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in the European Union**

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Introduction

Migration seems to represent the main test for the principle of loyalty, to which the European Members States have subscribed in adhering to the founding values proclaimed and enshrined in the founding EU Treaties.

The principles on which the European Union is established are represented by a set of common values, which Members States decided to incorporate into their national legislations: liberty, democracy, solidarity, respect for human rights and fundamental freedoms, and the rule of law, to which the Charter of Fundamental Rights added the dignity of the human being, equality and solidarity. For as much as they can be deemed as rhetorical, they nevertheless constitute the basis upon which the European Union rests. They are binding and they underpin the EU legal order and functioning by the instrument of the Treaties.

The ongoing debate about the conceptual foundations of the European Union is more than ever challenged by fundamental political crisis related to migration, to Brexit and to the respect of key values and freedoms within the

boundaries of Union, events that shake the European project to its core. In this brief contribution, we analyze the key principle of loyalty¹ set in the EU treaties, which calls, in the official texts, for sincere cooperation, partnership, communion of intents and goals. We want to highlight that the balance between Member States' national political agendas and Union-wide interests is legally defined in the Treaties and should not, in principle, jeopardize the Union's functioning and the decision-making processes.

The principle of loyalty between Members States is present in the Treaties since its first provisions in the the European Coal and Steel Community (ECSC) Treaty². What has changed quite considerably, however, is the context loyalty is placed in today, as it may appear that the provision should have a moral weight, but less a legal one. The principle of loyalty is reiterated in the notion of '*sincere cooperation*', '*principe de coopération loyale*' in the French version.

Horizontal vs. vertical loyalty

It is important to define *horizontal loyalty* as including all those obligations derived from Article 4 (3) TEU on sincere cooperation and the mandatory nature of respecting obligations.

The article cites:

“Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
2. The Union shall respect the equality of Member States before

the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives”.

Vertical loyalty, consisting in the obligations imposed onto the Member States by the EU Institutions, finds its limits in political agendas that each Member State pursues within the Union.

Horizontal loyalty concerns the obligations applying between Member States, as deriving from the duties of cooperation, an expression of a general obligation of loyalty. Provisions in the TFEU require Member States to assist each other 'where necessary' in eliminating incompatibilities between their 'old' treaties and Union law and to adopt a common attitude 'where appropriate'.

In the migration issue and in the most recent interventions of the Italian Government to redefine a policy on migration, it appeared very clearly that the principle of horizontal loyalty should have been put in place as part of a common EU response to migration and security matters on border controls already before the discussion on Dublin's Mechanism failed.

Vertical loyalty applies to the Member States even when they act within their own competences, or when they operate outside of the Treaty entirely. Thus, Member States are bound by Union law obligations and in particular by the duty of cooperation when they exercise their reserved competences within the context of a mixed agreement.

But the vertical application of loyalty finds its limits when it come to political matters: Member States are not required to cooperate in the Council, they are not obliged to make compromises, or to form majorities when possible.

Member States are thus formally obliged but politically not bound to act in the common interest of the Union or to refrain from pursuing national interests within the Union institutions.

Thus, vertical loyalty has very strong limits and plays *de facto* no role in protecting minority interests, nor does it require Member States to accommodate the positions of other Member States when taking decisions that will affect the EU as a whole. Simply, vertical loyalty cannot be invoked as the legal basis for facilitating or obstructing majority decisions.

For what concerns institutional loyalty, concerning duties of inter-institutional dialogue especially in the co-decision

procedures and the power struggle between the Council, the Commission, and the Parliament, it seems to be a topic for discussion especially after the proposal, launched by Commission's President Juncker on merging the Presidency of the Council with the Presidency of the Commission. Multiple scenarios stem from this point onwards and they all originate from the need to realizing a deeper level of cooperation between the European institutions as such.

Loyalty is relevant in all constellations under Union law, as it applies in the reverse vertical relationship between Union Institutions and the Member States as well as between the institutions themselves. It binds Member States to act under the auspices of the Union law not only between themselves but also exercising their reserved competences in mixed agreements.

Once Union interests are affected, loyalty applies irrespective of whether or not the matter belongs to the reserved powers of the Member States. Obligations that the Member States have undertaken with their membership in the European Union should be respected to avoid undermining the functioning of the Institutions.

The asymmetry

The asymmetry between the scope of the democratic mandate of each single Member State and the nature and spectrum of competences exercised by all Member States in concert under the Institutions' flag is growing. To what extent are Member States ready to put into full realization obligations deriving from the principle of loyalty as they have adhered to them in the EU Treaties and to reduce the

distance, the asymmetry between the scope of the Union and the instruments it has at its disposal?

From theory to reality, is the principle of loyalty and cooperation between Member States in accordance with what takes place in the European Union today?

In contrast to what happens for federal states, the Union has as sole instrument to affirm the supremacy of EU law over national law, which means of horizontal loyalty, through the Courts. Supremacy in the EU must be assured by a greater role of loyalty in the EU legal order, to uphold the effectiveness of respective legal orders and reduce asymmetry not only between horizontal and vertical loyalty but also between the Union and its Members States.

The asymmetry has been greatly heightened by the fact that Union loyalty, having a direct relation to the principle of solidarity between Member States, means enforcing decisions that challenge obedience to the vertical axis and enforcing rulings of the European Court of Justice: the aim would be to adjust the asymmetry, using the tool of the loyalty principle and avoiding ECJ rulings between Members States and Institutions, both on the horizontal and the vertical axis.

If the principle of loyalty has to foster EU law and its embodiment in the Institutions, the asymmetry between the horizontal and the vertical axis should be erased and new instruments should be provided to decision-makers to foster the cohesion of the European Union around the loyalty principle instead of around tribunal rulings.

Loyalty addresses all branches of law in the national and in the supra-national organizations: the executive, legislative

and judiciary authorities of the Member States are bound by loyalty vis-à-vis each other and vis-à-vis the Union and they are required to ensure that the provisions of Union law take full effect on their territories.

Migration and the limits of loyalty

The question of loyalty becomes central when it comes to questions such as migration.

The migration issue, and the difficulty of putting together the varied and often opposed positions of Member, is putting to the test the principle of reciprocal loyalty, sincere cooperation (which is part of loyalty and derives from it) and the collective partnership between Member States when it comes to protecting a wide range of common interests.

Respect of principles, loyalty and cooperation should have the effect of furthering the integration of the Member States as constituent elements of the European Union, of providing the basis for all sorts of duties of cooperation, and of interlocking the legal regimes of the Member States with the Union. But in this case, they represent the cause of a great deadlock that still persists in the so far missing common action on migration.

Obligations deriving from the loyalty principle within the Treaties has a limit imposed by individual political choices.

Jürgen Habermas's view on the future of Europe and what he deems as a much-needed European Constitutions is based on the distinction between values and norms, in favor of a constitutional patriotism as a strong civic attachment to values. Are values enough to guarantee the respect of the European principles and in particular of mutual loyalty?

Migration will remain a central issue on the European policy agenda for decades to come and migration policies do call strongly upon the obligations of vertical and horizontal solidarity that bind Italy as Member State to the European Union, and Member States in their duties towards other Member states and Italy.

Migration policies cannot be pursued at the national level only, and European governments have the obligation to support policies that address the issue of the management of EU external borders, the distribution of migrants, refugees and asylum-seekers among member states, the cooperation as for what concerns transit and legal routes for the access to the EU, and the fight to terrorism and human trafficking.

If the principles of loyalty, mutual and sincere cooperation bind together, as ascertained in the Treaties supporting and regulating the European Union, then the exercise of vertical and horizontal loyalty principles should be applied without the recurrence to European judiciary bodies or diplomatic crisis. An European Council level discussion on this issue would benefit the European conciliation mechanisms and could sparkle a viable solution that, at the moment, does not exist.

How can you bind Europeans together?

Jean-Marc Ferry, in its many works on European identity, tells us that European loyalty and cooperation at European level are challenged by transnational migration, diversity, different cultural dispositions that operate on national established models of belonging and loyalty.

Ferry says that transnational migrants highlight the tension between *hot loyalties*, which are singular and nationally

exclusive, and a range of more selective *attachments*, containing the awareness that human beings are made of multitudes.

The fundamental issue is whether European modern political structures can accommodate this tension and at which level: migration, in fact, introduces a new concept of loyalty which is defined as modernly flexible and that poses an existential and philosophical question to the Europeans.

How can you accommodate in your structure those who are not directly linked to you nor against you? How can European law adopt legally binding choices that are respectful of new political events and that consider socio-demographic events taking place within the Union?

Ascertained that loyalty within the European Union works on two levels, propelling actions of Member State and creating legally binding actions that need to be enforced, it is obvious that the system fails when the full implementation of the established Community law or the effectiveness of the implementing measures contradict the changes expressed by political changes within the Member States and consequently in their EU policies.

Which involves that, if the obligation of sincere cooperation set up by Articles 4(3) frames the entire Union law regime, this principle, even if not limited to the relation between institutions and Member States but applying generally to all levels of cooperation within the Union, fails to protect interests of all Member States and it does not absolve its primary function of framing the decisions that concern the entire Union. Political agendas, in fact, do seem to

jeopardize the legally binding agreements and to put into halt mechanisms that have been codified in the Treaties.

Migration is the hardest challenge to the principle of loyalty upon which the European Union is built. National political decisions that challenge European policies on migration represent a threat to the core philosophy of the Union and move the point of equilibrium well outside the established legal frame of action, invalidating the principles contained in the Treaties such as the principle of loyalty and sincere cooperation.

External arrangements and *ad hoc* solutions, as pre-Council summits and reduced forms of concertation between fewer Member States, have the power of endangering the stability of the Treaties and the legal framework of action that they support, opening up and creating new possibilities and means of action that can weaken the foundations of the two axis upon which the principle of loyalty is built, the vertical and the horizontal.

Note

- 1 Article 4 (3) Treaty of the European Union.
- 2 M. Blanquet, *L'Article 5 du Traité C.E.E.—Recherche sur les Obligations de Fidélité des États Membres de la Communauté* (Paris: LGDJ, 1994), 5–6.

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Its activities are focused on interdisciplinary research, documentation and information on the domestic and supranational federalism, the development of European integration, the governance of globalisation.

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