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APPLYING SOLIDARITY AS A PROCEDURAL OBLIGATION IN EU CITIZENSHIP LAW

Niamh Nic Shuibhne [*]

Abstract: Building on recent EU case law, which underlines that a commitment to solidarity in the European context produces concrete legal obligations, this paper highlights that solidarity has procedural as well as normative and substantive dimensions. It then explores the potential of procedural solidarity in the context of Union citizenship and, more specifically, the free movement of Union citizens. The overall objective is to consider if the conception of solidarity as a procedural obligation under EU law can provide fresh ways to think about persisting challenges around freedom of movement. Procedural solidarity emphasises the fair sharing of responsibility, including financial responsibility, when implementing EU objectives and the taking of decisions collectively, respecting the general requirements of EU law. Fundamentally, while adherence to procedural solidarity might not produce significantly different outcomes in contested areas of EU citizenship law, it would strengthen the decision-making processes that deliver those outcomes, cultivating, in turn, better accountability for the choices made by both EU and national institutions.

Keywords: solidarity, Union citizenship, free movement, procedural solidarity.

'The key question is whether solidarity has the status of a legal principle and, if it does, what its nature and scope are. The alternative would be for that concept to have a purely symbolic value with no prescriptive force'.[1]

1 Introduction

Already in the Schuman Declaration of 9 May 1950, it was appreciated that 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity'.[2] Now, in Article 2 of the Treaty on European Union (TEU), solidarity

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[1] Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:218, Opinion of AG Campos Sánchez-Bordona, para 63.

[2] Schuman Declaration May 1950 <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en>. AG Sharpston has observed that '[t]hat statement found an echo in the third recital to the Treaty establishing the European Coal and Steel Community – ECSC Treaty (the precursor to the EEC Treaty, of which the present TEU and TFEU are direct descendants), which spoke expressly of "recognising that Europe can be built only through practical achievements which will first of

is described as one of the principles that 'prevails' when the common values on which the European Union is 'founded' are respected (Article 2 TEU).[3] The substantive and normative significance of solidarity is widely discussed in EU scholarship, both generally[4] and for the free movement of Union citizens more specifically:[5] in essence, substantively, what does an EU legislative provision or a ruling of the Court of Justice tell us about how much solidarity we can detect in EU citizenship law; and does that reflect, more normatively, the degree of solidarity that we would wish to see there (which is necessarily a contested standard)?

Fundamentally, then, solidarity requires us to ask how much we do – and how much we should – care about the Member State nationals who cross borders because they have been conferred not only with a legal permission but with a legal right to do so. In that sense, solidarity contributes both an origin story and a continuing benchmark of assessment for the development of free movement law. But reflecting on solidarity from both substantive and normative perspectives can also feel futile: taking us either too far, towards conceiving a free movement system that has no political chance of actually being realised; or not far enough, towards conceding that the free movement law framework cannot be progressed or improved because there is simply not enough *de facto* solidarity in the fabric of Member State relations to achieve that. Thus, to build on normative and substantive conceptions of solidarity in EU citizenship law as well as developments in other areas of EU law underlining that a commitment to solidarity in the European context produces concrete legal implications, this paper explores instead the procedural dimensions of solidarity and considers the potential of that idea for resolving some persistent tensions within EU law on the free movement of Union citizens.

The paper first underlines the legal nature of solidarity in the Treaties and in foundational EU case law (Section 2) before showing how generalisable legal obligations have been developed in two main areas of EU activity more recently: immigration and energy (Section 3). In these fields, solidarity has

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all create real solidarity, and through the establishment of common bases for economic development'" (Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Czech Republic and Hungary* ECLI:EU:C:2019:917, Opinion of AG Sharpston, para 247).

[3] Article 2 TEU provides that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

[4] For a range of perspectives and reflections on concepts, contexts, and models of solidarity in EU law, see G de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2009); F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015); and A Sangiovanni 'Solidarity in the European Union' (2013) 3 Oxford Journal of Legal Studies 213.

[5] Eg M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing 2005); M Everson, 'A Citizenship in Movement' (2014) 15 German Law Journal 965; S Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy' in H Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2018) 75; A Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 European Law Review 787; D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017); and H Verschueren, 'EU Free Movement of Persons and Member States' Solidarity Systems: Searching for a Balance' in E Guild and PE Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill 2011) 47.

been engaged to reinforce the importance of *collective responsibility* and *fair responsibility-sharing* as obligations of EU law. After framing that approach as procedural solidarity, the paper then applies it to two intensively debated examples from the free movement of Union citizens (Section 4): situations where welfare entitlement across borders is ruled out, which concerns the vulnerability of those who move; and contentions that freedom of movement is experienced unevenly by the Member States, which highlights the vulnerability of free movement law in a more systemic sense.

While adherence to procedural solidarity might not produce significantly different outcomes in contested areas of EU citizenship law, its emphasis on collective action and fair responsibility-sharing does hold some potential to take us beyond the poles of futility noted above. Above all, procedural solidarity strengthens the decision-making processes that deliver outcomes, cultivating, at least, clearer ownership of and better accountability for the choices made by both EU and national institutions. However, it is also acknowledged that procedural solidarity will only ever take things so far. The legal implications of solidarity flow from a more profound commitment – and perhaps, therefore, require a recommitment – to being in something together; to recognising that a legal space that promises freedom of movement represents a goal rooted in the common good. In that sense, two related provisos underlie the assessment that follows. First, the difficult questions that we must confront are *created by* the practice, the system, and the objectives of free movement: and we cannot create something and then just walk away from or try to ignore its implications. Second, Union citizenship and freedom of movement remain objectives *agreed to* by – not forced or imposed on – the European Union and its Member States. That is also why solidarity's procedural accenting of the fair sharing of responsibility and of coordinated as opposed to unilateral responses really matters. In essence, it reorients the debate from burden to choice.

2 Solidarity as a procedural principle of EU law: early foundations

Solidarity has been vividly described as the 'lifeblood of the European project'.[6] It is also, more prosaically, woven into the EU legal order.

First, solidarity frames several Treaty provisions addressing Union specific policies. For example, in its relations with the wider world, Article 3(5) TEU requires the Union to contribute to 'solidarity and mutual respect among peoples'.[7] There are also specific manifestations of both the spirit and the mechanics of solidarity in Articles 122(1) and 194(1) TFEU (energy) and in Article 222 TFEU, which is commonly referred to as the Union's 'solidarity

[6] Opinion of AG Sharpston (n 2) para 253.

[7] That objective is elaborated in Article 21(1) TEU, which establishes that '[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. Additionally, Article 24 TEU frames the Common Foreign and Security Policy in terms of 'mutual political solidarity' (Articles 24(2) and 24(3)) and 'a spirit of loyalty and mutual solidarity' (Article 24(3)) for the Member States' relationships both with each other and with the Union. See also Articles 31(1) and 32 TEU.

clause'.[8] Solidarity also features prominently in the Area of Freedom, Security and Justice (AFSJ). Article 67(2) TFEU requires that ensuring 'the absence of internal border controls for persons' and instituting 'a common policy on asylum, immigration and external border control' shall be '*based on* solidarity between Member States'. This provision builds on the significance of solidarity in political programmes that shaped, over time, the objectives and competences now codified in Title V TFEU.[9] Article 80 TFEU further states that both AFSJ policies and their implementation 'shall be *governed by* the principle of solidarity and *fair sharing of responsibility, including its financial implications*, between the Member States' and that, '[w]henever necessary, the Union acts pursuant to this Chapter shall contain appropriate measures to *give effect to* this principle'. While acknowledging that specific expressions of solidarity in cognate policy fields are in some respects distinctive and context-dependent, reading across them does already start to suggest criteria that illuminate solidarity as a more generalised principle of EU law, notably as regards *cooperative responses to challenges* and the *fair sharing of responsibility*, ideas that have strong salience for the free movement of Union citizens too.

Second, the case law of the Court of Justice shows that, alongside its potent rhetorical magnetism, solidarity produces concrete obligations in EU law. The case law history is uneven: solidarity's legal qualities were very clearly articulated in early rulings of the Court yet developed further only much more recently. Those developments are returned to in Section 3 below, but the origins of solidarity's legal qualities are first set out here.

In early case law, in order to embed the distinctive EU system established in *Van Gend en Loos* and *Costa v ENEL*,[10] the Court rejected a decentralised approach to the enforcement of Community obligations, emphasising instead that 'the basic concept of the Treaty requires that the Member States shall not take the law into their own hands'.[11] That idea was

[8] Article 222(1) requires the Union and the Member States to 'act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster' mandates the Union to 'mobilise all the instruments at its disposal, including the military resources made available by the Member States' in certain circumstances, ie to '(a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster'. See also, Declaration 37 on Article 222 TFEU: '[w]ithout prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State. Article 222(2) establishes an obligation to assist a Member State in such circumstances 'at the request of its political authorities'.

[9] Eg on the importance of solidarity and mutual trust for the Schengen area, see Case C-680/17 *Vethanayagam and Others* ECLI:EU:C:2019:278, Opinion of AG Sharpston, para 38. On the different shapes that solidarity takes across the functioning of the AFSJ, see A Meloni, 'EU Visa Policy: What Kind of Solidarity?' (2017) 24 Maastricht Journal of European and Comparative Law 646. However, in common with solidarity and free movement law, the *absence* of (sufficient) solidarity is also problematic in the AFSJ: see eg Case C-213/17 *X* ECLI:EU:C:2018:434, Opinion of AG Bot, paras 99–100.

[10] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1962 :42 (establishing the direct effect of EU law); Case 6/64 *Costa* v *ENEL* ECLI:EU :C :1964 :66 (establishing the primacy of EU law).

[11] Joined Cases 90 and 91/63 *Commission v Luxembourg and Belgium* ECLI:EU:C:1964:80.

further developed in *Commission v Italy*, with explicit categorisation of solidarity as a 'duty':

> 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. 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.[12]

In *Eridania zuccherifici nazionali*, the Court extended solidarity as a horizontal obligation, finding that it can justify distribution mechanisms in EU legal acts addressed to private actors.[13]

It is notable that, in the rulings summarised above, solidarity was conceived not only as a 'duty' under EU law but one that is 'accepted by' the Member States. An important contrast was therefore drawn between a State acting 'unilaterally' based on 'its own conception of national interest', on the one hand, and an 'equilibrium between advantages and obligations flowing from its adherence to the [Union]', on the other. To give effect to that idea, mechanisms that ensured that the Member States did act collectively therefore already suggested a procedural dimension to solidarity: the Court not only 'made it clear that the principle of solidarity necessarily sometimes implies accepting burden-sharing'[14] but also affirmed the validity of Community mechanisms set up to give effect to that obligation. Thus, irrespective of outcome, in other words, the process of collective decision-making is itself solidarity-tuned in more procedural terms.

3 Solidarity as a procedural principle of EU law: recent innovations

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[12] Case 39/72 *Commission v Italy* ECLI:EU:C:1973:13, paras 24–25 (emphasis added); confirmed in Case 128/78 *Commission v United Kingdom* ECLI:EU:C:1979:32, para 12.

[13] Case 250/84 *Eridania zuccherifici nazionali and Others* ECLI:EU:C:1986:22, para 20 ('the Council was justified in dividing the quotas between the individual undertakings on the basis of their actual production […] [S]uch a distribution of the burden is […] consistent with the principle of solidarity between producers, since production is a legitimate criterion for assessing the economic strength of producers and the benefits which they derive from the system'). Commenting on that decision, AG Sharpston observed that '[i]n so ruling, the Court made it clear that the principle of solidarity necessarily sometimes implies accepting burden-sharing'.

[14] Opinion of AG Sharpston (n 2) para 251. She also underlined that the significance of solidarity in situations of crisis or emergency, now addressed by Article 222 TFEU, has a similarly long case law history: 'as early as 1983, in the context of steel quotas, the Court explained that "it is in fact impossible to entertain the concept of necessity in relation to the quota system provided for by Article 58 of the ECSC Treaty, which is based on solidarity between all Community steel undertakings in the face of the crisis and seeks an *equitable distribution of the sacrifices arising from unavoidable economic circumstances*"' (para 249 of the Opinion; referring to Case 263/82 *Klöckner-Werke v Commission* ECLI:EU:C:1983:373, para 17, emphasis added).

The legal nature of solidarity has, more recently, been significantly progressed in two main areas of case law: immigration and energy.[15] As the analysis in this section shows, these developments have also highlighted the procedural aspects of solidarity as a legal obligation by emphasising the significance of processes that ensure collective decision-making and determine the fair sharing of responsibilities, thus consolidating the foundations already introduced in Section 2 above.

First, in case law in the field of *immigration*, the Court affirmed that 'it is not permissible, if the objective of solidarity […] is not to be undermined, for a Member State to be able to rely […] on its unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning' of adopted EU mechanisms.[16] That finding evidences continuity with the foundational solidarity case law in terms of the importance of taking decisions collectively under processes developed through and governed by EU law. To give effect to that requirement in the area of international protection, binding relocation mechanisms were conceived at EU level to address the unequal impact on a minority of Member States, having regard to the commitment in Article 80 TFEU that 'the policies of the Union in the area of border checks, asylum and immigration and their implementation are to be governed by the principle of solidarity and fair sharing of responsibility between the Member States'.

Hungary and Slovakia (unsuccessfully) challenged the legality of Council Decision 2015/1601/EU, which implemented mechanisms to support Italy and Greece.[17] The Court highlighted the 'significant and growing pressure [that] would continue to be put on the Greek and Italian asylum systems' to underline why 'the Council considered it vital to show solidarity towards those two Member States'.[18] Arguments that the Council had made a manifest error of assessment were dismissed, bearing in mind that '[it] was in fact *required*, as is stated in recital 2 of the decision, *to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States*, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented'.[19] Moreover, '[w]hen one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States'.[20]

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[15] Anticipating that solidarity implied these legal consequences, see E Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' in Biondi, Dagilyté, and Küçük (eds), *Solidarity in EU Law. Legal Principle in the Making* (Edward Elgar 2018) 38; see, in contrast, in the same volume, E Dagilyté, 'Solidarity: A General Principle of EU Law? Two Variations on the Solidarity Theme' (ibid) 61.

[16] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Czech Republic and Hungary*, ECLI:EU:C:2020:257, para 180.

[17] Council Decision 2015/1601/EU establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

[18] Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:631, para 251.

[19] ibid, para 252 (emphasis added).

[20] ibid, para 291.

It might be argued that the concrete findings drawn from the principle of solidarity in *Slovak Republic and Hungary v Council* connect directly – and only – to the statement in Article 80 TFEU that AFSJ policies and their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. However, the Court's references to previous rulings such as *Commission v Italy* in a subsequent judgment illustrate the wider reach of solidarity as a legal principle and of its impulse towards taking *collective* action even in situations of *different* impacts for different Member States. In *Commission v Poland, Czech Republic and Hungary*, (successful) infringement proceedings were taken against all three Member States for failures to fulfil obligations under the binding relocation mechanisms adopted to support Italy and Greece.[21] The Court confirmed that 'the burdens entailed by' the contested Decisions 'must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States'.[22] Once again, the importance of resolving difficulties collectively rather than unilaterally – and moreover, through a mechanism conceived and agreed to under EU law – was highlighted. For example, addressing arguments from the Czech Republic about 'the alleged malfunctioning or ineffectiveness of the relocation mechanism […] as applied in practice',[23] the Court responded that where 'practical difficulties' in implementing the EU mechanism might arise, they must 'be resolved, should they arise, in the spirit of cooperation and mutual trust between the authorities of the Member States that are beneficiaries of relocation and those of the Member States of relocation'.[24] Similarly, Advocate General Sharpston observed that 'other Member States facing problems with their relocation obligations, such as Austria and Sweden, applied for and obtained temporary suspensions of their obligations under those decisions, as provided for by Article 4(5) and (6) thereof' and that '[i]f the three defendant Member States were really confronting significant difficulties, that – rather than deciding unilaterally not to comply with the Relocation Decisions was not necessary – was clearly the appropriate course of action to pursue in order to respect the principle of solidarity'.[25]

The reasoning summarised above illustrates, once again, that solidarity sets procedural as much as substantive obligations in EU law. Reflecting on things more normatively, however, AG Sharpston considered that the infringement proceedings raised 'fundamental questions about the parameters of the EU legal order and the duties incumbent upon Member States'.[26] She issued strong statements on the nature of solidarity in EU law that merit repeating, since both substantive and procedural duties do stem from something deeper in the DNA of the EU:

> Through their participation in that project and their citizenship of European Union, Member States and their nationals have

[21] Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece ([2015] OJ L239/146); and Decision 2015/1601 (n 17).
[22] *Commission v Poland, Czech Republic and Hungary* (n 16) para 80.
[23] ibid, para 179.
[24] ibid, para 182.
[25] Opinion of AG Sharpston (n 2), para 235.
[26] ibid, para 238.

> obligations as well as benefits, duties as well as rights. Sharing in the European 'demos' is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one *to shoulder collective responsibilities and (yes) burdens to further the common good*. Respecting the 'rules of the club' and playing one's proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of 'what precisely does the EU cost me per week and what exactly do I personally get out of it?' Such self-centredness is a betrayal of the founding fathers' vision for a peaceful and prosperous continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must all do better than that.[27]

Importantly for present purposes, she invoked, *inter alia*, the 'certain degree of financial solidarity' standard developed for EU citizenship law, returned to in Section 4 below, to underpin these idea(l)s.

Second, in the case law on *EU energy policy*, the Court has referred to its classic rulings in *Commission v Italy* and *Commission v UK* and stated that 'the principle of solidarity underpins the entire legal system of the European Union'.[28] It also observed that solidarity is 'closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties' – a duty that 'not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States'.[29] The 'allegedly abstract nature of the principle of solidarity' was also directly addressed.[30] Recalling its case law on the international protection relocation mechanisms, the Court considered in *Germany v Poland* that 'there is nothing that would permit the inference that the principle of solidarity referred to in Article 194(1) TFEU cannot, as such, produce binding legal effects on the Member States and institutions of the European Union'.[31] Other aspects of the relocation mechanism case law were also applied to energy solidarity, including the fact that where the application of EU energy policy may 'have negative impacts for the *particular interests of a Member State* in that field […] the EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests

[27] ibid, paras 253–254 (emphasis added). See similarly, on the idea of 'European belonging', AG Ruiz-Jarabo Colomer in Case C-228/07 *Petersen* ECLI:EU:C:2019:281; remarking that 'Justice Benjamin Cardozo expressed it superbly in *Baldwin* v *G.A.F. Seelig*, in connection with the Constitution of the United States of America, when he pointed out that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"' (Baldwin v GAF Seelig, Inc, 294 US 522, 523 (1935)).

[28] Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:598, para 41.

[29] ibid.

[30] ibid, para 42.

[31] ibid (emphasis added).

both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict'.[32]

Thus, in developing its conception of energy solidarity under Article 194 TFEU, the Court did draw analogies with Article 80 TFEU and the AFSJ. However, that does not mean that solidarity requires a specific operational provision in the Treaties to produce concrete legal effects, noting again the Court's references also to its 1970s case law in considering the legal qualities of solidarity *per se* and its more generalised finding that 'the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it'.[33] Thus, even if 'the variety of forms in which the principle of solidarity manifests itself makes it difficult for that principle to be applied in the same way and to the same extent in all areas of EU competence [...] there is no reason not to regard solidarity, in some of those areas of competence, as having the capacity to operate as a "guiding principle" for the actions of the European Union in those fields, in which cases this has an impact on its effects in law'.[34]

In *Germany v Poland,* Advocate General Sánchez-Bordona also observed that solidarity 'appears to be linked to relations both horizontal (between Member States, between institutions, between peoples or generations and between Member States and third countries) and vertical (between the European Union and its Member States), in a variety of contexts'.[35] We see the same horizontal dimension of solidarity in the Court's findings four decades ago about private actors sharing burdens within the Community with respect to steel quotas:

> The quota system [...] involves heavy sacrifices which must be distributed equitably between all steel undertakings; *those undertakings must strive together in a display of Community solidarity so as to enable the industry as a whole to overcome the crisis and to survive. That being the aim of the system in question*, no necessity consisting in the continued existence and profitability of a particular undertaking can be invoked against the application of the system. In addition it must be emphasized that *if every undertaking could, by pleading necessity on account of serious financial difficulties, exempt itself from the restrictions and exceed at will the production quotas allocated to it the quota system would be destroyed.* If the quotas of undertakings pleading necessity were increased — or simply exceeded by the undertakings without any penalty, on grounds of necessity — it would necessarily entail a reduction in the quotas of other undertakings, so that some of them would in turn find themselves in a state of necessity and would be

[32] ibid, para 73.
[33] ibid, para 49. See also, Opinion of AG Campos Sánchez-Bordona (n 1) para 70: 'even though the principle of solidarity is multifaceted and deployed at different levels, its importance in primary law as a value and an objective in the process of European integration is such that it may be regarded as significant enough to create legal consequences'.
[34] Opinion of AG Campos Sánchez-Bordona (n 1) para 72.
[35] ibid, para 60.

> entitled to claim increased quotas or to exceed their quotas without any penalty. *A chain reaction would set in which would lead to the collapse of the system* and thus compromise the purpose of Article 58 of the ECSC Treaty.[36]

The degree to which both the existence and systemic conditions of the Community shaped the Court's reasoning at that time still has remarkable resonance for the strained commitment to free movement as a viable objective today, especially against arguments based on the protection of national public finances. This point is picked up in Section 4 below.

In summary, the Court's reasoning in the areas of immigration law and energy policy confirms that solidarity as a legal principle has procedural as well as normative and substantive dimensions. While obligations for cognate policy areas have been drawn from specific Treaty provisions, more general statements about collective responsibility, cooperation, and fair burden-sharing are evident by reading across them. Solidarity is therefore soaked in the theme of responsibility, which provokes in turn the importance of ensuring accountability not just for decisions taken in the pursuit of EU objectives but also for *how* those decisions were taken – for the procedure. For EU Member States, procedural solidarity represents a continuing commitment to engage with the peoples and the institutions of the Union, which includes those at national level for that purpose. And in that light, the phrasing of Article 2 TEU makes sense: if solidarity prevails in (EU) society, then committing – and sustaining that commitment – to respect for the rule of law or protection of fundamental rights under the system of the EU legal order flows from it.

Importantly for our purposes, however, these ideas also require mechanisms and processes agreed to under EU law for their enforcement, and that is where procedural solidarity again comes to the fore. The procedural dimensions of solidarity guide *how* decisions should be taken – collectively not unilaterally, in expression of sincere cooperation and mutual trust – and *which* interests should be considered in that decision-making process, recognising that the effects of Union law do not always fall evenly across all Member States. Procedural solidarity will not necessarily point to one clear answer. Neither will it necessarily point to the most intensively solidaristic outcome in substantive or normative terms. Rather, it provides a template for how to undertake the process of negotiation that such decisions should entail: to the questions that should be asked, and to the legal parameters within which they should be answered. If solidarity is respected in that sense, then there is at least procedural accountability as regards how certain choices were made.

Thus, reading across the case law considered so far, both foundational and more recent, I would summarise the main features of procedural solidarity as follows:

- Reflecting the fact that responsibilities flow from privileges in the EU system, solidarity is closely related to the principles of equality, mutual respect, mutual trust, and sincere cooperation – in other words, to the expectation that, as Article 4(3) TEU expresses it, *the Union and the*

[36] *Klöckner-Werke v Commission* (n 14) paras 19–20 (emphasis added).

Member States should 'assist each other in carrying out tasks which flow from the Treaties' – a conception that reflects solidarity as a duty to act *together* from the earliest references to it in the Court's case law.

- Solidarity entails *implementation* in procedural terms as much as representing a commitment to a value or objective more abstractly.

- Determining and implementing *the fair sharing of responsibility, including for financial commitments*, is a first significant expectation in terms of procedural solidarity.

- Solidarity also suggests, second, the fundamental importance of *taking decisions and coordinating action collectively rather than unilaterally*, and of *working within the overall EU system* – even where very specific or individual interests need to be accommodated.

Expressed in that way, what might procedural solidarity offer in terms of advancing some of the more contested questions on the free movement of persons in EU citizenship law?

4 Solidarity as a procedural obligation and the free movement of Union citizens

This part of the paper considers what the procedural understanding and qualities of solidarity presented in Section 3 could contribute to what can seem like intransigent debates about solidarity, Union citizenship, and the free movement of persons. As introduced in Section 1, one of the difficulties about focusing on substantive and/or normative solidarity only is that impasse can quickly be reached: we can assess, empirically, the extent to which solidarity was or was not extended to Union citizens in certain situations; and we can debate, more normatively, whether it should or should not have been. Can we harness procedural solidarity in ways that inject some impetus for change or evolution into these questions?

Following an overview of how solidarity has, more generally, shaped the free movement of Union citizens to date (Section 4.1), two examples of strained solidarity will then be considered in more detail: situations where entitlement to welfare in host States is ruled out, for both economically inactive and economically active Union citizens respectively (Section 4.2); and the differential impact of free movement for different Member States (Section 4.3). Overall, it is argued that procedural solidarity has concrete contributions to make – that it is legally demanding – in EU citizenship law. Procedural solidarity complements the substantive and normative considerations of solidarity, which focus on what outcomes *are* and on what they *should* be in determining the freeness of movement for Union citizens. Procedural solidarity addresses the frameworks and principles that should be applied for the determination of outcomes, emphasising collective rather than unilateral action that remains sensitive to divergent effects and consequences for different Member States; the fair sharing of responsibility, including financial responsibility, for the agreed-to EU objective freedom of movement; and decision-making processes that are, above all, sited within and therefore

governed by the wider system of EU law. In this procedural guise, solidarity induces better accountability for decisions actually taken.

4.1 Solidarity, freedom of movement, and Union citizenship: foundational principles

In both normative and substantive senses, considerations of solidarity are *implicitly* present in EU free movement law: fundamentally, as a benchmark that enables or justifies the extent of equal treatment with host State nationals that will be extended to mobile Union citizens, thereby correcting disincentives or dissolving obstacles to freedom of movement and residence in the first place as well as providing an EU legal safety net when difficulties are experienced afterwards. Conversely, the absence of (sufficient) transnational solidarity is normally invoked to explain why, and where, barriers to welfare entitlement are located.[37] In free movement law, such barriers relate more to the status than the means of the citizen concerned: solidarity is deeper where a link to economic activity can be demonstrated; but dependent on requirements of lawful residence (based largely on financial criteria) and sufficiency of integration in other situations.[38]

At the same time, looking across the development of EU law on the free movement of persons, the role of solidarity is less *explicitly* evident than we might expect. It has been engaged in three main ways to date. First, in adopting and implementing 'such measures in the field of social security as are necessary to provide freedom of movement for workers', the objective of coordination set by Article 48 TFEU delimits the reach of EU law to recognise that how a State designs its national welfare system is an expression of solidarity at *national* level.[39] As a result, '[t]he State to whose community of solidarity a person belongs should also bear the responsibility for guaranteeing a minimum means of subsistence'.[40] In that context, Regulation 883/2004 'serves, albeit indirectly, to set limits to the principle of financial solidarity *between* Member States'.[41]

Nevertheless, second, *transnational* solidarity can override national solidarity to ensure equality of treatment in the exercise of free movement. When EU law 'guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there,

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[37] See again the references in (n 5) in particular.

[38] Compare especially the requirements for lawful residence in Articles 7(1)(a) (being a worker or self-employed person within the meaning of EU law without further conditions) and 7(1)(b) ('sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State') of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

[39] Recital 4 of Regulation 883/2004 on the coordination of social security systems [2011] OJ L166/1 affirms that '[i]t is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination'. As AG Tanchev has underlined, 'under EU law, as it presently stands, there is no principle of unified supranational social security solidarity' (Case C-866/19 *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* ECLI:EU:C:2021:301, Opinion of AG Tanchev, para 66).

[40] Case C-287/05 *Hendrix* ECLI:EU:C:2007:196, Opinion of AG Kokott, para 64.

[41] Case C-255/13 *I* ECLI:EU:C:2014:178, Opinion of AG Wahl, para 57 (emphasis added).

is *a corollary of* that freedom of movement'.[42] On that basis, the Court held in *Cowan* that 'the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law' and '[t]he fact that the compensation at issue is financed by the Public Treasury cannot alter the rules regarding the protection of the rights guaranteed by the Treaty'.[43] This example illustrates that host States bear certain responsibilities because free movement is workable only if transnational solidarity takes precedence over national solidarity in certain circumstances. Moreover, the latter circumstances are defined by EU, not national, law.

Third, most controversially, case law on Union citizenship later established that 'the principle of a minimum degree of financial solidarity can, in specific, objectively verifiable circumstances, *create a right to equal treatment*'.[44] The contours of that right have changed over time. A 'general' right to move to and reside in another Member State – ie for purposes other than economic activity within the meaning of EU law – was developed before Union citizenship and thus before the adoption of Article 21 TFEU. Building on case law bringing receipt of services within the scope of Article 56 TFEU[45] and extending freedom of movement for cross-border studies,[46] legislative rights to move and reside for purposes other than economic activity were created in three directives: Directive 90/364 on the right of residence generally;[47] Directive 90/365 for retired employees and self-employed persons;[48] and Directive 93/96 for students.[49] The idea of general movement and residence rights was primarily linked to the furthering of the internal market.[50] Importantly, all three Directives set conditions requiring their beneficiaries to have sufficient financial resources to avoid becoming a burden on the social assistance system of the host State and comprehensive sickness insurance cover.[51] The general right to move and reside was therefore

[42] Case 186/87 *Cowan* ECLI:EU:C:1989:47, para 17 (emphasis added).
[43] ibid.
[44] Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:117 Opinion of AG Geelhoed, para 90 (emphasis added).
[45] See especially Joined Cases 286/82 and 26/83 *Luisi and Carbone* ECLI:EU:C:1984:35; see later eg Case C-274/96 *Bickel and Franz* ECLI:EU:C:1988:563, para 15.
[46] See especially Case 293/83 *Gravier* ECLI:EU:C:1985:69; Case 24/86 *Blaizot* ECLI:EU:C:1988:43; and Case C-47/93 *Commission v Belgium* ECLI:EU:C:1994:181. However, the reach of the Treaty did not, at the time, extend to host State obligations for the payment of maintenance grants, representing a limit to transnational solidarity (Case 39/86 *Lair* ECLI:EU:C:1988:322).
[47] [1990] OJ L180/26.
[48] [1990] OJ L180/28.
[49] [1993] OJ L317/59.
[50] Member State nationals who exercised general rights to move and reside under the Directives were thus described as 'peripheral market actors' (G More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1st edn, OUP 1999) 517, 540).
[51] Articles 1(1) of Directives 90/364 and 90/365, and Article 1 of Directive 93/96. Article 1 of Directive 93/96 established that 'the Member States shall recognize the right of residence […] *where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources* to avoid becoming a burden on the social assistance system of the host Member State during their period of residence […] and that he is covered by sickness insurance in respect of all risks in the host Member State'. The same language is now in Article 7(1)(c) of Directive 2004/38. Compare eg Article 1(1) of Directive 90/364 '*are covered*

decoupled from economic activity but not from conditions of an economic nature.

The creation of Union citizenship elevated general free movement rights from secondary to primary law for EU Member State nationals. To determine welfare entitlement in a host State in that context, EU citizenship law emphasises *lawful residence*. The 1990s Residence Directives did not refer expressly to lawful residence, but they implied it through the conditions on sufficient financial resources and comprehensive sickness insurance. In *Martínez Sala*, the Court of Justice observed that the applicant had 'been *authorised* to reside' in the host State.[52] In consequence, the conditions in Directive 90/364 were not discussed. Instead, the Court held that a Member State national 'lawfully residing in the territory of another Member State [came] within the scope *rationae personae* of the provisions of the Treaty on European citizenship' and could therefore, 'in all situations which fall within the scope *rationae materiae* of [Union] law', rely on the prohibition of nationality discrimination in Article 18 TFEU.[53] In subsequent case law, lawful residence remained an essential precondition, but it was generously construed – continuing to include, as in *Martínez Sala*, residence authorised by national law.[54]

Soon after *Martínez Sala*, *Grzelczyk* instituted an explicitly solidarity-based approach to equal treatment claims in EU citizenship law. The preambles to the 1990s Directives had 'envisage[d] that beneficiaries of the right of residence must not become an "unreasonable" burden on the public finances of the host Member State'.[55] For the Court, that explicit reference to *unreasonable* burden implied tolerance of a *reasonable* burden, ie 'accept[ance of] *a certain degree of financial solidarity* between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'.[56] Advancing Union citizenship as the 'fundamental status' of Member State nationals,[57] student maintenance grants were subsequently brought within the scope of EU law in *Bidar*.[58] There, the Court indicated that Member States did not just 'accept' (as per *Grzelczyk*) a certain degree of financial solidarity in adopting the 1990s Directives. Rather, they '*must*, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States'.[59] However, the Court also found that it was 'permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students

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by sickness insurance in respect of all risks in the host Member State *and have sufficient resources* to avoid becoming a burden on the social assistance system of the host Member State during their period of residence'. See similarly now, Article 7(1)(b) of Directive 2004/38, which is returned to below.

[52] Case C-85/96 *Martínez Sala* ECLI:EU:C:1998:217, para 60 (emphasis added).

[53] ibid, paras 61 and 63.

[54] Case C-456/02 *Trojani* ECLI:EU:C:2004:488, especially para 43.

[55] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 44.

[56] ibid (emphasis added).

[57] ibid, para 31.

[58] Case C-209/03 *Bidar* ECLI:EU:C:2005:169. Note also the expansion of welfare entitlement to jobseekers: compare the exclusion of equal treatment previously (eg Case 316/85 *Lebon* ECLI:EU:C:1987:302, para 26) with the approach taken in Case C-138/02 *Collins* ECLI:EU:C:2004:172 and Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* ECLI:EU:C:2009:344.

[59] *Bidar* (n 58) para 56 (emphasis added).

from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State' and it was therefore 'legitimate [...] to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State' – which could be established through, for example, proportionate residence conditions.[60]

Replacing the 1990s Directives, Article 6 of Directive 2004/38 now confirms an unconditional right to reside in another Member State for up to three months. For longer periods, Article 7(1)(a) establishes an unconditional right to reside in a host State for workers and self-employed persons. Article 7(1) also addresses rights for economically autonomous persons (Article 7(1)(b)), students (Article 7(1)(c)), and family members who are themselves Member State nationals (Article 7(1)(d)). Reflecting the 1990s Directives, residence rights based on Articles 7(1)(b) and 7(1)(c) are subject to conditions of sufficient financial resources and comprehensive sickness insurance.[61]

In a general sense, it might be considered that EU law 'is based on values of solidarity *which have been further reinforced since the creation of citizenship* of the Union'.[62] However, Article 24 of Directive 2004/38 restrains the scope of equal treatment with host State nationals, establishing that:

> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.[63]

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[60] ibid, paras 56–59.

[61] The Court has confirmed that the requirement to have comprehensive sickness insurance 'would be rendered redundant if it were to be considered that the host Member State *is required* to grant, to an economically inactive Union citizen residing in its territory on the basis of Article 7(1)(b) of Directive 2004/38, affiliation free of charge to its public sickness insurance system': Case C-535/19 *A (Soins de santé publics)* ECLI:EU:C:2021:595, para 56 (emphasis added). However, where 'a Union citizen is affiliated to such a public sickness insurance system in the host Member State, *he or she has comprehensive sickness insurance* within the meaning of Article 7(1)(b)': Case C-247/20 *Commissioners for Her Majesty's Revenue and Customs (Assurance maladie complète)* ECLI:EU:C:2022:177, para 69 (emphasis added).

[62] Case C-535/19 *A (Soins de santé publics)* ECLI:EU:C:2021:114, Opinion of AG Saugmandsgaard Øe, para 153 (emphasis added).

[63] For an early indication that equal treatment claims would be viewed differently following the adoption of the Directive, see Case C-158/07 *Förster* ECLI:EU:C:2008:630; applying

Case law has confirmed that the Directive, amid changing economic and political circumstances,[64] unsettled the relationship between equal treatment and the 'certain degree of financial solidarity' that Member States had previously been presumed to accept.[65] In particular, the rulings in *Dano*,[66] *Alimanovic*,[67] *Commission v UK*,[68] and *CG*[69] evolved significant changes in the Court's approach to equal treatment and welfare entitlement. In essence, compliance with the lawful residence conditions in the Directive will now almost always be required.[70] Host States are not obliged to undertake assessments of a citizen's individual circumstances where such conditions are not met,[71] and residence authorised by national law that does not also comply with the Directive's conditions no longer constitutes lawful residence for the purposes of equal treatment.[72]

Recent case law does therefore entail certain conflicts with earlier rulings, which have not been openly confronted by the Court of Justice.[73] Legislative exclusions from entitlement to equal treatment can also seem arbitrary: why sustain equal treatment as regards minimum income support for part-time workers, for example, who reside under Article 7(1)(a) of the Directive, but not for students, who were treated so favourably in that respect in *Grzelczyk*? Reflecting generally on the free movement and associated equal treatment of Union citizens, then, what determinations about solidarity have been made in the Directive and in the case law? In terms of who does and who does not merit host State financial support, these questions are extensively discussed in both normative and substantive terms.[74] However, in

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previous case law (especially *Bidar*), AG Mazák had reached the opposite view (ECLI:EU:C:2008:399).

[64] See eg Case C- 238/15 *Bragança Linares Verruga and Others* ECLI:EU:C:2016:389, Opinion of AG Wathelet, paras 3-5; Case C-140/12 *Brey* ECLI:EU:C:2013:337, Opinion of AG Wahl, para 1; and Case C-181/19 *Jobcenter Krefeld* ECLI:EU:C:2020:377, Opinion of AG Pitruzella, para 1. See further, M Blauberger and others 'ECJ Judges Read the Morning Papers: Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 Journal of European Public Policy 1422; G Davies 'Has the Court Changed or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' (2018) 25 Journal of European Public Policy 1442; and U Šadl and S Sankari, 'Why Did the Citizenship Jurisprudence Change?' in Thym (ed) (n 5) 89.

[65] See generally K Lenaerts 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 Jurisprudencija 397; and D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17.

[66] Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

[67] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597.

[68] Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436.

[69] Case C-709/20 *CG* ECLI:EU:C:2021:602.

[70] See, exceptionally, Case C-181/19 *Jobcenter Krefeld* ECLI:EU:C:2020:794, which confirms equal treatment under EU law for persons residing in the host State as former workers and the primary carers of children who reside there on the basis of Article 10 of Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[71] Compare eg Case C-140/12 *Brey* ECLI:EU:C:2013:565 and *Alimanovic* (n 80).

[72] Eg *CG* (n 82).

[73] Eg compare the material significance and non-significance of residence authorised by national law for the purposes of invoking Article 18 TFEU in *Martínez Sala* (n 52) and *CG* (n 69) respectively, which is returned to in Section 4.2.1 below.

[74] Eg M Cousins, 'The Baseless Fabric of this Vision: EU Citizenship, the Right to Reside and EU Law' (2016) 23 Journal of Social Security Law 89; Editorial comments, 'The Free Movement of Persons in the European Union: Salvaging the Dream while Explaining the Nightmare' (2014) 51 CML Rev 729; A Heindlmaier, 'Mobile EU Citizens and the

more procedural terms, attention has concentrated on how proportionality functions when equal treatment is restricted.[75] Expanding that inquiry, this paper asks us to consider, what, if anything, would assessing EU citizenship law through a wider lens of procedural solidarity add or indeed change. As shown in Sections 2 and 3 above, solidarity entails a set of procedural obligations that should shape how decisions are taken when EU objectives are at stake, ie collective rather than unilateral action, expressed through decision-making that is governed by EU law, confronts the fair sharing of responsibilities, and cultivates better accountability overall for the decisions that are ultimately taken. The extent to which emphasising these obligations more directly in EU citizenship law will now be considered through examples on both welfare entitlement (Section 4.2, to examine the procedural aspects of the fair sharing of responsibility) and uneven mobility (Section 4.3, to examine the procedural aspects of collective rather than unilateral responses where the effects of EU law are differently experienced).

4.2 What happens after welfare entitlement is ruled out? Procedural solidarity and vulnerable free movers

In EU free movement law, determining entitlement to welfare support for Union citizens in host States involves different legal criteria depending on whether the citizen in question is economically inactive (Section 4.2.1) or economically active (4.2.2) there.

4.2.1 Responsibility shared fairly I: welfare entitlement and the economically inactive

As introduced in Section 4.1 above, the 'certain degree of financial solidarity' case law was curtailed by Directive 2004/38 in two important ways: first, by the express derogations from equal treatment in Article 24(2) of the

"Unreasonable Burden": How EU Member States Deal with Residence Rights at the Street Level' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill 2020) 140; K Hailbronner 'Union Citizenship and Access to Social Benefits' (2005) 42 CML Rev 1245; D Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 Cambridge Yearbook of European Legal Studies 270; S Mantu and P Minderhoud, 'Exploring the Links Between Residence and Social Rights for Economically Inactive EU Citizens' (2019) European Journal of Migration and Law 313; C O'Brien, '*Civis capitalist sum*: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 CML Rev 937; N Rennuy, 'The Trilemma of EU Social Benefits Law: Seeing the Wood and the Trees' (2019) 56 CML Rev 1549; Thym (n 65) and 'When Union Citizens turn into Illegal Migrants: The *Dano* Case' (2015) 40 EL Rev 249; and H Verschueren, 'Free Movement of EU Citizens: Including for the Poor?' (2015b) 22 Maastricht Journal of European and Comparative Law 10.

[75] Eg M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 EL Rev 613 and 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Adams, de Waele, Meeusen and Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 127; A Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The *Alimanovic* Judgment' (2016) 53 CML Rev 1007; H Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?' (2015) 52 CML Rev 363; and F Wollenschläger, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the post-*Dano* Era' in Thym (ed) (n 5) 171.

Directive (which mainly rule out social assistance during the first three months of residence only as well as, beyond this, for those seeking work); and second, also by the more open-ended requirement in Article 24(1) that Member State nationals must reside in a host State 'on the basis of' the Directive before being entitled to equal treatment there. That usually requires compliance with the conditions in Article 7(1).[76] These conditions for lawful host State residence govern claims to both social assistance[77] and social security benefits.[78] Only beneficiaries of the right of permanent residence in the host State, as set out in Article 16 of the Directive, benefit from 'full solidarity' there.[79] Conversely, Member State nationals who reside in a host State on other grounds – including residence permits granted under national law – may not now claim to equal treatment unless the conditions in Article 7(1)(b) are also fulfilled. Thus, in *Dano*, the Court held that 'the principle of non-discrimination, laid down generally in Article 18 TFEU, *is given more specific expression in Article 24 of Directive 2004/38* in relation to Union citizens who […] exercise their right to move and reside'.[80] Otherwise, '[t]o accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State'.[81] In that light, Article 7(1)(b) 'seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence'.[82]

The Court has still not addressed a logical gap in that reasoning: if Article 24 of the Directive is the 'specific expression' of equal treatment for citizens residing in the host State *on the basis of the Directive*, why is it relevant at all to the equal treatment claims of citizens who are *not* residing

[76] In *GMA*, the Court considered that jobseekers reside 'on the basis of' Article 14(4)(b) of the Directive, but their exclusion from entitlement to social assistance is permitted expressly by Article 24(2) (Case C-710/19 *GMA (Demandeur d'emploi)* ECLI:EU:C:2020:1037).

[77] In *Brey*, the Court defined 'social assistance' for the purposes of Directive 2004/38 as 'all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State' (*Brey* (n 71) para 61. In *Alimanovic*, the Court also introduced a 'predominant function' approach to characterising benefits: ie if 'the predominant function of the benefits at issue […] is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity', then such benefits 'cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State' (*Alimanovic* (n 67) paras 45–46).

[78] *Commission v UK* (n 68) para 68. However, national processes for verifying lawful residence in such circumstances must be proportionate (para 78 ff; see also Article 14(2) of Directive 2004/38, which precludes systematic verification of residence rights).

[79] Case C-456/12 *O and B* and Case C-457/12 *S and G* ECLI:EU:C:2013:837, Opinion of AG Sharpston, para 104.

[80] *Dano* (n 66) para 61 (emphasis added).

[81] ibid, para 74.

[82] ibid, para 76.

in the host State on that basis?[83] That is just one of the many issues debated following the rulings in *Dano* and *Alimanovic*.[84] Some important clarifications and adjustments were made in subsequent case law, which has confirmed, for example, that only the express derogations in Article 24(2) of the Directive restrict equal treatment when lawful residence *is* established;[85] and that, for workers (including former workers), the guarantee of equal treatment with host State workers as regards social and tax advantages (which includes income support where relevant) in Article 7(2) of Regulation 492/2011 continues to apply in parallel to, rather than having being absorbed by, the Directive.[86] For present purposes, however, it is the Court's finding that the Charter of Fundamental Rights functions as a safeguard to ensure (at least in certain circumstances) residence in a host State under conditions of dignity even where that residence does not comply with the conditions of the Directive that raises traces of procedural solidarity – of a framework to guide the taking of a fair share of responsibility for the reality of free movement's consequences.

Several provisions of the Charter of Fundamental Rights could be applied in the context of freedom of movement for Union citizens: the law has engaged mainly to date with Articles 7 (respect for family life) and 24 (children's rights) CFR; but we could also consider Articles 1 (human dignity), 14 (education), 20 (equality before the law), 21 (non-discrimination), 25 (rights of the elderly), 26 (integration of persons with disabilities), 34 (social security and social assistance) and 35 (health care) CFR.[87] However, Article 51(1) CFR provides that the Charter is 'addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'. To establish when national authorities are bound by the Charter, the Court has determined that Member States are 'implementing Union law' when national legislation 'falls within the scope' of EU law.[88] The referring court had therefore asked in *Dano* 'whether Articles 1, 20 and 51 of the Charter [require] the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State'.[89] In response, the Court of Justice held:

> [Regulation 883/2004] is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions. Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence […] to define the extent of the social cover provided by that type of benefit.

[83] See further, M Haag, 'The *coup de grâce* to the Union Citizen's Right to Equal Treatment: *CG v The Department for Communities in Northern Ireland*' (2022) 59 CML Rev 1081.
[84] See again, the references in (n 74) and (n 75).
[85] Case C-411/20 *Familienkasse Niedersachsen-Bremen* ECLI:EU:C:2022:602.
[86] *Jobcenter Krefeld* (n 70). See further, F Ristiuccia, 'The Right to Social Assistance of Children in Education and Their Primary Carers: *Jobcenter Krefeld*' (2021) 58 CML Rev 877.
[87] See further, Verschueren (n 75) 384 and 389–390.
[88] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, para 19.
[89] *Dano* (n 66) para 85.

> Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.[90]

Yet very differently, before *Dano*, the Court found in *Commission v Austria* that while 'it is for [the Member States] to determine the conditions concerning the right or duty to be insured with a social security scheme as well as the conditions for entitlement to benefits, *in exercising those powers, they must none the less comply with the law of the European Union and, in particular*, with the provisions of the FEU Treaty [on the right to move and reside]'.[91]

Applying the Charter might not have changed the outcome in *Dano*.[92] Nevertheless, the narrow interpretation given to national measures that come within the scope of EU law did not fit with the Court's approach to Charter scope more generally. It thus revisited its position on the Charter and free movement law in *CG*. The claimant could not establish equal treatment with host State nationals as regards entitlement to social assistance because she did not reside in the host State (the UK) on the basis of Directive 2004/38. However, her residence was authorised under the UK's pre-settled status scheme, introduced to implement the Withdrawal Agreement concluded between the EU and the UK.[93] On the grounds that she had exercised free movement rights under Article 21 TFEU and that 'the fundamental rights guaranteed in the legal order of the European Union are applicable *in all situations governed by EU law*',[94] the Court concluded that while the granting of her right to reside did not constitute implementation of the Directive since its conditions were not met,[95] host State authorities were nonetheless 'implement[ing] the provisions of the FEU Treaty on Union citizenship' and 'they are accordingly obliged to comply with the provisions of the Charter'.[96]

Recognising that the Charter applies where residence is unlawful under EU law but authorised under national law is an important case law adjustment in terms of the solidarity that Member States should extend in situations produced by free movement. In a substantive sense, the Court engaged Article 1 CFR, obliging the host State 'to ensure that a Union citizen who has made use of his or her freedom to move and to reside within the territory of the Member States, who has a right of residence on the basis of national law, *and who is in a vulnerable situation*, may nevertheless live *in dignified conditions*'.[97] To give effect to that idea, however, the Court then

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[90] ibid, paras 89–91.
[91] Case C-75/11 *Commission v Austria* ECLI:EU:C:2012:605, para 47 (emphasis added); referring to Case C-503/09 *Stewart* ECLI:EU:C:2011:500, paras 75–77.
[92] Though in the context of Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44, the Court has found that 'according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources' (Case C-571/10 *Kamberaj* ECLI:EU:C:2012:233, para 92).
[93] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384I/01. Citizen's rights are provided for in Part 2 of the Agreement: see generally, E Spaventa 'The Rights of Citizens under the Withdrawal Agreement: A Critical Analysis' (2020) 45 European Law Review 193.
[94] *CG* (n 69) para 86 (emphasis added).
[95] ibid, para 87.
[96] ibid, para 88.
[97] ibid, para 89 (emphasis added).

issued a set of questions that national authorities must consider, reflecting procedural solidarity. In substantive terms, the guidance issued to the referring court in *CG* was very much framed around the specific facts of the case.[98] How far the Charter's protection, and thus obligations of solidarity, extend is therefore not clear: indeed, both in factual terms and through the focus on Article 1 CFR and human dignity rather than the more general social protections provided for in the Charter, the substantive impact of the ruling could be relatively limited.[99] Moreover, even though any Member State national who is refused social assistance in a host State could be vulnerable to living in non-dignified conditions, CG's authorised residence was legally significant to trigger the Charter in the first place. Thus, EU law itself permits a sphere of vulnerability for mobile Union citizens,[100] and for the purposes of reflecting on the 'rightness' of that outcome, solidarity is a vital benchmark in normative and substantive terms. Directive 2004/38 reflects the view that citizens integrate more deeply in the host State over time and can therefore claim stronger protection from expulsion and greater access to equal treatment – that they have a stronger claim to solidarity – as a result.[101] To put it another way, for the first five years of residence, Article 24 of the Directive '*authorises* differences in treatment between Union citizens and the nationals of the host Member State',[102] representing legislatively agreed and legislatively articulated limits to freedom of movement and residence and thus also to transnational solidarity.

Nevertheless, *CG* also illustrates how solidarity is enhanced in a procedural sense – as underlined by the contrast with the dismissal of the Charter's relevance in *Dano*. It represents an obligation that could be framed as the fair sharing of responsibility to ensure the dignity of Union citizens who do not enjoy equal treatment with host State nationals. Before *CG*, the

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[98] 'CG is a mother of two young children, with no resources to provide for her own and her children's needs, who is isolated on account of having fled a violent partner' and, '*[i]n such a situation*, the competent national authorities may refuse an application for social assistance […] only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter' (ibid, para 92, emphasis added). O'Brien therefore asks: [c]an national authorities refuse benefits to EU nationals, even those with a right to reside, without considering fundamental rights, if there is no evidence of domestic abuse? Or if they are not similarly isolated? Or do not have young children? Or have some meagre resources? Should other vulnerabilities be taken into account—long term illnesses, or being disabled, for instance?' (C O'Brien, 'The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable (*CG v The Department for Communities in Northern Ireland)*' (2021) 46 European Law Review 801, 812).

[99] For example, Haag notes that '[t]he Court omitted Article 21(2) CFREU which also provides for the right to non-discrimination on the basis of nationality. It also did not refer to Article 34(2) CFREU on the entitlement to social security benefits and social advantages. This suggests that the protection of fundamental rights in this context is not about equal access to social assistance as compared to the nationals of the State, but rather it is about ensuring that the Union citizen is granted basic subsistence to uphold their human dignity' (Haag (n 83) 1102). See further, C O'Brien, '*Acte cryptique*? *Zambrano*, Welfare Rights, and Underclass Citizenship in the Tale of the Missing Preliminary Reference' (2019) 56 CML Rev 1697; and AG Richard de la Tour in *CG* (ECLI:EU:C:2021:515) para 103 of the Opinion.

[100] As O'Brien expresses it, '[w]hy are Member States that permit EU migrants to reside in their territories without sufficient resources, without granting access to social assistance, not also in effect recognising those migrants' art.21 TFEU rights?' (O'Brien (n 99) 812).

[101] Eg *Familienkasse Niedersachsen-Bremen* (n 85) para 78.

[102] Case C-299/14 *García-Nieto* ECLI:EU:C:2015:366, Opinion of AG Wathelet, para 65 (emphasis added).

rejection of a claim to financial assistance by Union citizens who did not reside in the host State under Directive 2004/38 was effectively the end of the EU-based legal obligation. However, that cut-off point did not taken into account that, in factual terms, the extent to which someone is integrated in a host State 'does not depend on [their] material circumstances […], that is whether they are secure or insecure, as those circumstances have been taken into account and managed by the host Member State for a period of time'.[103] Recall, for example, that Ms Dano's son was born in the host State (where she also had a sister) and that State also paid family benefits to her; or that all three of Ms Alimanovic's children were born in the host State, to which the family returned after a decade spent in another Member State, ie having taken advantage of the EU's free movement space.

These examples illustrate that, in reality, Member State nationals who are either unlawfully resident or lawfully resident yet excluded from equal treatment in host States under the express derogations in Article 24 of the Directive are often still, 'as it were, "tolerated"' there.[104] That host States should bear a 'certain degree' of responsibility in such circumstances fits with solidarity's procedural obligations.[105] Before the *CG* case, there were few signals in EU law about how responsibility for tolerated citizens should be *fairly shared* (to recall the test that procedural solidarity prescribes), even when a Union citizen's residence has been tolerated though not formally authorised by a host State for some time. Importantly for our purposes, though, where that situation has been confronted rather than overlooked by EU law, host States have been asked to confront the consequences of their own inaction.[106] The family ties built in the host State in *Dano* and *Alimanovic* as well as the facts in *CG* demonstrate that attributing responsibility only to the citizen concerned – obliging them, in effect, to leave the host State if they cannot support themselves there, as well as assuming that they can easily do so – can be too simplistic.

When the Court conceived its 'certain degree of financial solidarity' case law, it also underlined that 'it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence' and, in such circumstances, the host State 'may […] take a measure to remove [them]' but only 'within the limits imposed by [Union] law'.[107] Thus, we see from the Court an accepted limit on substantive and normative solidarity, but a

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[103] Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* ECLI:EU:C:2011:575, Opinion of AG Bot, para 55.

[104] Case C-331/16 *K and HF* ECLI:EU:C:2017:973, Opinion of AG Saugmandsgaard Øe, para 125.

[105] At a basic level, tolerated citizens are protected by the procedural safeguards provided for in Articles 8, 14, 15, 30 and 31 of the Directive should the host State reach the point of *intolerance* of their presence, returned to below. Case law also suggests that even unlawfully resident Union citizens can claim protection from extradition outside the territory of the Union in certain circumstances (see especially Case C-182/15 *Petruhhin*, ECLI:EU:C:2016:630). In *Singh II*, AG Kokott referred to ECtHR case law establishing that 'in so far as a family has […] lawfully established its residence in a particular State, withdrawal of the right of residence may amount to an infringement' (Case C-218/14 *Singh II* ECLI:EU:C:2015:306, Opinion of AG Kokott, para 47).

[106] See eg on the sufficient resources condition in Article 7(1)(b) of the Directive, Case C-93/18 *Bajratari* ECLI:EU:C:2019:809; and on the requirement of comprehensive sickness insurance in the same provision, *A (Soins de santé publics)* (n 74).

[107] *Trojani* (n 54) para 45.

safeguard of procedural solidarity put in place. Directive 2004/38 now sets out the basic 'limits imposed by EU law' in such situations – it places EU-set, collectively agreed processual steps around the actions that national authorities can take, reflecting the fair sharing of responsibility under procedural solidarity. Article 14(3) of the Directive underlines that 'recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure'.[108] However, Article 15(1) implicitly enables host States to expel Member State nationals who are unlawfully resident within the meaning of EU law, ie who do not comply with the conditions in Articles 6, 7, 12, 13 or 14(4)(b) of the Directive before rights of permanent residence are acquired.[109] For expulsion decisions based on Article 15(1), the host State must first, having regard to recital 16 of the Directive, 'examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion'.[110] Where it is decided to proceed to expulsion, Article 15(1) requires the host State to comply with the procedural safeguards in Articles 30 and 31 of the Directive.[111] Indeed, Advocate General Villalón has suggested that host States 'may not confine themselves simply to refusing to grant the benefit claimed' but should inform citizens found not to have a right to reside in the host State of that fact, observing the procedural safeguards in Articles 30 and 31.[112]

The most detailed reflection on such responsibility to date came in *FS*, which required the Court to consider whether a person expelled from the host State under Article 15(1) could immediately re-enter under Article 6 of the Directive, ie restarting a new residence period without any conditions for up to three months. The Court held that if 'mere physical departure' from the host State was accepted as sufficient to comply with an Article 15(1) expulsion decision, a Union citizen 'would only have to cross the border of the host Member State in order to be able to return immediately to the territory of that Member State and to rely on a new right of residence under Article 6' and by '[a]cting repeatedly in that way', they 'could be granted numerous rights of residence successively in the territory of a single Member State' under Article 6 ('even though, in reality, those various rights would be granted for the purposes of the same single actual residence').[113] That scenario 'would be tantamount to rendering redundant the possibility for the host Member State to terminate the residence of a Union citizen, ignoring the 'actual temporal limit' of periods up to three months around which Article 6 is designed.[114] The Court therefore established procedural criteria that permit a host State to determine if the person has 'genuinely and effectively terminate[d]' their

[108] ibid.
[109] Article 15(1) of Directive 2004/38 provides that '[t]he procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds *other than* public policy, public security or public health' (emphasis added, thereby confirming that expulsion is possible on other grounds).
[110] Confirmed in eg *Alimanovic* (n 67) para 59.
[111] Except for the guarantees specifically addressing public policy, public security or public health (Case C-94/18 *Chenchooliah* ECLI:EU:C:2019:693).
[112] Case C-308/14 *Commission v UK* ECLI:EU:C:2015:666, Opinion of AG Cruz Villalón, para 96.
[113] Case C-719/19 *FS* ECLI:EU:C:2021:506, para 73.
[114] ibid, para 74.

residence in the host State.[115] Thus, to claim a new right of residence in a host State under Article 6(1) of the Directive, someone who has already been expelled on the basis of Article 15 'must not only physically leave that territory, but also have genuinely and effectively terminated his or her residence on that territory, with the result that, upon his or her return to the territory of the host Member State, his or her residence cannot be regarded as constituting in fact a continuation of his or her preceding residence'.[116]

Between the extremes of passive tolerance of residence that is unlawful under EU free movement law and proceeding actively to expulsion in such situations, procedural solidarity provides a way not only to frame and understand the limited obligations that have already been determined in the Directive and in the case law, but also to develop these obligations further. For example, the fair sharing of responsibility could be invoked to mandate better, more proactive support for Union citizens to transition to more secure residence statuses in a host State: for example, to guide the economically inactive citizen who is refused social assistance towards opportunities for changing their situation there. If the citizen concerned can commence economic activity within the meaning of EU law or otherwise acquire sufficient resources (for example, from a family member), their residence status is entirely transformed. Similarly, even limited levels of work can, as noted above and retuned to in Section 4.2.2 below, generate full entitlement to equal treatment with host State nationals as regards social assistance. But it is not always easy or even possible for citizens to change their situations by themselves. Previous case law that established host State obligations in situations of temporary difficulty, notably *Grzelczyk,* perhaps better reflected a framework – concrete mechanisms and processes – that encourages *fairly* shared responsibility: for citizens themselves to transition towards self-sufficiency; but also, for host States to facilitate that transition, within reason.

Difficulties around the administrative burden and legal uncertainty that a very diffuse case-by-case assessment obligation would reinstate have to be acknowledged. Yet it is important that EU free movement law continues to articulate how responsibility for situations produced by that very privilege can be shared fairly.[117] Conversely, the fact that free movement does not very comprehensively address these responsibilities at present is a significant gap with respect to the fair sharing of responsibility that procedural solidarity compels. In situations where welfare entitlement in host States is denied under EU law, addressing equal treatment anomalies where residence is not based on Directive 2004/38 and progressing beyond passive tolerance of Union citizens towards more actively supporting them to transition to more secure residence statuses would fit well with procedural solidarity's emphasis on cooperatively carrying out of tasks that flow from the Treaties in ways that are, in particular, reflective of the fair sharing of responsibility.

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[115] ibid, para 75.

[116] ibid, para 81.

[117] On the less developed but potentially very significant responsibilities of home States in this regard, see M Haag, 'A Sense of Responsibility: The Shifting Roles of the Member States for the Union Citizen' (PhD thesis, European University Institute, Florence, 2019); F Strumia, 'Supranational Citizenship Enablers: Free Movement from the Perspective of Home Member States' (2020) 45 EL Rev 507; and I Goldner Lang and M Lang, 'The Dark Side of Free Movement: When Individual and Social Interests Clash' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement: Taking Supranational Citizenship Seriously* (Brill 2020) 382.

Debates about whether EU citizenship law exhibits substantive and normative solidarity gaps when equal treatment does not apply will not, and should not, be displaced by Charter safety nets or expulsion safeguards: we will still disagree about whether the claimants in *Dano* and *Alimanovic* should have won their cases or not. But even where equal treatment with host State nationals does not apply, procedural solidarity's requirement that responsibility for resulting situations is acknowledged and *fairly* shared signals that equal treatment is not the end of the legal duties that EU law imposes. The Directive and the case law do establish some basic criteria for such situations already, but there is undoubtedly scope for conceiving more imaginative, more proactive mechanisms of support and fair responsibility sharing too.

4.2.2 Responsibility shared fairly II: welfare entitlement and the economically active

As noted in Section 4.1, Article 48 TFEU establishes EU competence for social security coordination. Equal treatment is a critical objective,[118] and entitlement to welfare for workers and self-employed persons who are not host State nationals draws added bite from Articles 45 and 49 TFEU respectively and from Regulation 492/2011 for workers specifically. Article 7(2) of that Regulation establishes that workers who are nationals of other Member States 'shall enjoy the same social and tax advantages as national workers'. The Court of Justice considers that such advantages are not confined to the context of work itself. Rather, 'in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, *whether or not attached to the contract of employment*'.[119] Thus, social and tax advantages 'are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory,[120] promoting the 'social advancement' of workers in a host State.[121] The definition of work in free movement law requires that activities must be 'real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary' to trigger equal treatment with host State nationals.[122] In contrast, work that fails to meet that definition would not establish, 'in principle, a *sufficient* link of integration with the society of the host State'.[123]

Neither the EU legislator nor the Court of Justice has expressed these principles in the language of solidarity explicitly. Nevertheless, solidarity is a useful way to frame the understanding that work evidences sufficient

[118] See especially Article 4 of Regulation 883/2004 ('[u]nless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof').
[119] Case 32/75 *Cristini* ECLI:EU:C:1975:120, para 13 (emphasis added).
[120] Case 65/81 *Reina* ECLI:EU:C:1982:6, para 12.
[121] *Lair* (n 46) para 22 (emphasis added). See also, recital 3 of Regulation 1612/68 ([1968] OJ L257/13); now reflected in recital 4 of Regulation 492/2011.
[122] Case C-345/09 *van Delft* ECLI:EU:C:2010:610, para 89. See earlier, Case 53/81 *Levin* ECLI:EU:C:1982:105 and Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284.
[123] Case C-542/09 *Commission v Netherlands* ECLI:EU:C:2012:346, para 65 (emphasis added).

integration in the host State to generate related entitlement to equal treatment there. Moreover, the nature of the benefit being claimed does not impact on equal treatment in situations of economic activity. In other words, even 'a benefit guaranteeing a minimum means of subsistence constitutes a social advantage, within the meaning of [Article 7(2) of] Regulation [492/2011], which may not be denied to a migrant worker who is a national of another Member State and is resident within the territory of the State paying the benefit, nor to his family'.[124] In such circumstances, '[t]he link of integration arises from, *inter alia*, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers'.[125] Equal treatment for minimum income benefits is extended to self-employed workers through the direct application of Articles 18 and 49 TFEU.[126] The entitlement that results, for both workers and self-employed persons, is also reflected in Directive 2004/38. As noted in Section 4.1 above, for residence beyond three months, Article 7(1)(a) of the Directive confers unconditional rights on Member State nationals who either work or are self-employed in the host State. In other words, once the *status* of worker or self-employed person is held, the Directive imposes no further requirements as regards their *means*. Article 7(3) of the Directive further ensures that, in certain circumstances, Member State nationals retain the status of worker or self-employed person after economic activity has ceased.[127]

Historically, the most volatile line of case law on welfare entitlement in situations of economic activity concerned frontier workers, requiring determination of the respective integration values of economic activity and place of residence.[128] However, more general fractures in the equal treatment

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[124] Case 249/83 *Hoeckx* ECLI:EU:C:1985:139, para 22.

[125] *Commission v Netherlands* (n 123) para 66. See similarly, Case C-410/18 *Aubriet* ECLI:EU:C:2019:582, para 33 and Case C-328/20 *Commission v Austria* ECLI:EU:C:2022:468, para 51.

[126] Eg Case C-299/01 *Commission v Luxembourg* ECLI:EU:C:2002:394, para 12; Case C-168/20 *BJ and OV* ECLI:EU:C:2021:907, para 85.

[127] 'For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances: (a) he/she is temporarily unable to work as the result of an illness or accident; (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office; (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months; (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment'.

[128] As AG Kokott put it, 'whether place of residence alone constitutes a suitable criterion to establish membership of a community of solidarity' (Case C-287/05 *Hendrix* ECLI:EU:C:2007:196, Opinion of AG Kokott, para 68). See especially Case C-212/05 *Hartmann* ECLI:EU:C:2007:437; Case C-213/05 *Geven* ECLI:EU:C:2007:438; and Case C-287/05 *Hendrix* ECLI:EU:C:2007:494; and in the specific context of eligibility for study finance, Case C-20/12 *Giersch and Others* ECLI:EU:C:2013:411; Case C-238/15 *Bragança Linares Verruga and Others* ECLI:EU:C:2016:949; and *Aubriet* (n 125). See further, C Jacqueson 'Any News from Luxembourg? On Student Aid, Frontier Workers and Stepchildren: *Bragança Linares Verruga* and *Depesme*' (2018) 54 Common Market Law Review 901; and J Silga 'Luxembourg Financial Aid for Higher Studies and Children of

of workers and self-employed persons have recently emerged too.[129] As noted in Section 4.1 above, the protection of national public finances can justify restrictions on equal treatment in EU citizenship law in the absence of economic activity in the host State. In free movement law more generally, 'national legislation may […] constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest'.[130] More specifically, 'the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the public interest capable of justifying the undermining of the provisions of the Treaty concerning the right of freedom of movement for workers'.[131]

In *Commission v Netherlands*, the Court adopted a narrow understanding of that position in the context of workers, finding that 'budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt' but that 'they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers'.[132] However, in *Tarola* – for the first time in a case on Article 45 TFEU – the Court characterised the aim of 'striking a fair balance between safeguarding the free movement of workers, on the one hand, and ensuring that the social security systems of the host Member State *are not placed under an unreasonable burden*, on the other' as one of the objectives of Directive 2004/38.[133]

Defending free movement restrictions on the basis of 'reasons of an economic nature' had been a significant discussion point in pre-Brexit negotiations between the EU and the UK. It directly informed compromises reached by the EU and the UK that would have taken effect in the event of a 'remain' vote in the UK referendum in June 2016: proposals that would have placed discriminatory restrictions on newly arrived EU workers in certain circumstances where a Member State could demonstrate that it was supporting, in effect, a disproportionately high number of workers from other Member States.[134] Of course, given the outcome of the 2016 referendum in the UK, that did not happen, and it might be assumed that the degree of equal treatment from which EU workers benefit is therefore no longer a significant concern. The outcome of infringement proceedings against Austria, which had unilaterally introduced one of the restrictions proposed in 2016 (indexing

Frontier Workers: Evolution and Challenges in Light of the Case-law of the Court of Justice' (2019) 19 European Public Law 13.

[129] The points summarised here are examined in more detail in N Nic Shuibhne 'Economic Activity and EU Citizenship Law: Seeding Means-based Logic in a Status-based Freedom' in N Nic Shuibhne (ed), *Revisiting the Fundamentals of EU Law on the Free Movement of Persons* (OUP 2023) 87.

[130] Case C-515/14 *Commission v Cyprus* ECLI:EU:C:2016:30, para 53.

[131] ibid.

[132] *Commission v Netherlands* (n 123) para 57: '[t]o accept that budgetary concerns may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of EU law as fundamental as non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of Member States' (para 58).

[133] Case C-483/17 *Tarola* ECLI:EU:C:2019:309, para 50 (emphasis added).

[134] See further, Section D, Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union [2016] OJ C691/1.

exported family benefits to the family's State of residence rather than the worker's State of employment), seems to support that position at first glance. There, Advocate General Richard de la Tour emphasised the 'fundamental importance' of the fact that 'migrant workers contribute to the financing of the social policies of the host Member State through the taxes and social contributions which they pay by virtue of their employment there, which justifies the equality of the benefits or advantages granted'.[135] That point was reinforced by the Court, which explained that Austria's indirectly discriminatory restriction of the free movement of workers was not, therefore, defensible on public interest grounds because migrant workers 'must […] be able to profit from [their tax and social security contributions] under the same conditions as national workers'.[136]

However, economic activity only 'establishes, *in principle*, a sufficient link of integration with the society of that Member State, allowing [workers] to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages'.[137] In that light, another statement in *Commission v Austria* is striking: that 'the risk of jeopardising the financial balance of the social security system does not result from the payment of benefits to workers whose children reside outside Austria, *since those payments are estimated to represent only around 6% of expenditure* in respect of family benefits'.[138] Does that mean that the justification would be accepted under different conditions? Similarly, the Court held that 'the family benefits and social advantages at issue *are not subject to the adjustment mechanism where the children reside in Austria,* even though it is common ground that there are, between the regions of that Member State, differences in price levels comparable in scale to those which may exist between the Republic of Austria and other Member States. *That lack of consistency in the application of the mechanism* confirms that the justification put forward by the Republic of Austria cannot be accepted'.[139]

Thus, in both *Tarola* and *Commission v Austria*, the Court of Justice alluded to circumstances in which the economically active could become an 'unreasonable burden' on host State social security systems, notwithstanding the fact that the persons concerned 'are acknowledged to contribute to the financing of the social policies of the host Member State through the taxes and social contributions which they pay by virtue of their employment there'.[140] These rulings therefore suggest limits to previously assumed understandings of solidarity in free movement law, reflecting instead 'a more contractual approach to claims of social benefits'.[141] The motivation for these subtle case law statements is fairly evident: 'to somewhat soothe Member States' concerns of opening up their welfare systems too much'.[142] It is difficult to reconcile these trends in recent case law with the Court's philosophy in the case law on international protection considered in Section

[135] Case C-328/20 *Commission v Austria* ECLI:EU:C:2022:45, Opinion of AG Richard de la Tour, para 143.
[136] *Commission v Austria* (n 125) para 109. Most remarkably, the Court even indicated that it would have found the 2016 Decision invalid on this point had it come into effect (para 57).
[137] *Commission v Netherlands* (n 123) para 65 (emphasis added).
[138] *Commission v Austria* (n 125) para 107 (emphasis added).
[139] ibid, para 105 (emphasis added).
[140] *Commission v Austria*, Opinion of AG Richard de la Tour (n 135) para 143.
[141] Jacqueson (n 128) 921.
[142] Ristiuccia (n 186) 893.

3 above: that even '[w]hen one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States'.[143]

Simply put, Brexit catalysed deeper scrutiny of the extent to which equal treatment should be extended in free movement law,[144] and the UK's withdrawal from the Union did not end that debate.[145] Displacing the status of the person as a worker or self-employed person in formal terms and basing welfare solidarity on their financial means instead is out of step with decades of case law. Article 21(1) TFEU makes the right of '[e]very citizen of the Union' to move and reside freely within the territory of the Member States 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. But rights based on Articles 45 and 49 TFEU 'are not so conditional – the only limitations are those "justified on grounds of public policy, public security or public health", giving narrower scope for rights negation'.[146] The shift from status to means is also out of step with EU initiatives that recognise the changing and often precarious dimensions of economic activity more generally.[147]

The gradually stronger accommodation of public finance defences to justify restrictions of even economic free movement rights raises serious questions about solidarity – and, once again, not only as a substantive or normative basis for equal treatment of economically active Union citizens in host States but also, more procedurally, as a legal principle for determining the reach of free movement responsibility of both the Member States and the Union institutions. The emphasis that procedural solidarity places on the fair sharing of responsibility seems entirely missing from changing case law as well as political agreements in terms of how the contribution of economic activity to the host State, and thus to the citizen's claims to equal treatment there, is assessed – and therefore, how it is valued. These shifts erode the Treaty-based commitment to free movement principles by incorporating increasingly economically oriented justification grounds without sufficiently considering the competing obligations set by primary EU law. Additionally in terms of the requirements set by procedural solidarity specifically, these trends in EU free movement law also encourage the seeking of 'solutions' outside rather than within the established system of EU law itself. They thus unsettle the assumed idea that EU law entails a balance between advantages *and* obligations. They loosen the criteria, the processes, and the boundaries

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143 *Slovak Republic and Hungary v Council* (n 18) para 291.

144 Eg C Barnard and S Fraser Butlin, 'Free Movement vs Fair Movement: Brexit and Managed Migration' (2018) 55 Common Market Law Review 203; C Barnard and E Leinarte, 'The Creation of European Citizenship: Constitutional Miracle or Myopia?' (2023) 24 Cambridge Yearbook of European Legal Studies 24.

145 As anticipated by Mantu a decade ago: 'work operates as an instant integrative force, although the quality of this integration is somewhat less reliable than one is first tempted to think' (S Mantu, 'Concepts of Time and European Citizenship' (2013) 15 European Journal of Migration and Law 447, 458).

146 C O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 Common Market Law Review 1107 at 1110.

147 Eg Proposal for a directive on improving conditions in platform work, COM(2021) 762 final (the process of adopting this measure was still underway at the time of writing).

developed at EU level and suggest, instead, an extension of national discretion that veers from considerations of collective interest to unilateral interest. Once again, highlighting these issues in procedural solidarity language is intended to complement rather than subsume necessary substantive and normative debates about the sustainability in EU free movement law of its traditionally binary approach to economically active/inactive free movers. Illustrating the complexity of free movement challenges, however, the next section considers, in a sense, the opposite problem: where collective solutions might undermine genuine even if more individual concerns.

4.3 Solidarity and uneven freedom of movement

Could procedural solidarity play a part in resolving challenges that relate to the fact that freedom of movement is experienced unevenly by different Member States? This is an extremely difficult question both conceptually and practically because it challenges the fundamental connection between equality and uniformity in EU free movement law, an approach that is entrenched by the development of autonomous concepts of EU law to smooth divergences across national law – including the definition of work, for example. It also raises the difficulty of reconciling national and transnational understandings of solidarity. So far, we have managed these questions spectacularly badly since, as shown in Sections 4.1 and 4.2 above, developments on freedom of movement have gradually enabled unilateral conceptions of a State's national interest to rationalise restrictions of free movement; sown welfare tourism language into rulings of the Court; and accepted, in principle at least,[148] discriminatory restrictions on workers as part the agreement reached between the EU and the UK before Brexit – largely, moreover, without robust supporting evidence.

In contrast, as emphasised in Sections 2 and 3 above, decisions taken on the basis of a procedural understanding of solidarity require open acknowledgement and consideration not only of the different *interests* of Member States but also of different *impacts* of EU policies upon them. Thus, for demonstrated instances of uneven migration, might compensatory mechanisms coordinated at EU level, and possibly also entailing more responsibility on the part of home States, be appropriate?[149] Such mechanisms could draw from the established EU approach to regional or structural funds, or the coordination framework already well embedded in free movement law for navigating differences across national social security systems.

As a procedural obligation, solidarity will not provide definitive answers to these questions. However, it does require that they are asked and addressed. In the process of doing so, it mandates that the States who *agree* to construct the EU's free movement space must take responsibility and be accountable for sustaining it through a collective way of being. It might be argued that the accommodation of national public finance protection as a public interest argument in free movement law does, in fact, represent the

[148] See the unusually strong statement of the Court of Justice in *Commission v Austria* (n 125) para 57.

[149] Not to mention responsibility *to* home States: on the challenges faced by States that experience significant movement of their nationals to other Member States, see Goldner Lang and Lang (n 117).

collective response of the Member States and Union institutions. However, that argument overlooks the imperfections and inconsistencies – the 'internal discrepancies'[150] – of Directive 2004/38. It also overlooks the lack of appropriate evidence to support such developments. And it does not truly confront the *reality* of differential impact.

There are very few instances in free movement case law that we can point to for discussion of uneven free movement. Advocate General Sharpston's Opinion in *Bressol* still provides the best example, and it exemplifies the procedural as much as substantive and normative dimensions of solidarity. The case concerned whether restrictive Belgian rules on access to certain university courses could be justified, given their purpose of limiting the free movement of students from France.[151] Because of the impact on medical and paramedical university courses in particular, the Court of Justice accepted a public health justification defence in principle and, in notable contrast to recent welfare entitlement case law, emphasised the importance of appropriate evidence and provided detailed guidance for national authorities in that respect: in essence, 'it is for the competent national authorities to show that such risks *actually exist*'.[152] In her Opinion, Advocate General Sharpston directly addressed the geographically specific nature of the contested national response. Referring to what is now Article 2 TEU and the objective of promoting solidarity among the Member States as well as the 'mutual duty of loyal cooperation' under Article 4(3) TEU, she argued that '[w]here linguistic patterns and differing national policies on access to higher education encourage particularly high volumes of student mobility […] cause real difficulties for the host Member State, it is surely incumbent on both the host Member State and the home Member State actively to seek a negotiated solution that complies with the Treaty'.[153]

Thus, she acknowledged the bilateral context of the free movement pressure.[154] Importantly, though, she underlined the obligation to resolve it within the system and thus the standards of EU law at the same time. Linking back, once again, to the case law on relocation mechanisms in EU immigration law, discussed in Section 3 above, we saw similar instances of uneven impacts on different Member States, with Advocate General Bot, for example, acknowledging the '*de facto* inequality between Member States because of their geographic situation and their vulnerability in the face of

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[150] Thym (n 65) 49, who highlights that [p]ersisting uncertainties can be traced back to the indecisiveness of the legislature, which failed to establish clear standards for the free movement of the economically inactive'.

[151] As summarised in the ruling, '[t]he system of higher education of the French Community is based on free access to education, without restriction on the registration of students. However, for some years, that Community has noted a significant increase in the number of students from Member States other than the Kingdom of Belgium enrolling in its institutions of higher education, in particular in nine medical or paramedical courses. According to the order for reference, that increase was due, *inter alia*, to the influx of French students who turn to the French Community, because higher education there shares the same language of instruction as France and because the French Republic has restricted access to the studies concerned' (Case C-73/08 *Bressol and Others* ECLI:EU:C:2010:181, paras 17–18).

[152] ibid, para 71 (emphasis added).

[153] Case C-73/08 *Bressol and Others* ECLI:EU:C:2009:396, Opinion of AG Sharpston, para 154.

[154] '[T]he EU must not ignore the very real problems that may arise for Member States that host many students from other Member States' (ibid, para 151).

massive migration flows'.[155] To underline (yet again): little if any evidence of 'massive migration flows' has ever been established in EU free movement law. But we can point to instances of differential impact on Member States for geographic and/or linguistic reasons – Luxembourg providing the archetypal example. Could the solidarity-based 'adjustment mechanisms' adopted in EU immigration law, which aim at 'the attainment of a balance of effort between Member States', also be useful in free movement law?[156]

Advocate General Bot also suggested that, in immigration law, 'the Council has succeeded in reconciling the principle of solidarity with the taking into account of the particular needs that some Member States may have owing to the evolution of migratory flows. Such a reconciliation seems to me, moreover, to be perfectly consistent with Article 80 TFEU, which, as will be seen on a careful reading, provides for the "fair sharing of responsibility […] between Member States"'.[157] The Court's approach to steel quotas in much earlier case law, considered in Section 2 above, demonstrates that these ideas have salience beyond the specific circumstances of policies adopted under Article 80 TFEU. Confronting similar questions in free movement law might make us feel uncomfortable. But not confronting them brings higher risk for both the sustainability of EU free movement law and, more importantly, for the security and rights of Union citizens who move.

5 Conclusion

Determining the normative and substantive meanings of, and degrees of commitment to, solidarity in the objectives and practice of EU freedom of movement will and should continue. Adding to that debate, this paper has highlighted that solidarity as a legal principle also imposes procedural obligations. These are premised on the fair sharing of responsibility and the taking of more collective than unilateral approaches when addressing the consequences of freedom of movement. They require that related mechanisms, principles, and processes should be developed, and that they should function within rather than outside the wider system of EU law. At the same time, solidarity as a procedural obligation also entails that complicated questions about uneven impacts should not be glossed over in ways that might, in fact, end up being more systemically damaging in the longer term. Again, however, collective solutions to these challenges are required over allowing or enabling Member States to shape their responses unilaterally.

The fact that Union citizens who move can encounter and experience vulnerabilities is not something that those who have created the system of free movement can overlook. Fundamentally, the procedural dimension of solidarity is more about *how* to resolve questions than the answers that might be reached. However, the difficult questions that we must confront are indeed created by the practice, the system, and the objectives of Union citizenship and free movement: which, as emphasised at the outset of this paper, are objectives agreed to by the European Union and the Member States, not somehow inflicted upon them. Procedural solidarity generates a template for the implementation of responsibility (and the fair sharing of it more

[155] Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:618, Opinion of AG Bot, para 22.
[156] ibid, para 257.
[157] ibid, para 311.

specifically) for that system and for ensuring coordinated as opposed to unilateral responses when challenges are faced. That template supports the taking of difficult decisions that must somehow bring about 'substantive legal concepts of equality and solidarity that recognize the need *for both* collective endeavours *and non-reciprocal efforts* to address particular situations of unfairness'.[158] Thus, procedural solidarity encourages open discussion of the complexity of free movement rather than a dismissal of that complexity.

But procedural solidarity also illustrates that, at the end of the day, solidarity is, in any understanding, about being in something together. Ups, downs, benefits, and burdens are a part of the EU as a collective endeavour. In a case on the EU's Staff Regulations, the Court of Justice stated that '[m]arriage is characterised by rigorous formalism and creates reciprocal rights and obligations between the spouses, of a high degree, including the duties of assistance and solidarity'.[159] That idea perfectly captures the essence of what solidarity asks of those who commit to a common project to realise common objectives. Both in creating a status of Union citizenship and a system that facilitates the free movement of persons, that is what the EU and its Member States have done. Procedural responsibility better equips them to take responsibility for and thus be more accountable for it.

[158] Editorial comments, 'A Jurisprudence of Distribution for the EU' (2022) 59 Common Market Law Review 957, 968 (emphasis added).
[159] Case C-460/18 P *HK v Commission* ECLI:EU:C:2019:1119, para 73.