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What Solidarity?

A Look Behind the Veil of Solidarity in 'Corona Times' Contractual Relations*

Candida Leone

Introduction

This article aims to present a critical look at solidarity and contractual relations during the first months and years of the coronavirus pandemic, using examples from the Dutch experience to problematize the relationship between contractual and social solidarity. In particular, this article is written with (a resurgent literature on) Durkheim's ideal types of mechanical and organic solidarity in mind.[1] Very much in short, according to Durkheim's theory social solidarity – an institution crucial to maintaining societies in balance and preventing anomy – displays different forms in primitive and advanced societies. Primitive communities in this account are characterized by *mechanical solidarity*: a mechanism based on identity (= sameness) and which works through *punishment* as the main legal technique. Through punishment, law is tasked not so much with correcting the individual as with reaffirming the values of the community.[2] In advanced societies, in contrast, social solidarity is *organic:* social cohesion stems from the acknowledgement that *different* groups in society need each other in order to thrive. Relations between such different groups, and hence solidarity, are typically mediated and regulated by contract. In contrast to the punitive emphasis of law in primitive societies, the logic of cooperation and – when necessary – restitution prevails. Social cohesion is then upheld by civil law through guaranteeing contractual reciprocity, not by punishing breaches.[3] In this way, organic solidarity embraces individualism while accepting interdependence as a necessary corollary of modern division of labour.[4]

* Next to expressing gratitude for the opportunity to present this paper at the 2021 VWR Conference – The Principle of Solidarity During and Beyond COVID-19 (18 June 2021), the author wishes to thank Sanne Taekema and Mirthe Jiwa for their charitable reading and insightful suggestions. Mistakes are as usual mine alone. Websites have been last checked on 15 October 2021.

1 On mechanical and organic solidarity as ideal types: Jon Hendricks and C. Breckinridge Peters, 'The Ideal Type and Sociological Theory', *Acta Sociologica* 16, no. 1 (1973): 31-40. For an early application of Durkheimian insights to the pandemic: Chinmayee Mishra and Navaneeta Rath, 'Social Solidarity During a Pandemic: Through and Beyond Durkheimian Lens', *Social Sciences & Humanities Open* 2, no. 1 (1 January 2020), 100079.

2 Emile Durkheim, *The Division of Labor in Society* (Glencoe: Free Press, 1960).

3 Durkheim, *The Division of Labor in Society*.

4 Durkheim, *The Division of Labor in Society*; Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship', *European Law Review* 32 (2007), 787-818; Kenneth Veitch, 'Social Solidarity and the Power of Contract', *Journal of Law and Society* 38, no. 2 (2011): 189-214.

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Several voices have maintained that the prevalence of division of labour and organic solidarity in modern societies is not incompatible with an enduring significance of mechanical solidarity:[5] some, in particular, have done so in sympathy,[6] whereas others have focussed on the dark side of the mechanism, emphasizing the punitive logic that comes attached to contract (and contract breach) in the context of neoliberal governance.[7] As the article takes contractual relations and law as its object of inquiry, focussing on the *legal mechanisms* of solidarity seems appropriate. This requires some translation, as solidarity in Durkheimer is a social fact rather than a norm – and certainly not a norm of contract law. After having thus paid attention to the legal significance and possible articulations of solidarity, with a specific emphasis on contract law, the analysis will focus on the specific juxtaposition between compensatory/restitutory logic and 'punitive' legal intervention by looking, on the one hand, at the *recipients* of solidarity in contractual context and, on the other hand, at the framing of solidarity obligations.

The article considers three instances in which solidarity has been invoked – directly or indirectly – to interfere with contractual obligations in the context of the current pandemic, with effects partially similar to the ones just described. First, a number of decisions will be discussed which concern commercial rentals. In some of these cases, the rules on change of circumstances were relied upon in order to temporarily reduce the agreed rental price, often 'splitting' the tenant's loss of income between the parties. Second, I will discuss the case of vouchers in lieu of reimbursement which rose to prominence in 2020 consumer contracts across Europe, including in The Netherlands. Third and final focus point will be the *loonoffer* (wage sacrifice) asked of KLM employees as a condition for the concession of state aid in the summer of 2020. All these examples point to a version of *solidarity* – what version, and in particular towards whom and with what significance will be the specific angle of the short inquiry that follows.

Distinguishing 'solidarities' in law

From a broader legal perspective, it is tempting if perhaps problematic to identify solidarity with *mutualization*, that is, the idea that certain members of society 'subsidize' entitlements for other members. This understanding, however, is difficult to translate to contract law for at least two reasons. The first reason is the difference between voluntary and involuntary relations: in EU law, for instance, solidarity has been characterized as 'the inherently uncommercial act of involuntary subsidization of one group by another'.[8] This definition would cover, for instance, collective

5 Herbert Hart, 'Social Solidarity and the Enforcement of Morality', *The University of Chicago Law Review* 35, no. 1 (1967): 1-13.

6 David Courpasson, Dima Younes and Michael Reed, 'Durkheim in the Neoliberal Organization: Taking Resistance and Solidarity Seriously', *Organization Theory* 2, no. 1 (2021): 1-24; Mishra and Rath, 'Social Solidarity During a Pandemic'.

7 Veitch, 'Social Solidarity and the Power of Contract'.

8 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* [1997] ECR I-3395, AG's Opinion para. 29.

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health or social security insurance schemes, education and other benefits arranged through taxation or compulsory insurance. The definition's emphasis on the *involuntary* nature of legally arranged solidarity outlines the tension between this 'public law' model of solidarity and contract law, where the voluntary nature of relationships is a core postulate. Even when doing away with coercion, legal institutions of solidarity seem to point to a group sharing in both the risks and *benefits* of cooperation:[9] in contract law, in contrast, risk *allocation* is an important feature of the contract itself, and benefits are typically regarded from an individual perspective in line with the principle of private autonomy. A transposition, therefore, seems to require some work.

Possibly not by coincidence, 'solidarity' and *solidarism* are keywords through which in particular some French contract lawyers[10] have expressly articulated the twentieth century developments which questioned the reach of 'voluntarism'. Solidarity, or good faith, can require that a party abstains from exercising some rights, or it can lead to certain elements of the contract being declared invalid (think of an unfair limitation of liability). It can require a judge to interpret a contract in a certain way rather than one that would lead to a harsher outcome for the burdened party. As a result, in specific occasions, it can require that one party performs an obligation that it had not expressly committed to.

Within (Europe-oriented) English-language literature, some authors have expressed unease about the fit between solidarity language and contract law, preferring other nomers such as 'altruism' and 'regard',[11] whereas others have vindicated the analytical expediency of mapping contract law rules on a continuum between

9 Andrea Sangiovanni, 'Solidarity in the European Union', *Oxford Journal of Legal Studies* 33, no. 2 (2013): 213-41.

10 See *e.g.* Christophe Jamin, 'Plaidoyer Pour Le Solidarisme Contractuel', *Le Contrat Au Début Du XXIème Siècle*, 2001, 441; Denis Mazeaud, 'Loyauté, Solidarité, Fraternité: La Nouvelle Devise Contractuelle?', in *Mélanges Terré* (Paris: Dalloz, 1999), 603-634; Ruth Sefton-Green, 'A Vision of Social Justice in French Private Law: Paternalism and Solidarity', in *The Many Concepts of Social Justice in European Private Law*, ed. Hans-Micklitz (Cheltenham: Edward Elgar Publishing, 2011), 237-246.

11 See Brigitta Lurger, 'The "Social" Side of Contract Law and the New Principle of Regard and Fairness', Arthur S. Hartkamp and Carla Joustra, *Towards a European Civil Code* (Den Haag: Kluwer Law International, 2004), 275. About the duty to consider the other party's interest, Lurger writes: 'This obligation shows traces of "altruism" and "solidarity", but is not a fully-fledged form of these. [...] The term "solidarity" is closely associated with certain phenomena in ethics, sociology and public law. If applied to contract law, the term "solidarity" could mislead the reader to expect that such kind of contract law would deal with transfers of assets from richer to poorer parties, with sacrifices of groups of society made in support of other groups, or it could evoke the false impression that "contractual solidarity" is the same as a communitarian view of private law. The traditional term of "solidarity" has already so many established meanings and connotations that do not really or not completely coincide with the role and functioning of customer protection in contract law. It is therefore not advisable to use this old pre-defined term for a rather recently established principle of contract law.' Kennedy uses 'individualism and altruism' instead of autonomy and solidarity, but also refers to solidarity in explaining what altruism entails, see Duncan Kennedy, 'Form and Substance in Private Law Adjudication', *Harvard Law Review* 89 (1975): 1685.

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(and continuous balancing of) autonomy and solidarity.[12] By and large, both sets of authors have in mind (acknowledging the shortcuts that the translation entails) rules, principles and concerns not very different to what continental lawyers learn to be encompassed by 'objective' good faith: in essence, a duty to consider the other party's interests when asserting one's own. Compliance with such duty entails an act of balancing entrusted, in principle, to a private party – even though by its nature it will mostly end up in the hands of a judge entrusted with adjudicating a dispute, who will decide on somewhat 'objective' standards.

The dispute among contract lawyers as to whether developments in private law are to be characterized as 'altruism' or 'solidarity' rests on the extent to which each terminology foregrounds corrective or distributive justice concerns. While duties to care for the other party are often placed on the comparatively stronger contracting partner, this is not a requirement in classic contract law. Kennedy famously referred to rules on unilateral mistake, where a degree of selflessness may be required even among *ex ante* 'equal' parties. Thus 'altruism' could be a better term to catch the moral expectation that sometimes attaches to contractual relations.[13] As observed by Mak, much of this distinction lies in the eyes of the beholder – one can see 'socialization of contract law' where others see respect for equal autonomy, and hence see solidarity as emerging principle where others see altruism.[14] However, it does not seem unlikely that the presence of a clearly weaker party shapes the form 'altruism' takes in concrete cases, so for instance Mak herself opted for solidarity as a viable concept to study the influence of fundamental rights on contractual relationships. At the same time, to the extent that one uses the word solidarity in contract law discussions, its meaning seems different than what we have quickly sketeched above for 'public' law: emphasis on good faith or duties of care means that avoiding (excessive) unliateral advantage-taking, rather than *sharing* of benefit or risks, seems to be the relevant standard. Not much pooling is required beyond what the parties have established in the agreement. If contract, per Durkheim, is the form in which relations are articulated in a society which accepts division of

12 Martijn Hesselink, *The New European Private Law* (Den Haag: Kluwer Law International, 2002); Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Den Haag: Kluwer Law International, 2008). The latter also frequently refers to Jan Smits using the same language in the Dutch debate. In the same context, see also Nick J.H. Huls, 'Al het privaatrecht moet sociaal zijn!', *WPNR* 6564 (2004): 101 and Ton Hartlief, 'Autonomie en solidariteit. Beweging in het verbintenissenrecht', *WPNR* 6564 (2004): 106.

13 See Kennedy, 'Form and Substance in Private Law Adjudication'.

14 Contrasting Hesselink's and Du Perron's views on duties of care: Mak, *Fundamental Rights in European Contract Law*, 184.

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labour and interdependence, such interdependence is not expressly acknowledged in solidarity-qua-good faith discourse.[15]

The short overview above allows us to look at cases involving contract and solidarity with three analytical pillars: an internal view on contract law solidarity between parties, a view of organic social solidarity among distinct interdependent groups as mediated by contracts and normatively characterized by restitutory discourse and, finally, mechanical solidarity, based on group identity and normatively associated with punishment.[16] These pillars will hold together the analysis of the three cases discussed in the next part of the article.

Case 1: Sharing the pain of lockdown in commercial leases

On and off over the past two years, lockdowns have entailed massive disruptions of on-premise commercial activities, with a particularly remarkable impact on retail, hospitality and of course sports and personal care facilities. In contrast with the approach taken in other countries, in the Netherlands no specific rules have been passed to specifically govern the effects of the lockdowns on contracts in general – possibly also due to the soft law approach followed in the first ('intelligent') lockdowns. It is perhaps then no surprise that disputes ended up arising between tenants of commercial premises and their landlords concerning the consequences of the pandemic for their respective contractual rights and duties. In the cities, in particular, courts showed a degree of sympathy towards the claims of tenants who had been confronted with almost erased cash flows in the face of considerable (pre-corona) costs.[17] While the performance of the main obligation is still possible – the premises are still available to the tenant – the performance is deprived of any utility, whereas the monetary counter-performance has not been affected.

Dutch tenancy contract rules allow for a price reduction when the premises cannot be exploited as expected due to a 'defect',[18] which has been interpreted broadly to also cover circumstances external to the object to the contract. When the applica-

15 In contrast with, *e.g.*, Catholic social doctrine: '[…] new relationships of interdependence between individuals and peoples, which are de facto forms of solidarity, have to be transformed into relationships tending towards genuine ethical-social solidarity.' https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html#Solidarity%20as%20a%20social%20principle%20and%20a%20moral%20virtue, paras. 192 ff. Closer to this sensitivity are, however, some contemporary strands in Anglo-American contract theory, see *e.g.* the notion of justice based on contract as cooperation in Dagan, Hanoch and Dorfman, Avihay, 'Justice in Contracts' (17 May 2021), *American Journal of Jurisprudence* 67 (forthcoming 2022), available at SSRN: https://ssrn.com/abstract=3847845 or http://dx.doi.org/10.2139/ssrn.3847845.

16 The distinction, furthermore, may be clear for classical doctrines of contract law such as relief for unilateral mistake, but almost untenable for modern mandatory contract rules such as minimum wages, price controls, minimum quality.

17 See e.g. Rechtbank Amsterdam 9 March 2021, ECLI:NL:RBAMS:2021:937, 8701992 for the case of a hotel close to the city centre, but also Rechtbank Den Haag 21 January 2021, ECLI:NL:RBDHA:2021:461, 8616735 / 20-11418, concerning hospitality activities.

18 See Art. 7:204 section 2 Dutch Civil Code.

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tion of the price reduction rule, which is non-mandatory, is excluded, parties can still invoke a *change of circumstances*.[19] For a successful claim, the tenant will then have to demonstrate that, due to unforeseen circumstances, upholding the contract in its original form would give rise to an unacceptable hardship, against the requirements of *redelijkheid en billijkheid* (often translated as good faith or reasonableness). Courts have so far generally held that the coronavirus pandemic, and the consequent restrictions upon commercial activities, represent relevant unforeseen circumstances in the context of many types of commercial lease.[20] Tenants of commercial space will further need to show that their income has decreased as a result of the pandemic, but this fact alone is not enough to show that upholding the contractually agreed rent would be unreasonable.[21] In this respect, relevant circumstances have to be considered: whether the tenant is in a position to weather a difficult period, whether the landlord depends on the rental for their subsistence, and so on.[22] In other words, whereas the specific provision on lease contracts may be seen to impose a degree of altruism on the landlord with a view to preserving the contract's original balance, the unforeseen circumstances test is applied in a way that seems closer to actually considering the parties' social circumstances and needs.[23] In one way or another, while the pandemic makes for a rather imposing background,[24] the solidarity element is entirely consumed in-between the parties – landlords are, in other words, not expected to help keep shops or restaurants afloat so that their customers can still enjoy them.

Case 2: Give them vouchers?

The situation above is different from the case of consumer vouchers, offered when the main object of the contract had become impossible or extremely difficult to

19 Art. 6:258 Dutch Civil Code.

20 See Rechtbank Amsterdam 15 December 2020, ECLI:NL:RBAMS:2020:6951, 8559471 CV EXPL 20-9916 conspicuously referring to other court decisions having come to the same conclusion: 'In verschillende huurrechtelijke kort gedingen is reeds geoordeeld dat de beperkende overheidsmaatregelen als gevolg van de coronacrisis onvoorziene omstandigheden in de zin van artikel 6:258 BW opleveren (zie onder meer (…) gerechtshof te Amsterdam van 14 september 2020, ECLI:NL:GHAMS:2020:2604).'

21 See *e.g.* Rechtbank Gelderland 17 February 2021, ECLI:NL:RBGEL:2021:782, 8849231, noticing that the tenants had been able to terminate the contract early in the pandemic but failed to do so and additionally did not produce reliable proof of their pandemic-related losses. In contrast, in Rechtbank Amsterdam 9 March 2021, ECLI:NL:RBAMS:2021:937, 8701992 the tenant's income had fallen by 75% during the crisis and the link to the pandemic was uncontested.

22 See Rechtbank Amsterdam 11 June 2020 ECLI:NL:RBAMS:2020:2914, 8453358 KK EXPL 20-245 'In beginsel zou als redelijk richtsnoer kunnen worden aangenomen dat de tegenvaller gelijkelijk over beide partijen wordt verdeeld, zij het dat bij de beoordeling daarvan alle omstandigheden van het geval betrokken dienen te worden, zoals de maatschappelijke positie en onderlinge verhoudingen van partijen, alsmede de aard en ernst van de betrokken belangen van beide partijen.'

23 In his conclusions on a case pending before the Dutch Supreme Court, Advocate General Wissink suggests *redelijkheid en billijkheid* should also be considered in applying the specific rules on rent reduction: Hoge Raad 30 September 2021, ECLI:NL:PHR:2021:902.

24 Even in technical terms: for instance, different courts disagree on whether and how to consider government subsidies in calculating losses suffered by the tenant, see Gerechtshof Amsterdam 14 September 2021, ECLI:NL:GHAMS:2021:2728, 200.290.265.

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perform due to the pandemic: think of cancelled flights, package holidays etc. – but also, in some countries, concerts, museum visits and other events.[25] Cancelled flights were a particular issue throughout Europe, with the Commission set on a collision course with the Member States on the required degree of consumer protection.[26] As is by now widely known, in Europe, private travellers are entitled to a reimbursement when their flights are cancelled. During 2020, however, several Member States expressly adopted policies tolerating the issuing of vouchers in lieu of reimbursement, with a view to preserving the airlines' cash-flows from being (further) affected. These policies were not in line with repeated recommendations by the European Commission, according to which travellers should always be able to *choose* between immediate reimbursement and acceptance of a voucher, leaving it to providers (and Member States) to make the voucher option attractive.[27]

In essence, allowing vouchers as the only option turned consumers into 'lenders of first resort', leaving the airlines free to keep the cash, use it as they deemed appropriate and set the conditions for redeeming it. Contrary to the case of leases, the contract in these cases is terminated, so in fact both parties are *ex lege* liberated from their obligations. There is, in fact, no legal reason for the airlines to hold the ticket money beyond the time necessary to make the transfer. The consumer's right to reimbursement is not challenged. There is, essentially, no basis for contractual solidarity. On what basis, then, are consumers required to be altruistic or even act solidary, and – importantly – to whom?

The Dutch government suggested that solidarity was due to companies that were going through hard times,[28] whereas the European Commission seemed to think that a rush to reimbursements by some consumers would ultimately harm *other consumers*, who would end up unprotected if the affected companies declared bankruptcy.[29] Some companies, meanwhile, conceded that consumers may also be occasionally experiencing hardship, in which case their claim should take precedence over the company's cash-flow management strategy.[30] While ostensibly implying solidarity with one's former contractual partner, this case shows various forms of social solidarity part converging, part competing: if the Commission seems to hint

25 See *e.g.* the German 'voucher law', amending the introductory provisions to the German civil code to make vouchers instead of reinbursement the standard reaction to cancellations during the corona pandemic: https://www.bundesregierung.de/breg-de/aktuelles/gutscheinloesung-kulturbranche-1740010.

26 https://euobserver.com/coronavirus/148219.

27 See Commission Recommendation of 13.5.2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, (2020) 3125 final.

28 Mark Rutte, May 2020, mentioning his own small collection of cancelled tickets and ensuing voucher claims: 'Ik vind dat we dan ook een beetje solidair moeten zijn met de bedrijven die het moeilijk hebben' (source: NOS).

29 https://ec.europa.eu/info/sites/default/files/recommendation_vouchers_en.pdf, para 14.

30 Thus Corendon's director: 'Van der Heijden erkent dat consumentenrecht belangrijk is en dat mensen, zeker in sommige gevallen, hun geld moeten kunnen terugkrijgen. "Een paar honderd klanten die anders zelf in geldproblemen kwamen, hebben we hun geld teruggegeven. Daar maken we wel uitzonderingen voor".' See https://nos.nl/artikel/2333765-geldteruggarantie-teleurstelling-voor-reisbranche-maar-fijn-voor-consumenten.

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at a sort of in-group (mechanical) solidarity among consumers, solidarity with companies seems to resonate with an acknowledgement of interdependence between social groups (here, consumers and service-providers), while both play in the broadly community-based rhetoric of unity deployed by many governments during the early stages of the pandemic. The *mechanism* of involuntary lending, however, is ultimately based on deferred exchange and does not deviate from the paradigm of organic solidarity.

Case 3: State support and broad shoulders

This rhetoric, however, takes rather more combative tones in the last of the three examples discussed in this short article, namely the case of the conditional state aid to Dutch airline KLM. As widely known, in the summer of 2020 the Dutch government (contentiously) decided to grant state aid to KLM, in the form of a direct loan amounting to roughly 1 billion euros and public guarantee on ca. 2 billion more in bank loans. The government was clear, however, that the loan did not come without strings attached: KLM was expected to cut its costs by 15% in order to secure its long-term competitiveness, and this result was to a large extent to be attained through a restructuring – hence, savings on personnel costs.[31] In particular, the company and Dutch trade unions had to make sure that the highest earners (*i.e.* those receiving more than three times the country's modal salary)[32] would take a cut of at least 20%, 'so that the broadest shoulders carry the heaviest burden',[33] whereas workers on a lower salary could be expected to stay closer to their old remuneration levels.[34] The call for wage and cost reduction was not just a matter of pandemic-induced cash-flow shortage.[35] The company's reorganization, according to January 2021 estimates, has led to a downsizing of ca. 6,000 jobs throughout KLM's global operations.[36] Just before the reorganization plans had to be submitted in the fall of 2020, the usual holdouts had to be addressed: the generalist union claimed that too much had been cut into the lower salaries (up to 1,5 the modal salary), while the pilot union was not enthusiastic about the way in which the 'broader shoulders' had been singled out and the plan to make them carry the heaviest burden implemented. But why did the State require this 15% cost reduction in the first place?

31 https://www.rijksoverheid.nl/onderwerpen/staatsdeelnemingen/vraag-en-antwoord/financiele-steun-aan-klm.

32 That amounts, one must say, to a considerable reference figure: the modal salary for 2020 was calculated at 35,000 euros per year.

33 In original: 'zodat de sterkste schouders de zwaarste lasten dragen' – see https://www.rijksoverheid.nl/onderwerpen/staatsdeelnemingen/nieuws/2020/06/26/kabinet-biedt-financiele-steun-aan-klm-als-gevolg-van-de-coronacrisis.

34 https://www.rijksoverheid.nl/onderwerpen/staatsdeelnemingen/nieuws/2020/06/26/kabinet-biedt-financiele-steun-aan-klm-als-gevolg-van-de-coronacrisis.

35 In fact, KLM has been one of the largest recipients of wage support measures, or the 'NOW' (*Noodmaatregel Overbrugging Werkgelegenheid*) moneys, see https://www.consultancy.nl/nieuws/29984/deze-20-bedrijven-krijgen-de-meeste-now-subsidie; https://www.taxence.nl/nieuws/register-met-ontvangers-derde-aanvraagperiode-now-online/.

36 The lay-offs represent roughly one-sixth of KLM's workforce at 2019 levels.

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While the Dutch state holds roughly 14% of the shares in KLM, the company is a private company operating under rules of labour law; a generalized salary reduction would not have been really conceivable outside of a restructuring plan. For a similar demand to be acceptable in an individual context, in fact, courts consider numerous factors: importantly, the wage reduction needs to be *temporary* and it needs to be in practice bearable for the *individually affected worker*.[37] In contrast to the Dutch government's wholesale 'broader shoulders' image, a *contextual* assessment has to be made to decide whether a loss of income is bearable for the employee (and, where relevant, their family). Arguably, a reorganization would in any case have been the outcome of the coronavirus crisis – but now the government has effectively established the terms of any negotiations between KLM and the involved trade unions:[38] not only must the costs be reduced, this needs to *anyway* include a cut in the wage levels. A number of other financially relevant constraints included in the package – promises as to the prospects of Schiphol, use of cleaner fuels and so on – further reduced the margins of negotiation in respect of wages. In demanding to push down costs,[39] the Dutch-state-qua-lender was to a large extent effectively furthering the interests of the Dutch-state-qua-shareholder, who however as such could not have triggered a reorganization.

This push for KLM competitiveness, however, was not announced in a boardroom meeting but in a press conference held by ministers standing in front of a banner detailing 'only together we keep Corona under control', evoking language of public morality: 'the broadest shoulders' need to pay a toll for the state support to be awarded. One reading is that this is just about (the display of) typical protestant ethic, requiring austerity in return for support. In the context, however, and considering the way in which the cuts were presented, this interference with individual contracts and collective autonomy is most likely meant to be understood as requiring solidarity: of the highest-paid employees with those earning less, but also of all employees taking a cut – with whom, though?

The most prominent recipient of such 'broad shoulders' solidarity seems to be the Dutch taxpayer,[40] or even to 'the economy' broadly intended.[41] Contractual solidarity, towards KLM as an employer, seems hardly involved: the prohibition to distribute profits and dividends, which was also included in the conditions, does not seem

37 Nuna Zekić, 'Loonoffers in Tijden van Corona', *Tijdschrift Voor Arbeidsrecht in Context* 2020, no. 3 (2020), 1-11.

38 Which in fact presented an official complaint to the European Commission against this interference with their right of collective negotiation: https://www.fnv.nl/nieuwsbericht/sectornieuws/luchtvaart/2020/07/klacht-over-voorwaarden-steunverlening-klm, see https://fd.nl/opinie/1352686/nederlandse-staat-kan-niet-zomaar-loonoffer-eisen-in-ruil-voor-staatssteun-klm.

39 With reference to other conditions – the reduction of night flights, some laid-back sustainability requirements – the public interest was obvious.

40 'Het gaat om belastinggeld', zei minister Hoekstra toen. 'Het is redelijk dat de sterkste schouders ook de zwaarste lasten dragen.' Source: NOS, https://nos.nl/artikel/2338545-klm-krijgt-steunpakket-van-3-4-miljard-euro-later-persconferentie.

41 The government explains that KLM is not only an important employer and a national champion but also (in particular because of Schiphol airport) a strategically important actor which directly supports the 'open economy' of the Netherlands.

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to represent a comparable 'sacrifice' that could be put in a direct relationship to the contribution required of employees. Furthermore, given the salary cuts' inaptness to prevent other workers' layoffs, intra-group solidarity also seems a weak explanation. This becomes even more obvious by looking at the way in which cuts were implemented in the October 2020 plan. For instance, bonuses were partially turned into extended holiday leaves, so to distribute the remaining work shifts among the available employees in the face of many flights having been cut from the company's planning. Such an approach clearly displays elements of group solidarity. The strategy, however, was not a direct result of the government's demands but rather a way to partially *circumvent* such demands. In truth, by reducing its (personnel and) wages, KLM may have absorbed less resources in the form of outright corona subsidies, which could be seen as an indirect contribution to the support of other hardly hit sectors. The last observation points in fact to a form of Durkhemian *organic solidarity*, highlighting interdependence between different areas of the economy. At the same time, however, the requirement that cost reduction must in any case include pay cuts subtly suggests that KLM employees, with their obviously too lush employment conditions, are in fact to blame for the company's predicament and thus it is just normal that they are now expected to chip in.[42] This punitive component resonates rather with accounts of mechanical solidarity, much in line with the invocation of moralising language and references to 'taxpayers' money'.

A continuum?

Of course, the three cases above do not return a complete picture of how pandemic-induced pain has been shared in and through contractual relationships. They are idiosyncratically chosen rather than particularly representative. However, taken together, they give an interesting portrait of how individual and group responsibilities were articulated, with implicit or explicit appeals to solidarity, in contractual contexts which have been – uncharacteristically, for contracts as such – quite prominent in public conversations and news reporting.

Starting with the example of commercial leases, we have seen quite traditional contractual solidarity or altruism at play. This happened in relatively acontextual manners where the specific rules on price reduction in rental contracts had to be applied and with more societal embedment where rules on unforeseen circumstanced were of direct relevance. In this case, the parties were expected to share the pain brought about by the lockdowns in a way that took account of their relative positions, ability to bear the loss, reliance on the contract and so on. Perhaps the most relevant issue to be noticed here is in the background – while courts had been very reluctant, not to say straightaway unwilling, to consider the 2008 financial crisis as capable of triggering the unforeseen circumstances rule, it was quickly established that the pandemic fulfils the requirements for doing so.

42 This framing is, of course, particularly relatable: few people will instinctively commiserate high-earning pilots who are called to take a cut, somewhat overshadowing the fact that the vast majority of airline employees are of course not pilots.

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Looking at the second example – the consumer vouchers – we saw how the party generally considered as weaker and protected as such was being invited to show 'solidarity' and act as first instance lender to their counterpart. Contractually, we have seen, this was a very different situation than the first case: as upon terminaton each party goes back to the *status quo ante*, there is no obvious 'loss' to be shared, except for the provider's cash flow. The call for consumers to show solidarity with their (former) contractual counterpart, or eventually with other consumers in similar predicaments, had nothing to do with the individual position of consumers and providers. Consumers *as a group* are asked to show solidarity, as it is only the cumulative effect of this forced lending that can provide the necessary lifeline. This solidarity displays traits of mechanical (among consumers) and organic (between consumers and traders) solidarity, but the legal response and language remain compensatory, in line with 'civil law' mechanisms.

The ambiguity takes darker tones in the KLM 'sacrifices' case. In essence, the government in this case was able to use the granting of state aid to set the terms of an unavoidable reorganization, suggesting that KLM employees, simply put, had too good terms of employment for the company to stay competitive in the post-corona scenario. To the extent that the concerned workers were asked to 'take one for the team', the team was most likely the Dutch economy at large. While there was some hinting at individual positions – the much-repeated reference to 'broader shoulders' having to carry the heaviest burden – ultimately this was little more than a formula. The degree of autonomy that was preserved for collective actors leaves some space for agency and responsibility, but it is hard not to notice a punitive element creeping through the language: the perceived direct beneficiaries of the rescue must also suffer. This punitive element seems to bring us back to forms of mechanical solidarity, whereby the sacrifice required of the parties here would serve more to assert the values – competitiveness and, to an extent, thriftiness – of the community than to restore or compensate.

The overview resonates with previous observations that elements of 'primitive' and more modernized solidarity persist in contemporary social and legal systems,[43] and perhaps it is not by chance that the fullest reflection of mechanic solidarity in this purview is to be found in the domain of labor and social policies. What is remarkable, however, is how these forms of involuntary solidarity take place not so much directly in the relationship between citizens and public powers or citizens and community, but are *mediated* by the contractual form. With some qualification on Durkheim's claims in this respect, it is still quite obvious that such contractual form ultimately has the effect of depoliticising the underlying dynamics.[44] 'Private law' common-sense-by-association attaches to what are ultimately political choices; appeals to individual solidarity and responsibility ultimately trade matters of 'taxpayer money' as private relations. Dispelling the rhetorics of solidarity here, then,

43 See Courpasson, Younes and Reed, 'Durkheim in the Neoliberal Organization: Taking Resistance and Solidarity Seriously'; Mishra and Rath, 'Social Solidarity during a Pandemic'; Veitch, 'Social Solidarity and the Power of Contract'.

44 Veitch, 'Social Solidarity and the Power of Contract'.

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can be seen as a timid attempt by the author to help in keeping open urgent questions about the economic order that will come after the pandemic.

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