EU (Article 2 TEU), as a value common to the Member States and permeating European societies.[52] Solidarity is also a core tenet of market integration, one of the founding values of the internal market (Article 3 TEU) and a guiding principle of the relations of the EU with the wider world (Article 3(5) TEU). In all these instances, alongside a core meaning, the principle has different implications, be it intergenerational solidarity, solidarity of the EU towards the international community (Article 21 TEU) or solidarity between Member States (Article 24(2) TEU), but also in the peculiar meaning of solidarity from the Member States towards the EU (Article 24(3) TEU). The principle of solidarity also permeates other policies of the EU, notably asylum and migration (Articles 67 and 80 TFEU),

[49] The reference is to L Pirandello's novel about Vitangelo Moscarda, who decides to break up his life to distance himself from all the perceptions others have about him.

[50] P Genschel and M. Jachtenfuchs, 'Postfunctionalism Reversed: Solidarity and Rebordering during the COVID-19 Pandemic' (2021) 28 *Journal of European Public Policy* 350.

[51] S Morano-Foadi, 'Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures' (2017) 19 *European Journal of Migration and Law* 223, 227.

[52] G Morgese, 'Solidarietà di fatto … e di diritto? L'Unione europea allo specchio della crisi pandemica' [2020] *Eurojus* special issue 'L'emergenza sanitaria COVID-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive' 77.

but also economic policy (Article 122 TFEU), without forgetting, of course, the solidarity clause in the case of a terrorist attack or a natural or man-made disaster (Article 222 TFEU).

Solidarity has different meanings across policies, and presupposes multiple situations and relations involving both state and institutional actors (at all levels), and individuals and human beings more generally. Within the EU, at this historical moment, there are two crucial questions: one concerns the emergence of a vertical dimension of solidarity, ie solidarity from the Union to the Member States in crisis situations; the second one, which is an effect of the first one, is the complex affirmation of a redistributive effect of wealth between Member States across national constituencies, since the EU does not have autonomous taxation powers.

In the international context, the most classical situation is solidarity between states, or negative solidarity, which is the more embryonal meaning of solidarity, and it applies to the extent that it is legally appropriate in the context of existing intergovernmental contracts.[53] In this context, the fiscal consequences of solidarity are considered more important than the social ones. In this line of reasoning, negative solidarity has few chances to increase political and social integration; on the contrary, it can result in desolidarisation and disintegration. Within a supranational integration context such as the European one, solidarity is emancipating itself from this international framing, but it has not yet developed as a general principle of EU law, having a thick legal meaning across policies. In the context of the internal market, with the case law on European citizenship, we have witnessed the challenges of the emergence of a transnational dimension of solidarity having a social content,[54] and this can be seen even more in the context of migration and asylum. The apex of complexity is reached when the addressees of solidarity are citizens of third states.[55] All in all, solidarity as a legal principle of the EU displays effects on multiple types of relations, and if the most classical paradigm is the one operating between Member States, the most complex ones entail forms of redistributive effects, which are not adequately dealt with within the current institutional structures and procedural mechanisms of the EU.[56] An interesting alternative might be to frame solidarity as a corrective flexibility provision of the

[53] P Trein, 'Federal Dynamics, Solidarity, and European Union Crisis Politics' (2020) 29 *Journal of European Public Policy* 980. According to Trein, negative and positive solidarity can be defined as follows: 'In short, negative solidarity entails that governments consider solidarity only appropriate in the strict sense of existing intergovernmental contracts and that fiscal consequences should have priority over social consequences. Positive solidarity means that actors regard solidarity morally appropriate, even if it goes beyond existing intergovernmental contracts, and give priority of social consequences over fiscal consequences.'

[54] A Sangiovanni, 'Solidarity in the EU' (2013) 33 *OJLS* 213; S Giubboni, 'La solidarietà come scudo. Il tramonto della cittadinanza sociale transnazionale nella crisi europea' (2018) 38 *Quaderni costituzionali* 591.

[55] *cf* Art 67 TFEU enshrining the principle of fairness towards TCNs.

[56] P Eleftheriadis, 'Corrective Justice among States' (2020) 2 *Jus Cogens* 7. See also Sangiovanni (n 54).

EU legal system, a clause which should at least entail a corrective dimension of the disparities and asymmetries consolidated by incomplete integration processes.

The following section will expound on the core meaning of solidarity as a crisis management tool.

4.3.2. The Challenges of Transnational Solidarity as a Crisis Management Tool: Lessons from the Eurozone and Refugee Crises

As explained above, with the EMU a single currency has been built, but fiscal and economic policies have been left in the hands of the Member States. In short, the EU has been entrusted by states with limited instruments to govern the economic aspects connected with this currency, and vice versa: states have lost control of their monetary policies, and were bound, until COVID-19,[57] by the rules of the Stability and Growth Pact. This combination made it a non-optimal currency area, since this decoupling between monetary and economic policies can create uneven distributive effects within it.[58] The constraints of the Stability and Growth Pact have long hindered countercyclical fiscal policies in the countries where they were needed most.

This was observed in all its consequences during the financial crisis of 2008, which further amplified the internal imbalances between Member States' 'debtors' and 'creditors'. The so-called 'debtor countries' could not adopt counter-recessive policies because of the limits on public debt; not having a monetary policy to use, they felt 'their hands were tied'. This had multiple negative effects, since it contributed to the nurturing of anti-Europe movements in many countries, while, at another level, it contributed to creating poverty and social tensions in some countries, such as Greece.

In this context, solidarity has played an important role, and it was invoked after the crisis had demonstrated the pitfalls in the design of the single currency. Solidarity has been invoked to create mechanisms to compensate for the consequences of the 'fundamental disequilibrium' that emerged within the single currency zone. After the crisis, and when it became evident that the monetary union had exacerbated the differences existing before the integration project, 'creditor' states became aware of the necessity to assist the most badly affected states, such as Greece, Ireland, Portugal, Spain and Cyprus, via emergency loans.

[57] The Pact provides for a general escape clause that was activated at the outbreak of the pandemic. See the Statement of EU Ministers of Finance on the Stability and Growth Pact in Light of the COVID-19 Crisis of 23 March 2020.

[58] K Rogoff has stated that the problem at the heart of the euro crisis is that 'the Eurozone is a half-built house' and that it was a 'catastrophic mistake to put the monetary union ahead of fiscal and political union': K Rogoff, 'Crash Time', quoted by Eleftheriadis, 'Solidarity in the Eurozone' (n 19) 29–30.

These corrective justice instruments were sought outside the Treaty framework, with the European Stability Mechanism (ESM), enabled by a modification of Article 136 TFEU. The ESM was operating on the basis of stringent conditionality, an expression of the crisis which originated the measures. Notwithstanding the constraints imposed by the Treaties – prohibition of transfer union – the Member States agreed to activate a solidarity mechanism strongly framed by conditionality, because of context-specific aspects, such as distrust towards Greece.

Incomplete integration, on the one side, can create conflicts of sovereignty; on the other side, it creates externalities that should be addressed with solidarity inspired at least by a paradigm of correction of disparities and asymmetries created or consolidated by EU law.

The second example considered comes from the refugee crisis, which has witnessed the experimentation of emergency-driven solidarity in reply to the surge in irregular migration fluxes. Here, in contrast to the EMU, solidarity is strongly embedded in the Treaties (Articles 67, 78 and 80 TFEU) as a guiding principle, together with fair sharing of responsibility, especially as an expression of interstate solidarity and responsibility. It has an external aspect as well, in the sense that in the relations towards third country nationals it expresses one of the founding values of the EU, which also finds applications in the external dimension of EU policies, as stated in Article 3(5) and Article 21 TEU.[59] However, while the Treaties posit solidarity as a systemic value underlying the foundations of the EU, its actual realisation has been more complex.[60]

The translation of the principle of solidarity into policies and practices of solidarity has been a tortuous exercise in the last few years.[61] The 2015 refugee crisis revealed itself as a European governance crisis, in the sense that it showed the weakness of EU policies on migration, borders and asylum, based on a codification of existing asymmetries. By keeping in place many diverse national reception and asylum systems, largely working according to different rules and standards, the EU has done nothing but consolidate existing geographical asymmetries between states. The creation of a common external border, based on the juxtaposition of many national parcels of borders, has wrongly given the illusion that, by consolidating the external dimension of border controls, the internal dimension of integration could have been safeguarded. Yet, Schengen is 'in check' because of the unresolved dilemmas of the asylum system.

In 2015, the Council adopted two decisions establishing a temporary and mandatory system of relocations of asylum applicants to the benefit of Greece

[59] Morano-Foadi (n 51); V Moreno Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) 24 *Maastricht Journal of European and Comparative Law* 756.

[60] L Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law' (2020) No 1 *European Journal of Migration and Law* 60.

[61] Morano-Foadi (n 51); E Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 *Maastricht Journal of European and Comparative Law* 667.

and Italy, which were the countries most concerned by migration fluxes, together with Hungary.[62] This latter country should originally have been among the beneficiaries of the measures, but it opposed this, preferring to be among the countries compelled to take a quota of migrants to be relocated. It probably did so in order to have the grounds to engage in a political sovereignty conflict with the EU. Overall, the system of relocations did not work: irrespective of the opposition of the Visegrad states, which led to litigation before the Court of Justice,[63] few relocations have been arranged, even among countries that supported the system.[64] This is due to the difficulties of getting administrations of different countries to communicate and cooperate.

Why does the governance crisis of the asylum system look so complex? Political scientists argue that states have few incentives to change the status quo, since most of them can enjoy the advantages given by the codification of original asymmetries.[65] Thus, in this context, solidarity has the function of correcting structural inequalities, codified in the first entry criterion, which is still one of the core principles of the European asylum system.[66] Solidarity therefore has a corrective dimension here too, in the sense that it aims to compensate for the consequences of structural asymmetries which consolidate the inequalities of the system. However, since the consequences of a fully fledged competence of the EU on asylum would affect domestic welfare systems, states are reluctant to cede sovereignty on what they see as core state powers. The COVID-19 crisis has also reverberated on the governance of asylum, with domestic lockdowns and 'closed port' practices complicating disembarkation and reception of asylum seekers and migrants while assuring quarantine for the same.[67] To sum up, neither before

[62] Council Decisions (EU) 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

[63] CJEU (GC), Judgment of 6 September 2017, Joined Cases C-643/15 and C-647/15 *Slovak Republic, Hungary v Council of the European Union* ECLI:EU:C:2017:631.

[64] For an assessment, see E Guild, C Costello and V Moreno Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece' (EP Studies, 2017).

[65] N Zaun, 'States as Gatekeepers in EU Asylum Politics: Explaining the Non-adoption of a Refugee Quota System' (2018) 56 *Journal of Common Market Studies* 44; S Lavenex, 'Failing Forward towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) 56 *Journal of Common Market Studies* 1195.

[66] Despite attempts to reform and adjust the situation already with the Juncker Commission, by focusing on the legislation (for example, the Dublin Regulation and the 2016 reform proposal) and with relocations, many issues linked with the imbalances created by the systems originally in place and by secondary movements remained unsolved. The new Pact on Migration and Asylum recently proposed by the von der Leyen Commission in September 2020 again had to face challenges concerning the realisation of forms of solidarity within the EU asylum system.

[67] L Marin, 'The COVID-19 Crisis and the Closure of External Borders: Another Stress-Test for the Challenging Construction of Solidarity Within the EU?' (2020) 5 *European Forum/European Papers*; F Munari, 'Il decreto interministeriale per gestire l'emergenza COVID-19 nell'ambito degli obblighi dell'Italia ai sensi della convenzione SAR: l'insostenibile 'intermittenza' del luogo sicuro per i migranti diretti verso l'Italia' (*Quaderni di SIDIblog*, 16 April 2020); S Nicolosi, 'Non-refoulement During a Health Emergency' (*EJIL Talk*, 14 May 2020).

nor during the COVID-19 crisis did solidarity in asylum materialise beyond the emergency dimension,[68] and its implementation has been rather unsuccessful for various reasons.[69]

To conclude, solidarity entails a complex set of relations, vertically and horizontally. As to the state–individual relationship, a crucial challenge is that the beneficiaries of solidarity are third country nationals and not citizens of other Member States. On the horizontal side, the issue is that horizontal cooperation is motivated by a corrective justice rationale, which is, however, not adequately supported by the EU in organisation and financial terms. Hence, states are interested in limiting the external monitoring of their domestic systems.

4.4. Post-pandemic Solidarity: Towards a New Meaning of Solidarity within the EU?

4.4.1. Old-Fashioned Solidarity and its Limits

Former ECB president Mario Draghi has defined the coronavirus pandemic as a 'human tragedy of potentially biblical proportions',[70] and highlighted its economic consequences, namely an increase in public spending and the need to cancel private debts. Economists agreed quite readily that an external factor – a pandemic caused by a virus – has caused a massive symmetrical economic shock, the consequences of which, however, will be asymmetrical, both economically and socially.[71]

The type of crisis, its magnitude and its long-term effects were immediately clear, beyond the exact quantification of the 'damage' caused by the corona pandemic. It is precisely because of the unprecedented nature of this challenge that some leading scholars immediately pointed to the necessity of finding solutions by thinking outside the box, thus intervening in a debate that was already showing a high level of polarisation.[72] This perspective was put on the table after politicians had taken the first steps towards tackling the corona crisis with the same toolkit that had been used for the sovereign debt crisis, which hinged on the ESM.[73] The ESM has been controversial because it was based on a 'strict conditionality' and it

[68] Tsourdi, 'Solidarity at Work? (n 61); see also E Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity' (*Kaldor Centre for International Refugee Law blogpost*, 28 April 2020).

[69] Guild et al (n 64).

[70] Draghi (n 2).

[71] See also Commission, 'Summer 2020 Economic Forecast: Overview. A Deeper Recession with Wider Divergences' (7 July 2020).

[72] C Closa, G Papaconstantinou and M Poiares Maduro, 'EU and COVID-19: Time to Think Outside the Box' (*Euractiv*, 21 April 2020).

[73] For a full account of the evolution of the political debate, see Genschel and Jachtenfuchs, 'Postfunctionalism Reversed' (n 50).

was constituted of loans; additionally, it has been associated with economic policies based on austerity and focused on the reduction of public debt. This recipe has caused severe economic consequences in several states, and additional tragic social consequences in Greece,[74] as recognised even by the troika;[75] furthermore, this approach has been seen as unfit for the crisis caused by the COVID pandemic.[76]

The European answer to counter the economic crisis caused by the corona crisis took shape with an initial emergency package and a long-term response, developed over a longer time frame.

As mentioned in section 4.1 above, the first emergency package consisted of the Pandemic Crisis Support (PCS) of the ESM, of up to €240 billion, and SURE,[77] of €100 billion, to be funded from loans raised by the Commission against the EU budget, with Member States' guarantees as collateral. In particular, the PCS, decided by the Eurogroup on 9 April 2020 and finalised and made operational with a decision of the ESM Board of Governors on 15 May 2020, was based on the existing Enhanced Conditions Credit Line – a precautionary credit line that grants access to credit up to a maximum of 2 per cent of the respective Member State's GDP. The measure follows the provisions of the ESM Treaty, and the funds are to be made available within two weeks after the request by a state. The credit will be available until the COVID-19 crisis is over and in any case until the end of 2022. So far, no state has requested to activate this line of support.

Another consequence of the economic crisis caused by the pandemic has been the necessity to activate instruments to protect the labour markets, with measures such as wage support funds or other solidarity measures for self-employed people. SURE aimed to mitigate the risks of unemployment and constitutes a loan programme to support Member States. The €100 billion are first borrowed by the EU on the financial markets, and the EU retains the primary responsibility to repay its loans in case of default by a state on repayment of its own loans to the EU. However, the Member States are invited to contribute to the instrument by voluntarily counter-guaranteeing the EU's risk. The SURE Regulation required that €25 billion had to be guaranteed by states in order to make SURE available, without requiring upfront financial contributions by states. The instrument became operational in September 2020, and 19 states have already received support, with a

[74] UN High Commissioner for Human Rights, Greece: "'Troika Bailout Conditions Are Undermining Human Rights," Warns UN Expert on Debt and Human Rights' (Press Release, 1 May 2013); E Doxiadis and A Placas (eds), *Living Under Austerity: Greek Society in Crisis* (Berghahn Books, 2018).

[75] L Papadimas and R Maltezou, 'For Hard-hit Greeks, IMF Mea Culpa Comes Too Late' (*Reuters.com*, 6 June 2013).

[76] See D Gros, 'EU Solidarity in Exceptional Times: Corona Transfers Instead of Coronabonds' (*VoxEU*, 5 April 2020); D Furceri, P Loungani, JD Ostry and P Pizzuto, 'Fiscal Austerity Intensifies the Increase in Inequality after Pandemics' (*VoxEU*, 3 June 2021).

[77] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L159/1.

total amount of €91.8 billion disbursed (as of March 2022).[78] In practice, SURE has given states access to low-interest loans; it is based on the EU budget, and the EU borrows the funds on the financial markets, guaranteeing it with the emission of bonds. The reputation of the EU protects states in a position of need, and therefore SURE constitutes an expression of solidarity (its legal basis is Article 122 TFEU) which entails mutualisation of risks between states.[79]

This process of mutualisation of risks has become central to the core instrument designed by the EU to counter the COVID-19 crisis, which is the Next Generation EU (NGEU) initiative. This instrument represents a change of paradigm that has been strongly invoked by some states, such as Italy, which were persuaded that the previous toolkit – ie the ESM, based on strong conditionality – was insufficient to address the economic crisis caused by the pandemic.

4.4.2. The 'Boosted' Solidarity of Next Generation EU: The Hamiltonian Moment of European Integration?

The long-term recovery fund has materialised with the NGEU initiative, which has been defined as the 'Hamiltonian moment' of the European Union.[80] In reality, it is a temporary instrument meant to boost recovery and to create a long-term resilience, in harmony with the European Green Deal and with the digital agenda, and adopted in an effort towards systemic solidarity to react to the heavy economic legacy of the pandemic.[81] Additionally, the NGEU represents the long-awaited alternative to the contentious corona-bonds, strongly supported by some states and steadfastly opposed by others. Beyond the political dimension, the legal road for corona-bonds might have been a tortuous one: being a form of debt mutualisation, corona-bonds might require a Treaty reform; additionally, in some cases, constitutional constraints at domestic level might have further hindered the process.[82]

Instead, with the NGEU, states have agreed on a recovery plan, which represents a change of paradigm for its size, composition and design. With a total size of €750 billion, the NGEU represents the most significant financial effort undertaken

[78] European Commission, official information page on the SURE instrument, https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en.

[79] S Giubboni, 'Crisi pandemica e solidarietà europea' (2021) 41(1) *Quaderni costituzionali* 218.

[80] German Finance Minister O Scholtz referred to A Hamilton, who, in 1790, together with Madison and Jefferson, persuaded the American states to agree to a new national capital in return for the federal government taking over their war debts.

[81] Commission, 'Recovery Plan for Europe', https://ec.europa.eu/info/strategy/recovery-plan-europe_en.

[82] In addition to the well-known position of the German BVerfG, see also the Finnish case described by P Päivi Leino-Sandberg, 'Solidarity and Constitutional Constraints in Times of Crisis' (*Verfassungsblog*, 8 April 2020).

by the EU so far, considering that the yearly amount of the total EU expenditure for 2020 was €155.4 billion, for example.[83] Its final composition combines €390 billion in grants or subsidies with loans of €360 billion.[84] The initial proposal of the Commission was for €500 billion for the grant component and €250 billion for the loans, but this was met with criticism from the 'frugal countries' (Austria, the Netherlands, Denmark and Sweden, often joined by Finland). The final distribution is still momentous in symbolic terms, because the subsidy component remains larger than the loans. Within the NGEU, the Recovery and Resilience Facility (RRF) amounts to €672.5 billion, and is the most innovative and significant (post-corona) funding scheme the EU has adopted so far. As already happened before, this funding is an expression of conditionality, in the sense that the Member State must submit a plan of economic reform (the National Recovery and Resilience Plan) to the Commission, and this must be approved by the Council. These plans must be in line with the recommendations of the European Semester.

Considering the constitutional constraints imposed by the Treaties, most notably the no bail out clause of Article 125 TFEU, which prohibits the EU from 'saving states', on the one side, and the principle of the budgetary balance enshrined in Article 310 TFEU, which states that the EU cannot take out loans,[85] on the other, the NGEU has been grounded on a creative legal solution. The idea has been to link the NGEU initiative to the European budget by massively expanding it, and by financing the NGEU through the long-term issuance of debt on the financial markets by the Commission on behalf of the EU. The debt would be repaid through the EU budget between 2028 and 2058, so over a potentially long time period. To some extent, the road to the NGEU was paved by the German Constitutional Court with the *Weiss* judgment of May 2020. Even without considering the size of the investments needed after the COVID-19 crisis, after that judgment, it became clear in several arenas, both European and national, that political institutions had to face their responsibilities and that the technical and monetary solutions – namely, the Outright Monetary Transactions (OMT) programme and other instruments, such as the PSPP, which could be considered as the blueprint for the PEPP, provided

[83] Council of the EU, 'EU Budget for 2020: Council Endorses Deal with Parliament' (Press Release, 25 November 2019), at https://www.consilium.europa.eu/en/press/press-releases/2019/11/25/eu-budget-for-2020-council-endorses-deal-with-parliament/. It is nevertheless worth observing that several EU states have topped the EU funding with internal recovery instruments. For Germany, the Konjunkturpaket, known as the Wumms Recovery Plan, amounts to 130 billion euros, which is the 3.8% of the German GDP. Source: Innovation and R&D in COVID-19 Recovery Plans: The Case of France, Germany and Italy, at https://www.ofce.sciences-po.fr/blog/innovation-and-rd-in-covid-19-recovery-plans-the-case-of-france-germany-and-italy/.

[84] Commission, 'EU's Next Long-Term Budget & NextGenerationEU: Key Facts and Figures' (November 2020) https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/mff_factsheet_agreement_en_web_20.11.pdf.

[85] GL Tosato, 'The Union's Budget Balance Pursuant to Art. 310 TFEU: What Is the Impact on European Anti-coronavirus Measures?' (17 April 2020) Luiss SEP Policy Brief 21/2020. On the legal dimension of EU public finance law, see also B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 *CML Rev* 635, 659ff.

earlier on by the ECB under the presidency of Mario Draghi – could have led to constitutional challenges, especially in some states, like Germany.[86] So, without a Treaty reform, the European Commission has tabled proposals for two regulations, the European Union Recovery Instrument Regulation[87] and the Recovery and Resilience Facility (RRF) Regulation,[88] and the Own Resources Decision (ORD),[89] which empowers the Commission to borrow funds on the financial markets and provides for the overall volume of the EU's liabilities and the essential conditions for the repayment. The ORD included an agreement on an exceptional and temporary increase of the EU's own resources ceiling by 0.6 per cent of the GNI of all the Member States, which is reserved upfront to pay back the NGEU debt. The function of the Recovery Instrument Regulation is to allocate the proceeds of the borrowing on the markets to different control measures and programmes it indicates, and for this reason has been defined as the 'control room' of the overall system,[90] whereas the RRF Regulation governs the functioning of this brand new funding scheme, inspired by solidarity in recovery after the crisis, but also by a long-term EU vision of resilience, which finds expression in the connection of the RRF with the existing plans of the Commission for digital and sustainable economic transitions. In other words, the European budget has been used as a shortcut for all the constitutional constraints that were in the process of being put in place and that, in some cases, were also framed as sovereignty conflicts.[91] Once again, in Germany there has been a constitutional challenge, this time by the extreme right party Alternative for Germany on the German ratification by Parliament of the ORD decision. Though a first interim decision of the BVerfG prohibited the Chair of the Bundestag from approving the ORD, two weeks later the court rejected the injunction on promulgation of the domestic act ratifying the European decision, thus giving its green light to ratification of the ORD.[92]

To sum up, we can conclude that the NGEU does not represent a federal treasury since it is guaranteed by the European budget, and it does not create a permanent system of mutualisation of outstanding debt. Furthermore, in order to

[86] F Costamagna, 'Il Next Generation EU e la costruzione di una politica economica europea: quale ruolo per democrazia e solidarietà?' (2021) III *I Post di AISDUE*.

[87] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433I/23.

[88] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

[89] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L424/1.

[90] A de Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution' (*EULAWLive*, 6 May 2021) 4.

[91] On these aspects, see De Witte, 'The European Union's COVID-19 Recovery Plan (n 85); de Gregorio Merino (n 90). For example, the German Constitutional Court has rejected a challenge on the RRF.

[92] BVerfG, Order of 15 April 2021, 2 BvR 547/21. See also the press release of the Court: 'Unsuccessful Application for Preliminary Injunction against Promulgation of the Domestic Act Ratifying the EU Own Resources Decision ('EU Recovery Package')', Press Release No 29/2021 (21 April 2021).

represent a truly Hamiltonian moment it should also be matched by autonomous taxation competence of the EU; instead, the Own Resources Decision of the EU budget is actually composed of transfers or contributions from the Member States. In other words, the EU's own resources are in reality transferred resources.[93] For these reasons, the NGEU is not linked to the emergence of a fiscal capacity of the EU, nor to the creation of a European taxation power or to Eurobonds, long discussed in the aftermath of the euro-crisis, but unacceptable for some countries. Nevertheless, with the NGEU, solidarity is manifested in the liability dimension of the funding instruments.[94] The borrowing on the capital markets is guaranteed by the EU budget. Therefore, the COVID-19 recovery fund makes a clear step in the direction of politically supported interstate and systemic solidarity in the sense of debt and risk mutualisation.

4.5. Conclusions: What Did the COVID-19 Crisis Teach Us about the European Principle of Solidarity?

Being a common value of European society, solidarity was recognised as a founding value of the European Union in Article 2 TEU, together with pluralism, non-discrimination, tolerance, justice and equality between women and men, which are all framed as values common to European society. Its meaning as a legal principle and as an expression of a value is also recognised in several provisions in the Treaties, though its content and definition are far from being delineated precisely in their normative details and contours. However, despite some vagueness in its normative identity, amply recognised in the literature,[95] solidarity has a polymorphic dimension as a legal principle because the same Treaties codify different meanings of the principle of solidarity. This implies a variety of relational dimensions as well, be it solidarity of the Union with the Member States or among the Member States, or even solidarity between generations, just to give some examples of how the Treaties codify solidarity. Considering the context of European integration, it is here argued that solidarity has a systemic meaning, in the sense that it also concerns the citizens of the Member States as beneficiaries of solidarity in its transnational dimension,[96] and, in the contexts of asylum and migration, protection seekers and third country nationals more generally.[97]

[93] See also De Witte, 'The European Union's COVID-19 Recovery Plan' (n 85) 660; D Rinoldi, 'BILANCIO UE/La battaglia Parlamento-Consiglio in arrivo a settembre' (*Il Sussidiario*, 27 July 2020).

[94] As argued by T van den Brink and M Gargantini, 'Models of Solidarity in the EMU. The Impact of COVID-19 after Weiss' (2021) 17(3) *Utrecht Law Review* 80.

[95] See Morgese (n 52); E Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' in A Biondi, E Dagilytė and E Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar Publishing, 2018).

[96] On this aspect, see Sangiovanni (n 54); Giubboni, 'La solidarietà come scudo' (n 54).

[97] Moreno Lax, 'Solidarity's Reach' (n 59).

In other words, proper consideration of the scope of integration suggests that solidarity has reached a transnational dimension, which is, however, far from being unproblematic. The case law of the Court of Justice reflects this variety, offering a kaleidoscopic panorama of visions and interpretations; for example, the same court is also not univocal in its propensity to rely in its reasoning on solidarity as a constitutional principle, at least giving it an operational meaning across the different Treaty pillars.[98]

However, in spite of this complexity, which goes beyond the scope of this work, I advance some interim conclusions on solidarity as a legal principle of EU law, elaborating on some common threads that can be found in the normative fabric of solidarity across the different policy domains and in the case law of the Court of Justice.

A first, preliminary observation one must, however, address is the – hopefully – exceptional nature of the COVID-19 crisis. Because of its magnitude and size, and because it is a crisis shared and spread across all the Member States, the EU has managed to give a response that, though linked with responsibility and conditionality, is nevertheless stating the capacity of the EU to react as an effective governance system, to a great extent protecting the public goods it has created, such as the euro and freedoms of movement.[99] Within this framework the principle of solidarity still plays a pivotal role.

I argue that the fact that solidarity does not have a univocal normative identity does not mean one cannot draw conclusions on some of the core features of solidarity as a core legal principle of the EU. First, it is a legal principle which has a programmatic nature, and needs to be translated into legislative instruments, where the legislator has a high degree of discretion on how to enact solidarity in the specific contexts considered. Secondly, it is closely connected with a principle of responsibility. Responsibility is often a counterpart of solidarity, and it concerns at least two dimensions: one from the beneficiary of solidarity towards the actors that give their solidarity, and that often place conditions on that solidarity: hence the conditionality a state must accept, as respect for parameters, reforms and values such as the rule of law. The other one runs in the opposite direction, from the actors that give solidarity towards the addressees, and here responsibility concerns the sharing of a common trajectory as well as the sharing of the fate of

[98] For example, in the context of relocation decisions, the CJEU has been reluctant to frame solidarity as the foundation of the system differently from what has been done by the Advocate General. Cf CJEU (n 63); Opinion of Advocate General Bot, delivered on 26 July 2017, Cases C 643/15 and C 647/15 *Slovak Republic, Hungary v Council of the European Union* ECLI:EU:C:2017:618. In contrast, in the domain of energy, the Court has recently judged that the principle of energy solidarity plays a fundamental role. See also CJEU, Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:598.

[99] As observed by several authors, such as Morgese (n 52); Genschel and Jachtenfuchs, 'Postfunctionalism Reversed' (n 50). In a different perspective, it should be observed that EU has managed to learn from its mistakes, perhaps also thanks to the painful Greek experience with the euro-crisis.

fellow states, as a consequence of the integration path taken together. It is precisely at this juncture that solidarity shows its very core, meaning its nature of a flexibility 'clause' in a governance system based on incomplete and open contracting,[100] as it is the system enacted with the Treaties which has provided for political and technical institutions. Furthermore, it has also been argued that the EU Treaties have set up situations of incomplete integration, as provided for in the contexts examined here.

However, irrespective of this 'agreed incompleteness', integration produces interdependences and also externalities. When these appear in all their effects, the principles of loyalty, together with solidarity and responsibility, require intervention to correct the negative effects created by integration. This corrective dimension of solidarity is a crucial aspect of its identity as a legal principle of EU law and it is inspired by principles of corrective justice.[101] The corrective justice dimension has been stressed as crucial in the context of the eurozone, because EMU has consolidated pre-existing asymmetries,[102] but the same narrative also applies in asylum and migration management. Integration with Schengen and the Dublin system has produced consolidation of pre-existing asymmetries, to the disadvantage of the most exposed countries, ie the frontline states. It is therefore of paramount importance that solidarity, which is a legal principle of the EU and which has a connotation of corrective justice, can be effective and address the unbalances already existing, and can also be consolidated by the policies adopted within the framework of EU law. This corrective justice dimension has been addressed properly in the case of the Next Generation EU, because of the provision for grants as well as loans, and also because of the link with EU guaranteed obligations, thus avoiding a massive increase in the public debt of states, which are in a less strong financial situation when they have been hit by the pandemic. This corrective justice dimension is therefore a crucial aspect of the principle of solidarity in EU law, and the COVID-19 pandemic has taught us that the higher the values of the goods at stake, the higher the interest in finding a political content to solidarity. The interdependence created with integration reveals a good component of self-interest in the choice for solidarity.

However, we could make some additional reflections in the perspective of relations between public authorities and individuals underlying the principle of solidarity. In particular, when EU law addresses authentic transnational relations having redistribution effects among citizens of different Member States, the political and legal salience of solidarity is higher.[103] This happens with similar dynamics in migration and asylum, from a twofold perspective. The first perspective is that of solidarity of a Member State towards an asylum seeker, ie a third country national.

[100] A Stone Sweet, 'The Court of Justice' in Craig and de Búrca (n 28).
[101] Eleftheriadis, 'Solidarity in the Eurozone' (n 19).
[102] ibid.
[103] See Küçük (n 95); Sangiovanni (n 54).

The second concerns the relation between the EU and Member States at this juncture of accepting the EU's competence in an area where the EU is getting close to becoming a core state power, like that of deciding who has access to a Member States' territory and welfare system. This case helps us to understand a crucial challenge in the development of the principle of solidarity in the EU, namely its redistributive effects and also its capacity to touch upon core states' values, in the sense of redefining the community of beneficiaries of a state measure.

The EU is in a critical phase of its life, and solidarity is confirming this picture. The EU is evolving from negative solidarity towards a more organic form of solidarity which can have redistributive effects across and within its communities, but this evolution is complex and full of politicisation. The governance of the EU, which in some areas is hindered by forms of inter-governmentalism and paralysed by veto powers,[104] contributes by fuelling these challenges.[105] What the corona crisis has taught us is that Member States are ready to engage in solidarity when the prize at stake is high and shared between states, albeit to different extents; in other words, when the challenge is common to several Member States, solidarity can be expressed as a positive form of solidarity and its heritage can also be high for European integration. The dimension of self-interest is also there, but it can be reconciled with altruism. This factor has contributed to defusing the political conflict about self-interest, with the exception of the persistent divergent visions of the 'frugal' states; consequently, this has contributed to limiting the conflict in this context, and to avoiding it turning into a sovereignty conflict, as has been experienced before.

[104] The declaration by Mark Rutte entering a European Council meeting with a book on Chopin epitomises this veto power. See 'Dutch Leader, Prepared for EU Summit Impasse, Brings Book to Read' (*Reuters*, 20 February 2020).

[105] See B De Witte, 'Constitutional Design of the European Union: Getting Rid of the Unanimity Rule, video recording of 'Conversations for the Future of Europe 2020', European University Institute.