

## STUDENT PAPER

# EU Solidarity, Illustrated by the Covid-19 Crisis

What does EU solidarity mean in the context of free movement of goods and persons and how is this illustrated by the response to the Covid-19 pandemic?

Anne Joppe\*

Solidarity between the Member States of the EU is mostly called upon during times of crisis, as also now during the Covid-19 pandemic. In this article, the definition and importance of solidarity is studied with a focus on the internal market. It appears that solidarity does not have one unequivocal meaning, but that its importance and value depend per EU policy area. Yet, it is noteworthy that elements of reciprocity and altruism lie at the core of the value. In the context of the internal market, the principle is not referred to in the specific Treaty provisions on the fundamental freedoms. However, solidarity and the idea behind it can be enforced through the principle of loyalty within the meaning of Article 4(3) TEU. The reaction of the Union and the Member States to the Covid-19 outbreak illustrates how solidarity is reflected during crises. Studying the recent actions seems to confirm the conclusion that solidarity within the single market is rather a political aspiration, that is not legally binding or enforceable by itself. However, one could argue that this requires change, since it follows from the current pandemic that solidarity is crucial for the resilience of the internal market in times of crisis. The principle of loyalty can indeed play an instrumental role here and can be used to enforce the objectives of solidarity.

**Keywords:** solidarity; internal market; Covid-19; EU principles; Article 2 TEU

## 1. Introduction

*'Europe ne se fera pas d'un coup ni dans une construction d'ensemble: elle se fera pour des réalisations concrètes, créant d'abord une solidarité de fait.'*<sup>1</sup>

With this statement, Robert Schuman already referred to the concept of solidarity in 1950, while giving his speech about the creation of the European Coal and Steel Community (ECSC).<sup>2</sup> The concept was included in the ECSC Treaty as a fundamental aim of the Community and a number of instruments in the Treaty reflected the idea behind solidarity.<sup>3</sup> It is still seen as a key value, laying at the foundations of the European Union. This is supported by, among other things, the reference to solidarity in Article 2 TEU and the preamble of the Charter of Fundamental Rights (CFR).<sup>4</sup> However, a definition of solidarity is not given in the Treaties nor in the case law of the Court of Justice of the European Union (CJEU or Court).<sup>5</sup>

\* Anne Joppe is Junior Lecturer of Private law at Utrecht University, NL. email: [a.joppe@uu.nl](mailto:a.joppe@uu.nl).

<sup>1</sup> European Union, 'La déclaration Schuman du 9 mai 1950' <[europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_fr](http://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_fr)> accessed 16 June 2021.

<sup>2</sup> *ibid.*

<sup>3</sup> Jörg Monar, 'Solidarity as a challenge for the EU: The case of justice and home affairs' (2015) 35 *EU Studies in Japan* 1, 2.

<sup>4</sup> Federico Casolari, 'EU loyalty and the protection of Member States' national interests: A mapping of the law' in M Varju (ed), *Between compliance and particularism: Member State Interests and European Union Law* (Springer 2019) 67.

<sup>5</sup> Irina Domurath, 'The three dimensions of solidarity in the EU legal order: limits of the judicial and legal approach' (2013) 35 *Journal of European Integration* 459, 460.

Solidarity appears to be called upon mostly in times of crisis, as, for example, during the Eurozone crisis and the refugee crisis.<sup>6</sup> During the current Covid-19 crisis, the EU again calls for solidarity among the Member States to combat the pandemic.<sup>7</sup> Global solidarity is also mentioned as a value lying at the basis of the vaccines strategy.<sup>8</sup> Yet, at the beginning of the coronavirus outbreak, it seemed that only national, unilateral measures were taken by the Member States, mostly to protect their own citizens and markets.<sup>9</sup> The Union was criticised for the lack of a common, European approach by scholars.<sup>10</sup> Later, the EU increasingly announced different measures, aiming to establish such a coordinated approach, mostly by issuing different soft-law instruments.<sup>11</sup>

Against this background, the question arises what EU solidarity exactly entails, how it can be and how it is given effect to by both the Member States and the Union in their attempt to tackle the pandemic. Is solidarity a general principle of EU law that can be relied upon in court, or is it rather a fundamental value that is not enforceable? And what does 'solidarity' mean? The focus of this research will be on the EU internal market, and on the free movement of goods and persons in particular. Furthermore, this paper discusses solidarity between the Member States, and not solidarity between the Member States and individuals or other private actors, or solidarity between generations.<sup>12</sup> Thus, the central questions in this article are, firstly, what EU solidarity means in the context of the single market and secondly, how the value is reflected in the response to the Covid-19 pandemic. The aim is therefore to catch the meaning and value of the principle of solidarity in the context of the single market. The second part of the paper serves as an illustration of how the principle of solidarity is given effect to in practice during times of crisis. It can then be concluded whether the meaning established in the first part remains true or whether it changes in emergency situations.

The article starts with investigating solidarity within the constitutional framework, attempting to define its legal meaning for the EU single market (Section 2). The meaning of the value within different policy areas will be studied, as well as the case law of the CJEU and legal literature. This section contains doctrinal and conceptual research, aiming to grasp the concrete meaning of the principle of solidarity. The research is focused on the internal market, as a result of which the conclusion of this section might not be fitting all EU areas of law. Afterwards, the situation during the Covid-19 pandemic will be discussed (Section 3). This part of the article will serve as an illustration of how the Union gives effect to solidarity within the internal market in times of crisis. A short overview of the measures taken by both the Member States and the Union is given to demonstrate how solidarity is reflected here. It will be examined how solidarity can indeed be a useful tool in times of crisis and whether its meaning and importance in this emergency situation has changed. This paper will then end with a conclusion (Section 4).

## 2. The principle of solidarity

This section provides a general, doctrinal overview of the concept of solidarity. First, EU primary law will be investigated, giving an outline of how solidarity is reflected in the various Treaty provisions (Section 2.1). Then, the nature of the concept will be discussed, answering the question whether solidarity can be regarded as a general principle of EU law or not (Section 2.2). Afterwards, the meaning of the concept (Section 2.3) and the case law of the CJEU in this context are examined (Section 2.4). It will be shown whether solidarity has an unequivocal meaning throughout Union law, or whether its meaning is fragmented. In the fifth paragraph, the link with the principle of loyalty or sincere cooperation is looked into (Section 2.5). The next section will then outline what the possibilities are for the EU to give effect to solidarity in times of crisis, focusing on the current health crisis and the free movement of goods (Section 2.6). Again, it is noteworthy that the conclusion of this section regarding the meaning and value of the principle of solidarity for the single market is not necessarily suitable for other EU policy areas.

<sup>6</sup> Bengt Beutler, 'Solidarity in the EU: A critique of solidarity and of the EU' in A Grimmel & S My Giang (eds), *Solidarity in the European Union: A fundamental value in crisis* (Springer 2017) 21.

<sup>7</sup> e.g. Commission, 'Coordinated economic response to the Covid-19 Outbreak', COM (2020) 112 final, 1.

<sup>8</sup> Commission, 'Coronavirus: Commission unveils EU vaccines strategy' (Press Release 17 June 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1103](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1103)>.

<sup>9</sup> Ulla Neergaard and Sybe de Vries, 'Whatever is necessary... will be done' (2020) 14 EU Law Live 17, 20.

<sup>10</sup> *ibid.*, 17; Sybe de Vries, 'How Covid-19 reveals the tensions between the EU's Single Market and the protection of public health' (*blog.renforce.eu* 2020) <[blog.renforce.eu/index.php/nl/2020/03/24/how-covid-19-reveals-the-tensions-between-the-eus-single-market-and-the-protection-of-public-health-2/](http://blog.renforce.eu/index.php/nl/2020/03/24/how-covid-19-reveals-the-tensions-between-the-eus-single-market-and-the-protection-of-public-health-2/)> accessed 16 June 2021.

<sup>11</sup> Oana Stefan, 'Covid-19 soft law: voluminous, effective, legitimate? A research agenda' (2020) 5 European Papers 663, 663.

<sup>12</sup> See for this division: Domurath (n 5).

## 2.1 Solidarity in EU primary law

With the Treaty of Lisbon, the principle of solidarity is included in Article 2 TEU as one of the values on which the society in the Member States is based and thus as a foundational value of the Union.<sup>13</sup> Article 3(1) TEU imposes the obligation on the Union to promote solidarity as an objective.<sup>14</sup> Article 2 TEU reads as follows:

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of the persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*<sup>15</sup>

The value of solidarity is furthermore mentioned in the preamble of the CFR which leads to the conclusion that it serves a function as a core value of the Union.<sup>16</sup> The CFR also contains a full chapter regarding solidarity.<sup>17</sup> However, the provisions in this chapter refer to solidarity towards and among EU citizens and this form of solidarity is, as said, not the focus of this article.<sup>18</sup> This paper namely regards solidarity between the EU Member States.<sup>19</sup>

Many other provisions in both the TEU and the TFEU refer to the concept of solidarity, such as Article 21 TEU on the Common Foreign and Security Policy, Article 67 TFEU on the Area of Freedom, Security and Justice (AFSJ), Article 80 TFEU more specifically regarding the EU asylum policy and Article 122 TFEU in light of the European economic policy.<sup>20</sup> Most of these provisions do regard solidarity between Member States.<sup>21</sup>

## 2.2 The nature of solidarity

It is noteworthy that both Article 2 TEU and the preambles of the Treaty and the CFR refer to solidarity as a 'value' of EU law, whereas the other, more specific Treaty provisions like Article 21 TEU and Article 80 TFEU refer to the 'principle' of solidarity. The nature of the values in Article 2 TEU is a vexed issue in literature. The debate mostly regards the question whether they can lead to legal effects and how they can be enforced.<sup>22</sup> Yet, since the values form part of the operative part of the Treaty text, which is a legal text, they can be regarded as 'law'.<sup>23</sup> Furthermore, sanction mechanisms such as Article 7 TEU are applicable in case of a breach of one of the values, which confirms the statement that they can have legal effects.<sup>24</sup>

EU primary law does not clarify what the possible difference between 'principle' and 'value' entails or whether such a difference even exists. The general principles of EU law are an important part of EU law, that are not always codified, but have the same legal value as the Treaties.<sup>25</sup> They have a gap-filling function for the Court and operate as an aid for interpretation.<sup>26</sup> Furthermore, they form a basis of judicial review of Union legislation and actions, and the actions of Member States.<sup>27</sup> Some of the values of Article 2 TEU are regarded as general principles of EU law, such as the principle of non-discrimination and the respect

<sup>13</sup> Peter Hipold, 'Understanding solidarity within EU law: An analysis of the 'islands of solidarity' with particular regard to Monetary Union' (2015) 34 Yearbook of European Law 257, 258.

<sup>14</sup> Esin Küçük, 'Solidarity in EU law: An elusive political statement or a legal principle with substance?' in Andrea Biondi, Eglé Dagilyte and Esin Küçük (eds), *Solidarity in EU law: legal principle in the making* (Edward Elgar Publishing 2018) 44.

<sup>15</sup> Treaty on European Union, art 2.

<sup>16</sup> Casolari (n 4) 67.

<sup>17</sup> CFR, title IV.

<sup>18</sup> Dimitry Kochenov and Marcus Klamert, 'Article 2 TEU' (2019) 2 University of Groningen Faculty of Law Research Paper Series, 9.

<sup>19</sup> See again for the division between forms of solidarity: Domurath (n 5) 460.

<sup>20</sup> The list of articles mentioned is non-exhaustive.

<sup>21</sup> Küçük (n 14) 44.

<sup>22</sup> See e.g. András Jakab and Dimitry Kochenov, *The enforcement of EU law and values: Ensuring Member States' compliance* (Oxford University Press 2017); Luke Spieker, 'Breathing life into the Union's common values: on the judicial application of Article 2 TEU in the EU value crisis' (2019) 20 German Law Journal 1182, 1200.

<sup>23</sup> Spieker (n 22) 1200.

<sup>24</sup> *ibid*; Kochenov and Klamert (n 18) 6.

<sup>25</sup> Takis Tridimas, 'The general principles of law: who needs them?' (2015) 52 *Les Cahiers de Droit* 419, 419; Jacobine van den Brink et al, 'General principles of law' in Jan Jans et al (eds), *Europeanisation of public law* (Europa Law Publishing 2015) 135, 140; see for more extensive research on the general principles of EU law: Takis Tridimas, *General principles of EU law* (Oxford University Press 2006).

<sup>26</sup> Tridimas (n 25) 419; van den Brink et al (n 25) 139.

<sup>27</sup> Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 *Common Market Law Review* 1629, 1629; van den Brink et al (n 25) 139-140.

for fundamental rights.<sup>28</sup> Other values, such as freedom and tolerance, are not always regarded as general principles of EU law. There appears to be a difference between general principles, that are thus enforceable by themselves, and other values that need other, more specific Treaty provisions for it to be considered a principle and form a basis of judicial review.<sup>29</sup>

Solidarity within the meaning of Article 2 TEU is one of those values that is not always considered to be a general principle of EU law in literature. Even though the concept is sometimes regarded as a fundamental principle of the Union in literature,<sup>30</sup> other authors have argued that it is not a general principle since it is not similarly present in all areas of EU law.<sup>31</sup> The fact that the CJEU has not referred to the value as a general principle of EU law supports this conclusion. Furthermore, solidarity does not fulfil the requirement of being a principle that derives from the common constitutional traditions of the Member States.<sup>32</sup> As a result, solidarity has diverging meanings, depending on the area in which it is applied, which will be further elaborated below.<sup>33</sup> Thus, the value of solidarity as mentioned in Article 2 TEU by itself does not constitute a general principle of EU law. In conjunction with other Treaty provisions, however, such as Article 80 TFEU, the value becomes an enforceable principle of EU law.

There appears to be a difference between ‘value’ and ‘principle.’ The difference lies with the question whether a concept is enforceable and forms a basis for judicial review. Solidarity can therefore be called a principle, although it needs the specifying provisions further on in the Treaties to be enforceable.

### 2.3 The meaning of solidarity

Solidarity seems to be a principle upon which everyone agrees on its existence and importance, but when it comes to its actual application and definition, it is ambiguous.<sup>34</sup> The Treaty does not define solidarity and opinions in literature differ regarding its meaning and value.<sup>35</sup> Still, there appears to be agreement that solidarity concerns common interests and goals and that there is a form of shared responsibility.<sup>36</sup> According to Hipold, the basis of solidarity is therefore formed by the concept of reciprocity or mutuality.<sup>37</sup> Monar also refers to mutual support between the Member States when defining solidarity within its basic meaning.<sup>38</sup>

Importantly, the principle of solidarity has different meanings and values within the various policy areas in which it is referred to, as mentioned above.<sup>39</sup> For example, for the AFSJ, Article 67(2) TFEU provides that the common policy in this field should be based on solidarity between the Member States. Article 80 TFEU adds that the policies of asylum and migration law and their implementation are ‘governed by the principle of solidarity and fair sharing of responsibility between the Member States.’ Thus, in this field, solidarity is expressly linked to burden-sharing.<sup>40</sup> This is a consequence from the factual situation that some Member States are by definition more exposed to asylum requests and immigration than others.<sup>41</sup> Noteworthy is the reference to the use of financial instruments to ensure solidarity in Article 80 TFEU, which gives it a more concrete meaning compared to other solidarity provisions.<sup>42</sup> Put differently, solidarity is a governing principle in EU asylum policy and comes down to the sharing of burden or responsibility.

Another example is formed by the provisions of the Economic and Monetary Union, where solidarity is rather in function of keeping the system working, as a reciprocal interest of the Member States and the

<sup>28</sup> Kochenov and Klamert (n 18) 5.

<sup>29</sup> Kochenov and Klamert (n 18) 5.

<sup>30</sup> e.g. Case C-370/12 *Pringle* [2012] Opinion of AG Kokott ECLI:EU:C:2012:675, paras 142–144; Casolari (n 4) 66.

<sup>31</sup> Eglé Dagilyte, ‘Solidarity: A general principle of EU law? Two variations on the solidarity theme’, in Andrea Biondi, Eglé Dagilyte and Esin Küçük (eds), *Solidarity in EU law: legal principle in the making* (Edward Elgar Publishing 2018) 89.

<sup>32</sup> Malcolm Ross, ‘Promoting solidarity: from public services to a European model of competition?’ (2007) 44 *Common Market Law Review* 1057, 1069.

<sup>33</sup> Hipold (n 13) 284.

<sup>34</sup> Andreas Grimm, ‘Solidarity in the European Union: fundamental value or “empty signifier”’ in Andreas Grimm, Susanne My Giang (eds) *Solidarity in the European Union: A fundamental value in crisis* (Springer 2017) 162.

<sup>35</sup> Domurath (n 5) 460.

<sup>36</sup> Hipold (n 13) 262; Markus Kotzur, ‘Solidarity as a legal concept’, in Andreas Grimm, Susanne My Giang (eds) *Solidarity in the European Union: A fundamental value in crisis* (Springer 2017) 40; Casolari (n 4) 67.

<sup>37</sup> Hipold (n 13) 261.

<sup>38</sup> Monar (n 3) 1.

<sup>39</sup> Hipold (n 13) 284.

<sup>40</sup> Monar (n 3) 9.

<sup>41</sup> Hipold (n 13) 272.

<sup>42</sup> Monar (n 3) 9.

Union.<sup>43</sup> Moreover, as already mentioned above, the principle has received a specific value within the CFR. Specific rights are namely derived from solidarity, which mostly serve as inspiration for Union legislation.<sup>44</sup> Then, for the Union's external action, solidarity is again a more guiding principle, according to Article 21 TEU.<sup>45</sup>

Thus, the exact meaning of solidarity depends on the policy area in which it is used. However, there are some features retrievable that are common to all types of solidarity, namely the reciprocal or mutual nature of the concept and in most cases, altruistic elements are visible.<sup>46</sup> This means that solidarity comes down to acting in a common interest, supporting other states considering this shared goal, instead of protecting national or individual interests. Because of these core, common features of the principle, solidarity has a European transnational value, according to Ross.<sup>47</sup> Still, there is no unequivocal meaning of the concept.

The elements of reciprocity and altruism can be assumed to be at the core of EU solidarity, so that they are also important for the value in light of the internal market. With regard to the latter context, as is relevant to this article, solidarity is not a much-discussed issue in scholarship. The concept is said to be underdeveloped<sup>48</sup> and to be rather a political aspiration than a legally binding principle.<sup>49</sup> Ross states that solidarity is used by Member States to justify derogations from EU internal-market law.<sup>50</sup> An explanation for the ambiguity of the term in this context could lie with the fact that the concept is not retrievable in the provisions on the fundamental freedoms. As a consequence, only the value of solidarity from Article 2 TEU is applicable. This makes it harder to enforce solidarity, as explained above, because no other enforceable Treaty provisions are available. It is therefore submitted that solidarity is rather a fundamental value than an enforceable legal principle within the context of the internal market. This conclusion does not necessarily hold true for all the policy areas of the EU.

Even though the concept in the context of the single market is ambiguous and not easily enforceable, the value of solidarity comes down to a mutual or common interest that needs to be protected by setting aside national interests. The Union still has multiple instruments to enforce it in the current health crisis, which will be further elaborated below. The principle of loyalty also plays an important role here and provides for the instrumental toolbox to enforce solidarity, which will be explained as well. First, the case law of the CJEU on the value of solidarity will be studied.

## 2.4 Solidarity in case law

The concept of solidarity has been referred to rarely in the case law of the CJEU.<sup>51</sup> Nevertheless, there are still some important judgments to mention in order to understand the development of the principle. *Commission v France* is a landmark judgment for the principle of solidarity, since the Court suggested that the whole EU system is based on it.<sup>52</sup> In *Commission v Italy*, Italy infringed EU legislation establishing systems of premiums for slaughtering cows and for withholding milk products from the market, since it did not implement those rules correctly.<sup>53</sup> The CJEU held that there are obligations for Member States flowing from the principle of solidarity in exchange for the benefits flowing from it.<sup>54</sup> The Court also adheres to the idea of mutuality or reciprocity and both cases seem to suggest that solidarity comes down to the idea that common goals and interests prevail over national ones.<sup>55</sup>

In *Commission v Italy*, solidarity is thus described as a duty.<sup>56</sup> The Court later described the value as a requirement, while giving its opinion in light of an international draft agreement on navigation of traffic on the Rhine.<sup>57</sup> Furthermore, *Rottmann* concerned a preliminary ruling about withdrawing a nationality,

<sup>43</sup> Hipold (n 13) 275.

<sup>44</sup> Ross (n 32) 1063.

<sup>45</sup> Iris Goldner Lang, 'Is there solidarity on asylum and migration in the EU?' (2013) 9 Croatian Yearbook of European Law & Policy 1, 7.

<sup>46</sup> Hipold (n 13) 284.

<sup>47</sup> Ross (n 32) 1070.

<sup>48</sup> Domurath (n 5) 460.

<sup>49</sup> Marcus Klamert, *The principle of loyalty in EU law* (Oxford University Press 2014) 35–36; Casolari (n 4) 68.

<sup>50</sup> Ross (n 32) 1064.

<sup>51</sup> Küçük (n 14) 40.

<sup>52</sup> Joined cases 6 and 11/69 *Commission v France* ECLI:EU:C:1969:68, [1969] ECR I-523, para 16.

<sup>53</sup> Case 39/72 *Commission v Italy* ECLI:EU:C:1973:13, [1973] ECR I-101, para 25.

<sup>54</sup> *ibid*, paras 24–25.

<sup>55</sup> Küçük (n 14) 55–56.

<sup>56</sup> Case 39/72 *Commission v Italy* ECLI:EU:C:1973:13, [1973] ECR I-101, para 25.

<sup>57</sup> Opinion 1/76 *Draft agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63, [1977] ECR I-741, para 12.

obtained through naturalisation, with the result of losing EU citizenship and being stateless.<sup>58</sup> The Court referred to the special relationship between solidarity and good faith, and again to the reciprocity on which it is based. It concluded that, in this light, it is legitimate for a Member State to withdraw naturalisation when based on a reason related to the public interest.<sup>59</sup>

The CJEU has thus been referring to solidarity in a few cases, with very different backgrounds. Nevertheless, the Court is increasingly reluctant to answer questions related to solidarity and to give the concept a more concrete meaning.<sup>60</sup> This is, for example, shown in *Pringle*, a case concerning the validity of the European Stability Mechanism (ESM) and thus the competence of Member States to sign the ESM Treaty.<sup>61</sup> The Court does not mention solidarity once, even though Advocate General Kokott mentions the principle in her view on the case.<sup>62</sup> Küçük argues that solidarity was indeed the main concern in this case.<sup>63</sup>

Put another way, the case law of the CJEU confirms that there is no unequivocal meaning of the principle of solidarity and that its importance depends on the policy area and circumstances of the case. According to Ross, there are several areas for which the Court has elaborated upon solidarity in which the different roles of the principle come to the fore.<sup>64</sup>

## 2.5 Loyalty and solidarity

The principle of loyalty or sincere cooperation is often mentioned in combination with the principle of solidarity in literature, so that it is important to elaborate on it as well. Loyal cooperation is established in Article 4(3) TEU since the entry into force of the Treaty of Lisbon.<sup>65</sup> The principle contains a duty for the Member States to 'act in the interest of the Union.'<sup>66</sup> In *J.J. Zwartveld* the CJEU held that the principle of sincere cooperation entails not only an obligation for the Member States to guarantee the application of EU law, but also a mutual obligation of sincere cooperation for both the Member States and the Union institutions.<sup>67</sup> Loyalty is thus based on an idea of mutuality as well, which furthermore follows from the terminology 'in full mutual respect' in Article 4(3) TEU.<sup>68</sup> The Court connected loyalty to other fundamental values, such as the rule of law.<sup>69</sup>

Moreover, the principle of loyalty has been used in the context of the internal market, such as in the landmark cases *Spanish Strawberries*<sup>70</sup> and *Schmidberger*.<sup>71</sup> The Court ruled that Article 4(3) TEU, in light of the *effet utile* of EU law, imposes an active obligation on the Member States under the free movement rules to take 'necessary and appropriate measures to ensure that fundamental freedom is respected on their territory.'<sup>72</sup> In both cases, the Member States concerned failed to comply with this duty since they did not take the needed measures to take away obstacles to the internal market.<sup>73</sup>

There are different opinions regarding the link between the principle of sincere cooperation, enshrined in Article 4(3) TEU, and solidarity. Some authors see the principle of loyalty as a clear expression of solidarity.<sup>74</sup> That there is a link between the two appears also from the above-mentioned judgment *Commission v France*.<sup>75</sup> This case concerned a unilateral action of France that was regarded by the Court as an infringement

<sup>58</sup> Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, [2010] ECR I-1449, para 35.

<sup>59</sup> *ibid*, para 51.

<sup>60</sup> Küçük (n 14) 40.

<sup>61</sup> Case C-370/12 *Pringle* ECLI:EU:C:2012:756, para 28.

<sup>62</sup> Case C-370/12 *Pringle* ECLI:EU:C:2012:675, [2012] Opinion of AG Kokott.

<sup>63</sup> Küçük (n 14) 58.

<sup>64</sup> Malcolm Ross, 'Solidarity – A new constitutional paradigm for the EU?' in Malcolm Ross, Yuri Borgmann-Prebil (eds) *Promoting solidarity in the European Union* (Oxford University Press 2010) 41.

<sup>65</sup> Klamert (n 49) 11.

<sup>66</sup> Eleftheria Neframi, 'The duty of loyalty: rethinking its scope through its application in the field of EU external relations' (2010) 47 *Common Market Law Review* 323, 325.

<sup>67</sup> Case C-2/88 *Imm J.J. Zwartveld* ECLI:EU:C:1990:315, [1990] ECR I-3365, para 17.

<sup>68</sup> Klamert (n 49) 13.

<sup>69</sup> Case C-2/88 *Imm J.J. Zwartveld* ECLI:EU:C:1990:315, [1990] ECR I-3365, paras 16–17; Casolari (n 4) 50.

<sup>70</sup> Case C-265/95 *Spanish Strawberries* ECLI:EU:C:1997:595, [1997] ECR I-6959.

<sup>71</sup> Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659.

<sup>72</sup> Case C-265/95 *Spanish Strawberries* ECLI:EU:C:1997:595, [1997] ECR I-6959, para 32; Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 59.

<sup>73</sup> Case C-265/95 *Spanish Strawberries* ECLI:EU:C:1997:595, [1997] ECR I-6959, paras 65–66; Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 64.

<sup>74</sup> Ross (n 64) 42; Graham Butler, 'Solidarity and its limits for economic integration in the European Union's internal market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310, 317; Küçük (n 14) 48.

<sup>75</sup> Joined cases 6 and 11/69 *Commission v France* ECLI:EU:C:1969:68, [1969] ECR I-523.

of state aid law.<sup>76</sup> The CJEU ruled that solidarity is ‘in accordance with’ the principle of loyalty.<sup>77</sup> On the other hand, Klamert sees both as separate principles. He relies on the argument that loyalty and solidarity are, except in this judgment, never mentioned together by the CJEU.<sup>78</sup> Furthermore, he states that the fact that solidarity is ‘in accordance with loyalty,’ does not mean that both can be equated or should be considered subcategories from one another.<sup>79</sup>

Advocate General Sharpston sees solidarity and loyal cooperation as two separate important strands of the EU legal order, as she describes in her Opinion on cases regarding the relocation of asylum seekers.<sup>80</sup> It follows from the case law referred to in the Opinion that the principle of sincere cooperation implies that EU law needs to be respected and implemented by the Member States and that they may reasonably expect other states to comply with their obligations of due diligence.<sup>81</sup> From the principle of solidarity, which Sharpston calls ‘the lifeblood of the European project’, flows the idea of burden-sharing between the Member States.<sup>82</sup>

Casolari argues that both concepts should be treated as ‘two sides of the same coin.’<sup>83</sup> Both concepts appear to converge in the idea that national interests must be set aside to protect EU interests.<sup>84</sup> In other words, in light of both loyalty and solidarity, common interests overrule national interests.<sup>85</sup> Casolari argues, however, that solidarity should be relied upon only in situations of crisis or emergency and that loyalty governs ‘normal’ situations.<sup>86</sup> This is based on the idea that loyalty can play an instrumental role in all areas, to attain, *inter alia*, the objectives of solidarity.<sup>87</sup>

In other words, solidarity in itself is not a legally enforceable principle within the single market, but the principle of loyalty can provide the instrumental toolbox to enforce its objectives. The idea of solidarity lies clearly at the basis of loyalty and seems indeed to be part of it, which leads to the conclusion that loyalty is an expression of solidarity. Loyalty can be used by the Court to impose duties on the Member States in the field of the internal market, as happened before in *Schmidberger*. Therefore, it is submitted that solidarity can be enforceable through the principle of sincere cooperation, bearing in mind that both principles are not identical. This is especially valuable in light of the internal market, since solidarity is not mentioned in concrete enforceable Treaty provisions there.

## 2.6 Solidarity in times of crisis in the single market

The ambiguous meaning of solidarity becomes even more clear during times of crisis.<sup>88</sup> This was true in the context of the Eurozone crisis, but also in the migrant crisis of 2015 and in light of Brexit.<sup>89</sup> As stated above, Casolari is of the opinion that solidarity is eminently at stake in crises or emergency situations.<sup>90</sup> However, it is argued that the lack of a common understanding makes it difficult to apply it in practice, which leads to the conclusion that it is a weak concept.<sup>91</sup> Grimmel and My Giang write that solidarity is a value that needs to be ‘created,’ since it will remain a ‘hollow word’ otherwise.<sup>92</sup> Solidarity is an ambiguous concept with diverging interpretations, but with a strong symbolic and political purpose so that it remains important.<sup>93</sup> This section will explore the different options for the Union to enforce solidarity in times of crisis, more specifically focused on the context of the single market and the current health crisis.

<sup>76</sup> *ibid*, paras 42–45.

<sup>77</sup> *ibid*, para 16.

<sup>78</sup> Klamert (n 49) 37.

<sup>79</sup> *ibid*, 40–41.

<sup>80</sup> Cases C-715/17, 718/17 and C-719/17 *Commission v Poland, Hungary & Czech republic* ECLI:EU:C:2020:257, para 238.

<sup>81</sup> *ibid*, paras 243–244.

<sup>82</sup> *ibid*, paras 251 & 253.

<sup>83</sup> Casolari (n 4) 68.

<sup>84</sup> Küçük (n 14) 49.

<sup>85</sup> Casolari (n 4) 69.

<sup>86</sup> *ibid*, 70.

<sup>87</sup> *ibid*, 68.

<sup>88</sup> Grimmel (n 34) 162.

<sup>89</sup> Beutler (n 6) 21.

<sup>90</sup> Casolari (n 4) 70.

<sup>91</sup> Grimmel (n 34) 163.

<sup>92</sup> Andreas Grimmel and Susanne My Giang, ‘Introduction: solidarity lost? The European Union and the crisis of one of its core values’, in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A fundamental value in crisis* (Springer 2017) 2.

<sup>93</sup> Grimmel (n 34) 165.

### 2.6.1 Instruments and mechanisms of the EU

There are several concrete options for the EU to give effect to solidarity within the context of the single market during crises such as the current pandemic. First of all, even though the Union has limited competences in the field of public health and cannot harmonise this field, it can still issue soft-law instruments.<sup>94</sup> Soft law, in this crisis, has been considered a useful tool to stimulate solidarity.<sup>95</sup> This will also be seen below, while discussing the national measures, that are often a reaction to the Union's soft law.

Secondly, Decision 1082/2013/EU<sup>96</sup> regulates joint public procurement of medicinal countermeasures in case of outbreaks on large scale or health emergencies.<sup>97</sup> This is a valuable tool in light of the distribution of medicines and vaccines.<sup>98</sup> Thirdly, through the EU Civil Protection Mechanism, which is based on the idea of cooperation, Member States can request assistance in case of disasters.<sup>99</sup> The Mechanism is reinforced by a Decision in 2019.<sup>100</sup> The disadvantage is that it depends on the readiness of the states to grant assistance to others.<sup>101</sup> This became clear when Italy, at the beginning of the corona outbreak, called for activation of the Mechanism but the other Member States ignored the call.<sup>102</sup>

In short, although the specific Treaty provisions on the fundamental freedoms do not refer to solidarity explicitly, the framework contains multiple options to still give effect to the value. They are all (based on) secondary or soft law since they are no specific Treaty provisions concerning solidarity in the internal market. Furthermore, the idea of reciprocity or mutuality is reflected in all of them, and elements of altruism are retrievable. These options together with the toolbox of the principle of sincere cooperation make it possible for the Union to still enforce solidarity, or at least the underlying idea, in the context of the free movement rules.

### 2.6.2 Free movement of goods

Articles 34 and 35 TFEU in principle prohibit import and export bans. Article 34 prohibits quantitative restrictions of trade and all rules that are capable of hindering trade within the Union.<sup>103</sup> For export bans, the Court decided that all measures that negatively affect trade internationally more than nationally, are prohibited under Article 35 TFEU.<sup>104</sup> Article 36 TFEU provides justification grounds for restrictions of the free movement of goods, of which public health ranks first, according to the CJEU.<sup>105</sup> To successfully invoke a justification ground, the measure must always be proportionate and not be discriminatory.<sup>106</sup>

An idea to give effect to solidarity would be to allow for a more 'solidarity-friendly' approach of Article 36 TFEU. One could argue that it should be an option for the CJEU to take into account solidarity when assessing national measures. The Belgian judgment *Tobufar* serves as an illustration here. The Belgian Constitutional Court declared legislation that hindered Belgian suppliers to export medicines incompatible with Article 36 TFEU.<sup>107</sup> It should be possible for these distributors to export medicines to geographical areas that need

<sup>94</sup> Paul Craig and Grainne De Búrca, *EU Law: Text, cases and materials* (Oxford University Press 2020) 116.

<sup>95</sup> Roberto Baratta, 'EU soft law instruments as a tool to tackle the Covid-19 crisis: looking at the 'Guidance' on public procurement through the prism of solidarity' (2020) 5 *European Papers* 365, 373.

<sup>96</sup> Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC.

<sup>97</sup> Scott Greer and Annik de Ruijter, 'EU health law and policy in and after the Covid-19 crisis' (2020) 30 *European Journal of Public Health* 623, 623.

<sup>98</sup> Hans Temmink, 'De covid-19 maatregelen van de EU: buigen of barsten' (2020) 3 *Nederlands Tijdschrift voor Europees Recht* 72, 74.

<sup>99</sup> Commission, 'EU Civil Protection Mechanism' <[https://ec.europa.eu/echo/what/civil-protection/mechanism\\_en](https://ec.europa.eu/echo/what/civil-protection/mechanism_en)> accessed 16 June 2021.

<sup>100</sup> Decision (EU) 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism.

<sup>101</sup> Annik De Ruijter et al, 'EU solidarity and policy in fighting infectious diseases: state of play, obstacles, citizen preferences and ways forward' (2020) *Amsterdam Centre for European Studies Research Paper No. 2020/06*, 10 <<https://ssrn.com/abstract=3570550>>, 18.

<sup>102</sup> Bob Deen and Kimberley Kruijver, 'Corona: EU's existential crisis – Why the lack of solidarity threatens not only the Union's health and security, but also its security' (2020) *Clingendael Alert*, 2 <[https://www.clingendael.org/sites/default/files/2020-04/Alert\\_Corona\\_Existential\\_Crisis\\_April\\_2020.pdf](https://www.clingendael.org/sites/default/files/2020-04/Alert_Corona_Existential_Crisis_April_2020.pdf)> accessed 16 June 2021.

<sup>103</sup> Case 8/74 *Dassonville* ECLI:EU:C:1974:82, [1974] ECR I-837, para 5.

<sup>104</sup> Case C-205/07 *Gysbrechts* ECLI:EU:C:2008:730, [2008] ECR I-9947, paras 43–44.

<sup>105</sup> Case 104/75 *De Peijper* ECLI:EU:C:1976:67, [1976] ECR I-613, para 15.

<sup>106</sup> Wouter Devroe and Nina Colpaert, 'Corona and EU economic law: free movement of goods' (*lexxion.eu* 15 March 2020) <<https://www.lexxion.eu/coreblogpost/corona-and-eu-economic-law-free-movement-of-goods/>> accessed 16 June 2021.

<sup>107</sup> Belgian Constitutional Court Case no. 146/2019 *Tobufar and others* (17 October 2019) <[https://www.etaamb.be/nl/wet\\_n2019205046.html](https://www.etaamb.be/nl/wet_n2019205046.html)> accessed 16 June 2021.



them, and not only within one Member State.<sup>108</sup> The Belgian Court placed an emphasis on the interests of the suppliers but could also have focused on the interests or even the health of citizens in other Member States to support its ruling.<sup>109</sup> This ruling does not regard the horizontal relationship between Member States but illustrates the idea of how a solidarity-friendly approach of Article 36 TFEU could be helpful to enforce EU solidarity. In other words, this approach could be extended and improved, for example by making solidarity part of the proportionality assessment and the balancing of interests in light of Article 36 TFEU. This could contribute to making solidarity a more working and enforceable principle in the context of the free movement of goods and be beneficial for public health throughout the Union.<sup>110</sup>

### 3. Solidarity during Covid-19

After having discussed solidarity from a general point of view, this section will look into the situation during the Covid-19 pandemic. First, the context and the initial response of both the EU and the Member States will be outlined (Section 3.1). Then a timeline of EU and Member State actions later will be sketched, focusing on the measures where solidarity is reflected (Section 3.2 and 3.3). The timeline is thus not complete but presents a selection of the most known and relevant actions. The studied actions regard the free movement of persons and goods, as said before. This will serve as an illustration of how the principle of solidarity is relied upon in times of crisis. It will also be seen whether the crisis situation provides for more useful insights about the meaning of solidarity within the EU single market.

#### 3.1 EU's slow start

The EU was initially criticised for its lack of action at the beginning of the coronavirus outbreak.<sup>111</sup> Its response was considered too slow.<sup>112</sup> The Member States, meanwhile, took different measures to combat the virus.<sup>113</sup> There were some common elements visible between those measures: all the Member States prohibited gatherings and issued rules on 'social distancing', for example.<sup>114</sup> However, the measures were mostly taken unilaterally and differed.<sup>115</sup>

One explanation for the slow reaction from the EU is, as referred to above, the limited competence it has in the field of public health.<sup>116</sup> Pursuant to Article 6 in conjunction with Article 168 TFEU, the protection of human health falls within the supportive competences of the EU.<sup>117</sup> In other words, the EU's action was limited at first, because the Member States had agreed on this while drafting the Treaties.<sup>118</sup> Due to the corona crisis, a tension arose between national interests and principles underlying the EU internal market.<sup>119</sup> Some authors have argued that a rebound to selfishness and prevailing national interests became immediately visible as a consequence.<sup>120</sup> This appeared, for example, from the fact that some Member States unilaterally decided to 'close' their borders, which recently has happened again.<sup>121</sup> One could say, therefore, that solidarity between the Member States was lacking at the beginning of the pandemic.

<sup>108</sup> *ibid.*

<sup>109</sup> Sybe De Vries, 'Covid-19 en de veerkracht van de EU interne-marktvrijheden' (2021) 4 SEW, Tijdschrift voor Europees en economisch recht 127, 135.

<sup>110</sup> *ibid.*; Anne Joppe, 'Solidarity during the Covid-19 crisis within the European Union – a legal principle or just a pivotal political aspiration?' (blog.renforce.eu 2021) <<http://blog.renforce.eu/index.php/nl/2021/01/29/solidarity-during-the-covid-19-crisis-within-the-european-union-a-legal-principle-or-just-a-pivotal-political-aspiration/>> accessed 23 July 2021.

<sup>111</sup> De Vries (n 10).

<sup>112</sup> Baratta (n 95) 373.

<sup>113</sup> Neergaard and de Vries (n 9) 20.

<sup>114</sup> Temmink (n 98) 77.

<sup>115</sup> De Vries (n 10).

<sup>116</sup> Neergaard and de Vries (n 9) 20.

<sup>117</sup> De Vries (n 10).

<sup>118</sup> Greer and de Ruijter (n 97) 623.

<sup>119</sup> De Ruijter et al (n 101).

<sup>120</sup> Stefan Lehne, 'How the coronavirus is testing the EU's resilience' (EU Observer 25 March 2020) <<https://euobserver.com/opinion/147861>> accessed 16 June 2021; Temmink (n 96) 89.

<sup>121</sup> Sergio Carrera & Ngo Chun Luk, 'Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area', (2020) Centre for European Policy Studies 2020/4, 1 <<https://www.ceps.eu/ceps-publications/love-thy-neighbour/>> accessed 16 June 2021; Hanne Cokelaere & Hans Von Der Burchard, 'Brussels battles capitals over border restrictions' (Politico 23 February 2021) <<https://www.politico.eu/article/eu-border-restrictions-coronavirus-brussels-versus-capitals/>> accessed 16 June 2021.

However, other scholars state that solidarity within the EU still was present and became more and more apparent.<sup>122</sup> Baratta saw a change of behaviour of the Union when it explicitly started to call on European solidarity,<sup>123</sup> for example in the ‘Communication on a Coordinated economic response to the Covid-19 outbreak.’<sup>124</sup>

### **3.2 Measures affecting the free movement of persons**

There were three main types of measures taken at national level with regard to the free movement of persons: the temporary reintroduction of border checks, entry or exit bans intra-EU and travel bans or restrictions internationally.<sup>125</sup> Despite a more coordinated approach now and agreement of the Union leaders that internal borders should stay open, six Member States recently again decided to impose travel restrictions.<sup>126</sup> Moreover, the Commission, on 16 March 2020, advised the Member States to introduce temporary restrictions on travel across the EU’s external borders.<sup>127</sup> Almost all Member States decided to follow this advice and restricted non-essential travel to the EU from third countries.<sup>128</sup> This is an example of how soft law can encourage Member States to take certain actions, despite its non-binding character.<sup>129</sup>

On the same date, the Commission issued the ‘Guidelines on border management,’ with the aim of ensuring coordination at Union level with regard to border checks on persons and the availability of goods throughout the EU.<sup>130</sup> The three forms of measures until then namely were all taken unilaterally. The Commission emphasised the importance of solidarity, stating that the principle should be governing the approach to tackle the pandemic.<sup>131</sup>

Another element of the EU’s approach is the attempt to go ‘back to normal’ smoothly. On 15 April 2020, the Commission announced a roadmap that is based on a phased approach of lifting national measures.<sup>132</sup> Solidarity is again considered essential in this document.<sup>133</sup> Moreover, the EU announced guidance to relaunch safe traveling and tourism in Europe with a package of different guidelines and advices.<sup>134</sup> It even developed an online platform for this.<sup>135</sup>

Lastly, the Commission acknowledged that the Member States took different measures at the beginning of the pandemic, which affected the free movement of persons within the Union.<sup>136</sup> On 4 September, it introduced a proposal for a Council Recommendation so that more clarity and predictability of these kind of measures can be reached in the future.<sup>137</sup>

### **3.3 Measures affecting the free movement of goods**

Several countries restricted the free movement of goods in a reaction to the virus-outbreak as well. France, Germany and the Czech Republic, for example, introduced export bans on personal protective equipment.<sup>138</sup>

<sup>122</sup> Neergaard and de Vries (n 9) 24; Temmink (n 98) 89.

<sup>123</sup> Baratta (n 95) 373.

<sup>124</sup> COM(2020) 112 final.

<sup>125</sup> Carrera and Chun Luk (n 121) 2.

<sup>126</sup> David Herszenhorn, ‘EU leaders agree borders should stay open’ (Politico 21 January 2021) <<https://www.politico.eu/article/eu-leaders-agree-borders-should-stay-open/>> accessed 16 June 2021; Cokelaere and Von Der Burchard (n 121).

<sup>127</sup> Commission, ‘Covid-19: Temporary restriction on non-essential travel to the EU’ COM(2020) 115 final.

<sup>128</sup> Commission, ‘Coronavirus: Commission invites Member States to extend restriction on non-essential travel to the EU until 15 June’ (Press Release 8 May 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_823](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_823)>.

<sup>129</sup> Treaty on the Functioning of the European Union, art 288.

<sup>130</sup> Commission, ‘Covid-19 – Guidelines for border management measures to protect health and ensure the availability of goods and essential services’ C(2020) 1753 final.

<sup>131</sup> *ibid.*, 1.

<sup>132</sup> Commission, ‘Coronavirus: European roadmap shows path towards common lifting of containment measures’ (Press release 15 April 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_652](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_652)>.

<sup>133</sup> Joint European Roadmap towards lifting Covid-19 containment measures, 6 <[https://ec.europa.eu/info/sites/info/files/communication\\_-\\_a\\_european\\_roadmap\\_to\\_lifting\\_coronavirus\\_containment\\_measures\\_0.pdf](https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf)> accessed 16 June 2021.

<sup>134</sup> Commission, ‘Tourism and transport: Commission’s guidance on how to safely resume travel and reboot Europe’s tourism in 2020 and beyond’ (Press release 13 May 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_854](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_854)>.

<sup>135</sup> Commission, ‘Re-open EU: Commission launches a website to safely resume travelling and tourism in te EU’ (Press release 15 June 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1045](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1045)>.

<sup>136</sup> Commission, ‘Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic’ COM(2020) 499 final, 1.

<sup>137</sup> COM(2020) 499 final; Commission, ‘Coronavirus: Commission proposes more clarity and predictability of any measures restricting free movement in the European Union’ (Press release 4 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1555](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1555)>.

<sup>138</sup> Devroe and Colpaert (n 106).

Import and export bans such as these can endanger the functioning of the EU single market.<sup>139</sup> The Commission rapidly issued an implementing act to protect the availability of personal protective equipment, such as face masks.<sup>140</sup> The Implementing Regulation establishes that the export of these goods will be subject to an export authorisation.<sup>141</sup> About a month later, guidelines regarding the rational supply of vital medicines were introduced, calling again on solidarity.<sup>142</sup>

As part of the Civil Protection Mechanism explained above, a European stockpile of emergency medical equipment was created for the first time, called 'rescEU'.<sup>143</sup> Commission President Von der Leyen stated that hereby solidarity was put into action.<sup>144</sup> This resulted in, for example, delivering face masks to Spain, Italy and Croatia in May and ventilators to the Czech Republic in October.<sup>145</sup> The stockpile is now kept by six Member States, that distribute the equipment to other countries when needed.<sup>146</sup> Furthermore, Romanian and Norwegian doctors and nurses were sent to help in Italy with the critical situation in April, also under the Mechanism.<sup>147</sup>

Moreover, with regard to the free movement of goods, the Commission introduced guidelines to ensure the continuous flow of goods within the Union.<sup>148</sup> The Member States were hereby given practical advice and requested to make the flow of goods possible by designating so-called 'green lanes' at internal borders.<sup>149</sup>

### 3.4 Solidarity during the pandemic

Most of the measures taken by the Member States restricting the free movement of persons and goods were said to be justifiable, at least at the beginning of the pandemic.<sup>150</sup> From case law of the CJEU, it appears that Member States have a margin of discretion when they act in light of public health.<sup>151</sup> However, imposing restrictions on free movement is still subject to certain requirements and states do not have a *carte blanche* in this regard.<sup>152</sup> This is shown, for instance, by the recent developments regarding the unilateral closing of borders. The Commission has warned the Member States concerned that they are endangering the functioning of the internal market and has asked them to lift the border controls.<sup>153</sup>

On the other hand, the actions taken by the Union seem to rely on the idea that a coordinated and common approach is needed, by which the interests of the internal market and public health of citizens are balanced.<sup>154</sup> This corresponds to the basic idea behind solidarity where the common goal prevails over national ones. In November 2020, the Commission announced that the Union is developing a European Health Union, also with a view to future pandemics, for which cooperation between the Member States stands

<sup>139</sup> De Vries (n 10).

<sup>140</sup> Commission, 'Commission moves to ensure supply of personal protective equipment in the European Union' (Press release 15 March 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_469](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_469)>.

<sup>141</sup> Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorization.

<sup>142</sup> Commission, 'Coronavirus: Commission calls on Member States to optimize supply and availability of medicines' (Press release 8 April 2020) <[https://ec.europa.eu/malta/news/coronavirus-commission-calls-member-states-optimize-supply-and-availability-medicines\\_mt](https://ec.europa.eu/malta/news/coronavirus-commission-calls-member-states-optimize-supply-and-availability-medicines_mt)>.

<sup>143</sup> Commission, 'Covid-19: Commission creates first ever rescEU stockpile of medical equipment' (Press release 19 March 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_476](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_476)>.

<sup>144</sup> *ibid.*

<sup>145</sup> Commission, 'Coronavirus: rescEU masks delivered to Spain, Italy and Croatia' (Press release 2 May 2020); Commission, 'Coronavirus: first rescEU ventilators dispatched to Czechia' (Press release 22 October 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1971](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1971)>.

<sup>146</sup> Commission, 'Coronavirus: 4 new Member States join the rescEU medical reserve' (Press release 22 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1709](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1709)>.

<sup>147</sup> Commission, 'Coronavirus: EU Medical Teams deployed to Italy' (Press release 7 April 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_613](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_613)>.

<sup>148</sup> Commission, 'Guidelines for border management measures to protect health and ensure the availability of goods and essential services' C(2020) 1897 final.

<sup>149</sup> Commission, 'Coronavirus: Commission presents practical guidance to ensure continuous flow of goods across EU via green lanes' (Press release 23 March 2020) <[https://ec.europa.eu/transport/modes/road/news/2020-03-23-covid19-continuous-flow-of-goods\\_en](https://ec.europa.eu/transport/modes/road/news/2020-03-23-covid19-continuous-flow-of-goods_en)>.

<sup>150</sup> Stefano Montaldo, 'The Covid-19 emergency and the reintroduction of internal border controls in the Schengen Area: Never let a serious crisis go to waste' (2020) 5 *European Papers* 523, 527.

<sup>151</sup> Case C-348/09 *P.I.* ECLI:EU:C:2012:300, para 22.

<sup>152</sup> Neergaard and de Vries (n 9) 22.

<sup>153</sup> Daniel Boffey, 'EU tells six countries to lift Covid border restrictions' (The Guardian 23 February 2021) <<https://www.theguardian.com/world/2021/feb/23/eu-tells-six-countries-to-lift-covid-border-restrictions>> accessed 16 June 2021.

<sup>154</sup> e.g. Commission, 'Coronavirus resurgence: Commission steps up action to reinforce preparedness and response measures across the EU' (Press release 28 October 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1986](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1986)>.

central.<sup>155</sup> It is explicitly mentioned that the Union is learning from the lessons of the current pandemic, that shows the importance of coordination among the Member States.<sup>156</sup> As part hereof, the Commission has also announced that it is developing a new health security framework, revising also Decision 1082/2013/EU, mentioned above as one of the options for the Union to give effect to solidarity.<sup>157</sup> From the other options for the Union to enforce solidarity listed above,<sup>158</sup> the Union seems to have made use most of the option to issue soft-law instruments. It activated and used the Civil Protection Mechanism as well.

Solidarity is an idea often mentioned in the soft-law instruments from the Commission or by Commissioners when announcing the instruments.<sup>159</sup> The EU even has a website about solidarity in times of Covid-19, which shows what 'European solidarity in action' looks like.<sup>160</sup> Here, solidarity is projected as Member States supporting each other, for example, with treating patients and protecting the health of workers and citizens.<sup>161</sup> There is furthermore a 'European solidarity tracker,' which measures and visualises different types of solidarity, both among Member States and Union institutions.<sup>162</sup> However, except from the use of the Civil Protection Mechanism, the Commission does not elaborate on the meaning of solidarity or how it should be used or realised in practice. Because of the way in which is solidarity is referred to during the current crisis, namely just mentioning its importance without explanation or elaboration, the principle does not get a clearer meaning. It still seems a rather important political, societal value with no real legal meaning as long as no other Treaty provisions can be applied or the duty of sincere cooperation is not invoked.

#### 4. Conclusion

Solidarity is considered a foundational value of the European Union. However, a clear definition of the principle is not established in case law, nor in legislation or literature. The principle does not have one unequivocal meaning, so that its definition and importance depend on the policy area concerned. Within the internal market, solidarity is rather a political aspiration, expressed and enforceable by the principle of loyal cooperation established in Article 4(3) TEU. Since no more specific Treaty provisions refer to solidarity, except for Article 2 TEU, it is difficult to enforce the value. It is namely established that a value that is not considered a general principle of EU law needs more specific Treaty provisions to form a basis of judicial review. Put differently, solidarity does have a legal value, but is not enforceable by itself in the context of the single market. It finds that legal meaning rather as part of the duty of sincere cooperation, which is a general principle of EU law and thus enforceable. Other instruments, mostly based on soft law, can be helpful for the enforcement of solidarity as well. One should bear in mind, though, that this conclusion is not necessarily suitable for other areas of EU law, such as migration law. As said, the principle has different meanings and values depending on the legal area it is used in.

Still, this preliminary conclusion seems to remain true during the pandemic within the context of the single market. The (only) legal basis of solidarity, namely Article 2 TEU, is not referred to explicitly. Nevertheless, the principle is mentioned frequently in the Commission's press releases and soft-law instruments, so that it appears to have a central role in this crisis. It is rather seen as an ideal of cooperation and coordination within the EU and mutual support between the Member States in practical issues, such as treating patients and sending personal protective equipment. This ideal or political aspiration is not equal to the enforceable principle of solidarity such as it is known in, for example, asylum law. The principle of loyalty furthermore does not seem to play an important or explicit role in the measures taken to tackle the pandemic.

In other words, the meaning of solidarity within the internal market has not become any clearer because of the use or reference to it during the pandemic. It appears still to be a pivotal political aspiration, that needs other provisions or principles to be enforced. This holds true since the value as mentioned in

<sup>155</sup> Commission, 'European Health Union – Protecting the health of Europeans and collectively responding to cross-border health crises' <[https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en)> accessed 16 June 2021.

<sup>156</sup> *ibid.*

<sup>157</sup> Commission, 'Preparedness and response planning' <[https://ec.europa.eu/health/security/preparedness\\_response\\_en](https://ec.europa.eu/health/security/preparedness_response_en)> accessed 16 June 2021.

<sup>158</sup> See section 2.6.1.

<sup>159</sup> e.g. Joint European Roadmap (n 133); Commission (n 154).

<sup>160</sup> Commission, 'Coronavirus: European solidarity in action' <[https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/coronavirus-european-solidarity-action\\_en](https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/coronavirus-european-solidarity-action_en)> accessed 16 June 2021.

<sup>161</sup> *ibid.*

<sup>162</sup> European Council on Foreign Relations, 'European Solidarity Tracker' <<https://ecfr.eu/special/solidaritytracker/>> accessed 16 June 2021.

Article 2 TEU by itself is not a basis of judicial review. One could argue, however, that this requires change, since it follows from the current crisis that solidarity is crucial for the resilience of the internal market, especially in emergency situations. An example of this change is judicially operationalising the value of solidarity by allowing for a more solidarity-friendly approach of Article 36 TFEU by the Court. Also, including the principle expressly in one of the Treaty provisions on the fundamental freedoms could contribute to its enforceability.

## Competing Interests

The author has no competing interests to declare.

**How to cite this article:** Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis' (2021) 17(3) *Utrecht Law Review* pp. 130–142. DOI: <https://doi.org/10.36633/ulr.683>

**Published:** 12 October 2021

**Copyright:** © 2021 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.



*Utrecht Law Review* is a peer-reviewed open access journal published by Utrecht University School of Law.

OPEN ACCESS The Open Access logo, consisting of a stylized 'A' inside a circle.