



A Proportionate Solidarity Test?

Ex Ante Existence and Ex Post Application of a Principle of Solidarity in European Union Law

T. S. B. Sveen

Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

Florence, [2 February 2018]

European University Institute
Department of Law

A Proportionate Solidarity Test?

Ex Ante Existence and Ex Post Application of a Principle of Solidarity in
European Union Law

T. S. B. Sveen

Thesis submitted for assessment with a view to obtaining
the degree of Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Supervisor

Professor Giorgio Monti, European University Institute

[© T.S.B. Sveen, 2018

No part of this thesis may be copied, reproduced or transmitted without prior
permission of the author]

**Researcher declaration to accompany the submission of written work
Department of Law – LL.M. Programme**

I Thea Snøfrid Bygjordet Sveen certify that I am the author of the work

A Proportionate Solidarity Test? Ex Ante Existence and Ex Post Application of a Principle of Solidarity in European Union Law I have presented for examination for the LL.M. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the Code of Ethics in Academic Research issued by the European University Institute (IUE 332/2/10 (CA 297)).

The copyright of this work rests with its author. Quotation from this thesis is permitted, provided that full acknowledgement is made. This work may not be reproduced without my prior written consent. This authorisation does not, to the best of my knowledge, infringe the rights of any third party.

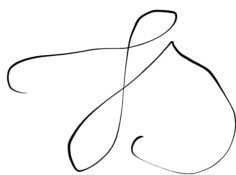
I declare that this work consists of 27, 366 words.

Statement of language correction (if applicable):

This thesis has been corrected for linguistic and stylistic errors.

I certify that I have checked and approved all language corrections, and that these have not affected the content of this work.

Signature and date:



Thea Snøfrid Bygjordet Sveen
2 February 2018

Structure of the LL.M thesis

Introduction	8
1 Solidarity Explained: A Theoretical Standpoint	11
1.1 An Attempt to Define the Term	13
1.1.1 A Roadmap Towards a Principle	16
1.1.2 Progressive Change Through Extended Interpretation	19
1.2 Searching for Solidarity as Joint Action	22
1.2.1 A Legal Translation of the Theory of Solidarity as Joint Action	23
1.2.2 A Duty that is Not Coerced yet Open to Coercion	25
2 From Ex Ante Existence towards Ex Post Application of Solidarity	26
2.1 The Ex Ante Existence of the Principle of Solidarity in European Union Law	28
2.1.1 The Principle of Sincere Cooperation in Light of Solidarity as Joint Action	30
2.1.2 The Principle of Conferral in Light of Solidarity as Joint Action	31
2.2 Solidarity as an Obligation Open to Coercion	32
2.2.1 To Profit from the Advantages of the Community	33
2.2.2 The Equilibrium between Advantages and Obligations in Tachographs	35
3 Ex Post Application of the Legal Principle of Solidarity	36
3.1 Sub Plans that Mesh	37
3.2 Example of Cases as Background Coercion Ex Post	38
3.2.1 Ålands Vindkraft AB	40
3.2.2 Essent	43
3.2.3 A Reinforced Proportionality Test	45
4 The Importance of Solidarity in the Future Architecture of European Union Law	47
4.1 The Fine Line Between a Reinforced Principle of Proportionality and Solidarity	48
4.2 The Necessity of a Legal Principle of Solidarity in European Union Law	50
4.3 Finding Solidarity in the European Union Future Legal Framework	55
Conclusion	57
Bibliography	61

Introduction

Solidarity is an inherent component of the European integration process as well as a guide to its legal construction. The Lisbon Treaty explicitly mentions solidarity in many different contexts and elevates it to a legal principle. Within the current stage of integration and against the backdrop of several new and nuanced challenges – ranging from renewable energy promotion to migration – academic debate and European Union case law struggle to construct a definition or workable concept of solidarity that enables a wide-ranging application of this ubiquitous principle. A clear interpretation of solidarity within European Union law is, however, necessary in order to capture and assess unilateral actions of Member States that are addressed to objectives to be jointly achieved. Understood in this broader sense, solidarity is not only a negative obligation to abstain from harming or undermining Treaty objectives; it is also a positive obligation to work towards a goal or joint action. Without such a two-pronged conceptualization, the concept of solidarity risks becoming a vague or even nugatory principle within the Treaties, which struggles to achieve a clear and useable definition. This thesis will therefore aim at a three-fold objective: To understand what a legal principle of solidarity is; to understand what a legal principle of solidarity does and finally; to give examples of recent case law supporting the proposed interpretation. When examined from a broader perspective, the principle of solidarity in European Union law is found to entail three dimensions. First, solidarity is a positive obligation to achieve the aims set forth. Second, solidarity is a negative obligation to not to undermine the objectives set forth. Third, solidarity is a supplement to the proportionality test to add a moral claim to the Court's balancing act. This thesis makes a distinction between the *ex ante* existence and the *ex post* application of solidarity to gain a more effective understanding of the concept of solidarity operating in two temporal dimensions. The *ex ante* existence of solidarity represents the Member States' promise of cooperation through the principle of conferral and sincere cooperation. The *ex post* existence of solidarity is the judicial evaluation of whether or not the promise has been kept. Hence solidarity binds the entire range of Member State actions from a perspective of joint action agreed upon *ex ante* and a duty not to undermine, and to promote joint action *ex post*.

The interesting question here is whether there is room in the debate for a more ambitious claim for solidarity. Instead of asking whether unilateral action fulfills either the principle of proportionality or of sincere cooperation, a supervising court should also ask whether a state's action is within the spirit of solidarity as explicitly mentioned in the Treaties.

This thesis attempts to demonstrate how such a line of argumentation is already being shaped, how a legal principle of solidarity applies both *ex ante* and *ex post*, and finally, why this line of inquiry is a necessary supplement to the principle of proportionality in European Union law. The interaction between the different principles is mirrored in the theory used within the thesis. This thesis' methodology and purpose seeks to address this lacuna by translating Sangiovanni's theory of solidarity as joint action into a legal interpretation of how recent case law is evolving within European Union law.¹ The thesis uses this theory as a basis for how solidarity as joint action could be translated into a more fine-grained tool for assessing unilateral measures. The *ex ante* existence of solidarity therefore remains a description as to how Member States have agreed upon a joint action. "Sub plans" are different measures taken unilaterally by the Member States within the ambit of the objective to be achieved. To achieve the objectives and act *in solidarity*, these unilateral sub plans need to mesh. Thus, unilateral actions within a principle of solidarity need to respond both to a negative obligation not to undermine Union objectives as well as a positive obligation to fulfill the aims pursued.

The actual application of the principle *ex post* is better to be understood as a reinforced principle of proportionality, veering unilateral actions towards the aim to be achieved. This would indirectly create a bridge to a wider interpretation of a legal principle of solidarity in European Union law. Not only does the emerging form of reinforced principle of proportionality add more elements to the proportionality test used by the Court. The reinforced proportionality test also aims to verify whether or not unilateral sub plans mesh (i.e. operate in concert). This concept is inherent to the theory of solidarity as joint action.

The *ex ante* aspect of solidarity is not to be coerced. It can however function as a binding principle – and thus be open to coercion - when the objectives to be achieved by the virtue of solidarity have been agreed upon previously. As such, it becomes clear that solidarity as a legal principle serves as a foundation with its *ex ante* existence as well as a reminder of the obligations through its *ex post* application. This thesis will underline that the existence of solidarity as a legal principle *ex ante* could be interpreted as existing in the interstices between the principle of sincere cooperation and the principle of conferral.

¹ Andrea Sangiovanni *Solidarity as Joint Action* 32 J of Applied Phil 340 (2015.) ("Sangiovanni Joint Action".) In this vein, unilateral actions are described or defined as "**sub plans**" by Sangiovanni, who borrows this terminology from Michael Bratman. See e.g. Michael E. Bratman, *Faces of Intention: Selected Essays on Intention and Agency (Cambridge Studies in Philosophy)* (Cambridge, Cambridge University Press, 1999) ("Bratman Faces of Intention")

Further, the actual application of the principle *ex post* is better understood if a reinforced principle of proportionality is used to balance the unilateral actions towards the aim to be achieved. Nevertheless, there is no moral claim within proportionality balancing and thus the Court interacts with a second reminder of the principle of solidarity as such – adding a different layer to the proportionality test. The interaction between these *ex ante* and *ex post* notions of solidarity is mirrored in the theory used within the thesis. This theory is the basis for examining how solidarity as joint action could be translated into a more fine-grained tool for assessing unilateral measures. These “sub plans” are different measures taken unilaterally by the Member States within the ambit of the objective to be achieved. Solidarity as such has a function similar to the operation of the Hippocratic Oath in the sense of “First do no harm” plus “I will use treatment to help the sick according to my ability and judgment.”²

In the first part, this thesis aims to explore solidarity from a theoretical standpoint. It will attempt to define the term, outline a roadmap towards the principle as well discussing current developments. The purpose of this thesis is to translate Sangiovanni’s thesis into legal terms and properly reframe the model into a legal understanding of solidarity in European Union law.

The second part will explain the *ex ante* existence of solidarity in European Union Law. It will do so by taking into consideration both the principle of sincere cooperation as well as the principle of conferral. These principles will be seen in light of the theoretical framework proposed by Sangiovanni.

Third, the *ex post* application of solidarity will use examples of recent case law that may illustrate how the Court of Justice interprets how sub plans or unilateral actions mesh. This interpretation is seen through the lenses of solidarity as joint action.

The last part will explore the fine line between the principle of proportionality and the importance of solidarity in the future architecture of European Union law. This will also include a discussion of the existence of a reinforced principle of proportionality and the necessity of principle of solidarity in European Union law.

² More accurately, “Also I will, according to my ability and judgment, prescribe a regimen for the health of the sick; but I will utterly reject harm and mischief”. Lat. “Victus quoque rationem ad aegrotantium salutem pro facultate, iudicioque me o adhibebo, noxam vero et maleficium propulsabo”.

1 Solidarity Explained: A Theoretical Standpoint

With the increasing scope and complexity of Union tasks, solidarity has been studied by an increasing number of scholars. The German school has, in this area, been a guiding reference shaping the solidarity debate from a legal perspective.³ The focus of this research primarily incorporates a positivist “*pacta sunt servanda*” international law perspective on Member State obligations to the Union as found in Article 18 of the Vienna Convention’s (“VC”) principle that: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty”. This is, for example, the function of Article 69 TFEU which requires National Parliaments to consider matters concerning judicial and police obligations in criminal matters in light of their subsidiarity obligations.

However, the increasing importance of shared competences and three-party interaction between the Union and Member States and among Member States *inter se* has created a demand for the inclusion of a different, more active role for “solidarity” within the principle of “sincere cooperation” now found in Article 4 (3) TEU and the possibility of “enhanced cooperation” under Article 326-334 TFEU. Both sincere cooperation and enhanced cooperation have a positive, albeit voluntary, obligation to them. Because the needs of the modern state and of the evolving Union are increasingly more complex and technical, and problems arise and multiply within shorter time spans, *ex post* proportionality balancing alone can neither keep up with the changing landscape, nor predict solutions for new issues or the unexpected consequences of improperly coordinated networks

A different examination is required of Member State actions which are not reactive solely to *ex post* judicial coercion as a form of negative abstention from harm as in Article 18 VC, but rather to a form of positive solidarity similar to *esprit des corps* whose operation is *ex ante* to the activity. One academic working from that perspective is Andrea Sangiovanni who conceptualises solidarity as joint action.

³ Christian Calliess *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* 2d ed (Nomos, Baden Baden, 1999) (“Calliess Subsidiaritäts“.); Roland Bieber “Gegenseitige Verantwortung – Grundlage des Verfassungsprinzips der Solidarität in der Europäischen Union” (“Bieber”) in Calliess Subsidiaritäts; Armin von Bogdandy “Founding Principles” (Bogdandy Founding Principles”) in *Principles of European Constitutional Law* 2d revised ed Armin von Bogdandy and Jurgen Bast Eds (Oxford Hart Publishing Ltd 2011) (“Bogdandy Principles of Constitutional Law”); Karel Wellens, “Revisiting Solidarity as a (Re-) Emerging Constitutional Principle: Some Further Reflections”, (“Wellens”) in *Solidarity: A Structural Principle of International Law* Rudiger Wolfrum and Chie Kojima Eds (Heidelberg Springer 2010) (“Wolfrum and Kojima”)

This theoretical framework is designed to depict how unilateral Member State actions are designed to “mesh” with actions taken by other Member States toward a common goal (much like the construction of the different nodes in a communication network which must operate together if the network is to function properly.) Solidarity comes into play here in the initial conceptual construction of such actions, *ex ante*, without the complications stemming from justifying the action *ex post* in the context of judicial review. The application of solidarity as a legal principle *ex post* is also incorporated in the model. What is needed for understanding Member State/Member State action is a different, more Kantian perspective, “act only in accordance with that maxim through which you can at the same time will that it become a universal law.”⁴ The consequences of not knowing how to apply, define, or interpret solidarity as a legal principle of European Union law can be quite severe. A lack of an effective means of interpretation hampers a reading of recent cases whose meaning has puzzled practitioners and scholars alike.⁵ Likewise, inadequate interpretive tools detract from legal argumentation based on moral claims that exist within the ambit of European Union law. It also risks confusion in comparisons with market based claims and the more neutral, balancing act between advantages and obligations.⁶ The principle also serves to remind us why and how European integration may not be reduced to a mere calculation of costs and benefits, or as the Court of Justice and its AG assert:

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.⁷

How would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation? I am referring here to the quintessence of what is both the *raison d'être* and the objective of the European project.⁸

⁴ Immanuel Kant *Groundwork for the Metaphysics of Morals* [1785] Allen W. Wood Trans and Ed (London Yale University Press 2002) AK 4:21, Section I p 37

⁵ I refer here to the Ålands Vindkraft, Essent and Hungary/Slovakia cases discussed infra in the subsequent chapters. My understanding from these cases is that Advocate General Yves Bot has paved the way for a new found understanding and interpretation of solidarity as a legal principle in European Union law.

⁶ For a detailed account of solidarity as a legal principle see Alain Supiot *La Solidarité: Enquête sur un principe juridique* (Paris Odile Jacob 2015) (“Supiot”)

⁷ Case C-128/78 *Commission v UK*, 7 February 1979 (“Tachographs”) ECR [1979] 419 par 12. The *Tachographs* case has been widely used as a point of departure for the principle of solidarity within European Union law, see Calliess *Subsidiaritäts-fn 3 supra* p. 18 (citing and discussing *Tachographs* para 12.)

⁸ Opinion of AG Bot delivered 26 July 2017 in Joined Cases C-643/15 and C-647/17 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:618 (“Opinion Slovakia and Hungary v Council”) para. 17

Is there then room for a more ambitious claim that, instead of asking two bifurcated questions, whether a state's action fulfils the principle of proportionality or the principle of sincere cooperation, the better question is whether the state's action lies within the spirit of solidarity as explicitly mentioned in the Treaties. Translated from Sangiovanni's terms to legal argumentation, unilateral actions are proportionate to the aim pursued when they fulfil the criteria for a legal principle of solidarity within their *ex ante* and *ex post* applications.⁹ As applied to recent legal developments this enables a dual, holistic understanding of the *ex ante* existence and an *ex post* application of solidarity in the form a legal principle in European Union law, a conceptualisation that has hitherto been lacking.

1.1 An Attempt to Define the Term

Solidarity as a concept entered European integration policy and discourse in the Schuman Declaration of 9 May 1950 as "solidarité de fait". The Preamble to the ECSC Treaty enshrined the concept as part of the output legitimacy resulting from common efforts towards economic development: "CONSCIENTS que l'Europe ne se construira que par des réalisations concrètes créant d'abord une solidarité de fait, et par l'établissement de bases communes de développement économique; ..." This was followed by the Treaty of Rome's assertion of its existence: "ENTENDANT confirmer la solidarité qui lie l'Europe et les pays d'outremer, et désirant assurer le développement de leur prospérité, conformément aux principes de la Charte des Nations-Unies, ..."

The Lisbon Treaty incorporated "solidarity" as one of its goals in Article 2 TEU and uses the term sixteen other times within the Treaties in several different contexts. Arguably, "while the principle [of solidarity] has been used in a variety of ways by the [European] institutions, at no stage there has been any attempt to define the term. The EU institutions appear to apply the elephant test: you know it if you see it."¹⁰ If we do not know what solidarity means in European Union law or what function it serves, its mentioning in the Treaties as well as in case law could be void. This is a problem, both moral and legal, if the European Union claims, in Article 2 TEU, to be based upon "solidarity".

⁹ Sangiovanni Joint Action fn 1 supra

¹⁰ Catherine Barnard, "Solidarity and the Commission's 'Renewed Social Agenda'" ("Barnard") in *Promoting Solidarity in the European Union* Malcom Ross and Yuri Borgman-Prebil Eds (Oxford, Oxford University Press, 2010) (Ross and Prebil") p. 81

It is even possible to go as far as to reiterate the claim that solidarity is the basis of law or that « [l]e fondement du droit est la solidarité »¹¹. Most of the discourse of solidarity as a legal principle has focused, inter alia, on legal dogmatic analyses of whether or not solidarity may be seen as a legal principle¹²; whether it is a structural principle of international law;¹³ how can it be understood within the European Union legal order;¹⁴ how it is connected to the principle of subsidiarity and environmental protection;¹⁵ how it can result in the redistributive effects deemed necessary for the welfare state;¹⁶ how it can be understood as a non-market-based principle, and a stranger to the internal market paradigm,¹⁷ and finally, how it may be held to be a constitutional principle as such.¹⁸

In the following I will describe some of the developments and some of the inspirations for this understanding of solidarity as a legal principle and its inherent nature. The main theoretical framework for this is Sangiovanni's theory of solidarity as joint action. Translated into Member State action, the following elements are essential to the understanding of solidarity within European Union law:

1. [Member States] (a) share a goal to overcome some significant adversity;
2. [Member States] individually intend to do their part in achieving the shared goal in ways that mesh;
3. [Member States] are individually committed (a) to the realisation of the shared goal and (b) to not bypass each other's will in the achievement of the goal;
4. [Member States] are disposed (a) to incur significant costs to realise their goal; and (b) to share one another's fates in ways relevant to the shared goal.

Facts 1.-4. Need *not* be common knowledge.¹⁹

The gravamen of the problem stems from the fact that a close cousin of the principle of solidarity has primarily been applied *ex post* after the decisions of the Member States. This is better known as the principle of proportionality when unilateral member state action has become subject to judicial review by the European Court of Justice.

¹¹ Roland Bieber fn 3 supra p. 72 (Quoting from Léon Duguit, *Traité de droit constitutionnel*, 2. Aufl. Bd. 3, 1923, s. 595.)

¹² Esin Küçük *Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?* 23 Maastricht J of Eur and Comp L 966 (2016) ("Küçük")

¹³ Wellens fn. 3 supra

¹⁴ Cf. Calliess Subsidiaritäts fn 3 supra Bieber fn 3 supra, and; Ingolf Pernice "Solidarität in Europa – Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union" in Calliess Subsidiaritäts fn 3 supra pp 25 et seq. ("Pernice")

¹⁵ Calliess Subsidiaritäts fn 3 supra

¹⁶ Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford Studies in European Law (Oxford, Oxford University Press, 2014)

¹⁷ Supiot fn 6 supra

¹⁸ Bogdandy Principles of Constitutional Law fn. 3 supra

¹⁹ Sangiovanni Joint Action fn. 1 supra, at p. 343

Yet, there is also a need for a legal principle of solidarity which may also be applied and understood *ex ante*, before requiring the interaction of an adjudicatory body, as well as *ex post*, thus adding a layer of morality or ethical behaviour to the proportionality test. These two temporal dimensions are of equal importance to understanding what solidarity as a legal principle actually *does*. Instead of being solely an after-the-fact, result-oriented approach, an *ex ante* application of solidarity as a legal principle places greater emphasis on formative processes and their bases in adherence to the Treaties. Between the *ex ante* existence and the *ex post* application of the principle lies the vehicle of the *decisions* made by the Member States in light of European Union law. Between the *ex ante* existence and *ex post* application of solidarity lies the decision of the Member State to act, framed between existing EU law and the review of the Member State's choice by the European Court of Justice. Küçük however concludes:

Considering the fact that solidarity is a politically loaded concept, one may understand the Court's reluctance in employing solidarity as a legal instrument when it was possible to address the issue by using conventional arguments or technical analysis ... solidarity appears as an instrument for the creation of a common good, from which all the contributors benefit – if not immediately, then in the distance future. Seen from this perspective, solidarity can be regarded as a legal principle that is less amorphous and equivocal than it may seem at first sight.²⁰

It is particularly the Member State's intention to create that common good and the necessity to go beyond mere technical analyses that are key to grasping the importance of solidarity as a legal principle of European Union law. As framed by Malcolm Ross, “solidarity already occupies a significant place in the constitutional *acquis* of the EU and is explicitly enhanced by the ratified Lisbon Treaty”.²¹ The most relevant provisions for our purposes are those related to a spirit of solidarity, e.g. Articles 4 (3) and 21 (1) TEU, and Articles 80, 122, 194 and 222 TFEU. On this view, “the existence of solidarity is not an unwritten principle but a part of the substantive written positive law of the European Union”.²² Armin von Bogdandy characterises solidarity as the “last classical principle of European constitutionalism”.²³ In the following, a roadmap towards a principle will describe the current academic discourse. This will be followed by a discussion of a progressive change of the principle of solidarity through extended interpretation.

²⁰ Esin Küçük fn 12 supra p. 983 (Citing Cases C-370/12 *Pringle v Ireland* (Full Court) 27 November 2012 ECLI:EU:C:2012:756 and C-62/14 *Gauweiler and Others v Deutscher Bundestag* (GC)16 June 2015.) ECLI:EU:C:2015:400.)

²¹ Malcolm Ross, “Solidarity - A New Constitutional Paradigm for the EU?” (“Ross”) in Ross and Prebil fn 10 supra p 36.

²² Bieber fn 3 supra p. 69 (My translation.)

²³ Bogdandy *Founding Principles* fn 3 supra p 53.

1.1.1 A Roadmap Towards a Principle

There are certainly no lack of interpretations of solidarity as achieving common goals or facilitating joint action because “[s]olidarity is enshrined within the European Union’s genetic code with the European Union, the Member States have committed themselves, on the basis of common values, to reach common objectives... ”.²⁴ How then do we create a roadmap to better understand the evolution of the principle and its future trajectory? Within the European Union, German constitutional law scholars have taken the lead in raising questions regarding its moral and legal nature.²⁵ Within the solidarity debate, a sceptical view has emerged which may be summarised by the following statement: “[a]lthough international solidarity is an important moral principle and a moral commitment, it does not meet the requirements of a legal concept.”²⁶

Further, “[a]s long as solidarity is endorsed in the context of the *lex ferenda*, who can oppose it?” But sheer belief in solidarity as *lex ferenda* does not turn it into solid *lex lata*”.²⁷ What has come to be known as the sceptical view focuses on solidarity’s lack of legal properties.²⁸ This debate has been somewhat nuanced due to recent contributions in the field which appear to agree that solidarity may be deemed to be a legal principle, as such.²⁹ Another aspect that captures the essence of the legal debate is the fact that the principle of solidarity is no longer an auxiliary function but is well on its way to achieving a permanent status of normative superiority.³⁰ It is further, this normative claim that is helpful when assessing the added-value of solidarity as a principle when applied to the proportionality test.

Solidarity is often more than not a term invoked “when all else fails”.³¹ Such an inconsistent invocation of the legal principle of solidarity leads us astray. A search for a more coherent interpretation is needed, in order to avoid both a misuse and a misunderstanding of the

²⁴ Bieber fn. 3 supra p. 68. Bieber further questions the reason why solidarity is enshrined only in some specific provisions of the Treaty and as such, whether it might be a general principle applicable in every field: “Auch ist unklar, welche Bedeutung es hat, dass Solidarität nur an einzelnen Stellen des Vertrages genannt wird, obwohl man annehmen konnte, dass es sich um ein allgemein gültiges Prinzip handelt”. (At p. 70.)

²⁵ See e.g. Calliess Subsidiaritäts fn 3 supra.

²⁶ Point 23 GA/71/280 Human rights and international solidarity Note by the Secretary General transmitting the Report of the Independent Expert 3 August 2016 (“GA/71/280”) p. 9

²⁷ Dinstein’s comments p 79 on Dann’s paper Philip Dann, “Solidarity and the Law of Development Cooperation”, in Wellens fn. 3 supra pp 55 – 93 (“Dann”)

²⁸ Dinstein in Wellens fn. 3 supra p. 79

²⁹ Calliess Subsidiaritäts fn 3 supra; Ingolf Pernice fn 14 supra; and Bieber fn. 3 supra

³⁰ Karel Wellens fn 3 supra pp 37 and 40.

³¹ Emmanuel Melissaris, *On Solidarity* (June 5, 2017). LSE Leg. Stud. W P No. 10/2017. Available at SSRN: <https://ssrn.com/abstract=2980766>

concept itself. It is also not this author's intention to support a naïve presumption that this principle is, in Tuori's terms, a "global master principle" capable of solving all transnational legal challenges or uncertainty.³² Nevertheless, it can achieve some clarity as to what solidarity entails. According to Dienst, Duguit's concept of solidarity is not:

... entirely dissimilar to Hans Kelsen's "Grundnorm", i. e., an axiomatic meta-juridical concept that underpins the international legal system ... The real question ... is whether the principle of solidarity can be regarded not as a meta-juridical notion but as part and parcel of positive international law, that is to say, either custom or Treaty.³³

It is also quite important to address the question of what sort of moral obligations solidarity might entail. This analysis will be complemented by a theoretical framework for the analysis as mentioned in the introduction. Andrea Sangiovanni's theory of solidarity as joint action provides an instrument that is important, suggesting the possible interactions between the principles of EU law that may create a coherent interpretation of solidarity.³⁴ Such an interpretation is necessary in order to gain more clarity within legal argumentation based on solidarity as a principle of European Union law.

As Kotzur and Schmalenbach argue, "[e]ven though international solidarity is a highly amorphous concept, a legal examination about the relevance of the principle requires a certain grasp of the term's meaning and attribution".³⁵ As a legal principle,³⁶ "[s]olidarity may be used to describe and explain the normal order and normative social integration in societies and communities, as opposed to chaos and conflict, and as opposed to order based on coercion or maximization of self-interest".³⁷

³² Kaarlo Tuori, "Transnational Law: On Legal Hybrids and Perspectivism" in *Transnational Law: Rethinking European Law and Legal Thinking* Miguel Maduro, Kaarlo Tuori and Suvi Sankari Eds, (Cambridge, Cambridge University Press, 2014) ("Tuori Transnational Law") p. 38. Where he adds:

The search for a new, harmonising, global master principle capable of addressing legal transnationalism has pursued both descriptive/explanatory and normative aims, often enough intertwined. Scholars have longed for both a basic grid of interpretation, rendering the new global constellation of law intelligible, and a normative paradigm that would facilitate the creation of coherence in the fragmented legal world, and by the same token, enhance law's legitimacy. The meta-level order of orders aspired for displays both intellectual and normative features.

³³ Dienst's comments p 79 on Dann's paper, fn. 26 supra (Where he argues, "I see merit in a philosophical debate about solidarity in such a meta-juridical context, but clearly this will not suffice for the purposes of [a structural principle of law]" Perhaps this question might be framed as a "morality of duty" in the "thou shalt not" form theorized by Fuller See Lon L. Fuller, *The Morality of Law* Rev. Ed 35th Printing (New Haven, Yale University Press 1969) ("The Morality of Law") pp 5-6.

³⁴ Sangiovanni Joint Action fn 1 supra.

³⁵ Markus Tobias Kotzur and Kirsten Schmalenbach, *Solidarity Among Nations*, Archiv des Völkerrechts, Bd. 52, S. 68-91, Mohr Siebeck 2014, DOI 10.1628/000389214X14056754359545 p. 89 ("Kotzur and Schmalenbach".)

³⁶ Wellens, fn 3 supra.

³⁷ Arto Laitinen and Anna Birgitta Pessi, *Solidarity Theory and Practice* Arto Laitinen and Anne Birgitta Pessi Eds (New York, Lexington Books 2014) ("Laitinen & Pessi") p 2.

The existence and application of the legal principle of solidarity is closely connected to its interpretation *qua* principle. Solidarity can also be usefully developed as a tool which enhances legal certainty, both for its duty bearers and for its rights holders.³⁸ Simon Derpmann is one of the critical voices within this debate, claiming that solidarity should be a specific type of obligation:

A theory of solidarity is of systematic value within moral philosophy, only if it provides an account of solidarity as a specific type of obligation that can be distinguished from others. If it cannot explain in what regards obligations of solidarity are different from, go beyond, or are more specific than obligations of justice, fidelity, respect, or benevolence, then there is arguably no need for a distinct theory of solidarity within moral philosophy. So, a convincing exposition of solidarity requires the fulfilment of a condition of conceptual discriminability and its contribution to the systematic analysis of moral obligation.³⁹

Solidarity, it turns out, is indeed a legal principle in search of a coherent understanding. The following sections will therefore provide the background necessary to understanding how the various parts may fit together and to provide a basis for the *ex ante* existence and *ex post* application of solidarity as a principle of European Union law.

There has been little attention paid to asking what a legal principle of solidarity actually *does*.⁴⁰ If solidarity is perceived as a founding principle of European Union law, “[it] should be regarded as an essential element of a common language of conflict resolution”.⁴¹

It is significant that this common language of conflict resolution was first applied to undertakings’ obligations and subsequently to Member State obligations. Malcolm Ross underlines that:

... the positioning of solidarity as an emerging constitutional value suggest [that] solidarity becomes capable of shaping or directing other core values and legal institution ... a fundamental status to solidarity implies that it should apply unless there are good reasons for departing from it as a principle – in much the same way that the principles of equal treatment or non-discrimination have developed in the European legal order.⁴²

³⁸ In the UN draft declaration, United Nations General Assembly Human Rights Council 26th Sess. *Report of the Independent Expert on human rights and international solidarity* A/HRC/26/34, 1 April 2014 (and Addendum I) (“GA Report A/HRC/26/34”) point 29. Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ListReports.aspx>. (Last visit 4 July 2017.) – duty bearers are states and non-state actors

³⁹ Simon Derpmann, “Moral Recognition and Communitarity”, in Laitinen & Pessi, fn 37 supra p. 107.

⁴⁰ One exception to this is perhaps be Calliess’ work on solidarity, see Calliess Subsidiaritäts fn. 3 supra. Nevertheless, that is another contribution focusing on the failure of solidarity and not the reason for its reinforcement or emergence as such. In the regional consultation on the proposed draft declaration on the rights of peoples and individuals to international solidarity. GA Report A/HRC/26/34 fn 38 supra Mr Craig Mokhiber (an OHCHR official) stressed that “international solidarity is a crucial principle in addressing current global issues and tragedies” GA Consultation Report Insert fn p. 3

⁴¹ Id.,

⁴² Ross and Prebil, fn 10 supra p. 36

If solidarity as a principle can direct other core values and legal institutions, it underlines the importance of including morality within the Court's balancing act. This balancing takes both the *ex ante* existence (through the principle of conferral and sincere cooperation) of solidarity as well as an *ex post* application (through a reinforced proportionality test with an added layer of morality), into account. This latter element is the solidarity test, which incorporates but does not undermine the other legal principles as such. Solidarity as a principle is therefore a different tool for conflict resolution, serving both as a reminder and taking both temporal claims into account. It does so by adding a morality claim to the balancing of the Court.

More than just an unenforceable grundnorm, solidarity thus conceived enables a holistic interpretation and gives meaning to why there is a common legal order.⁴³ As Steven L. Winter explains, “[n]atural law theory claims that morality is a constitutive precondition of legality and, thus, a necessary component of all (proper) acts of law identification and law application”.⁴⁴

1.1.2 Progressive Change Through Extended Interpretation

If we consider that solidarity encompasses a standard of morality within European Union law, the introduction of morally informed judgments within the Court's reasoning may become a possibility or more accurately, a necessity. It is within this vein that Public International Law may shed light on questions with respect to what solidarity as a legal principle should actually entail and on the way in which solidarity might be interpreted as a moral obligation.⁴⁵ The UN Commission on Human Rights' work on the proposed draft declaration for a legal principle of solidarity may enlighten us in the process.⁴⁶ Their proposed draft declaration on a legal principle of solidarity underlines that it does not intend “to create new norms and obligations, but to signify existing obligations with a view to fostering implementation and accountability with regard to the fulfilment of human rights”.⁴⁷

⁴³ For more detailed discussion of the place of proportionality within the legal order, see section 4.2 *infra*

⁴⁴ Steven L Winter *A Clearing in the Forest: Law, Life, and Mind* (Chicago University of Chicago Press 2001), p. 199 (“Winter Fog”)

⁴⁵ Cf. United Nations General Assembly Human Rights Council 26th Sess. Report of the Independent Expert on human rights and international solidarity A/HRC/26/34, 1 April 2014 (and Addendum I) (“GA Report A/HRC/26/34”) point 29. Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ListReports.aspx>. (Last visit 4 July 2017.)

⁴⁶ GA Report A/HRC/26/34 fn 38 *supra*.

⁴⁷ GA/71/280 fn 26 point 9 pp 5/20-6-20.

The Expert's Report, issued prior to the UN draft declaration, noted the importance of an affirmative declaration on solidarity such that it not be viewed as a short-term emergency measure but rather as a full-fledged human right to be claimed not exclusively *ex post*.

As the Report on the Draft Declaration outlines, "... preventive solidarity and reactive solidarity [are] two sides of the same coin... the true value of international solidarity lies in the processes that inform collective objectives and acts of preventive solidarity and in their potential outcomes in the long-term".⁴⁸ This long-term view, and the concept of "preventative solidarity" is worthy of notice as many actions taken in the name of solidarity have been directed towards disaster relief and *ex post* application:

Preventive solidarity is the substantive component of international solidarity relating to the human rights standards and obligations that must inform collective agreements and initiatives. International cooperation is the operational component, through which preventive solidarity agreements and initiatives are implemented. As such, international solidarity is actualized only through the confluence of both preventive solidarity and international cooperation.⁴⁹

International cooperation is the *operational component*, whereas the joint actions agreed upon require sincere cooperation. A second strand posits that the principle should be seen as a broader, more inclusive form of cooperation aimed at a specific goal. This cooperation entails respect for existing Treaty obligations.

The Report on the Draft Declaration also asserts that

[...] it is possible for standards of morality to enter the domain of international law and politics, thereby allowing for progressive change through extended interpretations as well as for amendments of international norms and rules. The aim is not to revolutionise existing international law, but to introduce elements of morally informed judgement in the application or development of the rules of international law. While this solidarist doctrine of natural law is confronted with the argument that law cannot be based on something as disputable as morality and reason, an argument in its favour is that the validity of legal argument is based not on the nature of its origins, but on how it is received by the international community upon its introduction. Therefore, principles derived from reason and morality may be translated into standard operating procedures, State practice and, ultimately, rules of positive international law and thus possibly gain international recognition that cannot be acquired otherwise.⁵⁰

⁴⁸ Point 24 A/70/316 Note by the Secretary-General transmitting the report of the Independent Expert on human rights and international solidarity 12 August 2015 point1 p 4/20 ("A/70/316") Available at <http://www.un.org/en/ga/third/70/documentslist.shtml> (last visit 8 July 2017) p. 11

⁴⁹ Point 54 A/70/316 fn 48 supra p. 19/20

⁵⁰ GA/71/280 fn 26 supra point 29 p. 12/20 (citing Tonny Brems Knudsen, *International Society and International Solidarity: Recapturing the Solidarist Origins of the English School* Paper presented at workshop International Relations in Europe: Concepts, Schools and Institutions, 28th Joint Sessions of Workshops of the European Consortium for Political Research, 14-19 April 2000, Copenhagen, Denmark, ("Knudsen") p. 16 available at <https://ecpr.eu/Events/PaperDetails.aspx?PaperID=15134&EventID=46> (last accessed 21 February 2017). The specific point, also reiterated in the report's conclusions states that this supports the "reaffirmation

The Report of the Independent Expert thus concludes that:

... the right to international solidarity is a claimable right, both feasible and enforceable. It is not surprising why some degree of scepticism persists in the light of certain factors that affect not only the proposed right to international solidarity, but also others known as “collective rights”. For example, there may be no reliable and available means for enforcing compliance with the obligations generated by the right to international solidarity. In some cases, the courts may be unwilling or unable to adjudicate on that right.⁵¹

A serious search for an understanding and practical manifestation of this principle is clearly demonstrated by the construction of, and the debate on, the proposed Draft Declaration.⁵²

Article 6 of the Draft Declaration enumerates the holders of the right to international solidarity and, in Article 7 lays out what that right includes. There it seems, the right to international solidarity entails a respect for the international obligations. Thus, a right to international solidarity cannot be achieved without a corresponding duty to respect international obligations or agreed joint actions. Similarly, Article 8 identifies the principle’s duty bearers, laying out their responsibilities in broad terms, while Articles 9 and 12 set out more specific obligations. The Independent Expert⁵³ reiterates that the obligations of States (the primary duty bearers) spelled out in the proposed draft declaration, are pre-existing under the various international human right treaties to which they have acceded.

The Draft Declaration then provides an important value by articulating just how such obligations are to be applied or implemented in accordance with the requirements of the specific provisions of those human rights treaties, as set out in the corresponding general comments and general recommendations of the treaty bodies. In that context, the right to international solidarity is a right to demand the implementation of international solidarity understood as an obligation to participate so that actual benefits can be derived from it.⁵⁴ The problem is not merely to describe what solidarity means, or whether solidarity can be seen as a legal principle. More importantly it is to understand that solidarity exists prior to, and is then applied *ex post* to the unilateral actions of the European Union Member States. Importantly, the duality exists in both of these principles in indirectly asserting and entailing a duty not to undermine one another other.

that the principle of international solidarity meets the requirements of a legal standard and can thus become a right when the community of States so decides”, my italics

⁵¹ A/70/316 fn 48 supra point 50 p. 19/20

⁵² GA Report A/HRC/26/34 fn 38 supra

⁵³ The Independent Expert referred to is Virginia Dandan. More information on Dandan’s mandate and works may be found at <http://www.ohchr.org/EN/Issues/Solidarity/Pages/IESolidarityIndex.aspx> (last accessed 12 March 2017)

⁵⁴ Point 25 of GA/71/280 fn 26 supra p 10/20.

The principle of solidarity is subtle and is perhaps necessary as a form of background coercion to remind us of the commitments that follow on initial intentions.⁵⁵ The most pressing and acute legal problem remains to provide an understanding of solidarity as a response to current challenges, that is how solidarity as a principle adds another layer of obligation to act into a reading of the law. The problem with adjudication of the right or obligation of solidarity thus lies in the non-existence of a definition bridging its *ex ante* existence with its *ex post* application. It is perhaps this higher order which may provide some explanation for, and purpose of, an emergent principle of solidarity in both legal realms. In other words, the application of solidarity *ex ante* (proactive) and *ex post* (reactive): International cooperation, be it loyal or sincere, is the operational component through the decisions nation States are willing to make.

1.2 Searching for Solidarity as Joint Action

Although the sceptical view may offer a framework to inquire into why solidarity cannot be seen as more than “an elusive political statement”⁵⁶ or a normative claim, the impossibility of perceiving solidarity as a legal principle that this presupposes hinders a deeper understanding of the requirements of current legal dynamics. As will be discussed below, if solidarity is perceived as joint action, the philosophical as well as the legal interpretation must meld to create a coherent whole incorporating not only what solidarity could be but what solidarity as a legal principle actually does. Is solidarity then a joint action? Applying Sangiovanni’s typology to the solidarity required between Member States provides a unique insight to the functioning of the concept itself.⁵⁷ For the Member States to *share* various aims requires that the “specification of the goal includes a reference to the actions and aims” of each Member State.⁵⁸ Sangiovanni applies the principle in terms of goals instead of intentions, “acting in solidarity with others does not require – though it does not exclude – sharing an intention that we do something together. We can in solidarity with others even if our joint actions are not unified by an overarching, shared agency”.⁵⁹

⁵⁵ Sangiovanni fn 1 supra talks about background coercion at p. 346

⁵⁶ Küçük fn 12 supra

⁵⁷ Sangiovanni Joint Action fn 1 supra p. 342

⁵⁸ Sangiovanni Joint Action fn 1 supra p. 343.

⁵⁹ Ibid. p. 343

1.2.1 A Legal Translation of the Theory of Solidarity as Joint Action

Nevertheless, the classification of agreed joint actions may change over time as do social conceptions of what we define as the common good, (a term capable itself of misuse).⁶⁰ It is also possible that joint action is not specifically a definitional construct, but rather an evolving concept depending on circumstances and future needs, or a reminder of why cooperation and joint action was intended in the first place. When applied to the legal sphere, an understanding of the *ex ante* existence and *ex post* application of a legal principle of solidarity in European Union law are necessary. To better understand the construction of the principle, the following elements (as rephrased in §1.1 supra), for the purposes of this thesis as the following:

1. [Member States] share a goal to overcome some significant adversity;
2. [Member States] individually intend to do their part in achieving the shared goal in ways that mesh;
3. [Member States] are individually committed (a) to the realisation of the shared goal and (b) to not bypass each other's will in the achievement of the goal;
4. [Member States] are disposed (a) to incur significant costs to realise their goal; and (b) to share one another's fates in ways relevant to the shared goal.

Facts 1.-4. Need *not* be common knowledge.⁶¹

The first element might, for example, be the “adversity” entailed in overcoming climate change by the promotion of renewable energies. In that case, Member States intend to undertake individual and common efforts in a manner that do not undermine the objective or achievement of the goal. In addition, by agreeing to being part of a larger whole, Member States also share their fate – that is, one unilateral action that goes strictly against or severely undermines the objective will harm the objective set forth. In this sense, solidarity is an inherent part of joint action.

The fact that Member states share a goal has a close relationship to the principle of conferral where competences are conferred in order to achieve objectives that each and every one have in common. The principle of conferral could therefore be seen as a direct legal translation of a common intention or joint action. The principle of conferral in legal terms represents both the will to overcome a significant adversity together within a Union, be it an exclusive, shared or partial competence, as well as the limits thereof. That is, by setting boundaries to the competences there is also a possibility for the Member States to choose their own individual solution to common issues where European Union competences do not reach or where they are shared.

⁶⁰ On this point, see Peter Häberle who argues that the public common good is *Wandlungsfähig – Öffentliches Interesse als juristisches Problem* (Berliner Wissenschafts-Verlag, 2. Auflage 2006)

⁶¹ Sangiovanni Joint Action fn 1 supra, at p. 343

In this manner, the principle of conferral and the principle of sincere cooperation, acting together, provide a conceptual framework that can enable a principle of solidarity to function as intended. The principle of sincere cooperation or loyalty is therefore closely related to the claim that “Member States are individually committed (a) to the realisation of the shared goal and (b) to not bypass each other’s will in the achievement of the goal”. The conferral of competences may then be seen as an expression of solidarity that explains why common challenges should be met by common actions.⁶² Those two elements are therefore foundations of an *ex ante* function of the principle of solidarity, whereas point (2) and (4) operate at a later stage where the effects of the unilateral measures have proven to undermine a common or joint achievement of the goal.

In this sense, it is important to underline that these competences must have been conferred on the European Union at least in part, in order to make this claim effective. A lack of competence would make such a statement void and there would be no legal grounds to argue in favour of a joint action in the name of solidarity.

The final arbiter of what has been conferred and whether an action has been taken in solidarity is the European Court of Justice, whose role, in effect, is to define whether or not the individual sub plans of the various Member States have meshed. The fourth element seems to be more difficult to translate into a legal principle, but it should be understood as something more than a negative, *pacta sunt servanda* or positive good faith action, which would, ideally, penetrate solidarity’s entire temporal range of operation. It seems, then, that these four different elements operate as a foundation, as an encompassing whole, and, as a verification mechanism.

The principle of solidarity thus encompasses all these elements, *ex ante* and *ex post*. As a note for further discussion, it is probably timely to ask whether the joint actions and competences that have been conferred are sufficient to face the contemporary challenges faced by the European Union today. Accordingly, some of the most recent case law of European Union courts may now be read utilising a different perspective.

⁶² Pernice, fn 14 supra p. 43.

Diese Europäische Solidarität gründet sich auf das Eigeninteresse jedes Einzelnen, die gemeinsamen Herausforderungen durch eine gemeinsame Politik durch die gemeinsamen Institutionen und Verfahren der Europäischen Union zu meistern.

The verification or direct application of a principle of solidarity, nevertheless, may be understood as a justification of various unilateral measures that mesh with the overall common objective as enshrined in the treaties. Translated into Sangiovanni's terms in their *ex post* application, they are proportionate to the aim of introducing sub plans that mesh required to tackle significant adversity which are intended to be overcome by the Member States.

1.2.2 A Duty that is Not Coerced yet Open to Coercion

Solidarity as a legal principle, is a Janus-faced principle inasmuch as it is a duty that is not coerced *ex ante*, yet it remains open to coercion *ex post*, through a reinforced principle of proportionality (corresponding to the principle of conferral as well as to the principle of sincere cooperation). Thus, an understanding of solidarity as joint action cannot be complete without an understanding of sub plans that mesh. The individual actions of the Member States towards the joint action are characterised as sub plans. If a joint action could be deemed to be environmental protection, the various national sub plans must be capable of meeting this objective and not undermine it. That is, an individual unilateral sub plan should not be contrary to the shared goal. According to Sangiovanni, such action directed at common goals requires both reciprocal commitment and meshing:

When I coerce you to adopt subplans that mesh with mine, I do not achieve the intended mesh via your reciprocal commitment to the shared goal; I rather bypass it entirely.... Such coercion might be justified, and it might even be justified because you have an (enforceable) obligation to participate (on which more below), but as long as you do not commit yourself and I need to coerce your participation, I cannot be said to act in solidarity with you.⁶³

The key is that the coercion here is designed to “get us to do what we are already committed to doing; its primary aim is not to bypass the other's commitment but to reinforce it”.⁶⁴ But what type of obligations does solidarity entail?

Solidarity can be defined as a principle of duty that is not coerced, yet open to coercion. The view of solidarity as a coherent whole cannot be attained without the existence of a corresponding duty not to undermine it. This is similar to a situation where several nations face flooding from a rising ocean and build dykes which do not connect due to purely internal concerns. Nevertheless, an idea of solidarity as mentioned below does not need to be a forced, unified action.

⁶³ Sangiovanni Joint Action fn 1 supra p. 346. This element will be further analysed infra.

⁶⁴ *Idem*, p. 345

[...] we can still count as acting in solidarity despite our having very different ideas about what is required to achieve our shared goal. If, on the other hand, we have completely non-overlapping ideas about what would count as overcoming racial injustice and oppression, then we cannot act in solidarity because we cannot be said to share a goal in the relevant sense [...] to be acting in solidarity, we need to form an intention that our subplans mesh. Subplans mesh just in case there is a way for each participant to satisfy their subplans that is compatible with achievement of the shared goal. It is important to emphasise that for our subplans to mesh, however, they need not mesh all the way down. If, for example, we realise that your pursuing [a policy] and my pursuing a legislative agenda will end up somehow making [the situation] worse than if we only did one but not the other, then, insofar as we are acting in solidarity, we ought to coordinate our actions to prevent this from happening. But we can still act in solidarity if we each pursue our course of action despite our knowledge that we would do even better by uniting forces.⁶⁵

As noted above, many attempts have already been made to describe the nature and action of the principle of solidarity from a normative and from a legal perspective. Under a more holistic reading, sub plans may be described as follows: Sub plans here, are interpreted as actions translated into individual measures, the decision of the nature of legal remedies, or acts, at the national or regional level within the area covered by shared policy objectives enshrined in the Treaties. It also means that the goal or joint action should be shared in the relevant sense. In the guise of sub plans that mesh, a legal principle of solidarity therefore, has an intrinsic link to the principle of proportionality.

The following attempts to explain how and why that may be the case when the principle is addressed to an objective such as renewable energy promotion. There is a duty within the concept of solidarity for actors not to undermine each other. According to Sangiovanni, this action need not be coerced since the parties and may not coerce others to adopt individual subplans that mesh but coercion may be necessary where obligations are enforceable.⁶⁶ That is, if Member States decide to cooperate, their actions should serve the agreed-upon objective. Nevertheless, they can serve the agreed-upon objective in a variety of ways. The cooperation can be voluntary when possible and mandatory when needed and where so agreed.

2 From Ex Ante Existence towards Ex Post Application of Solidarity

The mandatory requirements do not imply a great deal of discretion as to the nature of the individual sub plans. When, then, must a measure of coercion reinforce the parties' obligations to do what they are primarily committed to without bypassing the operation of others' commitments?⁶⁷ It could perhaps be understood that such coercion is necessary when

⁶⁵ Hauke Brunkhorst, "Solidarity in Times of Crisis: Constitutional Evolution and Europe", in Laitinen & Pessi fn 37 supra pp. 178-238; Hauke Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community* Jeffrey Flynn Trans (Cambridge Mass, The MIT Press, 2005) ("Brunkhorst Civic Friendship").

⁶⁶ Sangiovanni Joint Action fn 1 supra p. 346. This element will be further analysed infra.

⁶⁷ Idem,

the shared goal suffers from discrepancies due to changed intentions or unilateral actions that undermine the goal.

Once a Treaty is signed or a joint action is agreed upon by the parties, there is an indirect application of an *ex ante* coercive element of the principle of solidarity. Applied *ex ante*, this principle has coercive power to the extent that common objectives have been agreed upon and should not be infringed. This variant of the principle of solidarity operates subtly as a form of background coercion reminding us of the commitments following onto the initial intentions.⁶⁸

Solidarity as a legal principle, remains a dual principle inasmuch as it is a duty that is not formally coerced *ex ante*, yet it remains open to coercion *ex post*, through a reinforced principle of proportionality responsive to the principle of conferral as well as to the principle of sincere cooperation. Importantly, both of these principles indirectly assert and entail a duty not to undermine each other. From this theoretical point of departure, we now turn towards a more detailed explanation of the *ex ante* existence and the *ex post* application of solidarity as a legal principle in European Union law. The theory Sangiovanni proposes informs our definition of the *ex ante* and *ex post* aspects of the legal principle of solidarity and mirrors the respect for the obligations within the Treaties and the consequences of such actions.

Bieber points to the provisions relevant to the solidarity existing between the Member States and among the Union, and the Member States as such. It is the latter form of solidarity that takes the most problematic form.⁶⁹ Nevertheless, recent developments demonstrate a need for a different and more nuanced understanding of the principle of solidarity. That would consist of a principle that functions as an overarching legal and normative contract and moral duty. This means going beyond a utilitarian approach where advantage and obligations are scored for each single case. A normative approach should favour a holistic understanding of the essence and meaning of being part of a whole – that the whole is more than the sum of its parts.

⁶⁸ Sangiovanni talks about background coercion at fn 1 supra p. 346

⁶⁹ Bieber fn 3 supra asserts:

Eine ganz anders gelagerte Form der Solidarität im Rahmen der Union betrifft die Ausgestaltung der Beziehungen der Mitgliedstaaten untereinander und zwischen den Mitgliedstaaten und der Union. Solidarität wird insoweit vielfach als Masstab für das Handeln der Union und/oder der Mitgliedstaaten festgelegt. Beispiele der ausdrücklichen Erwähnung in den Verträgen bilden die Art. 21

Abs. 1 EUV (Gemeinsame Aussen- und Sicherheitspolitik), Art. 80 AEUV (Immigration, Asyl, Kontrolle der Außengrenzen); die „Solidaritatsklauseln“ der Arti. 122 Abs. 1 AEUV und 222 AEUV (Hilfe bei Versorgungsproblemen und bei Terroranschlägen) sowie Arti. 194 Abs. 1 AEUV (Energiepolitik). Zur Bezeichnung dieser zwischenstaatlichen Solidarität verwenden die Verträge eine nahezu stereotype Begrifflichkeit (u.a. Art. 122 Abs. 1 AEUV; „im Geiste der Solidarität zwischen Mitgliedstaaten“). (at pp. 72-73.)

2.1 The Ex Ante Existence of the Principle of Solidarity in European Union Law

The general structure of the argumentation here sets out with an explanation of the *ex ante* existence of solidarity, followed by the relevant principles of European Union law, an elaboration of case law and finally an attempt at bridging the theoretical and legal reflections. There is a clear connection between the principle of solidarity and the principle of loyalty as “one of the most evident expressions of the Member States’ commitment to solidarity”⁷⁰ as well as an expression of sincere cooperation which:

corresponds with solidarity in cases where the Member States are to fulfil their obligations arising from EU law, despite the fact that it is against their national interests... In these cases, the Member States have to allow the collective interest of the EU to prevail over their individual interests, and thereby show solidarity with other Member States”.⁷¹

According to Sangiovanni, a disposition for joining together in solidarity, or sharing one another’s fate, are two necessary conditions which can be both motivated and unmotivated, but the actual function of solidarity is as collective action.⁷² The principle of solidarity exists where a coherent commitment needs to be reinforced, or where there is a need to embrace a principle capable of reminding the parties of their commitments and obligations based on the intentions pursued. As noted above, these developments may lead us to areas with their own interpretive perils, but one thing is rapidly becoming clear, the principle of solidarity is permanently enshrined and intertwined with other fundamental treaty objectives.⁷³ This engagement may not be overtly referenced, nor described in exhaustive, or explicit terms by the European Court of Justice. Nevertheless, it exists as a grounding rule of a legal game where other principles fail. As Küçük argues:

The omnipresence of solidarity in the EU legal order makes it difficult to develop a consistent and generally applicable definition of the concept, which paradoxically, makes it even more important to develop a sound understanding of its meaning.⁷⁴

⁷⁰ Küçük fn 12 supra p. 974 (referring to Ross, fn 21 supra ‘p. 42 and Koen Lenaerts and P. Van Nuffel Eds. *European Union Law* (London Sweet & Maxwell, 2011), p. 14 and Marcus Klamert, *The Principle of Loyalty in EU Law*, (Oxford University Press, 2014), p. 40, drawing distinctions between the principles of loyalty and solidarity.)

⁷¹ Küçük fn 12 supra p. 974 (note omitted, referring to Bruno de Witte, “Institutional Principles: A Special Category of General Principles of EC Law”, in *General Principles of European Community Law* Ulf Bernitz and Joakum Nergelius Eds (Alphen aan den Rijn, Kluwer Law International, 2000), p. 153 (“Bernitz and Nergelius General Principals”) and John Temple Lang, “Article 10 EC- The Most Important ‘General Principle’ of Community Law” in *General Principles of EC Law in a Process of Development*, Ulf Bernitz, Joakum Nergelius and Cecilia Cardner in association with Xavier Groussot Eds (Kluwer Law International 2008) p. 75, and Joined Cases 6/69 and 11/69 *Commission v France*, 10 December 1969 ECLI:EU:C:1969:68 (“Cases 6/16 and 11/69 *Commission v France*”).)

⁷² Sangiovanni Joint Action fn 1 supra p. 348

⁷³ See Wellens fn 3 supra

⁷⁴ Küçük fn 12 supra p 967

The main point demonstrating the duality of solidarity in this thesis, is found in the European Union's renewable energy policy, an area particularly associated with the concept.⁷⁵ If joint action is the primary characteristic of solidarity within European Union law, the conferral of competences is another expression of solidarity explaining why common challenges should be met by common actions.⁷⁶

It has been argued that “[s]olidarity operates as a principle to achieve common goals; sometimes it imposes common but differentiated obligations and responsibilities; it encompasses procedural, operational, substantive and normative elements as well as values and legal obligations”.⁷⁷ Thus, the principle of solidarity may be seen as a necessary precondition for the principle of conferral, a positive obligation to achieve common objectives. Obligations remind duty bearers of their mandate to fulfil their respective intentions.⁷⁸

The importance of understanding why solidarity as a legal principle may be an adequate tool to address issues of international cooperation lies in its potential to create a more coherent legal line of argumentation going beyond the conventional view of “sincere cooperation” as just another negative obligation not to harm. Sincere cooperation as a positive moral requirement supplements solidarity as a negative obligation.

Sincere cooperation entails more than just a negative obligation not to undermine the objectives and intentions leading up to a moral commitment.⁷⁹ The principle of sincere cooperation and the principle of conferral may operate together to act as guides towards an *ex ante* understanding of solidarity as a positive obligation.

⁷⁵ Küçük fn 12 supra. 972 where she states:

In the constitutional order of the EU, energy solidarity, however, is not limited to emergencies. It is central to the achievement of the Union's objectives in the area of energy. These objectives – are defined under Article 194 TFEU. The provision requires the Union to attain these objectives 'in a spirit of solidarity between Member States'. The wording of the provision asserts that it is not devised to impose a clear solidarity obligation.

⁷⁶ Pernice, fn 14 supra p. 43.

Diese Europäische Solidarität gründet sich aus das Eigeninteresse jedes Einzelnen, die gemeinsamen Herausforderungen durch eine gemeinsame Politik durch die gemeinsamen Institutionen und Verfahren der Europäische Union zu meistern.

⁷⁷ Kotzur and Schalenback fn. 35 supra p. 72 referring to R Wolfrum, “Solidarity amongst States: An Emerging Structural Principle of Public International Law,” in Dupuy (ed.), *volkerrecht als Weltordnung. Festschrift für Christian Tomuschat*, 2006, pp. 1087 and Wellens, fn 3 supra, pp. 3 at 13 p. 72

⁷⁸ Cf. GA Report A/HRC/26/34 fn. 38 supra

⁷⁹ Sangiovanni Joint Action fn 1 supra and Ronald St. John MacDonald, “The International Community as a Legal Community”, in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Ronald St. John MacDonald and Douglas M. Johnston Eds (Leiden, Martinus Nijhoff Publishers, 2005) (“MacDonald”)

Whereas the principle of conferral can be seen as a necessary condition, an “engine” of solidarity, the principle of sincere cooperation provides its fuel, reinforcing or securing the abstention from harming the objective. Nevertheless, a principle of solidarity is needed to underline the positive obligation of cooperation. If the very first Article of the Treaty on the European Union (TEU) stipulates that “[t]he Member States confer competences to attain objectives they have in common”, those objectives must, *prima facie*, be directly connected to the principle of sincere cooperation of Article 4 (3) TEU, where “Member States are, *inter alia*, to refrain from any measure which could jeopardise the attainment of the Union’s objectives”.

2.1.1 The Principle of Sincere Cooperation in Light of Solidarity as Joint Action

The *ex ante* operation of the principle of solidarity is a necessary tool and guide, for and to, an interpretation of the principle. The more limited view of the principle of solidarity has been focused on a reinforcement for the principle of loyal or sincere cooperation as opposed to a standalone obligation. Accordingly, “... solidarity and loyalty are of (and stem from) the same spirit as found in Article 24 (3) TEU which refers to a ‘spirit of loyalty and mutual solidarity’”.⁸⁰ But why is solidarity distinguishable from the principle of loyalty?

... solidarity is a principle of Union law, and its design once again portrays the Union as being distinct from an international organisation on the one hand and a federal state on the other. Although solidarity among Member States has not been the basis for much judicial activism, it has served to reinforce important legal concepts: the community of law and the principle of loyal co-operation.⁸¹

If the principle of loyalty is perceived in that manner, there is little to distinguish it from the principle of solidarity. That is, solidarity in its simplest form entails that “the parties of a relationship are expected not to pursue their short-term self interests if it means jeopardising the common good”.⁸² We see here, Küçük’s line of argumentation in the course of her reference to the codification of the loyalty principle into Article 4(3) TEU’s principle of sincere cooperation:

As a requirement of the loyalty principle, the Member States are to fulfil their responsibilities under EU law either by taking appropriate measures or by refraining from adopting measures that may jeopardise the attainment of the Union’s objectives. In accordance with the Court’s jurisprudence, the duty of loyalty was later codified to reflect the mutuality of the relationship between the Union and the Member States and rephrased as “the principle of sincere cooperation” under Article 4(3) TEU.⁸³

⁸⁰ Kotzur and Schmalenbach fn 35 supra p. 73 referring to E. Regelsberger/ D. Kugelmann, in Strenz (ed.), EUV/AEUV, 2nd ed. 2012, Art 24 TEU para 8,9 an dunderling that “It is this very interdependence of solidarity and loyalty that makes the Union a *solidagemeinschaft*“. See Peter Häberle and Markus Kotzur *Europäische Verfassungslehre* 7th ed. (Zurich Nomos 2011), p. 709

⁸¹ Bogdandy *Founding Principals* fn 3 supra p. 53(citing cases)

⁸² Küçük fn 12 supra p. 973

⁸³ Küçük fn 12 supra p 973. (Citing Bruno de Witte, ”Institutional Principles: A Special Category of General

In analysing the case law, Küçük further suggests in her interpretation of the case law up through 2009 that the Court doesn't require the weak to help the strong but rather solidarity is aimed at maintaining market stability.⁸⁴

2.1.2 The Principle of Conferral in Light of Solidarity as Joint Action

The concept of solidarity as a principle, dependent upon on a principle of conferral may redefine and reshape each of them in an interdependent manner. A reading of the first article of the Treaty on the European Union in this light thus gains another meaning.

Article 1 of the TEU proclaims that “[t]he Member States confer competences to attain objectives they have in common”. These coinciding interests are then legally translated into the principle of conferral, that is, an agreement amongst Member states to better do together, what cannot be achieved alone. Therefore, the principle of conferral is not made without reason or “*willkürlich hochgezont*” but rather is a pragmatic step to delineate the areas where a common action is needed in order to reach a specific goal.⁸⁵ A first important point is that the concept of solidarity “excludes the possibility of acting in solidarity with those with whom you do not share a goal”.⁸⁶

Thus, although the stepping-stones towards the goal may differ, the goal presupposes within its definition, an actual meaning of a “collectivity”, in which Member States collectively decided when and how to cooperate within this realm and even to confer competences to the Union level to achieve “objectives they have in common”.⁸⁷ The following provides an elaboration of the point in the case law and attempts to understand the relationship between the principle of conferral and the principle of sincere cooperation in light of a principle of solidarity.

These three elements are instrumental to the *ex ante* existence of the principle of solidarity as such, and are not to be seen as independent, free-standing individual principles but rather, as a coherent whole. The existence of solidarity within European Union law can be traced back to the days of the European Coal and Steel Community.⁸⁸ The first reference to solidarity within the case law came from Advocate General Lagrange in 1959.

Principles of EC Law”, in Bernitz and Nergelius General Principals fn 71 supra p. 153

⁸⁴ Küçük fn 12 supra p. 979 (and the cases cited in the footnotes.)

⁸⁵ Pernice fn 14 supra p. 40

⁸⁶ Sangiovanni, Joint Action, fn 1 supra p. 344.

⁸⁷ Article 1 TEU

⁸⁸ Küçük fn 12 supra describes some of the ECSC cases at pp 977-979 of which some of the cases are referred to in this thesis

AG Lagrange extended his 1961 discussion of solidarity subsequently in *Pont-à-Mousson v Haute Autorité*,⁸⁹ arguing that the relief demanded by the appellant steel companies was “incompatible with the principle of solidarity which underlies the Community”.⁹⁰ From this, we may infer that solidarity as a notion began with two elements; its comprehensive application, as well as its underlying and foundational nature. The first actual judgment based upon the principle was *Commission v France*, issued eight years later, emphasising the notion of solidarity’s relationship to Community Obligations when Italy set up its own system for dealing with milk and meat surpluses which interfered with EEC Regulations.⁹¹ In the first cases with Member States as parties (as opposed to those involving the interaction of undertakings with the High Authority), the Court took a concept it had previously applied to undertakings and formulated an application to Member State relations. In *Commission v France*, the Court, for the first time, connected the principle to Article 5 EEC⁹² thereby creating an interpretation of solidarity in the form of a sovereign state obligation. It is interesting to note the implications of this since, that article is imperative with respect to the adaption of unilateral measures that might endanger the objectives of the Treaty. Solidarity, when linked to Article 5 EEC was now, no longer a political notion, but a legal imperative in its own right.

2.2 Solidarity as an Obligation Open to Coercion

It is important to appreciate the European Court of Justice’s initial problem in setting out the principle’s parameters in the first cases under the ECSC and the EEC. The significance of the problem lies in the fact that the Court was formulating an interpretation for the first time. In giving normative form to the concept, the Court took the path of reserving to itself the right to interpret or reinterpret its meaning. Instead of defining solidarity in firm, substantive, legal terms from the outset, the Court has, in its reasoning as to whether or not the action fit within the principle, presented us with a less coherent interpretative lens under which to examine it.

The Court’s approach leaves us with little guidance, a lack of clarity and a lack of legal certainty as to what, precisely solidarity is. It leaves few clues as to whether solidarity

⁸⁹ Opinion of Advocate General Lagrange delivered on 19 October 1959 in Case 14/59 *Société des fonderies de Pont-à-Mousson v High Authority* [1959] ECR 215, 244 (Citing Article 3 ECSC) (“Case 14/59 Opinion”) p. 244

⁹⁰ Opinion of Advocate General Lagrange delivered on 7 June 1961 in Joined cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 *Meroni & Co. and others v High Authority* [1961] Eng Spec Ed 161, 176 (“Meroni Opinion”) p. 176

⁹¹ An extensive overview of the early cases is found in Küçük fn 12 The case represents a situation where a member state infringed a Commission Decision by maintaining a preferential rediscount rate for exports in violation of its obligation under Article 5 ECSC to facilitate the achievement of the Community's aims

⁹² Cases 6 and 11/69 *Commission v France* fn 71 supra paras 16- 17

can stand alone as a principle as such, or whether it is bound to specific joint actions. One tentative explanation of the principle is that solidarity is a concept and a principle that goes beyond a mere interest or balancing of Member States decisions to enact unilateral legal measures that will undermine a common objective. Solidarity therefore remains a principle of duty that is not coerced yet remains open to coercion. That it is not coerced is based on the *ex ante* existence within the Treaties themselves of a principle of solidarity that is constructed from both the principle of conferral and the principle of sincere cooperation.

2.2.1 To Profit from the Advantages of the Community

As next we see, solidarity was developed further into a legal imperative in the course of Member State implementations of secondary legislation and the interpretations of their acts by the Court. The concept of solidarity within European Communities, it should be recalled, was first enunciated years earlier in 1959 in an Opinion by Advocate General Maurice Lagrange in an ECSC case concerning the steel industry, where he opined:

The Court has frequently had occasion to rule that the equalization scheme is based primarily on the solidarity of all consumers ... which implies that its general application must be as comprehensive as possible. There seems to me to be no ground justifying the existence of a legal obligation on the part of the High Authority to grant an exception in this case which the Court has to adjudicate, however special the facts may be in certain respects.⁹³

In a subsequent Opinion (in another case under the ECSC), AG Lagrange summarily dismissed a claim for “special damages” under Article 40 ECSC asserted by an undertaking because it had allegedly been disproportionately harmed by the High Authorities’ administration of an equalization scheme, stating: “[i]n the first place it is incompatible with the principle of solidarity which underlies the Community”.⁹⁴ In the first case where the Court discussed the concept in relation to a Commission infringement action under Article 169 EEC *Commission v Italy* it held:

24. In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the State itself which places itself outside the Community rules.

25. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order.

It appears therefore that, in deliberately refusing to give effect on its territory to one of the systems provided for by Regulations Nos 1975/69 and 2195/69, the Italian Republic has failed in a conspicuous manner to fulfil the obligations which it has assumed by virtue of its adherence to the European Economic Community.⁹⁵

⁹³ Case 14/59 Opinion fn 89 supra (Citing Article 3 ECSC.)

⁹⁴ Meroni Opinion fn 90 supra p 176, here there is a direct connection between proportionality and solidarity

⁹⁵ Case 39/72 *Commission v Italy* 7 February 1973 [1973] ECR 101 paras 24-25.

Here, it appears that the principle of solidarity was seen here as a negative obligation, i.e. not to interfere (abstain from harming). Paragraph 24 also mirrors the positive obligation to respect the rules imposed by the Treaties under Article 5 (1) EEC⁹⁶, as noted by Küçük:

[Solidarity] was initially formulated under Article 5 of the Treaty establishing the European Economic Community and later under Article 10 of the Treaty establishing the European Community, and was designed to ensure the compliance of the Member States with their obligations arising from the Treaties and facilitate the achievement of Union tasks. As a requirement of the loyalty principle, the Member States are to fulfil their responsibilities under EU law either by taking appropriate measures or by refraining from adopting measures that may jeopardize the attainment of the Union's objectives.⁹⁷

That is, in this case, the duty of solidarity was seen as having both positive as well as negative aspects and as crucial to the Community legal order. Nobody should be able to take advantage of those who are complying with the rules. Further, the coercive arm of the Community, now included the coercive aspect of solidarity. This view is particularly noticeable in *Commission v. Italy* where the Court directly refers to Article 169 EEC of the Treaty of Rome.⁹⁸ AG Mayras, in his *Commission v Italy* Opinion, refers to Article 169 EEC as the mechanism for enforcing community interests in the face of inertia or resistance by the Member States.⁹⁹ The gist of this definition of solidarity and its starting point is found in AG Mayras' *Commission v Italy* Opinion:

[The Member State's] failure to act falls within the ambit of Article 169 of the Treaty, the aim of which is to ensure that Community interests prevail in face of the inertia or resistance of the Member States. To decide otherwise would be to disregard the very foundations and aims of the Community, which cannot be attained, as you have held in your judgments, unless the rule the rules laid down by its institutions are applied automatically at the same moment and with identical effects throughout the length and breadth of the Common Market.¹⁰⁰

This, then, is the foundation upon which the Court's jurisprudence on the principle of solidarity was laid. It might also be thought that solidarity as such meant that "the market actors had to give up their short-term interest for the sake of the common good".¹⁰¹ Nevertheless, it is in the guise of a foundational concept of the Community, equally a Member state duty, a solidarity obligation, that the Court proceeds to develop, into the main element of the solidarity principle in its future jurisprudence.

⁹⁶ Küçük fn 12 supra p 974.

⁹⁷ *Idem*.

⁹⁸ Case 39/72 *Commission v Italy* fn 95 supra paras 1 and 9.

⁹⁹ Opinion of Advocate General Mayras delivered on 11 January 1973 in Case 39/72 *Commission v Italy* [1973] ECR 118,124.

¹⁰⁰ *Idem*.

¹⁰¹ Küçük fn 12 supra p. 977 (citing Joined Cases 154, 205, 206, 226–228, 263 and 264/78, 39, 31, 83 and 85/79 *SpA Ferriera Valsabbia and Others v. Commission*, 18 March 1980 [1980] ECR 907 para 59.

2.2.2 The Equilibrium between Advantages and Obligations in Tachographs

The equilibrium between advantages and obligations is a particular aspect of the subsequent *Tachographs* case¹⁰² where a particular understanding of the notion of solidarity was applied (albeit simplified), to harmonised measures within a Community regulation. That is, the Court imposed a *negative obligation* to refrain from unilateral action that might disturb the equilibrium between the advantages and obligations flowing from the adherence to the Community.

Lastly, the failure of respecting the *positive obligation* of a duty of solidarity was deemed to strike at the fundamental basis of the Community legal order. In *Tachographs* the Court held that “[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 to or which it considers contrary to its national interests ...”¹⁰³

As noted by MacDonald, we must keep in mind that the signature and adherence to treaties renders signatories as parties and bearers of the objectives and values enshrined therein.¹⁰⁴ To defeat this, would be to act contrary to the principle of solidarity and a duty thereof, as may be seen in this passage from *Tachographs*:

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.¹⁰⁵

The following will discuss the concept of solidarity *ex post*, the idea that solidarity as a legal principle implies a reinforced proportionality test, and that the Court of Justice has developed through the reinforced proportionality test a tool that bridges the *ex ante* and *ex post* application of a legal principle of solidarity within European Union law.

¹⁰² *Tachographs* fn 7 supra

¹⁰³ *Tachographs* fn 7 supra, para. 9.

¹⁰⁴ MacDonald fn 79 supra.

¹⁰⁵ *Tachographs* fn 7 supra par 12. The *Tachographs* case has been widely used as a point of departure for the principle of solidarity within European Union law, see Calliess Subsidiaritäts fn 3 supra p. 18 (citing and discussing *Tachographs* fn 7 supra para 12.)

3 Ex Post Application of the Legal Principle of Solidarity

Although a reinforced proportionality test does not have a morality claim per se, it paves the way towards a more moral understanding of the law through a reading of solidarity and proportionality in parallel throughout the cases we will now present. We now turn from its *ex ante* existence and influence to its *ex post* application. The elusive question remains, how may a legal principle of solidarity be understood as a legal principle which the judiciary may utilise to balance competing sub plans in order that nation State or Member State action and legal measures, mesh and do not undermine each other in the pursuit of the prior, agreed-upon objective?.¹⁰⁶ Within its function it is the principle of proportionality which remains as the key aide to determining whether or not a principle of solidarity has been infringed.

As such, sub plan meshing comes very close to the way in which the principle of proportionality operates by balancing the acts as being adequate and necessary in order to achieve the objective. And here we should keep Mattias Kumm's view in mind before exploring the relationship between the principle of proportionality and the principle of solidarity as such:

Whenever there is a conflict between a principle and countervailing concerns, the proportionality test provides the criteria to determine which concerns take precedence under the circumstances... The proportionality test provides an analytical structure for assessing whether limits imposed on the realisation of a principle in a particular context are justified.¹⁰⁷

One strand of conceptualizing solidarity as joint action, namely as subplans that mesh, from a legal perspective, comes closer to the understanding of the function of the principle of solidarity within EU law. Restated, the reinforced principle of proportionality is a direct legal translation of subplans that mesh within a theory of solidarity as joint action. These sub plans are measured by the genuine ability, and the effectiveness and certainty of the national measure towards the joint action or aim pursued. E.g. whether the Member States have unilaterally acted towards a common objective in ways that do not undermine it. The decisions of the Member States and whether those are consistent with an understanding of solidarity *ex ante*, influences how the measure or decision is viewed by the European Court of Justice *ex post*. It is within this lens then, that the European Court of Justice places its emphasis on the principle of proportionality. Recall that solidarity is a principle that cannot be coerced; yet it is open to coercion. Solidarity as joint action entails an objective and an

¹⁰⁶ Sangiovanni Joint Action fn 1 supra

¹⁰⁷ Mattias Kumm, "Political Liberalism and the Structure of Rights, in Law, Rights and Discourse", in *The Legal Philosophy of Robert Alexy* p. 131-166, George Pavlakos ed (London Hart Publisher 2007) ("Kumm") at p 137

intention to achieve this objective in common. Nevertheless, the objective itself cannot be enforced as such. It is the sub plans which can define the appropriate form of coercion once the states make the decision to act on a common intention.

Three cases that are of profound interest in that light concern two within the arena of renewable energy promotion and one recent case concerning allocation mechanisms for refugees. The same Advocate General served on all three cases and, it is in his interpretation, as well as in the judgments that we can see reflections of some contours of how the principle of proportionality helps formulate an *ex post* application of the principle of solidarity within European Union law. The interpretive approach used here applies Sangiovanni's analytical framework of solidarity to recent case law.

3.1 Sub Plans that Mesh

More specifically, and as mentioned above, it will apply his notion of sub plans that mesh. Here, the principle of solidarity is manifested as an underlying postulate that serves to evaluate whether or not unilateral Member State actions mesh with regards to the objective pursued.¹⁰⁸ As Sangiovanni posits, however, "to be acting in solidarity, we need to form an intention that our sub plans mesh. Subplans mesh just in case there is a way for each participant to satisfy their subplans that is compatible with achievement of the shared goal".¹⁰⁹ States are not free to construct and connect technically incompatible stations as their contribution to a common telephone system. Several other legal principles also operate in this space, among them, solidarity as an end-neutral or joint action, and tensions with the various instruments available to the Court in its assessment and interpretation of unilateral actions within the bigger whole. That interaction also underlines the necessity of a holistic understanding of a legal principle of solidarity. The promise of a principle of solidarity as a subtle, and perhaps necessary, form of background coercion to remind us of the commitments that follow on the initial intentions.¹¹⁰

The elusive question remains, how a legal principle of solidarity may be understood as a legal principle which the judiciary may utilise to find balance among competing sub plans, where nation State or Member State action and legal measures mesh and do not undermine each other in the pursuit of the prior, agreed-upon objective.

¹⁰⁸ In this sense, the proportionality test translated into the concept of sub plan meshing is closer to Sangiovanni's understanding than that of Bratman's views as Bratman's understanding of sub plan meshing are all open ended, yet with the intention of the action that is most important. See e.g. Bratman *Faces of Intention* fn 1 *supra*

¹⁰⁹ Sangiovanni *Joint Action* fn 1 *supra* p. 345

¹¹⁰ *Idem*

As such, sub plan meshing comes very close to the way in which the principle of proportionality operates. Proportionality analysis standing alone as compared with proportionality as incorporated within an *ex post* application of solidarity, cannot reach the same coherent conclusions or take into consideration the various elements required for a horizontal reading of the Treaties.

While proportionality asks whether the measure is necessary or suitable, solidarity asks whether the measure or decision of the Member State was capable of *undermining* or has undermined other Member States, or the contemplated joint action. That indirectly subsumes the principle of sincere cooperation. The following cases are examples of *background coercion* by the Court. In the following section, two cases will be presented. They serve as a basis for an understanding of the connection between the principle of proportionality and the principle of solidarity within European Union law. The tension between voluntary cooperation and background coercion is the primary conduit informing how the principle of solidarity operates in these cases *ex post* after the unilateral decision of the Member State is examined under the lens of European Union law.

3.2 Example of Cases as Background Coercion Ex Post

This, then raises the further question of whether the Advocate General, in his Opinions has introduced elements of morally informed judgments into the application of rules of European Union law. The promotion of renewable energy has been an important joint action within the European Union. A voluntary cooperation mechanism was set in place in order to provide a mechanism to enhance cooperative action in the field.¹¹¹

The *Ålands Vindkraft* and the *Essent* cases may be seen as examples of the manifestation of one aspect of the principle of solidarity by the measuring stick of the principle of proportionality. Both cases are examples of background coercion by the Court. The promotion of renewable energy has been the subject of an extensive debate on whether the indicative national targets that became mandatory, were or were not, a breach of the principle of conferral since, the caveat in Article 194 (2) TFEU states that Member States retain

¹¹¹ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC OJ 2009 L 140/16 (“Directive 2009/28”)

competence with regards to the choice of their energy mixes.¹¹² In Sangiovanni's terms, Member States need to overcome significant adversity, yet the question remains whether the goal is shared or if Member States individually intend to do their part in achieving this goal.¹¹³

Article 194 TFEU reads:

1. 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, to:

(a) ensure the functioning of the energy market;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; ...

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).¹¹⁴

The legal reasoning of the *Ålands Vindkraft*, Grand Chamber Judgment¹¹⁵ and Opinion,¹¹⁶ and the subsequent Judgment and Opinion in *Essent*¹¹⁷ set the scene for a more theoretical exploration of understanding “the spirit of solidarity” as enshrined within the energy provisions for the promotion of renewable energy and its distribution.¹¹⁸ We will view unilateral actions or territorial limitations as proportionate or legitimate acts towards the object pursued on a European Union level, analysed utilising Sangiovanni's theory on solidarity as joint action. The joint action here is the promotion of renewable energy sources, when specified within secondary legislation is the heart of the reinforced proportionality test expounded by the Court.

¹¹² For more on this topic, see Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford, Oxford University Press, 2013) p.180, where he argues that mandatory renewable energy targets clearly have had a significant effect on the energy mixes which:

... clearly restrict the right of the Member States to decide on their energy mix [...] was adopted under the wrong legal basis, and is therefore in conflict with the Treaty, provided of course that a requirement that approximately half the national electricity production be from renewable energy sources instead of nuclear, coal, natural gas, or other options considered to “significantly affect” the right of a Member State to choose between different sources of energy, ...

¹¹³ Sangiovanni Joint Action fn 1 supra at p. 343

¹¹⁴ Article 194 TFEU (Emphasis added)

¹¹⁵ Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten*, (GC) 1 July 2014, ECLI:EU:C:2014:37 (“Ålands Vindkraft”)

¹¹⁶ Opinion of AG Yves Bot delivered 28 January 2014 in Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* (“Ålands Vindkraft Opinion”) ECLI:EU:C:2014:37

¹¹⁷ Case C- 492/14, *Essent Belgium NV v Vlaams Gewest and Others*, ECLI:EU:C:2016:257 (“Essent”) (Not to be confused with Joined Cases C-204/12 to C-208/12, *Essent Belgium v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, ECLI:EU:C:2014:2192) and Opinion of AG Yves Bot delivered 14 April 2016 in Case C-492/14 *Essent Belgium NV v Vlaams Gewest and Others* ECLI:EU:C:2016:257 (“Essent Opinion”)

¹¹⁸ State aid SA.33995 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users, Brussels 18.12.2013, C (2013) 4424 final, OJ C-37/73

The legal question in *Ålands Vindkraft* was whether or not other Member States had a duty to open up their support schemes to other Member States and whether a territorial restriction on the distribution of renewable energy could be justified. In other words, whether the unilateral action could be held to be proportionate towards the objective pursued, that is whether or not the unilateral measures or sub plans meshed. In the subsequent *Essent* case, the question regarding territorial limitations also posed itself as the legislative changes reserved “distribution solely to generating installations located in the Flemish Region.”¹¹⁹ We will now look at both cases from a perspective of solidarity as joint action.

3.2.1 Ålands Vindkraft AB

In the *Ålands Vindkraft* case, Ålands Vindkraft AB, located in the Finnish archipelago Åland, exported renewable energy to the Swedish mainland. The plaintiff located in Finland couldn't benefit from support from the Swedish certificate scheme on an equal basis with the Swedish national producers since it was not incorporated in Sweden and, as the support scheme had territorial limitations.¹²⁰ According to the Advocate General, *Ålands Vindkraft* presented the Court “with a fresh opportunity to rule on the consistency with EU law of national support schemes for energies produced from renewable energy sources under which the support is reserved to electricity producers located on the national territory”.¹²¹ This led the Advocate General to question whether or not Directive 2009/28 permitted “the establishment of a national support scheme for electricity produced from renewable energy sources ... where that scheme reserves the award of those certificates exclusively to green electricity producers located at the Member State in question”.¹²² It logically followed then, for the AG to ask “whether the territorial restrictions on access to support schemes of green energy are consistent with the requirements of the principle of free movement of goods, or in other words, whether Directive 2009/28 is valid in light of Article 34 TFEU”?¹²³

¹¹⁹ *Essent* Opinion fn 117 supra para. 33 (citing Belgisch Staatsblad, 30 April 2003, p. 23334, the ‘Decision of 4 April 2003’. Flemish Decision Vlaams Decreet Houdende de Organisatie van de Elektriciteitsmarks (Flemish Decree on the organisation of the electricity market) Belgisch Staatsblad, 22 September 200, p. 32166, the Electricity Decree, appealed by Decisions of 28 September 2001, 4 April 2003 and Decision of 5 March 2004.) Article 14 of the Decision was worded as follows:

In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the feed-in of electricity produced by the generating installations connected to the distribution systems in the Flemish region.

¹²⁰ *Ålands Vindkraft* Opinion fn 116 supra para 24. (Referring to the joint scheme as well as the Swedish scheme.)

¹²¹ *Ålands Vindkraft* Opinion fn 116 supra para. 1

¹²² *Idem* *Ålands Vindkraft* fn 115 supra para. 4

¹²³ *Idem*, para. 5

This tension gave rise to a myriad of legal questions as it was unclear whether or not such territorial restrictions were legitimate with regard to the alleged infringement of the free movement of goods.

The Advocate General argued that “whilst Directive 2009/28 aims to promote the use of green energy so that Member States can meet their mandatory targets, it *does not permit* the introduction of discriminatory support schemes, since these would give rise to unlawful restrictions on trade”.¹²⁴ The AG continued, reasoning that his different readings of the Directive presupposed no access to the restrictions in the schemes. He relied here upon the wording of Directive 2009/28, inasmuch as recital 25 of that Directive and its Article 3(3) state that Member States are free to decide whether – and if so, to what extent – they wish to support the production of green electricity in other Member States, and list the cooperation measures, which are optional in nature, to which Member States may have recourse in such cases.¹²⁵

The way in which Member States might choose to cooperate, (which might be seen as the principle of solidarity as joint action), was explicitly outlined within the secondary legislation at issue. Paragraph 1 of Article 11 of the Directive provided: “[w]ithout prejudice to the obligations of Member States under Article 3, two or more Member States may decide, on a voluntary basis, to join or partly coordinate their national support schemes”.

Thus, the intended cooperation was deemed voluntary, not mandatory. It was not coerced, yet it was open to coercion by way of a preliminary ruling by the Court of Justice. In the Swedish scheme, and under Swedish law, the preparatory works referred to the reservation of the green certificates for green energy production and located their nexus of action within Swedish territory. The Advocate General called for a reinforced proportionality test in *Ålands Vindkraft* due to market changes which had exacerbated the conflicts between territorial restrictions and renewable energy promotion. More importantly, none of the parties’ arguments convinced the Advocate General that territorial restrictions were necessary or appropriate for securing the attainment of the objective of environmental protection. He argued instead that:

¹²⁴ *Idem*, para. 38 (Emphasis added.)

¹²⁵ *Idem*, para. 40

... whilst it is easy to accept that green certificate schemes contribute to environmental protection by stimulating the production of green energy, it would, on the other hand, appear somewhat paradoxical to assert that the importation of green energy from other Member States might undermine environmental protection.¹²⁶

Accordingly, he reasoned that the answer lay in the balance provided by a reinforced proportionality test.

I take the view — for the reasons which I set out in *Essent Belgium*, which need not be revisited here — that national legislation constituting a measure having equivalent effect to quantitative restrictions may be justified by the objective of environmental protection even if it is discriminatory, provided, however, that it undergoes a particularly rigorous proportionality test, one which I have referred to as ‘reinforced’.¹²⁷

Significantly, the Court noted the fact that the support schemes at issue were not, and are still not, subject to harmonisation. The Court accordingly, held that the territorial limitations at issue were necessary, “... since, in particular, EU law has not harmonised the national support schemes for green electricity, it is possible in principle for Member States to limit access to such schemes to green electricity production located in their own territory”.¹²⁸

The Court further observed that these “... specifications confirm that the EU legislature did not intend to require Member States who opted for a support scheme using green certificates to extend that scheme to cover green electricity produced on the territory of another Member State.”¹²⁹ This pointed to the Court’s interpretation of Article 3(3) of the Directive as, in specific circumstances permitting territorial restrictions.¹³⁰ The *Ålands Vindkraft* Court distinguished the other unharmonized markets in the Union:

... it should be noted at the outset that, far from seeking to bring about exhaustive harmonisation of national support schemes for green energy production, the EU legislature – as is apparent, inter alia, from recital 25 to Directive 2009/28 – based its approach on the finding that Member States apply different support schemes in order to maintain investor confidence and to enable those States to define effective national measures in order to achieve their mandatory national overall targets under the directive.¹³¹

The Court clearly did not accept the AG’s interpretation of legalisation’s non-discrimination provisions. Instead, it held that secondary legislation “... prohibits any discrimination as regards either rights or obligations of electricity undertakings [including] the obligation of Member States to ensure that there is no discrimination in relation to access to distribution

¹²⁶ *Ålands Vindkraft* Opinion fn 116 supra para. 93

¹²⁷ *Ålands Vindkraft* Opinion fn. 116 supra para. 76

¹²⁸ *Ålands Vindkraft* fn. 115 supra para. 94

¹²⁹ *Ålands Vindkraft* fn.115 supra para. 53

¹³⁰ *Ålands Vindkraft* fn. 115 supra para. 54

¹³¹ *Ålands Vindkraft* fn 115 supra para 59.

systems and to the conditions, in particular the tariff conditions, governing such access”.¹³² Pointedly the AG had quoted recital 25 of Directive 2009/28 in support of his argument:

Member States have different renewable energy potentials and operate different schemes of support for [green] energy ... at the national level. The majority of Member States apply support schemes that grant benefits solely to [green] energy that is produced on their territory. For the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. ... it is essential that Member States are able to determine if and to what extent their national support schemes apply to [green] energy ... produced in other Member States and to agree on this by applying the cooperation mechanism provided for in this Directive.¹³³

Thus, it appears that in *Ålands Vindkraft* the Court saw that solidarity as a legal principle might in such a case, justify the enactment of an array of legal measures as well as the interpretation of the territory benefitting from environmental protection. Renewable energy is a policy area, bridging boundaries between the environmental and energy policies of the European Union. Within the tension between territoriality and non-discrimination, lies the concept of *subplans that mesh* as will be shown through two cases *infra*.¹³⁴ *Ålands Vindkraft* thus is one example of a case dealing with this rather difficult question, yet its substance related primarily to whether or not the Member States were obliged to open their support schemes for importing renewable energy into their territory within an internal electricity market.

3.2.2 Essent

The request for the preliminary ruling in *Essent* did not concern Directive 2009/28 but rather, its close relative, Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in electricity. Specifically, the issue was raised by Member state rules reserving the benefit of the free distribution of green energy to green energy fed directly into the distribution system within the Flemish Region and the other areas of which the region forms a part. The AG’s Opinion relied on *Ålands Vindkraft* where “... the Court allowed the benefit of national support schemes for the production of green electricity... to be limited solely to the production of green electricity in the Member State concerned.”¹³⁵ However, as the Court noted in its judgment, there had been a gradual progression within the internal energy market towards liberalization of the market, the priority of feeding renewable energies into the grid as well as free third-party access, from

¹³² *Essent* fn 117 supra para. 47

¹³³ Recital 25 of the Preamble to Directive 2009/28 fn 111 supra as quoted in *Ålands Vindkraft* Opinion fn 116 supra para 10

¹³⁴ *Ålands Vindkraft* fn 115 supra and *Essent* fn 117 supra

¹³⁵ *Essent* Opinion fn 117 para 3

the time when Ålands Vindkraft had been decided.¹³⁶ The question therefore became whether the reasoning of Ålands Vindkraft could be applied to the facts of the Essent case.¹³⁷

The Court distilled an appropriate treatment to give to conflicting policies encompassing differences between territorial restrictions on the distribution system, restrictions within the support schemes out of its assessment of different situations within the field of renewable energy. It distinguished the two situations and concluding that they should be treated differently. Since the CJEU found the infringement at issue in Ålands Vindkraft permissible, the question now arose as to where that line would be crossed.

Essent, the subsequent case, demonstrates a situation where a Member State exceeded the bounds of discretion and required a reassessment and clarification of the Ålands Vindkraft reinforced proportionality test. Essent was, in many ways, a call for a demonstration of the reinforced principle of proportionality. In *Essent*, legislative changes reserved “distribution solely to generating installations located in the Flemish Region.”¹³⁸

The appellant company Essent argued that, as a result of these legislative changes, it had suffered damage from loss of the benefits of the free distribution of distribution within the Flemish region.¹³⁹ Could there be any justification for such discrimination?¹⁴⁰

Referring to the Ålands Vindkraft case, the Advocate General opined, somewhat in contrast to his previous Opinion in Ålands Vindkraft, that: “... it is possible to infer that the Court accepts that discriminatory national measures may be justified by the objective of environmental protection, subject to the condition that they comply with the principle of

¹³⁶ Essent fn 117 supra para. 76:

[I]t must be borne in mind that the open third party access to transmission and distribution systems ... constitutes one of the essential measures which the Member States are required to implement in order to bring about the completion of the internal market in electricity...

¹³⁷ Essent fn 117 supra para 85

¹³⁸ Essent Opinion fn 117 supra para. 33 (citing Belgisch Staatsblad, 30 April 2003, p. 23334, the ‘Decision of 4 April 2003’. Flemish Decision Vlaams Decreet Houdende de Organisatie van de Elektriciteitsmarks (Flemish Decree on the organisation of the electricity market) Belgisch Staatsblad, 22 September 200, p. 32166, the Electricity Decree, appealed by Decisions of 28 September 2001, 4 April 2003 and Decision of 5 March 2004.) Article 14 was worded as follows:

In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the feed-in of electricity produced by the generating installations connected to the distribution systems in the Flemish region.

¹³⁹ Essent Opinion fn 117 supra para. 40 (Footnote omitted.)

¹⁴⁰ Essent Opinion fn 117 supra, para. 65 where the Advocate General argued that “[a] phenomenon whereby discrimination is concealed emerges clearly from the case-law, although the process that is at play in reaching that result is shrouded in a certain degree of mystery.”

proportionality”.¹⁴¹ That is, the joint action here was required to entail measures or sub plans that mesh. In contrast to *Ålands Vindkraft* however, the *Essent* case concerned rules reserving the benefit of the free distribution of green energy solely to green energy fed directly into the distribution system within the Flemish Region and the other areas of which this region forms a part.

The Advocate General’s Opinion relied once more on *Ålands Vindkraft* where “... the Court allowed the benefit of national support schemes for the production of green electricity ... to be limited solely to the production of green electricity in the Member State concerned.”¹⁴² Taking one step back, and reminding the reader of the objective of the national legislation, the Advocate General argued that it was “necessary to ascertain whether the national legislation at issue in the main proceedings [was] appropriate for ensuring the objective of environmental protection ... and whether or not it [went] beyond what [was] necessary in order to achieve that objective”. That question goes right to the heart of the proportionality test, in other words the balancing of the various national schemes (or sub plans) towards the common objective (or the joint action). The development of the renewable energy promotion framework and particularly the development within the internal electricity market had wrought significant changes to the legal landscape since the last battle. Whereas in *Ålands Vindkraft* it was possible to limit access to the schemes, the territorial limitation free distribution as seen in a case with territorial restrictions did not provide a rationale giving direct support to producers.

3.2.3 A Reinforced Proportionality Test

The question then in *Essent* became whether the reasoning from *Ålands Vindkraft* could or could not be applied. While in *Ålands Vindkraft* it was possible to limit access to the schemes, the territorial limitation free distribution as seen in a case with territorial restrictions, that iteration of a reinforced proportionality test could not provide a rationale for situations where the legislation provided direct financial support to producers.

Thus, the *Essent* Court expanded its proportionality analysis, extending it to encompass unilateral action in respect of the territorial limitations, in question. The introduction of another element into the renewable energy debate, namely its distribution, was the key to the decision. Now, the *Essent* Court, two years after *Ålands Vindkraft*, and with the same

¹⁴¹ *Essent* Opinion fn 117 supra para. 71. Within this argumentation, the author reminds the reader that AG Bot called for a reinforced proportionality test in the *Ålands Vindkraft* case. See fn 115 supra

¹⁴² *Essent* Opinion fn 117 supra para. 3

Advocate General, expounded a reinforced proportionality test, which seemingly upset the principles the Grand Chamber had just established.

AG Bot did not see any reason for a change, especially so soon after the Ålands Vindkraft decision, although the Advocate General did not subscribe to its reasoning. In *Essent* the Advocate General did not see how territorial limitations could be viewed as differently situated in the distribution and support of the promotion of renewable energies, arguing that “[h]aving already had the opportunity to set out the reasons why such territorial limitations on support schemes do not seem to me to be compatible with the free movement of goods, ... I shall not mount to a rear-guard action, although I do not find the Courts reasoning in those judgments to be persuasive”.¹⁴³

The *Essent* Court however, found it necessary to add several new criteria to the mix, namely the criteria of genuine ability, effectiveness and the certainty of the measure:

... it must be concluded that the genuine ability of that scheme to achieve the legitimate objective pursued in the present case, which is to create an incentive for operators to produce more green electricity notwithstanding the additional costs of production, thus contributing to the Member State’s achievement of the indicative production targets imposed on them under [the Directive] has not been established.¹⁴⁴

The *Essent* Court also added a requirement for a triple-fulfilment criterion, consisting of an assessment of the unilateral action’s genuine ability, certainty and effectiveness. Genuine ability, and certain and effective way, were also criteria applied by the Court to the various unilateral sub plans to measure whether or not they mesh:

On account of that indirect, uncertain and risky nature, and given that there were, moreover, other methods – such as, for example, the grant of green certificates – which do contribute in a certain and effective way to the pursuit of the objective of increasing green electricity production, notably without undermining the introduction of third-party free access to distribution systems on terms that are non-discriminatory, as provided for [in the Directive] it must be concluded that regional legislation such as that at issue in the main proceedings does not satisfy the requirements arising under the principle of proportionality, and that the interference with that free access and with the free movement of goods which it entails cannot, therefore, be justified by that objective.¹⁴⁵

The legal reasoning of the Grand Chamber Judgment and Opinion in *Ålands Vindkraft* as well the Judgment and the Opinion in *Essent* sets the scene for a more theoretical exploration and understanding of “the spirit of solidarity” as enshrined within the energy provisions related to

¹⁴³ *Essent* Opinion fn 117 supra, para. 4

¹⁴⁴ *Essent* fn 117 supra para 115.

¹⁴⁵ *Essent* fn 117 supra para 116.

the promotion of renewable energy and its distribution.¹⁴⁶ The sub plans in this section are the national renewable energy policies that are influenced by the joint actions agreed upon at the European Union level. In its line of interpretation, the European Court of Justice holds that these national energy policies must not contravene the shared goals. In order to do so, the background coercion by the Court consists of a reminder to the Member States of the agreed-upon objective. The background coercion of the joint action runs through an examination of the various sub plans of the Member states in general, filtered through a proportionality analysis. The enhanced or reinforced proportionality test is therefore a measure that may set out in detail, how the Court interprets the various national sub plans against the intention pursued.

4 The Importance of Solidarity in the Future Architecture of European Union Law

The discussions above have focused on explaining the current legal debate with regard to solidarity as a legal principle, the possible explanations from a theoretical standpoint as well as from a case law perspective. This debate is important as it seems that the existing principles cannot adequately incorporate the requisite flexibility of interpretation necessary for the current challenges faced within the European Union legal order. Solidarity might become solely a justiciable principle bearing its main elements as a reminder of the obligations enshrined within the Treaties.

Nevertheless, this is also where solidarity as a justiciable principle reaches its limits. Without the member states' political will not to undermine each other or alternatively to better define the joint action, a legal principle of solidarity would then only be of a legal interpretative nature. Yet, the necessity of defining this principle in case law and in European Union law, particularly with regard to primary law, could ease the interpretative perils European Union law now faces. Knowing what solidarity is and knowing what solidarity does as a legal principle is of utmost importance for the future European legal construct. Without directly elaborating its application or function, the European Court of Justice has underlined that the principle of solidarity exists not only as a peripheral argumentation but at the "root of the Community's legal order".¹⁴⁷

¹⁴⁶ See e.g. State aid SA.33995 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users, Brussels 18.12.2013, C (2013) 4424 final, OJ C-37/73

¹⁴⁷ Tachographs case fn 7 supra

The final part of this thesis will provide a line of argumentation where the fine line between a reinforced principle of proportionality and solidarity is to be found, the necessity of finding a principle of solidarity is underlined and finally some perspectives of these elements as a whole with regards to the future of European integration. It is this line of thought that should be brought to bear in legal reasoning. Other principles of European Union law do not cease to apply yet it is important to have a holistic perspective on the way in which they may interact with a legal principle of solidarity that could, in the future, be useful to the Court's adjudication of tensions with these other principles. The next section will explain the fine line between solidarity and proportionality, the necessity of solidarity as a legal principle in European Union law

4.1 The Fine Line Between a Reinforced Principle of Proportionality and Solidarity

The elements of sub plans that mesh may complicate the understanding of solidarity as joint action but they are, nonetheless useful, if the principle of proportionality is to be taken into account *ex post*.¹⁴⁸ According to Sangiovanni, “to be acting in solidarity, we need to form an intention that our sub plans mesh. Subplans mesh just in case there is a way for each participant to satisfy their subplans that is compatible with achievement of the shared goal”.¹⁴⁹ The reinforced principle of proportionality could therefore be interpreted as a direct legal manifestation of subplans that mesh as measured by the genuine ability of, and effectiveness and certainty of the national measure towards the joint action i.e. whether the Member States have unilaterally acted towards the common objective in ways that do not undermine it.

It appears that the Court has already seen that solidarity as a legal principle may in some cases be deemed necessary to justify enactment of an array of legal measures as well as the interpretation of the way in which a joint action should be achieved. To reach an explicit understanding of the principle of solidarity, a line of interpretation consisting of examining the intent not to undermine each other, and the importance of sub plans that mesh is useful to outline how the legal principle of solidarity is to function.¹⁵⁰

As Sangiovanni argues, there is not necessarily a contradiction between upholding one goal and upholding divergent interests, and here the conditions and relations between the actors are key so that “as long as we are not actively undermining our shared goal or each other, there is

¹⁴⁸ Bratman Faces of Intention, fn. 1 supra

¹⁴⁹ Sangiovanni Joint Action fn 1 supra, p. 345

¹⁵⁰ See Macdonald fn 79 supra

no need to sacrifice our other, non-convergent goals for the maximal realisation of the shared goal”.¹⁵¹ Let us revise the criteria for solidarity as joint action before proceeding to a recent judgment that highlights the connection between the principle of proportionality and the principle of solidarity even more than the energy cases. The intention to promote renewable energy both in production and in distribution was apparent in both cases. Nevertheless, the interpretation of the sub plans towards the intended joint action was different. In the first case, the European Court of Justice deemed that the sub plans keeping territorial limitations did not harm the intention to promote the use of renewable energy sources, as the cooperation was voluntary. This voluntary cooperation was stipulated as a joint action in secondary legislation and left no doubt as to whether or not the Member States could decide to limit their support schemes to the national territory if not in a voluntary cooperation. In the second case, the sub plans of territorial limitation harmed the intention of a functioning internal electricity market and the agreement not to discriminate was through secondary legislation mandatory. The Advocate General’s Opinion in the first case, arguing that the sub plans did not mesh to the agreed intention is nevertheless convincing. From this point, the reinforced proportionality test was launched in order to ensure that a stricter line of interpretation was followed in cases where there was doubt as to whether or not the national sub plans could or could not harm the joint action.

In *Ålands Vindkraft*, the direct response to these conflicting norms of duty and objective was a call for, and the construction of, a reinforced proportionality test.¹⁵² In my opinion, this reinforced proportionality test should be viewed through the twin lenses of additional layers of genuine ability, and the degree of certainty and effectiveness of the measures in question, so as to identify when and where those unilateral subplans mesh. This case may represent one of the first legal manifestations of the “invisible” spirit of solidarity within the energy provisions.

There, one strand of solidarity as joint action, namely the subplans that mesh, from a legal perspective, comes closer to an understanding of a working definition of the principle of solidarity within EU law. Referring to primary law, the finalisation of the internal electricity

¹⁵¹ Sangiovanni Joint Action, fn 1 supra p. 345

¹⁵² Yves Bot’s proposed a reinforced proportionality test in his *Ålands Vindkraft* Opinion, fn 116 supra para. 79: I take the view — for the reasons which I set out in *Essent Belgium*, which need not be revisited here — that national legislation constituting a measure having equivalent effect to quantitative restrictions may be justified by the objective of environmental protection even if it is discriminatory, provided, however, that it undergoes a particularly rigorous proportionality test, one which I have referred to as ‘reinforced’.

market as joint action is now “ensured” and has entailed several prohibitions on territorial limitations, namely those related to third party non-discriminatory access to the grids as well as a protection of the mandatory relocation mechanisms. Thus, sub plans were required to mesh on all levels. The absence of harmonising measures in specific secondary legislation has created a space where non-discrimination has found less traction. Here we find that the criteria of genuine ability to achieve the objective (certain and effective way) defined and refined the way in which sub-plans (unilateral action) meshed with the overall legitimate objective, through a reinforced proportionality test interpreting the various sub plans related to the objective pursued.¹⁵³ E.g. whether or not Member States have unilaterally acted towards the common objective in ways that do not undermine it. By opening up the understanding of the principle to this kind of interpretation, and by meshing both the political and legal justifications, the Court’s jurisprudence now stands at a point where the collective good aimed to be achieved is no longer justified solely on a purely on a balancing basis but requires additional moral underpinning and argumentation. This substitution of compatibility over competence reminds us of the way in which unilateral action in such a case may not permit a Member State to apply, in an incomplete or selective manner, provisions of Community legislation so as to render them nugatory.¹⁵⁴ A reinforced principle of proportionality is insufficient to enhance the both the legal certainty and the morality of European Union law. The next section, discusses the necessity of the discovery of a principle of solidarity.

4.2 The Necessity of a Legal Principle of Solidarity in European Union Law

The principle of proportionality be it simple or reinforced provides the equity value necessary for a properly functioning principle of solidarity. Proportionality in such case may be an excellent tool to measure the rights of the parties. Nevertheless, it does a poor job when it comes to measuring obligations or the morality of the claims.¹⁵⁵ Proportionality only determines the existence of an infringement of a right and then balances that finding of infringement against the objective pursued. As such, it cannot claim that someone ought to act positively but is rather an after-the-fact reaction. Further, proportionality is more neutral than a legal principle of solidarity. It does not necessarily underline the importance of duty bearers, but instead attempts a balance between various objectives. As argued by Kai Möller:

¹⁵³ Sangiovanni Joint Action, fn 1 supra p. 15

¹⁵⁴ Tachographs fn 7 supra

¹⁵⁵ For this, see Kai Möller *Dworkin's Theory of Rights in the Age of Proportionality* LSE Leg Stud WP no 11/2017 (2017) Forthcoming in *12 L & Ethics of Human Rights*. Available at SSRN: <https://ssrn.com/abstract=2981003> (“Möller”)

...the doctrine does not give any indication as to its moral foundation – which is illustrated by the fact that its most famous theoretical account, namely Robert Alexy’s theory of rights as principles and optimisation requirements, is a *formal* theory – while offering a structure that has proven to be so useful that it has become the globally dominant tool of rights adjudication.¹⁵⁶

Kai Möller continues, observing that the “proportionality-based strand of rights discourse” has to be nuanced, leaving a place for other principles that entail obligations. Solidarity is such a principle. The following, quite recent case provides a good illustration of how solidarity enriches the principle of proportionality. Although it is not a case concerning renewable energy legislation, it gives a broader and deeper understanding to solidarity as a principle of European Union law. The case is closely related to the fourth criteria of solidarity, namely whether or not the Member States are disposed to share one another’s fates in ways relevant to the shared goal. The situation was explained by the Advocate General and a firmer manifestation of solidarity was achieved through the Court’s reaction to his interpretation.

*Slovak Republic and Hungary v. Council of the European Union*¹⁵⁷ was a Grand Chamber Judgment rendered 6 September 2017, with an Opinion by Advocate General Yves Bot delivered 26 July 2017. The case revolved around the Slovak Republic and Hungary’s votes against adoption of a decision of the Council adopted by qualified majority in respect of the immigration crises.¹⁵⁸ That decision was adopted on the basis of Article 78 (3) TFEU which provides that:

in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of national of third countries, the Council, on a proposal from the [European Commission], may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.¹⁵⁹

The contested decision as to which the Slovak Republic and Hungary sought annulment was a decision adopted “in order to deal with [the] migration crisis and the pressure which it placed on the asylum regimes in the Italian Republic and the Hellenic Republic”.¹⁶⁰

¹⁵⁶ Möller fn 155 p. 2

¹⁵⁷ Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (GC) 6 September 2017 ECLI:EU:C:2017:618 (“Slovakia and Hungary v Council”)

¹⁵⁸ Opinion Slovakia and Hungary v Council fn 8 supra

¹⁵⁹ Opinion Slovakia and Hungary v Council fn 8 supra para. 2

¹⁶⁰ Opinion Slovakia and Hungary v Council fn 8 supra para. 4 referring to Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures on the area of international protection for the benefit of Italy and Greece

The AG argued that the decision represented “an expression of solidarity which the Treaty envisages between Member States”.¹⁶¹ According to the Advocate General, the case required a call for solidarity:

The present action provides me with an opportunity to recall that solidarity is among the cardinal values of the Union and is even among the foundations of the Union. How would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation? I am referring here to the quintessence of what is both the *raison d'être* and the objective of the European project.¹⁶²

While the AG asserted that solidarity was a “founding and existential value of the Union”¹⁶³, he also identified solidarity as “a set of values and principles that constitutes ‘the bedrock of the European construction’”.¹⁶⁴ Nevertheless, that begged the question of whether solidarity is a principle not to be coerced yet a principle that is open to coercion:

The particular feature of the contested decision is that it establishes a relocation mechanism on the basis of allocations assigned to Member States which are binding in nature. With that decision, solidarity between Member States has a specific content and a binding nature. That essential and innovative characteristic of the decision explains the politically sensitive nature of the present cases, since it has crystallised the opposition on the part of Member States which advocate freely consented solidarity based solely on voluntary commitments.¹⁶⁵

Here is a case where mandatory relocation mechanisms were at the heart of the legal issue. Both Member States argued that the contested decision breached the principle of proportionality.¹⁶⁶ The Advocate General maintained that the decision did not breach any of the elements in the proportionality test, such as the appropriateness of the measure for attaining the legitimate objective pursued (or the joint action) and that the decision did not exceed the limits of what was necessary in order to achieve those objectives.¹⁶⁷ He viewed the relationship between solidarity and proportionality as quite settled:

While it is clear to me that the appropriateness [principle of proportionality] of the contested decision for attaining the objective which it pursues cannot be disputed by the applicants on the basis of its weakness of its application or of its ineffectiveness in practice ... one thing which come to my mind is indisputable,

¹⁶¹ Opinion Slovakia and Hungary v Council fn 8 supra para. 16

¹⁶² Opinion Slovakia and Hungary v Council fn 8 supra para. 17

¹⁶³ Opinion Slovakia and Hungary v Council fn 8 supra para. 18

¹⁶⁴ Opinion Slovakia and Hungary v Council fn 8 supra para. 19 referring Favreau, B., ‘La Charte des droits fondamentaux: pourquoi et comment?’, *La Charte des droits fondamentaux de l’Union européenne après le traité de Lisbonne*, Bruylant, Brussels, 2010, pp. 3 to 38, in particular p. 13. See also Bieber, R., and Maiani, F., ‘Sans solidarité point d’Union européenne, Regards croisés sur les crises de l’Union économique et monétaire et du Système européen commun d’asile’, *Revue trimestrielle de droit européen*, Dalloz, Paris, 2012, p. 295.

For a collection of contributions relating to the principle of solidarity, see Boutayeb, C., *La solidarité dans l’Union européenne – Éléments constitutionnels et matériels*, Dalloz, Paris, 2011.

¹⁶⁵ Opinion Slovakia and Hungary v Council fn 8 supra para. 23

¹⁶⁶ Opinion Slovakia and Hungary v Council fn 8 supra para. 218

¹⁶⁷ Opinion Slovakia and Hungary v Council fn 8 supra paras. 219-318

namely that the decision can succeed in resolving the emergency situation that justified its adoption only on condition that all the Member States, in the spirit of solidarity as that which constitutes the *raison d'être*, make an effort to implement it.¹⁶⁸

It should be borne in mind, in that regard, that the non-application of the contested decision also constitutes a breach of the obligation concerning solidarity and the fair sharing of burdens expressed in Article 80 TFEU. To my mind here there is no doubt that, in an action for failure to fulfil obligations on this matter, the Court would be entitled to remind the offending Member States of their obligations, and to do so in no uncertain terms, as it has done in the past.¹⁶⁹

It does not seem coincidental that the judgments referred indirectly to the reasoning of the Court of Justice in *Tachographs* on this point. That is an indication that according to the AG, *Tachographs'* line of interpretation holds continued vitality. It is also important for our purposes, as it navigates the space between the *ex ante* existence and *ex post* application of the principle of solidarity within European Union law as such.

The following passage from the AG's Opinion also finds a parallel between the principle of solidarity and mandatory Treaty requirements, as the previous cases within the area of renewable energy had shown:

... the assertion, which to a large extent crystallises the opposition to the contested decision shown by certain Member States, that the objective pursued by that decision ought to have been achieved solely by means of voluntary commitments on the part of the Member States to receive a certain number of applicants does not bear scrutiny. The genesis of the contested decision shows that it was because consensus could not be reached between all Member States on a voluntary distribution among them of the applicants for international protection that it was decided to opt for a mandatory relocation mechanism, that is to say, one based on binding quantitative allocations¹⁷⁰

The AG's observation, that mandatory and quantitative quotas take precedence over Member state voluntary distributions because those were insufficient, might just as well apply to the promotion of renewable energy sources. There, indicative targets were indicative, cooperation is voluntary, yet with the immense challenge of climate change and the difficulties involved in administering a European energy policy, we may well find the same line of interpretation appropriate. The Court of Justice in that judgment rejected the Member States allegations of a breach of the principle of proportionality.¹⁷¹ Nonetheless it does not explicitly mention a

¹⁶⁸ Opinion Slovakia and Hungary v Council fn 8 supra para. 241 my comment

¹⁶⁹ Opinion Slovakia and Hungary v Council fn 8 supra para. 242 citing judgment of 7 February 1973, *Commission v Italy* (39/72, fn 95 supra):

“where the Court held that, ‘in permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before [Union] law and creates discriminations 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 fundamental basis of the [Union] legal order’ (paragraphs 24 and 25). See also judgment of 7 February 1979, *Commission v United Kingdom* (128/78, EU:C:1979:32, paragraph 12)

¹⁷⁰ Opinion Slovakia and Hungary v Council fn 8 supra para. 259

¹⁷¹ Slovakia and Hungary v Council fn 157 supra paras. 206-310

reinforced principle of proportionality and does not refer in any manner to the requirement of genuine ability.¹⁷² Although the cases examined here come from two different policy areas, it is rather interesting to see that solidarity and proportionality were linked in order to aid in the Court's interpretation. The Court of Justice refers implicitly to solidarity as enshrined in *Slovakia and Hungary v Council*¹⁷³ but also more explicitly:

As regards Hungary's complaint that the contested decision does not include criteria for determining which is the Member State of relocation, it must be recalled that, as is made clear in recital 2 of the decision and as has been stated, *inter alia*, in paragraphs 253 and 291 to 293 of the present judgment, the decision took account of Article 80 TFEU, which applies when the European Union's asylum policy is implemented and, in particular, when provisional measures based on Article 78(3) TFEU are adopted and from which it follows that the determination of the Member State of relocation must be based on criteria related to solidarity and fair sharing of responsibility between the Member States.¹⁷⁴

As stated there, solidarity is not to be coerced yet it is open to coercion. The challenge remains for solidarity to be understood as a legal principle entailing both obligations and not merely "rights."¹⁷⁵ Mattias Kumm stresses the importance of proportionality balancing i.e. "... how proportionality is connected to the idea of rights and how it actually operates as a test to assess the limits of rights".¹⁷⁶ Yet, the limits of obligations are also tested through this balancing as well as the scope of the obligations. The principle of proportionality goes to the heart of the *ex post* application of solidarity underlining the obligation of the Member State. The meshing of the sub plans is closely related, but not identical to the commitment or claim "not to bypass each other's will". This is what could be translated into action by a theory of proportionality where a reinforced proportionality test has been introduced *ex post*.

According to AG Maduro, "the principle of proportionality entails a consideration of the costs and benefits of a measure enacted by a Member State in the light of the different interest which Community rules deem worthy of protection".¹⁷⁷ This leads us to the final part of the thesis, namely a future outlook on a legal principle of solidarity bearing on the future of European integration.

¹⁷² See the discussions concerning the *Essent* case section 3.2.2 *supra*

¹⁷³ *Slovakia and Hungary v Council* fn 157 *supra* para. 2

¹⁷⁴ *Slovakia and Hungary v Council* fn 157 *supra* para. 329

¹⁷⁵ Case 26/62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* 5 February 1963 [1963] ECR Spec Eng Ed 1, 12 ("Van Gend & Loos").

...Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

¹⁷⁶ Kumm, fn. 107 *supra*, p. 136

¹⁷⁷ Opinion of AG Madaras delivered 13 June 2006 in Case C-434/04 *Ahokainen and Leppik v Virallinen syyttäjä* [2006] ECR I-9173 ("Ahoikainen Opinion") para 23

4.3 Finding Solidarity in the European Union Future Legal Framework

Even though the Court has still not set out a clear normative definition of solidarity it may now have waltzed around it sufficiently that Member States have a better idea of the dance steps. Sangiovanni underlines that cooperation or acting in solidarity should not be easily upset or deflected.¹⁷⁸ Nevertheless, the current challenges faced within the European Union calls for a restatement or renewal.

Proportionality alone seems to be an inadequate test to evaluate Member States' inherent moral obligations to European Union law as signatories of the treaties as well as for matters where mandatory obligations are jeopardised by unilateral action. That may also echo the plea or warning issued by the Advocate General in the Ahoikainen case where "... another crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project".¹⁷⁹ Solidarity is, by far, one of the most frequently mentioned notions within the Treaties. Nevertheless, without a legally binding or guiding definition of the principle, much of the glue holding European Union member states together is at risk of coming unstuck. Whether or not a Member State has acted in solidarity is therefore determined by an arbiter, the Court, by reference to whether or not the unilateral Member state action does or does not contribute to what has already been agreed upon to be "jointly achieved" as the principle of proportionality acts as a sub-set, overseeing the principle of solidarity when seen as joint action. It is important to note that solidarity is more than the sum of its parts, that it is separate and separable from the sum of the individual interests:

[a]fter pointing out that the concept of 'solidarity' is not defined anywhere in the Treaties, those authors observe that 'the Treaties confer on that concept a scope that varies according to the context — sometimes an objective or parameter for EU action, sometimes a basic value, sometimes a criterion of the obligations to which the Member States have subscribed by acceding to the European Union. The common denominator that links those various emanations of solidarity in the context of the European Union is the recognition of the existence of a "common interest", separate from and separable from the sum of the individual interests.¹⁸⁰

¹⁷⁸ Sangiovanni Joint Action fn. 1 supra, p. 346

¹⁷⁹ Ahoikainen Opinion fn 177 supra para. 24 referring to Labayle, S., op. cit.:

who observes, in regard to the discrepancies which have appeared between Member States in the management of that migration crisis, that while it is necessary to 'be wary of any tendency to dramatise, ... nonetheless the fear of the danger that the work patiently built up over more than half a century will disintegrate cannot be ignored. Such a gradual undermining of the foundations threatens the entire edifice and reinforces the need for absolute vigilance with respect to the matter. Failure by its own Member States to respect the founding principles of the Union introduces a potential factor of the disintegration of elements which are essential to its continuity and to the logic of its functioning" (point 1 182, p. 477). See also Chassin, C.-A., 'La crise des migrants: l'Europe à la croisée des chemins', *Revue Europe*, No 3, LexisNexis, 2016, pp. 15 to 21, in particular point 43, p. 21, which states that 'the migrant crisis is ... a human crisis, but also a moral crisis, for the European Union: beyond the short-term answers, it underlines the fragility of the European construction'.

¹⁸⁰ Opinion Slovakia and Hungary v Council fn 8 supra para. 19 referring Favreau, B., 'La Charte des droits fondamentaux: pourquoi et comment?', *La Charte des droits fondamentaux de l'Union européenne après le*

This paragraph is worth quoting as it includes the gist of what solidarity as a principle entails. Mindful of the fact that the concept varies according to context, it is the latter that has been the focus of this thesis.

The focus has been to perceive solidarity not merely as a criterion but rather as a principle of the obligations to which the Member States have subscribed by acceding to the Union. From this stem both the *ex ante* existence as well as the *ex post* application of solidarity. The ways in which the Court interprets and integrates solidarity within the cases referred to and interfaces it with the other general principles of EU law should take on greater importance. Here, it is extremely useful to examine the reception of a principle based on morality within the current legal transnational legal (dis)order.¹⁸¹ There has to be a community, an international community to which we owe solidarity, not to the other States but to a “higher order”.¹⁸²

There has, perhaps, now been a redirection or renewal with regard to conceiving the principle of solidarity and that of proportionality through an assessment of voluntary cooperation mechanisms.

That is, if sub plans do not mesh in order to achieve the objective, the proportionality test has, through application of the principle of solidarity, rendered national measures mandatory in order to counterbalance the lack of such commitments from the Member States themselves. Solidarity as joint action thus defined requires a double-layered understanding of the law in intersecting with other principles as well as an understanding of a newfound solidarity test that incorporates an extended interpretation of proportionality by adding morality to its claim.

traité de Lisbonne, Bruylant, Brussels, 2010, pp. 3 to 38, in particular p. 13. See also Bieber, R., and Maiani, F., ‘Sans solidarité point d’Union européenne, Regards croisés sur les crises de l’Union économique et monétaire et du Système européen commun d’asile’, *Revue trimestrielle de droit européen*, Dalloz, Paris, 2012, p. 295.

For a collection of contributions relating to the principle of solidarity, see Boutayeb, C., *La solidarité dans l’Union européenne—Éléments constitutionnels et matériels*, Dalloz, Paris, 2011.

¹⁸¹ See the quotation in Tuori, fn 32 supra (Adding that the proposed master principles of law does not bring order to the disorder. *Idem*, at p. 24)

¹⁸² Comments by Brun-Otto Bryde in the discussion following the presentation by Karel Wellens in Wellens fn 3 supra p. 53

Conclusion

When examined from a broader perspective, the principle of solidarity in European Union law is found to entail three dimensions. First, it is a positive obligation to achieve the aims set forth. Second, it is a negative obligation to not to undermine the objectives set forth. Third, it is a supplement to the proportionality test to add a moral claim to the Court's balancing act. Nonetheless, without a proper definition or understanding of its legal and moral properties, the European Union risks losing itself in a maze of confusion among its most fundamental concepts, principles and bases of legal argumentation. Without such an attempt, the concept of solidarity risks becoming a vague or even nugatory principle within the Treaties without a clear and useable definition – thus threatening an expression of the very foundation upon which the Union was built. A different perspective on solidarity as a legal principle within European Union law needs to be found. A renewed search for its meaning, interpretation and implications is vital to the future European Union legal architecture. Thus, a truncated understanding of where solidarity applies and how it is applied by the Court leaves a gap with too high a cost which risks undermining the European integration project as a whole.

Solidarity is an essential element incorporating both the will to jointly achieve common objectives as well as Member State loyalty to the adherence to the shared objectives of the Union. The thesis has set out a description of the conceptual framework of current academic debates with respect to a legal principle of solidarity within European Union law. After framing the theoretical basis of a theory of solidarity as joint action as coined by Andreas Sangiovanni, the thesis attempts to show how solidarity should be understood temporally in both its *ex ante* existence through the principles of conferral and sincere cooperation, and additionally in its application *ex post* where a reinforced principle of proportionality leads us towards an understanding of a workable solidarity test. Accordingly, the thesis has made an attempt to provide a more nuanced perspective to explain why solidarity is related to, but albeit different from other legal principles when applied separately. These principles operate in concert and, in concert are essential for the forming of an understanding of solidarity. Recent developments within European Union case law are a real-world demonstration that a morality/ethics based claimed based of a solidarity principle may be usefully incorporated into the Court's "toolbox" to ensure that in the interpretation and application of the Treaties the law is observed.

This thesis has made distinction between the *ex ante* existence and the *ex post* application of solidarity to provide a tool for distinguishing between the two temporal dimensions of Member State action. The *ex ante* existence of solidarity represents a promise of cooperation *ex ante* through the principle of conferral and sincere cooperation. The *ex post* existence of solidarity is the judicial evaluation of whether or not the promise has been kept. This thesis proposes to contribute to European Union law scholarship by assessing whether a more ambitious, holistic claim may be made towards and interpretation of the principle of solidarity could be made.

The tendency has been to use the proportionality test as a firm line of legal argumentation. Nevertheless, the balancing of whether measures are proportionate gives scholars and practitioners alike little insight into the moral claims connected to European integration. Searching for solidarity as a legal argument, and finding its application is therefore of utmost importance. A legal line of interpretation for a principle of solidarity in European Union law may help both the Member States, the Court of Justice and the European Union itself out of the current circular discourse on the proportionality of these measures. It may also become a reminder of both positive and negative obligations flowing from the adherence to the Treaties. It is more than fair to say that the European Union has been experiencing a crisis of fate. During this crisis, several important moral and legal questions have come to the fore.

The necessity of redefining and framing an interpretation of a legal principle of solidarity is not only timely, it is necessary. Its moral connotations remind signatories of the Treaties within the European Union that what is expected of their cooperation is more than creation of a market, that there should be a balance between the advantages and obligations, and finally that the time could be ripe for a reorientation and perhaps a rewriting of the framework as a whole. An inconsistent notion of what solidarity as a legal principle actually entails and how it operates, risks weakening the legal architecture and moral foundation of the Lisbon treaty and of its *acquis*. The rediscovery of values and principles is a fragile undertaking fraught with its own interpretive perils. Nevertheless, claims to their normative superiority have a rather uncertain and inadequately explained content. European Union law may inspire and assist scholars and practitioners alike in their understanding of the principle of solidarity. This thesis suggests the possibility of a more coherent framing of solidarity as a legal principle in European Union law.

This approach may assist legal scholarship in moving forward to build upon existing literature within the field and integrate a more holistic model of the legal principle of solidarity in European Union law based on a theory defining solidarity as joint action. The latter may better reflect the various legal correlates that together define this principle both *ex ante* and *ex post*.

First, the existence of solidarity as a legal principle *ex ante* could be interpreted an intersection between the principle of sincere cooperation and the principle of conferral. Second, the application of the principle of solidarity *ex post* draws a reinforced principle of proportionality that balances the unilateral actions towards the aim to be achieved. Nevertheless, there is no moral claim to this balancing and thus the Court interacts with a second reminder of the principle of solidarity as such – adding a different layer to the proportionality test.

Solidarity functions as a legitimate reminder of the obligations set forth within the Treaties incorporating the principle of sincere cooperation as well as a reinforced principle of proportionality. Thus, the important question that has been asked and answered is whether we are currently witnessing a shift from a strict test of proportionality towards a separate test of solidarity within the European legal landscape. A reinforced principle of proportionality is an added value in the tool box of the European Court of Justice, without an explicit mention of the moral connotations of a principle of solidarity. This indirectly creates a bridge to a wider interpretation of a legal principle of solidarity in European Union law. Not only does the emerging form of reinforced principle of proportionality add more elements to the proportionality test used by the Court. There are currently glimpses in case law indicating the developing a new reading of the legal principle of solidarity– perhaps not unlike the developments seen in the creation of the principle of direct effect and primacy in that historical period. In this light, the proposed interpretation of a legal principle of solidarity is best explained in conjunction with the theory of solidarity as joint action as coined by Andrea Sangiovanni.

To reach for a legal definition of solidarity that cannot be morally or politically effectuated is a matter of concern. One cannot create solidarity through law. However, the Court of Justice should be able to make morally informed judgements and clarify what solidarity within the legal construct should entail.

In doing so, the Court is interpreting the treaties without being falsely accused of being an activist Court. Nevertheless, such morally informed judgements and interpretations may not resonate if the political will or legitimacy behind such decisions are weak. However, as a matter of its judicial role the Court should clarify what European Union law is and in particular what a principle of solidarity does. The important problem to be solved is to separate what solidarity as a principle can do from what it actually is. If solidarity is a principle not to be coerced but open to coercion, it functions as a legitimate reminder of the Treaty obligations set forth that incorporate both the principle of sincere cooperation as well as the principle of proportionality. A development of this nature for the interpretation of European Union law may also be problematic. There are clear boundary issues to this principle as a legal notion of which one must be made aware. Solidarity as a principle of European Union law does not mean a complete harmonisation of various measures but rather an examination of whether these measures do not undermine the objective set forth.

It is in that sense that we should understand solidarity as a legal principle. These, more subtle distinctions can no longer be ignored and their development in the case law should be closely followed. The fact remains that the European Union is more than the sum of its parts. It is not always the case that a satisfying cost benefit calculation can be made, that what is lost automatically will be gained, that advantages always outnumber obligations. Solidarity is currently making a spectacular emergence as a separate legal principle of European Union law. Its role is not only to serve as a reminder of the moral obligations European integration entails but also to soften an approach that has too-long been based on calculations of advantages without regard of the burdens of obligation adherence to the Treaties may entail. As such, the following serves as a basis for the interpretation of solidarity as a legal principle in this thesis. A test of solidarity has been gestated and born through the interpretative lenses of the European Court of Justice.

Bibliography

Treaties and Reports

Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140 ("ECSC") Expired by its terms 23 July 2002.

Treaty establishing the European Economic Community, signed in Rome 25 March 1957, in force 1 January 1958 298 U.N.T.S. 11 ("EEC")

Single European Act, Signed in Luxembourg and the Hague 17 February 1986, in effect 1 July 1987 O.J. L 169 1, 25 I.L.M. 506

Treaty on European Union signed in Maastricht 29 February 1992, in Force 1 November 1993 ("TEU") (renaming the EEC the European Community ("EC"), 1992 O.J. C 191/ 1, 31 I.L.M. 253

Treaty of Amsterdam Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, 1997 O.J. (C340) 1, 37 I.L.M. 253

Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 26 February 2001, 2001 O.J. 2001 C 80/1

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, in force 1 December 2009, 2007 O.J. C 306/1. Consisting of a Treaty on European Union ("TEU") and a Treaty on the Functioning of the European Union ("TFEU")

GA/71/280 Human rights and international solidarity Note by the Secretary General transmitting the Report of the Independent Expert 3 August 2016 ("GA/71/280")

United Nations General Assembly Human Rights Council 26th Sess. Report of the Independent Expert on human rights and international solidarity A/HRC/26/34, 1 April 2014 (and Addendum I) ("GA Report A/HRC/26/34") point 29. Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ListReports.aspx>. (Last visit 4 July 2017.)

Cases

Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:618

Opinion of AG Bot delivered on 26 July 2017 in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:618

Case C-379/98 *PreussenElektra, AG Schleswig AG and Windpark Reußenköge III GmbH v Land Schleswig-Holstein*, 13 March 2001 [2001] ECR I-2099

Case 250/84 *Eridania v. Cassa Conguaglio Zucchero*, EU:C:1986:22

Case 26/62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* 5 February 1963 [1963] ECR Spec Eng Ed 1 (“van Gend & Loos”; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) 20 February 1979 [1979] ECR 649.

Cases C-370/12 *Pringle v Ireland* (Full Court) 27 November 2012 ECLI:EU:C:2012:756 and C-62/14 *Gauweiler and Others v Deutscher Bundestag* (GC) 16 June 2015.) ECLI:EU:C:2015:400.)

Opinion of Mr Advocate General Lagrange delivered on 19 October 1959 in Case 14/59 *Société des fonderies de Pont-à-Mousson v High Authority* [1959] ECR 215, 244

Opinion of Mr Advocate General Lagrange delivered on 7 June 1961 in Joined cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 *Meroni & Co. and others v High Authority* [1961] Eng Spec Ed 161, 176

Case 39/72 *Commission v Italy* 7 February 1973 [1973] ECR 101 paras 24-25.

Opinion of Mr Advocate General Mayras delivered on 11 January 1973 in Case 39/72 *Commission v Italy* [1973] ECR 118,124.

Joined Cases 154, 205, 206, 226–228, 263 and 264/78, 39, 31, 83 and 85/79 *SpA Ferriera Valsabbia and Others v. Commission*, 18 March 1980 [1980] ECR 907

Case C-128/78 *Commission v UK*, 7 February 1979 (“Tachographs”) ECR [1979] 419

Joined Cases 6 and 11/69 *Commission v France* 10 December 1969 [1969] ECR 525

Opinion of AG Yves Bot delivered 14 April 2016 in Case C-492/14 *Essent Belgium NV v Vlaams Gewest and Others* ECLI:EU:C:2016:257 (“Essent Opinion”) para 61.

Opinion of AG Yves Bot delivered 28 January 2014 in Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* (“Ålands Vindkraft Opinion”) ECLI:EU:C:2014:37 para 24. (Referring to the joint scheme as well as the Swedish scheme.)

Case C-309-02 *Radlberger Getränkegesellschaft mbH & Co., and S. Spitz KG v Land Baden-Württemberg*, 14 December 2004 (GC) ECR 2004 I-11763 para 53 (and the case law cited therein.)

Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten*, (GC) 1 July 2014, ECLI:EU:C:2014:37 (“Ålands Vindkraft”) para 59.

Case C- 492/14, *Essent Belgium NV v Vlaams Gewest and Others*, ECLI:EU:C:2016:257 (“Essent”)

State aid SA.33995 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users, Brussels 18.12.2013, C (2013) 4424 final, OJ C-37/73

Case T-450/12 *Alexios Anagnostakis v Commission*, ECLI:EU:T:2015:739

Opinion of AG Maduras delivered 13 June 2006 in Case C-434/04 *Ahokainen and Leppik v Virallinen syyttäjä* [2006] ECR I-9173 (“Ahoikainen Opinion”)

Books and articles

Alexy, R. *On balancing and subsumtion. A Structural Comparison** 16 Ratio Juris 436 (2003)

Barnard, C. “Solidarity and the Commission’s ‘Renewed Social Agenda’” (“Barnard”) in *Promoting Solidarity in the European Union* Malcom Ross and Yuri Borgman-Prebil Eds (Oxford, Oxford University Press, 2010)

Beatty, D. *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2014)

Bieber, R. "Gegenseitige Verantwortung – Grundlage des Verfassungsprinzips der Solidarität in der Europäischen Union" in Calliess

Bratman, M.E, *Faces of Intention: Selected Essays on Intention and Agency (Cambridge Studies in Philosophy)* (Cambridge, Cambridge University Press, 1999) (“Bratman Faces of Intention”)

Brunkhorst, H. “Solidarity in Times of Crisis: Constitutional Evolution and Europe”, in Laitinen and Pessi

Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community* Jeffrey Flynn Trans (Cambridge Mass, The MIT Press, 2005)

Bogdandy, A von. "Founding Principles" (Bogdandy Founding Principles”) in *Principles of European Constitutional Law* 2d revised Armin von Bogdandy and Jurgen Bast Eds (Oxford Hart Publishing Ltd 2011)

Calliess, C. *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* 2d ed (Nomos, Baden Baden, 1999)

Calliess, C. *Europäische Solidarität und nationale Identität Überlegungen im Kontext der Krise im Euroraum* Christian Calliess Ed (Tübingen, Mohr Siebeck 2013)

Derpmann, S. “Moral Recognition and Communality”, in Laitinen and Anne Birgitta Pessi

Duguit, L. *Traité de droit constitutionnel* (2. Aufl. Bd. 3, 1923)

Fontanelli, F. *The Essent judgment: Another revolution in the case law on free movement of goods?* in Blog EU Law Analysis, 19 September 2014, at <http://eulawanalysis.blogspot.it/2014/09/the-essent-judgment-another-revolution.html> (last accessed 12 May 2016.)

Fuller, Lon . L. *The Morality of Law* Rev. Ed 35th Printing (New Haven, Yale University Press 1969)

Häberle, P. and Kotzur, M. *Europäische Verfassungslehre* 7th ed. (Zurich Nomos 2011),
Häberle, P. *Öffentliches Interesse als juristisches Problem* (Berliner Wissenschafts-Verlag, 2. Auflage 2006)

Klamert, M. *The Principle of Loyalty in EU Law*, (Oxford University Press, 2014)

Kotzur, M.T. and Schmalenbach K, *Solidarity Among Nations*, *Archiv des Völkerrechts*, Bd. 52, S. 68-91, Mohr Siebeck 2014, DOI 10.1628/000389214X14056754359545

Knudsen, T.B. *International Society and International Solidarity: Recapturing the Solidarist Origins of the English School* Paper presented at workshop International Relations in Europe: Concepts, Schools and Institutions, 28th Joint Sessions of Workshops of the European Consortium for Political Research, 14-19 April 2000, Copenhagen, Denmark, available at <https://ecpr.eu/Events/PaperDetails.aspx?PaperID=15134&EventID=46> (last accessed 21 February 2017)

Küçük, E. *Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?* 23 *Maastricht J of Eur and Comp L* 966 (2016)

Kumm, M. "Political Liberalism and the Structure of Rights, in Law, Rights and Discourse", in *The Legal Philosophy of Robert Alexy* p. 137 131-166, George Pavlakos ed (London Hart Publisher 2007)

Laitinen, A. and Pessi A.B, *Solidarity Theory and Practice* Arto Laitinen and Anne Birgitta Pessi Eds (New York, Lexington Books 2014)

Lang, J.T. "Article 10 EC- The Most Important 'General Principle' of Community Law" in *General Principles of EC Law in a Process of Development*, Ulf Bernitz, Joakum Nergelius and Cecilia Cardner in association with Xavier Groussot Eds (Kluwer Law International 2008)

Lenaerts and P. Van Nuffel Eds. *European Union Law* (London Sweet & Maxwell, 2011)

Pernice, I. "Solidarität in Europa – Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union" in Calliess

Rigaux, F. *Hans Kelsen on International Law* 9 *EJIL* 325 (1998)

Ross, M. "Solidarity - A New Constitutional Paradigm for the EU?" ("Ross") in Ross and Prebil

Sangiovanni, A. "Solidarity in the European Union: Problems and Prospects" ("Sangiovanni Problems and Prospects") (2012) in *The Philosophical Foundations of European Union Law*, Julie Dickson and Pavlos Eleftheriadis, Eds (Oxford, Oxford University Press, 2012)

Sangiovanni, A. *Solidarity as Joint Action* 32 *J of Applied Phil* p 340 (2015.) ("Sangiovanni Joint Action".) Available at doi:10.1111/japp.12130

- St. John MacDonald, R. “The International Community as a Legal Community”, in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Ronald St. John MacDonald and Douglas M. Johnston Eds (Leiden, Martinus Nijhoff Publishers, 2005)
- Sternberg, C.S. *The Struggle for EU Legitimacy: Public Contestation, 1950-2005*. Palgrave Studies in European Politics, (London Palgrave Macmillan, 2013)
- Somek, A. *Kelsen Lives* 18 EJIL 409 (2007)
- Supiot, A. *La Solidarité : Enquête sur un principe juridique* (Paris Odile Jacob 2015)
- Talus, K. *EU Energy Law and Policy: A Critical Account* (Oxford, Oxford University Press, 2013)
- Teymoori, A., Bastian B., and Jetten, J. *Towards a Psychological Analysis of Anomie* (November 2016) Political Psychology doi:10.1111/pops.12377
- Tusseau, G. “Theoretical Deflation: The EU Order of Competences and Power-Confering Norms Theory” in *The Question of Competence in the European Union*, Azoulai, Loïc Ed (Oxford, Oxford University Press 2014)
- Tuori, K. “Transnational Law: On Legal Hybrids and Perspectivism” in *Transnational Law: Rethinking European Law and Legal Thinking* Miguel Maduro, Kaarlo Tuori and Suvi Sankari Eds, (Cambridge, Cambridge University Press, 2014)
- Villapando, S. *L'émergence de la communauté internationale dans la responsabilité des Etats* (Geneva Graduate Institutions Publications 2005)
- Wellens, K. “Revisiting Solidarity as a (Re-) Emerging Constitutional Principle: Some Further Reflections”, in *Solidarity: A Structural Principle of International Law* Rudiger Wolfrum and Chie Kojima Eds (Heidelberg Springer 2010)
- Winter, S.L. *A Clearing in the Forest: Law, Life, and Mind* (Chicago University of Chicago Press 2001).
- Witte, B de. ”Institutional Principles: A Special Category of General Principles of EC Law’, in *General Principles of European Community Law* Ulf Bernitz and Joakum Nergelius Eds (Alphen aan den Rijn, Kluwer Law International, 2000)
- Witte, F de. *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford Studies in European Law (Oxford, Oxford University Press, 2014)
- Wolfrum, R. “Solidarity amongst States: An Emerging Structural Principle of Public International Law,” in Dupuy (ed.), *volkerrecht als Weltordnung. Festschrift fur Christian Tomuschat*, 2006