



Solidarity among member States in EU Law

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1. Introductory remarks

Theories which tried to explain the EU:

- **neo-functionalism** was developed in the second half of the 1950s. It was based on **Jean Monnet's approach to European integration** and on the **concept of 'spill-over'**.
- **intergovernmentalism** was developed in the mid-1960s. **National governments control the level and speed of European integration.** It depends on direct decisions by governments;
- **federalism** was the **idea of Altiero Spinelli.** It revolves around the idea of a political Union **to integrate different entities;**
- **multilevel governance** has its origins in the early 1990s in order to conceive the evolving EU structural policy after the Maastrich reform. It is based on a **constant coordination across different territorial levels** including a supranational, national, regional and local level (**vertical dimension**) **as well as within them (horizontal dimension),** that is to say a complex **overlapping process which involves numerous actors.**

Scholarship considers the EU a **supranational organization**.

Article 9 of the Treaty establishing the European Coal and Steel Community (Treaty of Paris).

The fundamental **characteristics of supranational Organizations** should be:

1. The power to take **decisions binding** the member States;
2. Binding decisions could be adopted by **majority vote**, so that the member **States** can be **bound against their will**;
3. The organization should be entitled to make rules which **directly bind inhabitants of its member States**;
4. The organization should have the **power to enforce its decisions**, even without the cooperation of the governments of the concerned States;
5. The organization should have **some financial autonomy**;
6. The members should **not** even have the **power to collectively dissolve** the organization or to amend its powers **without the collaboration of supranational organs**.

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- In the *Benzine en Petroleum Handelsmaatschappij and Others v. Commission* case of 1978, the Court of Justice considered the principle of Community solidarity as one of the fundamentals of the Community.
- In the *United Kingdom v. Commission* case of 1979, the Court stated: ‘[...]’:
 1. *It cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a Community regulation so as to render abortive certain aspects of Community legislation which it has opposed or which it considers contrary to its national interests. Practical difficulties which appear at the stage when a Community measure is put into effect cannot permit a Member State unilaterally to opt out of fulfilling its obligations.*
 2. *For a State unilaterally to break, according to its own conception of national interest, the equilibrium between the advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discrimination at the expense of their nationals. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community legal order [...]’.*
- In the *Breda Fucine Meridionali and Others v. Commission* case of 1998, the Community solidarity is an objective of the Treaty as established in the Preamble.

2. Solidarity in the evolution of the Treaties

The EU is a process of integration towards an ever closer union among the people of Europe on the basis of a series of treaties that evolved over time.

The original treaties contained **rare references** to the idea of solidarity.

The Schuman Declaration of 5th May 1950

*‘[...] L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble : elle se fera par des réalisations concrètes, créant d'abord **une solidarité de fait**. Le rassemblement des nations européennes exige que l'opposition séculaire de la France et de l'Allemagne soit éliminée : l'action entreprise doit toucher au premier chef la France et l'Allemagne [...].’*

*‘[...] La **solidarité de production** qui sera ainsi nouée manifestera que toute guerre entre la France et l'Allemagne devient non seulement impensable, mais matériellement impossible. L'établissement de cette unité puissante de production ouverte à tous les pays qui voudront y participer, aboutissant à fournir à tous les pays qu'elle rassemblera les éléments fondamentaux de la production industrielle aux mêmes conditions, jettera les fondements réels de leur unification économique [...].’*

This declaration proposed the establishment of a European Coal and Steel Community, which became a reality with the Treaty of Paris of 18th April 1951. It came into force on 23th July 1952, for a 50 years period time.

The ‘Six’ then decided, with the **Treaties of Rome on 25th March 1957**, to set up an **European Atomic Energy Community (Euratom)** and an **European Economic Community (EEC)**. The latter would involve building a wider common market covering a whole range of goods and services.

Solidarity was recalled in the **preamble** of Treaty and concerned the aims of peace and economic growth strictly connected to the UN Statute.

Conversely, **less direct references** were included in **Article 103** and **Article 108 of the Treaty establishing the European Economic Community**, such as providing mutual assistance among member States ‘*[w]here a Member State is in difficulties or seriously threatened with difficulties as regards its balance of payments as a result either of overall disequilibrium of the balance of payments*’.

The Single European Act was signed in February **1986** and came into force on **1th July 1987**.

Solidarity was recalled in the **Preamble** as connected to the UN Statute but also as necessity within Europe and among member States.

*‘[....] AWARE of the responsibility incumbent up on Europe to aim at speaking ever increasingly with one voice and toast with consistency and **solidarity** in order more effectively to protect its common interests and independence in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter [...].*

The Treaty of Maastricht specified:

- In the Preamble of EU Treaty: ‘[D]esiring to deepen **the solidarity between their peoples** while respecting their history, their culture and their traditions’;
- In article A, par. 1 (then Article 1) TEU: ‘The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and **solidarity**, relations between the Member States and between their peoples’;
- In article 2 TEC: ‘The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life and economic and social cohesion and **solidarity among Member States**’;
- With regard to the common foreign and security policy, Article J.1, par. 4: ‘The Member States shall support the Union's external and security policy actively and unreservedly in a **spirit of loyalty and mutual solidarity**. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council shall ensure that these principles are complied with’.

The Treaty of Amsterdam specified:

- In article J.1, par. 2, TEU: *‘The Member States shall work together to **enhance and develop** their **mutual political solidarity**. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations’;*
- In article J.13., par. 1, TEU: *‘Decisions under this Title shall be taken by the Council acting unanimously. Abstentions by members present in person or represented shall not prevent the adoption of such decisions. When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. **In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action** based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent more than one third of the votes weighted in accordance with Article 148(2) of the Treaty establishing the European Community, the decision shall not be adopted’;*
- Article 2 TEC.

The Treaty of Nice

- Article J.1 – Article 11, par. 2;
- Article J.13 – Article 23, par. 1;
- Article 2 TEC.

At the European Council of Nice on 7th December 2000, the Presidents of the European Parliament, European Council and European Commission solemnly proclaimed the **Charter of Fundamental Rights of the European Union**.

Preamble of the Charter: *‘Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice’.*

CHAPTER IV SOLIDARITY

- Article 27: Workers' right to information and consultation within the undertaking
- Article 28: Right of collective bargaining and action
- Article 29: Right of access to placement services
- Article 30: Protection in the event of unjustified dismissal
- Article 31: Fair and just working conditions
- Article 32: Prohibition of child labour and protection of young people at work
- Article 33: Family and professional life
- Article 34: Social security and social assistance
- Article 35: Health care
- Article 36: Access to services of general economic interest
- Article 37: Environmental protection
- Article 38: Consumer protection

On **14th-15th December 2001**, the European Council of Laeken took place. It adopted the **Declaration on the future of the EU** thus opening the way for the forthcoming major reforms of the EU and the creation of a Convention (chaired by Valéry Giscard d'Estaing) to draft the **European Constitution**.

On **29th October 2004**, the **Treaty establishing a Constitution for the Europe** was signed in Rome by the 25 Heads of State or Government, but it was not ratified by all the member States. New rules, proposed in such Constitution, would have replaced all the existing Treaties.

Accordingly, the **Treaty of Lisbon took place**. It was signed on **13rd December 2007** and **came into force on 1st December 2009** and amended, whereas not replacing, the previous Treaties. Nonetheless, it succeeded in introducing most of the amendments that were featured in the Constitution.

The most evident new provisions of the Lisbon Treaty have been:

1. The **replacement of the European Community with the European Union**. Article 1 of TEU - in fact - states that: *‘The Union shall replace and succeed the European Community’*;
2. We have still **two** ongoing Treaties, but they are consequently the **Treaty on the European Union (TEU) and Treaty on the Functioning of European Union (TFEU)**;
3. The **suppression** of the subdivision in **pillars**. In any case, **the Common Foreign and Security Policy is still intergovernmental**, as it is based essentially on the cooperation of the government in the European Council, acting unanimously;
4. The introduction of a **new Title II laying down provisions on democratic principles** along the lines of national democracies;
5. The establishment of the **High Representative of the Union for Foreign Affairs and Security Policy** and a **stable presidency of the European Council**;
6. The attribution of a **binding value to the Charter of Fundamental Rights**, under the new Article 6, paragraph 1, which states: *“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”*

3. Solidarity in the Treaty of Lisbon

Article 2 TEU: *‘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 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’.*

Article 3 TEU, par. 3, among the internal objectives of the Union: *‘It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall **promote** economic, social and territorial cohesion, and **solidarity** among Member States’.*

Article 3 TEU, par. 5, among the external objectives: *‘In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, **solidarity and mutual respect among peoples**, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’.*

In the general provisions of its external action, according to article 21 TEU: *‘The Union's **action** on the international scene shall be **guided** by the **principles** which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and **solidarity**, and respect for the principles of the United Nations Charter and international law’;*

In the specific provisions on Common Foreign and Security Policy in article 24, para. 2 e 3, TEU;

In the specific provisions concerning: a) decisions (now article 31 TEU) and a common approach (article 32 TEU) in the field of Common Foreign and Security Policy;

Even though not expressly mentioned in it, solidarity is the **basis** of the **mutual defence clause** found in article 42 (7) TEU;

Article 67, par. 2 TFEU: *‘It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on **solidarity between Member States**, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals’;*

Article 80 TFEU: *‘The policies of the Union set out in this Chapter and their implementation shall be governed by **the principle of solidarity** and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle’;*

Article 122 TFEU: *‘Without prejudice to any other procedures provided for in the Treaties, **the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy’;***

Article 194 TFEU: *‘In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, **in a spirit of solidarity between Member States** [...]’.*

4. The Solidarity Clause (Article 222 TFEU)

*'1. The Union and its Member States shall act jointly in a **spirit of solidarity** if a Member State is the **object of a terrorist attack** or the **victim of a natural or man-made disaster**. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) — prevent the terrorist threat in the territory of the Member States; — protect democratic institutions and the civilian population from any terrorist attack; — assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.*

2. Should a Member State be the object of a terrorist attack or the victim of a natural or manmade disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed. For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action'.

The Solidarity Clause originated in the Working Group VIII, ‘Defence’, of the European Convention (Final Report of 16 December 2002, CONV 461/02, para. 57-58) and its final purpose was debated through opposing discussions.

The **view of including natural disasters** was mainly supported by its chairman, Michel Barnier, who later drew up a report on the EU’s response to major cross-border emergencies, better known as the Barnier Report (*For a European Civil Protection Force: Europe Aid*).

The Clause is now a binding norm of the Treaty of Lisbon which **obliges the Union and its Members** to *‘act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster’*, as well as it compels the Union to mobilise all the instruments at its disposal, including military means, made available by the Member States.

There is **no agreement** on the **precise contents** of such **obligation**.

Declaration no. 37 on Article 222(2) TFEU: *‘[...]Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or manmade disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State[...]’*.

The wording of article 222 TFEU must be complemented with the provisions of the **Implementing Council Decision 2014/415/EU**.

4.1. The Implementing Decision 2014/415/EU

This Decision specified that the word **disaster** here stands for '*any situation which has or may have a severe impact on people, the environment or property, including cultural heritage*', while **crisis** means '*a disaster or terrorist attack of such a wide-ranging impact or political significance that it requires timely policy coordination and response at Union political level*' (article 3).

The Decision **does not clarify** what is meant by **disaster**, **but confirms** that the provision **focuses** on the **harmful effects** of abnormal **gravity consequent** to such events regardless of the fact that the disastrous event might originate inside or outside the territory of the involved Member State (article 2).

The Decision seems to allow the Clause to be invoked whenever a disaster occurs in the territory of a Member State or when, occurring outside the Union, it extends its damaging effects to the territory of a Member State as well as when it affects EU citizens abroad.

The application of the Clause **cannot limit** the **governmental action only** to the **EU territory**.

The Clause can be seen as having an unilateral and subsidiary nature: only the political authorities responsible for managing crises of a Member State affected by a disaster can invoke this clause; to this purpose '*the affected Member State may invoke the clause if, after having exploited the possibilities offered by existing means and tools at national and Union level, it considers that the crisis clearly overwhelms the response capabilities available to it*' (article 4).

The invocation of the Clause is in fact addressed to the **Presidency of the Council** (article 4) which immediately activates the **Integrated Political Crisis Response** arrangements (IPCR, article 5). These arrangements have been created to provide a platform for tailored and rapid response by the EU political level on a crisis originated inside or outside the Union and assist in the structuring of the EU response.

Then, the decision instructs the Commission and the High Representative to *'identify all relevant Union instruments that can best contribute to the response to the crisis, including sector-specific, operational, policy or financial instruments and structures and take all necessary measures provided under those instruments'* (article 5.2, lett. a).

All existing instruments should be used since **additional measures** are considered **exceptional** (article 5.3). These are namely the European Union Internal Security Strategy, the European Union Civil Protection Mechanism, the security initiative for serious cross-border threats to health, the European External Action Service, as well as the above-mentioned Integrated Political Crisis Response.

The **Decision only** lays down the **guidelines** to the application of the Clause without further clarifying some important aspects:

- The **Council** has a **leading role** on the **political response**, but the **Commission** and, above all, **Member States** share a **crucial operational role** within the EU crisis structure;
- The application of further provisions of the Treaties is necessary, i.e. the adoption of civil protection legislation in the name of solidarity.

Article 222 has been seen as a **mere procedural facility**, aimed at maximizing the effectiveness of other existing instruments as confirmed by the Council Decision.

5. The coordination with the Union Civil Protection Mechanism

'The implementation of the solidarity clause by the Union should rely on existing instruments to the extent possible, should increase effectiveness by enhancing coordination and avoiding duplication, should function on the basis of no additional resources, should provide a simple and clear interface at Union level to Member States, and should respect the competences conferred upon each Union institution and service' (Point 4 of the Decision's Preamble).

The Union Civil Protection Mechanism has been considered *'the short-term instrument for the realization of the solidarity clause'*.

It was activated several times to face disasters very different from each other.

The EU cooperation in civil protection, in fact, dates back to 1985 although a specific mechanism has been set up only in 2001, partly as a result of the 11/9 terrorist attacks in the USA.

The legislative reference was Article 3 let. (f) TEC.

Council Decision 2001/792/EC established a Community Civil Protection Mechanism in order to *'[...] facilitate reinforced cooperation between the Community and the Member States in civil protection assistance intervention in the event of major emergencies, or the imminent threat [...]'*.

Treaty of Lisbon
TITLE XXIII
CIVIL PROTECTION

Article 196

‘1. The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters.

Union action shall aim to:

(a) support and complement Member States' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man-made disasters within the Union;

(b) promote swift, effective operational cooperation within the Union between national civil-protection services;

(c) promote consistency in international civil-protection work.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure shall establish the measures necessary to help achieve the objectives referred to in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States’.

The EU competences in this field are just the ones *'to carry out actions to support, coordinate or supplement the actions of the Member States'* (Article 6, let. f) TFEU).

Decision 1313/2013/EU of the European Parliament and of the Council, which expressly provided a connection with article 222 TFEU, states that *'[t]he Union Mechanism should also contribute to the implementation of Article 222 of the Treaty on the Functioning of the European Union (TFEU), by making available its resources and capabilities as necessary'*.

This Decision also specifies that *'the Union Mechanism constitutes a **visible expression of European solidarity**'* and that the very same mechanism *'[...] **promotes solidarity** between the Member States through practical cooperation and coordination, without prejudice to the Member States' primary responsibility to protect people, the environment, and property, including cultural heritage, on their territory against disasters [...]'*;

The Civil Protection Mechanism, operating mainly on a voluntary basis, has been modified with the aim to establish an European Emergency Response Capacity (EERC) consisting of a voluntary pool of pre-committed response capacities of the Member States.

The operational heart of the system is the Emergency Response and Coordination Centre (ERCC).

The two systems can be considered not only interconnected, but also complementary. The operational capacity of the Solidarity Clause lies, among the other tools, on the Civil Protection Mechanism too, although their coordination remains to be seen.

6. Conclusions

- The European Union is a construction of solidarity and founded on the same principle.
- In this system, the Clause is certainly an added value because it introduces a legal obligation for Member States to be activated, however, at their discretion upon the occurrence of specific conditions: severe crises that have transboundary effects concerning more than one sector, which exceed the individual capacity of response of the State affected after the latter has exhausted all the means available to it.
- The implementing decision instead leaves a large margin of discretion on the means to be employed.
- These must be chosen by the institutions among the existing ones, such as in particular the Civil Protection Mechanism. Although it has been already pointed out, *'it is hard to image a Member State being called to the Court of Justice for violation of the Clause'*.
- The end result is a hybrid that seeks, with difficulty, to combine two objectives: the security inside the Union and the solidarity of the Union
- Furthermore, doubts rise about the types of disasters to be included within the operativeness of the Clause. See the economic crisis in Greece and *Anagnostakis v. Commission* case in this regard.

Thanks for your attention!

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