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Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term

Leonhard den HERTOG & Simon STROB^{*}

Coherence has become the buzzword in EU studies. However, what exactly is policy coherence and how is it advanced by EU law? This article attempts to bridge the political science and legal debate on this ambiguous term. First, it critically analyses notions on coherence and consistency to find common ground in the seemingly confusing academic debate. On this basis, this article subsequently enquires into the promotion of these different notions by EU law. The focus is on the EU's external relations; arguably the most salient area for policy coherence in EU governance. The article argues that the theoretical debate sometimes lacks cross-fertilization and that conceptual fuzziness persists. The conceptual groundwork allows for analysing how primary law, and especially its interpretation by the Court, advances consistency and coherence in different ways. Albeit also marked by underdeveloped conceptual clarity, the Court's case law shows that several duties in EU law reinforce consistency and coherence in EU external relations.

1 INTRODUCTION

A recurring issue of interest in EU Studies has been the lack of coherence of EU external relations. Many academic contributions have analysed the conceptual contours of coherence and numerous case studies have been conducted which identify incoherencies in EU external relations.¹ The potential of EU's legal order to bring about coherence has been analysed at large, often taking an institutionalist perspective by focusing on for instance the EU's pillar structure (and end thereof) or the modified post of the High Representative.² Often, the overarching conclusions of the literature seem to be that the concept is unclear and coherence is lacking.

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¹ Cf. for instance A. Matthews, *The European Union's Common Agricultural Policy and Developing Countries: The Struggle for Coherence*, 30 *European Integration* 3, 381–99 (2008); N. Koenig, *The EU and the Libyan Crisis - In Quest of Coherence*, 46 *Intl. Spectator* 4, 11–30 (2011).

² Cf. C. Kaddous, *Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty*, in *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty?* 205–222 (S. Griller & J. Ziller eds., Springer 2008).

This article faces the conceptual fuzziness by first comprehensively examining the existing literature on policy coherence and consistency in order to find common ground. Subsequently it assesses whether and how particular readings of coherence are promoted by Union primary law. So, apart from facing the conceptual issues, this article also attempts to understand how the EU's legal framework confronts it. This should render insights into the nature of EU's overall commitment to policy coherence. At the outset, two important points on the focus of this paper should be made. First, the definitions put forward in the political science debate will be employed as the conceptual framework for the understanding of the relevant legal principles worded in the EU treaties, and as interpreted by the Court of Justice of the EU (CJEU, hereafter: the Court). Some authors enquired into this matter the other way around by asking what 'clues' EU law offers for constructing common definitions and classifications.³ Our choice rests on the finding that EU law is unfit for informing academic concept theorizing here as the concept of coherence is conceptually underdeveloped in EU law (see below). Therefore, with our contribution we also explicitly aim to build bridges between political science and legal debates which sometimes seem to be needlessly isolated. We consider this to be the added value of our contribution. The broad outlook taken here stretches however beyond the purely academic debate and could also inform policy-makers and other practitioners on what coherence could mean for their role in EU external relations. Second, it is important to note that we are not, as opposed to many earlier academic contributions, focusing on institutional configurations but on the *material obligations* that may foster coherence. Analysing these obligations links better to the political science conceptual debate on the principle than analysing constitutional institutional configurations.

Hence, the underlying research question of the article is what different concepts of policy coherence and consistency have become dominant in the academic debate and whether these are reflected and fostered in EU law. Accordingly, a critical analysis of occurring definitions and classifications of policy coherence and consistency is presented in section 2. Section 3 subsequently assesses the degree to which the Union's primary law, and the Court's interpretation of it, reflects some of the definitions and classifications from the political science debate. Finally, section 4 critically discusses the results of the study.

³ E.g., C. Hillion, *Tous pour un, un pour tous! Coherence in the External Relations of the European Union*, in *Developments in EU External Relations Law*, Collected Courses Acad. European L., 12–17 (M. Cremona ed., Oxford U. Press 2008).

2 POLICY COHERENCE AND CONSISTENCY: A CONFUSION OF IDEAS

We agree with Gebhard who states that ‘despite its over-use in the literature and in political debate, the notion of coherence is among the most frequently misinterpreted and misused concepts in EU foreign policy’.⁴ The point of this section is to show that although indeed the political use of the concept is often devoid of clear conceptualization, in the academic literature a set of core concepts can be identified. For the sake of clarity, this article distinguishes between *definitions* of the terms coherence and consistency on the one hand, meaning the basic understanding of the applied term, and concept *classifications* on the other hand, which comprises an ordering and grouping of various analytical levels of coherence and consistency.

2.1 DEFINITIONS: WHAT IS COHERENCE?

With regard to the distinction between the terms coherence and consistency, there are effectively two lines of thought in the academic discourse. First, it can be argued that the terms can be used more or less interchangeably.⁵ Proponents of this view invoke that both terms are used across different languages; notably English on the one hand and other European languages on the other hand. While ‘consistency’ is the applied term in the English version of the EU treaties, the term coherence is used in other languages, for instance in the German (*Kohärenz*), French (*cohérence*) and Spanish (*coherencia*) version. Remarkably, the Dutch, Swedish and Danish versions even apply another linguistic root and speak respectively of the need for *samenhæng*, *samstämmigheten* and *saemhenhang* in EU external relations, which can rather be translated into English as ‘connection’. Nuttall argues that ‘attempts to distinguish between them risk ending in linguistic pedantry’, although he admits that coherence ‘may well have a broader signification’ than consistency.⁶

Second, other scholars argue that coherence and consistency do not carry the same meaning. This line of thinking seems now dominant in the literature. The reading among proponents of a distinct definition of coherence and consistency is

⁴ C. Gebhard, *Coherence*, in *International Relations and the European Union*, 101–27, at 123 (C. Hill & M. Smith eds., Oxford U. Press 2011).

⁵ Cf. S. Duke, *Consistency as an Issue in EU External Activities* (EIPA Working Paper 99/W/06, 3, Maastricht, 1999); M. Carbone, *Mission impossible: The European Union and Policy Coherence for Development*, 30 *European Integration* 3, 323–342, at 323 (2008); R. Picciotto, *The Evaluation of Policy Coherence For Development*, 11 *Evaluation* 3, 311–330, at 312 (2005); S. Nuttall, *Coherence and Consistency*, in *International Relations and the European Union*, 91–112, at 93 (C. Hill & M. Smith eds., Oxford U. Press, 2005); P. Hoebink, *Evaluating Maastricht’s Triple C: The ‘C’ of Coherence*, in *The Treaty of Maastricht and Europe’s Development Co-operation* 185 (P. Hoebink ed., Aksant Academic Publisher 2004).

⁶ Nuttall, *supra* n. 5, at 93.

that the terms stand in a hierarchical order, with consistency usually being a necessary component of coherence. Many writers consider consistency simply as being the ‘absence of contradictions’⁷ or ‘avoiding contradictions among different (...) policy areas’.⁸ In a similar vein, the OECD defines policy consistency as ‘ensuring that individual policies are not internally contradictory, and avoiding policies that conflict with reaching for a given policy objective’.⁹ It is evident that many sources agree on the notion that consistency refers to a non-existence of adverse effects across different policy fields. Given that meaning, consistency can thus be described as having a rather ‘negative’ connotation as it mainly entails obligations of non-interference instead of positive obligations requiring cooperation.

In contrast, coherence would then refer to a more ‘positive’ reading in which different policy fields actively work together to achieve common overarching goals.¹⁰ Other similar definitions explain policy coherence as an ‘achievement of a synergy between (...) policies’¹¹ or a ‘desirable plus’ that ‘implies positive connections [and is] more about synergy and adding value’.¹² From the legal debate, Tietje has contributed that ‘consistency in law is the absence of contradictions; coherence, however, refers to positive connection. Moreover, coherence in law is a matter of degree, whereas consistency is a static concept’.¹³

The debate can thus be summarized to entail that policy consistency is an essential precondition for, and integral part of, policy coherence. The latter goes significantly further by demanding the active promotion of mutually reinforcing government actions on the basis of agreed overarching policy goals. Based on this discussion, we think that a core in the conceptual debate can be identified which describes policy consistency as the *absence of contradictions within and between*

⁷ Cf. P. Gauttier, *Horizontal Coherence and the External Competences of the European Union*, 10 European L. J. 1, 23–41, at 23 (2004); A. Missiroli, *European Security Policy: The Challenge of Coherence*, 6 European For. Affairs Rev. 2, 177–196, at 182 (2001).

⁸ European Parliament, *Report on the EU Policy Coherence for Development and the ‘Official Development Assistance plus’ concept*, A7-0140/2010, Art. A (2010).

⁹ Organisation for Economic Co-Operation and Development, *The DAC Guidelines – Poverty Reduction*, 104 (OECD 2001).

¹⁰ Cf. G. Ashoff, *Enhancing Policy Coherence for Development: Justification, Recognition and Approaches to Achievement*, 11 German Dev. Inst. Stud. (2005); OECD, *supra* n. 9.

¹¹ Gauttier, *supra* n. 7, at 23.

¹² Missiroli, *supra* n. 7, at 182; cf. M. E. Smith, *The Quest for Coherence*, in *The Institutionalisation of Europe*, 173 (A.S. Sweet et al. eds., Oxford U. Press 2004); N. Neuwahl, *Foreign and Security Policy and the Implementation of the Requirement of ‘Consistency’ under the Treaty on European Union*, in *Legal Issues of the Maastricht Treaty*, 235 (D. O’Keefe & P. Twomey eds., Chancery L. Publg. 1994); W. Van Der Velden, *Coherence in Law: A Deductive and a Semantic Explication of Coherence*, in *Coherence and Conflict in Law*, 259 (B. Brouwer et al. eds., Kluwer L. & Taxn. Publisher 1992).

¹³ C. Tietje, *The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy*, 2 European For. Affairs Rev. 2, 211–233, at 212 (1997); referring to Van der Helden, *supra* n. 12; see also R.A. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, 37 Com. Mkt. L. Rev. 5, 1135–1171 (2000).

individual policies while policy coherence refers to *the synergic and systematic support towards the achievement of common objectives within and across individual policies.*

2.2 CLASSIFICATIONS: WHAT DIMENSIONS DOES COHERENCE HAVE?

To add to the complexity of the discussion, the concept can further be *classified* in several categories or levels. Here again, different approaches are observable but common groupings and patterns can be identified. Independent from the particular *definition* of coherence and although often termed differently, most authors distinguish at least between two levels of coherence: horizontal and vertical.¹⁴

First, *horizontal coherence* refers to the coherence between a policy and other policies of the same political entity. An example would be the coherence between EU development cooperation and fisheries policy. This view is for instance held by Carbone who defines horizontal (in-)coherence as ‘the potential problems raised by the interaction between various policy areas; more specifically to development policy, it refers to the consistency between aid and non-aid policies in terms of their combined contribution to development’.¹⁵

The analysis of horizontal coherence of EU external relations often relates to the distinction between former European Community first pillar policies (including development cooperation) and the second pillar Common Foreign and Security Policy (CFSP). The rationale for this distinction is that both pillars were characterized by partly different actors, competences and decision-making structures. Although the Lisbon Treaty formally abolished the pillar structure of the EU and introduced a single legal personality for the EU, the division between CFSP and the former Community policies is still in place due to diverging rules and procedures.¹⁶

The second common classification refers to the *coherence between a policy at the EU level and the individual EU Member States policies in the same sphere.* This classification is generally termed *vertical coherence*. It can e.g. refer to the development cooperation policies of the EU and its Member States (‘incoherence between Community development policy and the development policy of the individual Member States (...)’¹⁷), to their external relations as a whole (‘the

¹⁴ Other possible classifications are for instance *internal coherence*, cf. Carbone, *supra* n. 5; Hoebink, *supra* n.5; Gebhard, *supra* n. 4; Picciotto, *supra* n. 5; or *donor-recipient coherence*, cf. Carbone, *supra* n. 5; see also Hoebink, *supra* n. 5.

¹⁵ Carbone, *supra* n. 5, at 326; cf. Picciotto, *supra* n. 5, at 211.

¹⁶ Cf. P.V. Elsuwege, *EU External Action after the Collapse of the Pillar Structure*, in *Search of a New Balance between Delimitation and Consistency*, 47 Com. Mkt. L. Rev. 987–1019 (2010); see Art. 24(1), second paragraph, TEU.

¹⁷ Hoebink, *supra* n. 5, at 188.

extent to which the foreign policy activities of individual EU states actually mesh with those of the Union'¹⁸), to any other policy that might affect Union policy ('[Vertical coherence] comes into play when one or more Member States pursue national policies which are out of kilter with policies agreed in the EU'¹⁹) or to a mixture of the described types.

3 FROM THE POLITICAL TO THE LEGAL: COHERENCE IN EU LAW

This section focuses on the question which definitions and classifications of consistency and coherence are promoted by EU law. It thus examines Articles and principles in EU (external relations) law and gives special attention to the case law of the Court. As explained in the introduction, this section does not analyse the institutional configurations, such as the role of the 'new' European External Action Service (EEAS), but the relevant material obligations worded in EU (case) law. This section thus aims to connect the political science debate with legal analysis.

First inserted in the Single European Act (1986, e.g., Article 30(5)) the Treaties refer multiple times to the general need for consistent EU policy-making, for example:

The Union shall ensure consistency between the different areas of its external action and between these and its other policies.²⁰

After the Treaty of Lisbon, this 'duty of consistency' more than ever features dominantly in the Union's constitutional texts²¹ and could be seen as a general principle of EU law thus being applicable to all fields of EU external relations.²² However, to translate the concept of coherence into *specific legal obligations* is not straightforward. As such the concept of coherence does not appear as a well substantiated constitutional principle of EU law.²³ Especially, case law of the Court explicitly dealing with the principle is scarce and lacks concretization.²⁴ Therefore, conflicts in the sphere of coherence are often legally framed in the context of other principles, such as the duty of sincere cooperation (see below).

¹⁸ Smith, *supra* n. 12, at 173 et seq.

¹⁹ Nuttall, *supra* n. 5, at 93.

²⁰ Article 21(3), second para. TEU, see also Art. 13, 16(6), second and third paragraphs. 26(2), second paragraph. TEU and Art. 7 TFEU.

²¹ P. Van Elsuwege & H. Merket, *The Role of the Court of Justice in Ensuring the Unity of the EU's External Representation*, in *Principles and Practices of EU External Representation*, 5 CLEER Working Papers, 40–41 (S. Blockmans & R. A. Wessel eds., 2012).

²² F. Casolari, *The Principle of Loyal Co-operation: A 'master key' for EU External Representation?* in Blockmans & Wessel, *supra* n. 21, at 13.

²³ See for a different opinion, Tietje, *supra* n. 13, at 214.

²⁴ Cf. Case C-266/03, *Commission v. Luxembourg* [2005] ECR I-4805, para. 60.

The quest for coherent policy-making could thus be translated into several legal duties. Cremona identifies three groups of legal rules that contribute to consistency or coherence: 1) rules of hierarchy, 2) rules of delimitation and 3) rules of cooperation and complementarity.²⁵ This list is vigorous, but even if actors cooperate sincerely and respect the limits of their proper competences this does not automatically result in coherent policy outcomes. In other words: the content of policies as such is not touched by those types of rules. Therefore, to complement the picture we present below a fourth category of rules for coherence: rules of substantive guidance.²⁶

3.1 COHERENCE AND CONSISTENCY ADVANCED

Rules of hierarchy carry with them the notion of an *absence of contradiction*. The most profound rule of hierarchy in the Union is undoubtedly the supremacy of EU law following from the *Costa* judgment and also codified in Declaration 17 to the Lisbon Treaty.²⁷ Under this doctrine national law that conflicts with EU law needs to be set aside. This principle has been paramount in the development of the EU legal order and has been reinforced in subsequent cases to cover all kinds of national norms, whether constitutional or minor administrative acts and whether pre- or post-dating EU law,²⁸ as well as decisions by (constitutional) national courts and other administrative agencies.²⁹ However important this principle is, it does not entail much of *positive connotation of cooperation*, thus lacking a clear coherence impetus. Although national courts and authorities are indeed required to ‘cooperate’ with this supremacy doctrine, as regards the material content of norms it could be seen as an essentially one-way top-down resolution of potential conflicts between the EU and national legal orders.

Second, rules of delimitation fail to guarantee cooperation and synergy (coherence) as they advance consistency through *protecting* competences and prerogatives. For example, the principles of conferral and subsidiarity prescribe the division of competences.³⁰ Article 7 TFEU states that:

²⁵ M. Cremona, *Coherence through Law: What Difference will the Treaty of Lisbon make?* 3 Hamburg Rev. Soc. Sci. 1, 14–16 (2008).

²⁶ Cf. J. Larik, *Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law*, 5 CLEER Working Papers (2011).

²⁷ Case 6–64, *Costa v. ENEL* [1964] ECR 585, 593.

²⁸ Resp. Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 3, Case C–224/97, *Ciola* [1999] ECR I–2517, para. 24 and Case 106/77, *Simmmenthal* [1978] ECR 629, paras 17, 18 and 21; cf. P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, 256–268 (Oxford U. Press 2011).

²⁹ Resp. *Simmmenthal*, 1978 *supra* n. 28, paras 21–24 and Case C–118/00 *Larsy* [2001] ECR I–5063, paras 52–53.

³⁰ See resp. Arts 3(6), 4(1), 5(1), 13(2) TEU, 7 TFEU and Art. 5(1, 3) TEU.

The Union shall ensure *consistency* between its policies and activities, taking all of its *objectives* into account and in accordance with the principle of *conferral* of powers (emphases added)

This Article thus connects the notion of consistency with the principle of conferral as well as with the fourth category of rules we introduce: the rules of substantive guidance. Moreover, the so-called catalogue of competences as introduced by the Lisbon Treaty aims to clarify competences.³¹ Although that does indeed help to bring about consistency, the positive notion of coherence is weak. It should be noted that rules of delimitation can thus be problematic for coherence as they may also *discourage* actors from cooperating across their competences.³²

Third, rules of cooperation and complementarity point towards a rather different direction. Most paramount is the principle of sincere cooperation as laid down in Article 4(3) TEU. This principle has been of great importance in the development of the Union legal order and its external relations; the Court has worded several obligations for Member States and Union institutions. Sometimes the principle even entails that Member States cannot act independently. Section 3.4 elaborates on this case law in more detail but it suffices to state here that the Court has clearly linked the duty of sincere cooperation with ‘the coherence and consistency’ of EU international representation.³³

Article 32 TEU words additional specific obligations for Member States in the context of Union institutions, diplomatic missions and Union delegations to the advancement of a ‘common approach’.³⁴ In development cooperation, the *positive coherence approach* is evidenced by Article 208(1) TFEU which stipulates that Union and Member States’ policies shall ‘complement and reinforce each other’.³⁵ Furthermore, ‘the Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries’ (Article 208(1), second paragraph TFEU).

We turn now to the fourth category of rules, which we coined as rules of substantive guidance. These rules may also be understood as stimuli for coherence. At a basic level the common values and objectives of the Union, albeit broad, should inform policy-makers about the outer boundaries of policy formulation and implementation (Articles 2, 3(1–4) TEU). Furthermore, they are not devoid of legal effect as they are often subject to court jurisdiction and substantiated in case

³¹ See Arts 3–6 TFEU.

³² Cf. Wessel, *supra* n. 13, 1167–1171.

³³ *Commission v. Luxembourg*, *supra* n. 24, para. 60.

³⁴ Article 32, paras 1 and 3 TEU both mention such duties and the common approach.

³⁵ Article 210(1) TFEU furthermore lays down duties of consultation and cooperation to attain this objective.

law.³⁶ Similarly and clearly linked to the overall EU values,³⁷ the Union's external relations are guided by specific common objectives.³⁸ Most exemplary, EU development cooperation is given unequivocal substantive guidance: it 'shall have as its *primary objective* the reduction and, in the long term, the eradication of poverty' (Article 208(1), second paragraph TFEU, emphasis added). These rules of substantive guidance may stimulate coherent policy-making: they do not 'merely' imply a negative connotation of *absence of contradictions* but would, ideally, require a substantive (re)orientation of policies around common principles and objectives.³⁹

This brief overview shows that despite the mere use of the word 'consistency' in the English version of the Treaties, notions of both *consistency* and *coherence* are advanced in Union primary law. In support of this position, Hillion points out that the Court speaks of the need to ensure the 'coherence and consistency of the action'⁴⁰ and 'thus suggests that the two notions cannot be used interchangeably, and that they should instead be understood as distinct concepts'.⁴¹

3.2 HORIZONTAL COHERENCE IN EU LAW

Important for horizontal consistency are the rules of delimitation. In EU external relations, notwithstanding the 'de-pillarization' of the Lisbon Treaty, the delimitation between CFSP and other Union competences is a central theme on the horizontal axis. CFSP's specific nature is evidenced by *inter alia* a limited jurisdiction for the Court and specific decision-making procedures.⁴² A central provision here is the delimitation clause of Article 40 TEU which protects the 'status quo' with regard to CFSP and non-CFSP competences. In the former (pre-Lisbon) Article 47 TEU, the Community competences were protected against encroachment by non-Community policies. The Court gave unequivocal priority to the use of Community legal bases. An example is the much debated *ECOWAS* case, dealing with the choice of legal basis (*CFSP v. Community development cooperation*) for action on small arms and light weapons.⁴³ The Court held that

³⁶ For example, where these Articles refer to human rights, a large body of human rights case law of the CJEU and the ECHR is applicable.

³⁷ See Art. 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values'.

³⁸ Articles 3(5), 21(1), first paragraph and (3), first para. TEU. These Articles do not exactly copy Arts 2, 3(1–4) TEU but embody a modified list of objectives specific for the Union external relations.

³⁹ Van Elsuwege & Merket, *supra* n. 21, at 40–41.

⁴⁰ *Commission v. Luxembourg*, *supra* n. 24, para. 60 and Case C-433/03, *Commission v. Germany* [2005] ECR I-6985, para. 66.

⁴¹ Hillion, *supra* n. 3, at 13.

⁴² Cf. Art. 24(1), second para. TEU. It should of course be mentioned that this horizontal dimension cannot be isolated from the vertical one as the special status for the CFSP is clearly motivated from a national sovereignty point of view.

⁴³ Case C-91/05, *ECOWAS* [2008] ECR I-3651.

even though the concerned Decision pursued both development and security objectives, priority had to be given to the Community legal basis.⁴⁴ A joint legal basis, as is in principle possible in the Union legal architecture⁴⁵ was deemed impossible by the Court in *ECOWAS*.⁴⁶ This leads to incoherence as policies are artificially split along the lines of CFSP and non-CFSP competences.⁴⁷

However, this Community dominance seems now abolished with the *mutual* non-affection clause of Article 40 TEU which some authors see as an opportunity for Union policy coherence.⁴⁸ We think we have good reason to be cautious on this point. After all, the underlying ‘illness’ – the division between CFSP and non-CFSP competences and procedures – is not cured by this new Article. It is at most an opening for the Court to do some plastic surgery on the patient. A joint legal basis is still quite unlikely as different components of a given legal act would have to be singled out to apply the correct decision-making procedures. However it is in theory possible and Van Elsuwege identified certain exceptional conditions under which such a joint legal basis could be acceptable for the Court.⁴⁹

Whatever may become of this possibility, the former case law established at least clarity about the priority of legal bases. Under the new Article this clarity is gone and the Court would be faced with the difficult job of assigning the correct legal basis.⁵⁰ Hence, it all depends on the Court to establish clear criteria for the delimitation of the competences while at the same time allowing for flexibility. If the Court manages to do just that, this could result in a more genuine interplay between the distinct policy fields and shift the Article’s focus *from consistency to coherence*.

Rules of cooperation and complementarity carry significant potential in bringing about horizontal coherence. The duty of sincere cooperation, often debated in a vertical Member State–Union relationship (see below), is also applicable horizontally. Hence, the Union institutions have to cooperate sincerely amongst each other. For example, the Court held that the Parliament breached its duty of sincere cooperation by not giving an opinion to the Council in due

⁴⁴ C. Hillion & R.A. Wessel, *Restraining External Competences of EU Member States under CFSP*, in *EU Foreign Relations Law: Constitutional Fundamentals*, 551–586 (M. Cremona & B. de Witte eds., Hart Publg. 2008).

⁴⁵ Joint legal bases not involving CFSP are possible in the Union legal order. See e.g. Case C-94/03, *Commission v. Council* [2006] ECR I-1.

⁴⁶ *ECOWAS*, *supra* n. 43, paras 76–77.

⁴⁷ Cremona, *supra* n. 25, at 21–25; and S. Blockmans & R.A. Wessel, *The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?*, 14 J. Conflict & Sec. L. 2, 33–35 (2009).

⁴⁸ Van Elsuwege, *supra* n. 16, at 1002.

⁴⁹ *Ibid.*, 1006–1007. In Case C-94/03, *Commission v. Council*, the Court also held that the joint legal basis were possible due to the fact that the applicable procedures of the legal bases were compatible with each other.

⁵⁰ Cf. Van Elsuwege, *supra* n. 16, at 1005–1008.

time.⁵¹ Article 13(2) TEU is a key provision in this regard as it stipulates that ‘the institutions shall practice mutual sincere cooperation’. Further duties of consultation and coordination in CFSP are stipulated in Articles 27, 32 and 34 TEU. Although this could warrant the conclusion that this provides ‘at least in theory (...) the backbone of a well-established system of cooperation and coordination at EU-level’,⁵² the absence of Court jurisdiction over these CFSP provisions is the Achilles’ heel of making them effective drivers for coherence.

Rules of substantive guidance are important in the horizontal context as they aim to align Union institutions and policies around common objectives and principles. It is important to note that the Lisbon Treaty has clearly prioritized external relations on the basis of common values and objectives, most notably in Article 21 TEU. As discussed above, for development cooperation the situation is clearer as its primary aim is unequivocally the eradication of poverty. The clear prioritization of this policy objective could strengthen internal coherence in Union development policy as well as coherence with other fields.

3.3 VERTICAL COHERENCE IN EU LAW

The Union is a complex construct with supranational and intergovernmental aspects; cooperation between Member States and Union institutions is hence vital. It is therefore especially in this vertical context that coherence is a central theme. The vertical connotation is inherently embodied in rules of hierarchy which deal with competences. After all, in essence the Court’s doctrine on the primacy of Union law (see more elaborately section 3.1) can be seen as a competence matter about who has the final say on the interpretation of Union law. This doctrine therefore aims to make the Union legal order more consistent.

Rules of delimitation are also important for vertical consistency as they prevent duplication of labour in the multi-level governance EU structure and Member State interference with existing Union competences. They may thus help to bring about the much debated ‘single voice’. The nature of external competences is however diverse and scattered: from exclusive (Common Commercial Policy), shared (external dimension of the Area of Freedom, Security and Justice), *sui generis* (CFSP)⁵³ to ‘parallel’ (development cooperation and humanitarian aid).⁵⁴ For example, the latter competence presents challenges for coherence as it leaves the Union and its Member States considerable leeway:

⁵¹ Case C-65/93, *European Parliament v. Council* [1995] ECR I-643.

⁵² Van Elsuwege & Merket, *supra* n. 21, at 40.

⁵³ However, the nature of the CFSP competence is a contentious issue, cf. Hillion & Wessel, *supra* n. 44, at 104.

⁵⁴ See Arts 3, 4 TFEU and Art. 24(1) TEU.

In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a *common policy*; however, the exercise of that competence *shall not result in Member States being prevented from exercising theirs*. (Art. 4(4) TFEU, emphasis added)

This parallel competence is however coupled with additional vertical duties to complement, reinforce, coordinate and consult amongst development policies.⁵⁵ This entails that the Union and its Member States cannot independently choose their own path of action.

This diverse and sometimes unclear nature of external competences led to rich case law with far-reaching consequences for coherence in EU external relations. To show the impact of Court's case law, some key cases are discussed without attempting to fully grasp the complex and casuistic nature of it here.⁵⁶

The central *ERTA* case law⁵⁷ of implied external powers is of importance here and should be seen against the background of 'conventional' competence acquisition within the Union: by conferral in the Treaties. In short, the Court held that external competences in the Union (then Community) are possible beyond those *expressly* conferred.⁵⁸ Hence, the Union is also competent to act externally if that action is within the scope of an internal Union policy. The implied external competence of the Union needs to be 'necessary for the attainment of one of the objectives of the Community'.⁵⁹ It is important to establish when such a competence qualifies as 'exclusive': helpful is the Court's judgment that in cases of *complete harmonization* of a policy field the Union acquires exclusive external competences.⁶⁰ This may also be the case for a policy field 'covered to a large extent by Community rules'.⁶¹ The underlying rationale for the Court is that external Member State action 'is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish'.⁶²

Hence, an exclusive Union external competence arises where a field 'largely covered by Union rules' would be affected by Member States competences. That finding is important: the Court's doctrine ensures a certain degree of vertical consistency as Member States cannot act. In pursuance of the Court's case law, Article 3(2) TFEU itself now also contains a 'back door', although poorly worded

⁵⁵ See Arts 208(1), first paragraph and 210(1) TFEU.

⁵⁶ Cf. for a more extensive analysis, Casolari, *supra* n. 22; and Van Elsuwege & Merket, *supra* n. 21. Case 22/70, *ERTA* [1971] ECR 263.

⁵⁷ Cf. *Ibid.*, para. 28; and Cases 3, 4 and 6/76, *Kramer* [1976] ECR 1279.

⁵⁸ Opinion 1/76, *European Laying-Up Fund for Inland Waterway Vessels* [1977] ECR 741, para. 4.

⁵⁹ Opinion 1/94, *WTO Agreement: GATS and TRIPS* [1994] ECR I-5267, para. 96.

⁶⁰ Opinion 2/91, *ILO* [1993] ECR I-1061, para. 25.

⁶¹ Opinion 1/03, *Lugano Convention* [2006] ECR I-1145, paras 126, 127 and 133.

according to some,⁶³ through which other policy areas could be added to the list of exclusive external Union competences.⁶⁴

Interconnected with this case law, rules of cooperation and complementarity can be held as crucial for coherence in the vertical sphere of EU external relations. The discussion here is not focused on the establishment and nature of the competence as such but rather on the obligations of sincere cooperation for Member States and EU institutions when acting within such qualified areas of external relations. The requirement of *unity in the international representation of the Union*, flowing from the duty of sincere cooperation, is a leading concept in the case law of the Court in this regard.⁶⁵

If Member States act within the framework of EU law and policy, two basic conceptual scenarios could be distinguished here, namely exclusive competences versus shared external competences, but in practice the concrete consequences could be similar, as explained below.⁶⁶

First, in the former scenario, a strong obligation of sincere cooperation is in place which can be seen as an *obligation of result* under which Member States cannot act independently but only on behalf of the Union.⁶⁷ An interesting case by the Court in this respect is *Commission v. Greece* which dealt with the conduct of Greece in the International Maritime Organization (IMO).⁶⁸ Greece had submitted a national position in a field where the Union enjoys an exclusive competence. However, the Commission did not have representation in the IMO. The Commission held that, because of the exclusive competence, Greece was not entitled to do so, unless explicitly authorized by the Commission. Greece argued that such non-binding proposals for measures cannot be covered by the *ERTA* doctrine, since that only related to treaty-making. However, the Court sided with the Commission and held that Greece had violated its obligations under the duty of sincere cooperation.⁶⁹ The Court made only a weak link with the actual conclusion of a treaty. It held that ‘the Hellenic Republic submitted to that committee a proposal which *initiates* a procedure which *could* lead to the adoption by the IMO of new rules’.⁷⁰ In these types of exclusive competence situations the

⁶³ B. de Witte, *The Constitutional Law of External Relations*, in *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention* (I. Pernice & M. Poiares Maduro eds., Nomos 2004).

⁶⁴ Craig & De Búrca, *supra* n. 28, at 316.

⁶⁵ Cf. e.g. Case C-246/07, *Commission v. Sweden* [2010] ECR I-03317, Opinion of AG Maduro, para. 37 and *ILO*, 1993, *supra* n. 61, para. 36.

⁶⁶ Van Elswege & Merket, *supra* n. 21, at 47.

⁶⁷ *Ibid.*; cf. Joined Cases 3, 4 and 6/76, *Kramer* [1976] ECR 1279, paras 42–45.

⁶⁸ Case C-45/07, *Commission v. Greece* [2009] ECR I-701.

⁶⁹ *Ibid.*, paras 23, 38.

⁷⁰ *Ibid.*, para. 21. Cf. E. Neframi, *The Duty of Loyal Cooperation: Rethinking its Scope through its Application in the Field of EU External Relations*, 47 *Com. Mkt. L. Rev.*, 341 (2010).

Member States thus have to virtually act as agents for the Union to ensure the common position. It also means that if the EU has not managed to find a common position, the Member States remain in principle pre-empted to act independently.⁷¹

Second, even if there is a remaining *shared* external competence for the Member States, they cannot act externally without constraints, but the duties could be characterized as *obligations of conduct* where a type of ‘best efforts’ obligation exists for Member States to find common ground in the Council.⁷² For example, in the 2005 cases of *Commission v. Luxembourg* and *Commission v. Germany* the Court held that if there has been a *start of negotiations* on the matter at Union level, Member States cannot exercise their external competences without prior cooperation and consultation with the Commission due to the duty of sincere cooperation.⁷³ In *Commission v. Sweden* the Court also found that Sweden had breached the duty of sincere cooperation and the principle of unity in EU’s international representation by independently proposing an amendment to the annex of an international treaty whereas the Council had a ‘concerted common strategy’ *not to do so*.⁷⁴

These cases illustrate that even though a shared competence exists, as soon as some kind of common EU strategy is in place, even if that amounts to *refraining to act* and even if not formally adopted, Member States are in principle pre-empted to act independently. The conceptual difference with the ‘exclusive scenario’ thus seems to be that here independent Member State action cannot be a priori excluded.⁷⁵ Concretely however, the case law would mean that, first, Member States are always under an obligation to inform and consult the EU institutions of their actions so that a common strategy *could* be considered (preventive function) and second, that if their actions would indeed negatively impact on Union tasks or objectives they would not be allowed to act independently.⁷⁶

The conclusion is warranted that this case law constitutes a pivotal source for coherence in EU external relations. It lays down clear and more specific duties of sincere cooperation and reinforces the idea of a Union ‘single voice’ in international affairs. However, it is of course clear that in day-to-day EU external relation practice the effect of the case law is limited and that it does not solve the institutional challenges and power asymmetries at the source of the enduring incoherence, even if competences are clearly defined.⁷⁷ Even when competences

⁷¹ Van Elsuwege & Merket, *supra* n. 21, at 47.

⁷² *Ibid.*

⁷³ *Commission v. Luxembourg*, *supra* n. 24; and *Commission v. Germany*, *supra* n. 40.

⁷⁴ Case C-246/07, *Commission v. Sweden* [2010] ECR I-3317, para. 104.

⁷⁵ Casolari, *supra* n. 22, at 23.

⁷⁶ Van Elsuwege & Merket, *supra* n. 21, at 48–50.

⁷⁷ Casolari, *supra* n. 22.

are exclusive, questions of coherence do arise as Member States remain vital to the execution of EU external action, as evidenced by the *Greece v. Commission* case. It should also be noted that when Member States do prima facie not act in an area of EU law and policy as such, this does not entail that coherence challenges do not arise. Namely, when their actions have an incidence on EU law and policy the duty of sincere cooperation does become pertinent.

A specific CFSP duty of cooperation features in Article 24(3) TEU which emphasizes the vertical relationship by wording obligations falling on the Member States.⁷⁸ The relationship of this Article with the general Article 4(3) TEU cooperation provision is not altogether clear but Van Elsuwege and Merket argue that the CFSP provisions should not be disconnected from the general EU framework. If Article 24(3) TEU could be interpreted in light of Article 4(3) this could also reinforce the nature of the principle of CFSP significantly.⁷⁹

4 CONCLUSIONS

Although the academic community has dealt with concepts of policy coherence and consistency for many years, the debate continues. Debates are without doubt the life blood for the progress of scholarship, but in our view this particular subject matter has not always profited from the cross-fertilizing benefits of such scholarly debate. Despite the observation that multiple scholars present helpful definitions and classifications of policy coherence, they have not always managed to establish common definitions. A review of relevant literature indicates however that there are sufficient shared notions of the concepts available to find common ground. It is in this light that we have attempted in this article to forge definitions and classifications of policy consistency and coherence that bring together several of these notions.

The conceptual fuzziness also resonates in EU law. We can conclude that the Union's primary law is impervious to some core notions developed in the political science literature. Apart from the observation that concepts of policy consistency and coherence are 'lost in translation' across different Treaty languages, it is moreover evident that the Treaty wording itself gives multi-interpretable indications for the advancement of these terms. Distinguishing *positive coherence obligations* from *negative prohibitions of consistency* is not always straightforward. That may be great food for thought for academic debate which lives off fuzzy Treaty provisions, but it does not provide clear guidance to policy-makers looking to the Treaty texts for clarification.

⁷⁸ Van Elsuwege & Merket, *supra* n. 21, at 39.

⁷⁹ This is unlikely due to the limited jurisdiction for the Court, but not altogether impossible. Cf. *Ibid.*, 52–56.

So, as this article examined how the Union's primary law advances certain concepts of coherence and consistency, the picture is mixed: all concepts are at some point, although sometimes implicitly, promoted. Both notions of consistency and coherence feature in the Treaty text. Thus, a number of identified Articles and principles do not contain positive coherence obligations and sometimes the rather rigid delimitation of competences could even discourage coherent policy-making. An in-depth scrutiny reveals however that the Court's case law has taken up some Treaty provisions and increasingly developed them into coherence obligations. The duty of sincere cooperation is the chief example of this. Without surprise and in light of the particular relationship between Member States and the Union, the emphasis is hereby on vertical coherence. More precisely, the obligations of consultation, coordination or even abstention to act seem to fall primarily on the Member States. The analysis of case law also shows that it is not so much the nature of the external competence (i.e., shared versus exclusive) that is decisive but that the duty of sincere cooperation promotes vertical coherence across the board of EU external relations.

Furthermore we presented a fourth category of rules that fosters coherence: the rules of substantive guidance. Although it leaves policy-makers with considerable interpretative liberty, it could nevertheless serve as common point of reference for and across policy areas. Especially after the Treaty of Lisbon, with an extensive set of objectives for its external relations, the importance of this category should be elevated and possibly taken up by the Court to promote more coherent law and policy-making in EU external relations.

One of the objectives of the Lisbon Treaty was to increase the coherence of Union external relations (Preamble Lisbon Treaty). It can be concluded that EU law offers windows of opportunity which can be exploited to attain this objective. Judged from past experiences as described in this article, the Court could be expected to be at the forefront of that process in the years to come.

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