Coherence in EU external relations and the law

The case of the CFSP-development cooperation nexus in the Union's action in Somalia

Mireia Estrada Cañamares

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 12 December 2016

European University Institute
Department of Law

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I Mireia Estrada Cañamares certify that I am the author of the work 'Coherence in EU external relations and the law: the case of the CFSP-development cooperation nexus in the Union's action in Somalia' I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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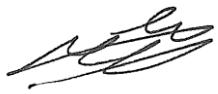

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Summary

Coherence in EU external relations is a long-standing concern. While seemingly surpassed in the last years by the idea of the 'comprehensive approach', the latter is nothing but the latest attempt to advance coherence in this field. The issue of the role of law in the quest for coherence is characterised by the existence of important gaps in the literature, at both theoretical and practical levels. This thesis aims at complementing legal literature on coherence with a study that specifically focuses on how coherence is sought between specific policies and activities coexisting in external action. It also intends to complement the empirical political science literature on coherence by focusing on the legal aspect of the query. The thesis elaborates on the notion of coherence in EU foreign policy, addressing questions like: What does coherence in external action mean? Why is it an obsession? What purposes does it serve? It also proposes a categorisation of the legal provisions and principles that are relevant to the struggle for coherence based on four mechanisms set out in EU primary law. It then focuses on the CFSP-development nexus in Union action in Somalia between 2008 and 2014 as a striking case to analyse these mechanisms in the development and implementation of policy action. The thesis reflects on the interaction between law and policy in the external dimension of the EU project, and provides arguments to think about how the law of external relations could more effectively promote coherence in this field.

Als meus pares.

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Abbreviations

ACP	African, Caribbean and Pacific Group of States
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General of the Court of Justice of the EU
APF	African Peace Facility
APSA	African Peace and Security Architecture
CFSP	Common Foreign and Security Policy
CISS	Coordination of International Support to Somalia
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
DAC	Development Assistance Committee of the OECD
DCI	Development Cooperation Instrument
DfID	Department for International Development of the UK Government
DEVCO	DG for International Cooperation and Development of the Commission
DG	Directorate-General
ECHO	Humanitarian Aid and Civil Protection
EDF	European Development Fund
EEAS	European External Action Service
EPA	Economic Partnership Agreement
ESA-IO	Eastern and Southern African and Indian Ocean Region
EUTM	EU Training Mission
EC	European Community
ENP	European Neighbourhood Policy
EPC	European Political Cooperation
EUSR	EU Special Representative
FAC	Foreign Affairs Council
HR	Secretary General of the Council/High Representative for the Common Foreign and Security Policy
HRVP	High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission
JAES	Joint Africa-EU Strategy

ICG	International Contact Group on Somalia
IcSP	Instrument contributing to Stability and Peace
IfS	Instrument for Stability
MDG	Millennium Development Goals
PanAf	Pan African Programme of the DCI
PSC	Political and Security Committee
SALW	Small Arms and Light Weapons
SEA	Single European Act
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning on the European Union
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WTO	World Trade Organisation

Introduction to the thesis

1 Aims and scope of the thesis

The thesis analyses the role of law in the quest for coherence in EU external relations. It claims that the 'obsession' with coherence in this field is fundamentally concerned with ensuring coherence between different policies and activities implemented in *parallel.* The project stems from the observation that coherence at this level has been examined at great length in political science empirical research,[1] whereas studies of the impact of legal norms on coherence between specific policies and activities (including at the empirical level) are largely missing. This situation is regrettable, especially if we take into consideration the presence of coherence in the treaties – with 16 provisions referring to it – as well as the increasingly important use of the notion in the case law of the CJEU.[2]

Legal analyses of coherence in the external relations of the Union have addressed the notion and the issue as to whether coherence constitutes a principle of EU law.[3] Legal studies have also been devoted to comprehensively conceptualising the role of EU primary law in the quest for coherence in this area.[4] Given their comprehensive nature, these studies have obviously remained at a very abstract level. The aim of the thesis is twofold. It intends to complement empirical political science research on coherence between policies and activities, by analysing the role that law plays in ensuring coherence at this level. Does the primary law of the EU foresee mechanisms to advance coherence? Most importantly, are these mechanisms fit for purpose? The thesis also aims to complement comprehensive studies on the role of EU primary law in the obsession with coherence, with a more concrete (and partly empirical) analysis showing how these

[1] See, for example, M. CARBONE, *Policy Coherence and EU Development Policy*, Routledge, 2009 and A. MISSIROLI, 'European Security Policy: the Challenge of Coherence', *European Foreign Affairs Review*, 6, 2001

[2] For instance, Articles 7 TFEU and 13(1), 16(6), 18(4) and 21(3) TEU. See also Case C-658/11, *Parliament* v *Council*, Mauritius Case, paras 52 and 60, and Case C-263/14, *Parliament* v *Commission*, Tanzania Case, paras 43, 68 and 72

[3] See, for all, P. GAUTTIER, 'Horizontal Coherence and the External Competences of the European Union', *European Law Journal*, 10, 1, 2004, C. TIETJE, 'The concept of coherence in the TEU and the CFSP', *European Foreign Affairs Review*, 2, 1997 and C. GEBHARD, 'Coherence', in C. HILL and M. SMITH (*eds.*), *International Relations and the European Union: Second Edition*, Oxford University Press, 2011

[4] M. CREMONA, 'Coherence in European Union Foreign Relations Law', in P. KOUTRAKOS (ed.), *European Foreign Policy: Legal and Political perspectives,* Edward Elgar, 2011 and C. HILLION, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union', M. CREMONA (*ed.*), *Developments in EU external relations law*, Oxford University Press, 2008

primary law norms operate in the context of concrete policies and activities coexisting in the external domain.

The thesis takes a legal approach. In certain instances, it engages in a type of analysis that is not confined to the legal aspect of coherence. This analysis is considered essential in understanding the context in which legal norms operate. Likewise, policy documents and literature in the fields of political science and international relations are important throughout the thesis. However, I do not intend to make a direct contribution in the fields of political science and international relations. The thesis aims at complementing empirical political science literature on coherence in external relations, by focusing on the legal dimension of the query.

2 'Coherence, coherence'

2.1 General approach to the idea of coherence in EU external relations

The thesis argues that coherence is a far-reaching political ambition that should characterise the policies and activities of the Union, across internal and external policy areas. The emphasis on 'policies and activities', which are the terms used in Article 7 TFEU, stresses that coherence is an ambition that extends to the whole of the Union's action. The quest for coherence transcends the legal sphere. In the context of the external relations of the Union, coherence is also an *obsession,* which explains why the question is particularly interesting in this area. The thesis focuses on coherence in external action, and the role of law therein. It analyses policies and activities developed under explicit EU external powers.[5] Due to the fragmented nature of EU external relations law and to the Union's self-perception of its potential as an international actor, EU law and policy are obsessed with coherence in this area. Moreover, the legal framework sets out mechanisms designed to secure coherence in this field. Since law is an important *cause*, law tries to be part of the *solution*. This is why, although the ambition is ultimately political, the quest for coherence in EU external relations cannot be understood without addressing the legal dimension. References to coherence *and the law*, coherence *through law* and the *legal dimension* of coherence emphasise the multifaceted nature of the query.

The thesis acknowledges that coherence and the legal principles that contribute to it, like the principle of sincere cooperation, are not the legal norms constraining political actors the most. However, I do not share the view that legal research should be confined

[5] Articles 2-4 TFEU

to the analysis of those rules and principles that most obviously constrain political action. In fact, whenever there seems to be an agreed understanding that certain treaty provisions and principles are devoid of practical effects, providing evidence confirming or denying this assumption is particularly interesting.

Furthermore, the thesis is not built on the assumption that coherence is an objective that the Union can aspire to fully achieve. No open international actor is perfectly coherent and, in any case, this would not be desirable.[6] Moreover, what the Union aspires to in the abstract (i.e. acting in a coherent manner on the international stage) is often in tension with how it needs or prefers to act in its response to concrete international events. The link between the notions of coherence and effectiveness that we can find in EU primary law and in policy documents is in tension with a competing idea of the Union's effectiveness as an international actor. In the first understanding of effectiveness, the question as to *how* the Union acts at the international level is central. The assumption is that the EU can only be ultimately effective as regards its external objectives if it acts in a coherent manner. The latter version of effectiveness prioritises, instead, the need to maximise the Union's external presence, by ensuring that the EU provides a *timely* response to international matters as often as possible, regardless of whether these responses qualify as coherent or not. This is only one example of how coherence is often in tension with other interests. When trying to make sense of the obsession with coherence, the thesis presents the 'ought to be' idea of coherence in EU primary law and policy documents. The reader should, however, be aware of these caveats. Moreover, the fact that coherence extends to everything the Union does, has an *instrumental* character (i.e. it is important because of the purposes it serves), and is not a specific stage to reach explains why it can be perceived as both a broad political ambition and a principle guiding the development of EU external relations.

In short, I argue that neither the quest for coherence in external action, nor the legal norms relevant in advancing it operate as a zero sum game. I take a nuanced and constructive position both to the ambition of coherence in the Union's foreign policy, and to the role of law therein.

[6] According to Pascal Gauttier: 'perfect coherence proves to be nevertheless impossible to achieve in a pluralist political system (…). A certain measure of incoherence remains thus inevitable, and must be deemed acceptable insofar as it arises from an open decision-making process', P. GAUTTIER, *op. cit*. 3, page 24

2.2 Writing about coherence in times of EU crisis

It is not easy to write about the quest for coherence in EU external relations when the European idea itself is going through a severe crisis. The quest for coherence is obviously an ambitious political objective. Moreover, it is linked to the idea of strengthened EU actorness on the international scenario. Coherence is an integrationist goal aimed at bringing the EU further as an external project. This is why the EU's response to the war in Ukraine in 2014 and to the refugee crisis in 2015-2016, and the recent referendum whereby UK citizens have decided to leave the EU do not exactly provide the best context in which to write about an integrationist agenda for the Union. This is clearly not a thesis for EU sceptics. It is not a thesis either for the increasing number of people who defend an instrumentalist approach to the Union, based on cost-benefit analyses. Truth being said, perhaps even I would have lost any hope for the idea of coherence were it not for the three months I spent at the EU Delegation to Ethiopia.[7] During that time, I could confirm how the promotion of human rights and democracy were *consistently* important objectives in the actions of the Union in Ethiopia. Noticeably, this could not be said about other external actors offering assistance to Ethiopia. Human rights considerations were essential in a project on the reintegration of former combatants from the Benshangul-Gumuz People Liberation Movement. They were central, too, in a project on the reintegration of Ethiopian migrants returning from the Kingdom of Saudi Arabia. Democratic considerations were crucial in the many meetings (between the Union and Member States) held at the EU Delegation to discuss the kind of support that the Union should provide for the general elections that took place in 2015. I could see, too, how EU officials *consistently* explained to representatives of the Government of Ethiopia as well as to other international organisations and NGOs that 'this or that' had to be done 'this or that' way because EU rules so required. I could clearly perceive that this way of acting was considered inflexible and 'annoying'. I understood, however, that this *modus operandi* rendered the Union more credible and persuasive when, in the context of political dialogue, it tried to convince the Government of Ethiopia of the need to act in a certain manner. Credibility was important when the Union pressured the Government of Ethiopia to respect human rights in trials involving opposition leaders. Credibility played its role, too, when the EU recalled the Government of Ethiopia that resettlement

[7] I was an intern at the Governance, Economic and Social Section of the EU Delegation to Ethiopia between August and November 2014

activities affecting tribes living in the Omo Valley had to comply with human rights. Complementing this direct pressure, I attended trial observation organised by the Union in Addis Ababa, and saw how some EU officials travelled to the Omo Valley to observe the resettlement activities of the Government. Besides soft power considerations – which are not very fashionable these days either – during my weeks in Ethiopia I learned about joint programming between the Union and the Member States in the field of development policy (i.e. an exercise of vertical *coherence*). I learned that joint programming strengthens the position of the Union in its dialogue with the Government of Ethiopia. The pressure of the EU delegation or an individual Member State cannot compare to the pressure of the Union as a block. Although I only realised about this months later, my experience in Ethiopia was essential to believe in my thesis again.

3 Outline

Chapter 1 of the thesis explores the reasons behind the obsession with coherence and the notion of coherence in EU external action. Moreover, it analyses the nature of coherence in external relations, drawing from its place in the treaties and case law of the CJEU. Most importantly, the chapter introduces the approach of the thesis to the legal dimension of coherence. This approach constitutes the backbone of the thesis. It proposes a categorisation of the fundamental mechanisms foreseen in EU primary law to secure coherence between parallel policies and activities. While the approach to the legal dimension of coherence remains very abstract in chapter 1, it is studied again in chapters 2 and 3, and it becomes more concrete every time it is examined. Starting from the treaties, the analysis considers certain developments in secondary law acts that are subject to the ordinary legislative procedure and finally focuses on specific legal acts adopted in the context of Union action in Somalia. Chapter 1 concludes with an examination of the idea of the 'EU's comprehensive approach' as the latest attempt to advance coherence in EU external relations.

Chapter 2 applies the approach of the thesis to the legal dimension of coherence in the context of the CFSP-development cooperation nexus. This case – the thematic case of this thesis – constitutes a paradigmatic example of two parallel policy areas requiring an exceptional degree of complementarity. As a result of the incorporation of the security-development nexus (i.e. the idea that security and development challenges are intertwined), the Union has taken the view that special efforts shall be directed towards

ensuring that CFSP and development cooperation measures complement and reinforce each other. When analysed in this specific context, the approach to the legal dimension of coherence considers certain secondary law developments that are relevant to coherence in the external action. For instance, I examine the adoption of the Instrument contributing to Stability and Peace (IcSP). Furthermore, with a view at setting the scene for the case study presented in chapter 3, chapter 2 presents four theoretical claims concerning the four mechanisms foreseen in EU law to ensure coherence in the external action. Chapter 2 concludes with an examination of joint programming in EU development cooperation. While still at a theoretical level (i.e. the analysis does not focus on any particular country or region), the case of joint programming provides a specific example of many issues addressed in chapters 1 and 2 of the thesis. For instance, it illustrates the link between the principle of sincere cooperation and the notions of coherence and effectiveness of the Union as an actor. Moreover, joint programming is a concrete example of an exercise designed to increase coherence between the development policies of the EU and those of its Member States. It fits perfectly into vertical inter-policy coordination as one of the mechanisms foreseen in the treaties to advance coherence in EU external relations (section 4 of chapter 2).

Chapter 3 presents the CFSP and development cooperation toolbox in Somalia between 2008 and 2014. It explains the wide array of instruments that the Union has used in its action in Somalia in the analysed period and within the analysed policy areas. The chapter offers a practical example of the idea of the Union's toolbox to tackle international concerns, introduced in chapter 1 of the thesis. It must be read together with Annex 2 of the thesis, which provides an extensive list of CFSP and development cooperation legal acts, falling within the different EU *tools* deployed in Somalia (e.g. restrictive measures, EUNAVFOR Atalanta, EDF). Annex 2 is the most tangible expression of the Union's wide toolbox. Moreover, chapter 3 provides the necessary context for understanding the case study. It presents an overview of Somalia's recent history, as well as the Union's approach to the country since the beginning of the 2000s. Besides, the chapter shows that the security-development nexus is not only visible in EU policy documents. Chapter 3 also presents the case study of the thesis, which is based on an analysis of 14 legal acts from the wide CFSP and development cooperation toolbox in Somalia (2008-2014). It explains the scope of the case study, as well as the legal acts examined. The idea of the legal dimension of coherence presented in this chapter adds to the consideration of primary law and of certain developments in secondary law, attention

for the role that specific treaty provisions and legal principles play in legal acts concerning the Union's action in a third State. The case study responds to the four claims presented in chapter 2 with four empirical claims on the basis of the role of law in practice. This opposition emphasises that the case study is thought of as a test, in the light of practice, of the legal framework presented in chapters 1 and 2. Finally, the conclusions of the thesis present the overall conclusions of the project.

There are at least three possible ways of reading this thesis. If the main interest is in analysing how ideas and principles concerning EU external relations that appear very abstract in the treaties and in policy documents translate into concrete realities, the thesis must be read chapter by chapter. If the focus is on the legal dimension of coherence alone, then the attention must be put in sections 5 (chapters 1 and 3) and section 4 (chapter 2). This way of reading the thesis will also show how treaty provisions and principles that are abstract and ambiguous in the treaties are applied in concrete cases. Lastly, if the reader is interested in the interaction between law and policy, then each chapter can be considered on its own. The three chapters of this thesis follow the same structure: they focus first on the political dimension of coherence to then introduce the legal aspect of the query.

Chapter 1
Coherence in EU external relations and the law

1 Introduction to chapter 1

The quest for coherence in EU external relations has been a central topic in the academic and political debates in this field since the establishment of the European Political Cooperation (EPC, 1970). Coherence, which found its way into EU external relations law with the adoption of the Single European Act (SEA, 1987), has been referred to as a 'burning question', a 'recurrent theme' and a 'fervently discussed' issue, to mention but a few examples from the literature.[8] Remarkably, 16 provisions in the current version of the treaties refer to the idea of coherence, many of which in the context of the Union's external action.[9] Academic studies have generally assumed that coherence in EU external relations is desirable and have focused, either on how the institutional design and the legal framework can advance it, or on the empirical analysis of whether certain policies and activities are or not consistent. The chapter addresses questions that have been to some extent overlooked in the literature, and is aware that this means navigating difficult waters. It aims at understanding the obsession with coherence in the Union's foreign policy: what factors justify the obsession? What does the term 'coherence' mean in this context? How does the CJEU use the notion of coherence in recent cases concerning the external action? The chapter studies these issues with a view to assessing the impact of the legal framework on coherence in this area.

The analyses of the reasons behind the quest for coherence and the notion of coherence are based on primary law, as well as on policy documents. Given that the obsession with coherence is manifest in the treaties and in policy documents, it is justifiable to consider both when trying to make sense of it. Furthermore, if policy documents are essential in the reasoning of the Court in cases concerning the external action, they should also be central in the academic legal debate.

[8] H. G. KRENZLER and H. C. SCHNEIDER, 'The Question of Consistency', in E. REGELSBERGER *et al* (*eds.*), *Foreign Policy of the European Union: From EPC to CFSP and Beyond*, 1996, page 134, P. GAUTTIER, *op. cit.* 3, page 25 and C. GEBHARD, 'Coherence', in C. HILL and M. SMITH (*eds.*), *International Relations and the European Union: Second Edition*, Oxford University Press, 2011, page 101

[9] C. HILLION, 'Cohérence et action extérieure de l'Union Européenne', LAW 2012/14, EUI WP, page 1

Besides, the chapter introduces the approach of the thesis to the legal dimension of coherence, as a particular way of conceptualising the role of law in the quest for coherence in EU external relations. This approach constitutes the backbone of the thesis. It is further elaborated on in chapter 2, where I apply it to the CFSP-development cooperation nexus and in chapter 3, where I analyse that nexus in the context of Union action in Somalia. Finally, chapter 1 addresses how the notion of coherence and the 'trendier' idea of the 'EU's comprehensive approach' interrelate.

2 Coherence in EU primary law and in policy documents: terminological confusion

The first references to coherence in EU external relations date back to the 1970s when the EPC was introduced and fragmentation in the Union's foreign policy materialised. The first form of CFSP had to coexist with the external policies of the EC. However, the idea of coherence was not introduced in primary community law until 1987, when the SEA was adopted. The SEA referred to the notion of coherence in its Preamble and in Article 30, on provisions on the EPC. It essentially referred to coherence between the Member States and the EPC and between 'the external policies of the European Community and the policies agreed in European Political Co-operation'.[10]

In the context of treaty reform initiated in 2001 with the Laeken Convention and ultimately leading to Lisbon Treaty in 2009,[11] the idea of coherence played a central role. The Laeken Declaration posed the question: 'How should the coherence of European foreign policy be enhanced?'.[12] Later, once the Constitutional Treaty had failed, the Commission adopted the Communication: Europe in the World – some practical proposals for greater coherence, effectiveness, and visibility (2006).[13] The document focused on efforts that could enhance coherence in EU external action in the context of the existing treaty framework. In the same direction, in the Presidency Conclusions of 15 and 16 June 2006, the European Council invited the Presidency, the Council, the HR and the Commission to study measures that, on the basis of the existing treaties, could strengthen coherence in the foreign policy of the Union.[14] As a result of this long process, the current version of the treaties contains 16 provisions referring to the idea of coherence, the majority of which are in the context of EU external relations.

[10] Article 30 (2)(d) and (5) of the SEA
[11] The Lisbon Treaty was signed on 13 December 2007 and entered into force on 1 December 2009
[12] European Council Meeting in Laeken 14 and 15 December 2001: Presidency Conclusions
[13] Communication: Europe in the World (C(2006) 278)
[14] Brussels European Council 15-16 June 2006: Presidency Conclusions (10633/1/06)

The constant calls for coherence in the Union's foreign policy did not stop with the entry into force of the Lisbon Treaty. Quite the contrary, references to coherence in official policy documents concerning this field of EU action are commonplace. In fact, as a consequence of certain institutional innovations introduced by the Lisbon Treaty (namely, the new role of the HRVP and the creation of the EEAS),[15] together with coherence, we now find plenty of references to the idea of the 'EU's comprehensive approach'.[16] As explained in section 7 of this chapter, the comprehensive approach is fundamentally a fresh attempt to advance coherence in external action. The Global Strategy for the European Union's Foreign and Security Policy (2016) refers to coherence on 20 occasions, to consistency in 9 cases, and to the 'EU's comprehensive approach' 4 times.[17]

The debate regarding coherence in EU external relations is characterised by confusion over the use of the words 'consistency' and 'coherence'. This terminological confusion is a long-standing reality, as it is as old as the SEA.[18] While the English version of the treaties and case law of the CJEU refer to consistency only, EU policy documents clearly prefer the word coherence, but also sporadically use the term consistency. This would not be problematic if these two words were interchangeable in English. However, as is widely accepted in the literature, consistency and coherence mean different things.[19] Consistency constitutes a necessary but insufficient condition for coherence. While consistency is linked to an idea of the absence of contradictions, coherence adds to the former the idea of synergetic connection or integration of different parts in a unified whole. To complicate the matter even more, whereas the English version of the treaties uses the term consistency, the French, Italian, German and Spanish language versions, for instance, refer to *cohérence, coerenza, Kohärenz* and *coherencia*, respectively.

The SEA, which was drafted in English, introduced for the first time the idea of coherence in EU primary law. Where the English text read 'consistency', other language

[15] See, for example, Articles 18 and 27 TEU and the Council Decision establishing the EEAS (2010/427/EU)

[16] See, for instance, the Joint Communication: The EU's comprehensive approach to external conflict and crises (JOIN(2013) 30), page 2

[17] Global Strategy for the European Union's Foreign and Security Policy (2016), available at: https://europa.eu/globalstrategy/sites/globalstrategy/files/eugs_review_web.pdf (last visited: 29 August 2016)

[18] According to Marise Cremona, this confusion goes back to the SEA in its provisions on the EPC and 'unfortunately has not been remedied in the Treaty of Lisbon', *op. cit*. 4, page 12

[19] See, for example: C. HILLION, *op. cit.* 4, page 14 and S. DUKE, 'Consistency, Coherence and European Union External Action: the path to Lisbon and beyond', in P. KOUTRAKOS (*ed*.), *European Foreign Policy: Legal and Political perspectives,* Edward Elgar, 2011, pages 17-18. On the difference between the notions of consistency and coherence, see section 4 of this chapter, pages 26-29

versions, like the Spanish and the French ones read *cohérence* and *coherencia* respectively. Although all official languages are equally authentic, the choice for consistency in the text in which the SEA was drafted may respond to the fact that English allows for nuance that is not possible or is much less evident in other languages. For example, there is an important difference regarding the common usage of the word consistency in English and that of *coherencia* in Spanish. While in Spanish the word *coherencia* is generally used to refer both to an absence of contradictions and the creation of synergies, in English the word consistency replaces the term coherence when we refer to the first part of the query (i.e. absence of contradictions). The word *consistencia* is rarely used in Spanish to refer to the idea of an absence of contradictions between two abstract elements. It is widely employed instead to describe the physical state of a substance. By way of example, in Spanish we say that the dough of a cake did not acquire the desired *consistencia.* If we want discuss how the policy of an institution took one direction over a certain period of time, but has taken a contradictory direction in recent times, we will probably say that the institution's policy is *incoherente.* In English, however, the term consistency is generally used to refer both to dough and the policy of our government. Therefore, the choice for the word *coherencia* where in English we read consistency may result from the fact that in Spanish the word *coherencia* is commonly used where, in English, the term consistency is widely employed, instead. [20]

Interestingly, the terms 'coherence and consistency' were used in the English version of Case C-266/03 as the translation of the original '*unité et cohérence'* of the action and international representation of the EU.[21] However, there is an example in the treaties where the unity, consistency and effectiveness of the Union's action in English are in the French version: *unité, cohérence,* and *efficacité.*[22] This shows that *unité* in French does not correspond to coherence in English. That the Court's term *unité* was translated as coherence indicates, however, that coherence in English means something more than coherence in the French version of the treaties and the case law of the Court.[23] Moreover,

[20] In fact, because of the common use of the word consistency in English, in some instances it would be more appropriate to refer to consistency (see the Introduction to the thesis, page 4). However, for the sake of clarity I generally refer to coherence throughout the thesis

[21] Case C-266/03, *Commission* v *Luxembourg* [2005] ECR I-04805, para 60. This is particularly important because this paragraph has been reproduced in other judgments, for example: C-433/03, *Commission* v *Germany*, [2005] ECR I-06985, para 66, Case C-246/07, *Commission* v. *Sweden*, PFOS Case, [2010] ECR I-03317, para 75, and Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 72

[22] Article 26(2) para 2 TEU

[23] For Christophe Hillion, that coherence is the translation of *unité* indicates that 'coherence in English would thus encapsulate the notion of united whole'. C. HILIION, *op. cit*. 4, pages 13-15

the reference to 'coherence and consistency' in the English translation of Case C-266/03 reinforces the idea of a distinction between these two terms.

The choice of consistency in English is not necessarily a mistake. In fact, the word consistency appeals in a clearer manner to the main concern of EU primary law in the quest for coherence in the Union's foreign policy, that is: to ensure a certain degree of *consistency* across EU policies and activities. This is not to say that references to coherence in the English version of the treaties do not imply a further-reaching idea of coherence than the one behind the word consistency. There are other terms in the treaties, like for instance cohesiveness, convergence and complementarity that clearly allude to the notion of coherence.[24] This justifies why, throughout the thesis, the preferred term is coherence. However, there are reasons to argue that EU primary law is particularly worried about securing *consistency* in EU external relations.[25]

3 Making sense of an obsession

The obsession with coherence in the external action of the Union, as reflected in the treaties and in policy documents in this area, is based on the EU's perception of its *potential* as an international actor:[26]

> 'But if we are to make a contribution that matches our potential, we need to be more active, more coherent and more capable.'

Coherence is a fixation with the policies and activities of EU external action, which must qualify as 'coherent' for the Union to be effective as an international actor. There are, in fact, two fundamental reasons behind the permanent quest for coherence in EU external action. The first one is the complex legal system in which EU actors implement the external policies of the Union (the *internal* factor). The second one is the fact that the Union considers ensuring coherence in its foreign policy as a *conditio sine qua non* to its effectiveness on the international panorama (the *external* factor).

3.1 The internal factor: legal fragmentation in the foreign policy of the Union

The Union likes referring to its wide toolbox for responding to international concerns. By doing so, the EU links its strength in the outside world not only to the existence of a wide

[24] See Articles 24(3) para 2 and 32 para 1 TEU, and Article 210(1) TFEU. See section 4 in this chapter on the notions of consistency and coherence, pages 26-29

[25] I reflect on this matter in section 5 in this chapter, page 45

[26] European Security Strategy (15895/03), page 13

array of tools, but also to the way in which it should use them: *coherently*. A great example can be found in the Council Conclusions on the EU's Comprehensive Approach (2014):[27]

> 'The European Union and its Member States can bring to the international stage the unique ability to combine, *in a coherent and consistent manner*, policies and tools ranging from diplomacy, security and defence to finance, trade, development and human rights, as well as justice and migration. This contributes greatly to the Union's ability to play a positive and transformative role in its external relations and as a global actor.'

The *tools* of the Union, as referred to in this fragment, correspond to the many policies of the EU. These policies are implemented under different policy areas (e.g. CFSP, common commercial policy) and instruments (e.g. EDF, CSDP military operations). This is why references to the EU's toolbox, like the one in the Council Conclusions on the EU's Comprehensive Approach, can be said to refer to the different policies, instruments and policy areas of the EU.[28] Furthermore, depending on the policy field and instrument chosen, the role of EU actors differs. For instance, the Commission does not play the same role in the common commercial policy as in the CFSP. The relevance of different policy areas in the context of EU external relations is clear from Article 21(3) TEU, which can be considered the most important provision regarding coherence in this field. While Articles 7 TFEU and 13(1) TEU, which are of general application to the Union's action, refer to coherence between different policies and activities or actions, Article 21(3) TEU puts the emphasis on coherence between the different *areas* of the Union's foreign policy. By doing so, this provision implicitly stresses the especial challenge for coherence created by the existence of different policy areas, most notably by the *sui generis* character of the CFSP.[29] As one can see, I draw a distinction between 'policies' and 'policy areas'. By policies, I refer, in general, to the substantive activities conducted in the external action of the Union and, in particular, to the objectives promoted by these policies or activities. By policy areas I refer, instead, to the different

[27] Council Conclusions (9644/14), page 2 (emphasis added). Another reference to the Union's wide toolbox can be found in the Council Conclusions on Security and Development (15097/07): 'The Council recalls that the EU, as an important global actor, can avail itself of a wide array of instruments to contribute to long-term development and poverty eradication, to prevent and manage violent conflict and to build peace in developing countries', page 2

[28] Chapter 3 and Annex 2 provide a concrete example of the idea of the Union's wide toolbox with the case of Somalia (2008-2014)

[29] Article 24(1) and 40 TEU

external competences that the treaties attribute to the Union.[30] Given that most of these competences are of a shared nature, the external policies of the Union often coexist with those of its Member States in a *parallel* manner. The multiplicity of policy areas and instruments, where specific policies are implemented, and where EU actors play different roles, constitutes legal fragmentation in EU external relations. This is why, while the idea of the Union's wide toolbox is positively charged, it often hides the fact that organising the different *tools* of the EU is no easy task.

Indeed, the different policies and activities of the external action of the Union, including those of its Member States, are implemented in a truly parallel or *horizontal* manner.[31] Unlike the foreign policies of Member States, if the EU manages to be a coherent actor, we will speak about a very *horizontal* coherence.[32] This is why, throughout the thesis, I emphasise the *parallel* character of the coexistence of EU policies and activities. As far as the EU-Member States axis is concerned, the logic of exclusivity, either because competences are defined as exclusive in the treaties or because of the primacy of existing EU legislation,[33] is not sufficiently relevant in the field of external relations so as to change the truly parallel character of EU and Member States action.[34] For instance, this is the case in the development cooperation field,[35] where the Union and its Member States program and implement their own aid programmes for each partner country.[36] The CFSP, albeit generally requiring the unanimity of the Council, is not to affect the 'formulation and conduct' of Member States' foreign policies.[37]

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[30] The emphasis on 'policy areas' in Article 21(3) TEU, as opposed to 'policies and activities' in Article 7 TFEU indicates that the quest for coherence in the EU external action has a more legal connotation, as the idea of policy areas appeals to the principle of conferred powers

[31] 'Horizontal' in this context is to be differentiated from references to 'horizontal coherence' linked to coherence between the different policies and activities of the Union (without considering those of Member States)

[32] 'A truly hierarchical foreign and security policy architecture – if it exists at all – is more typical of an individual State's constitutional set-up and bureaucratic machinery than of the condominium-type EU/CFSP structure and decision-making procedures.' A. MISSIROLI, *op. cit.* 1, page 183

[33] Marise Cremona refers to the latter as 'legislative (non-a priori) exclusivity'. See Articles 3(1) and (2) TFEU and M. CREMONA, 'Defending the Community Interest: the Duties of Cooperation and Compliance', in M. CREMONA and B. DE WITTE (*eds.*), *EU Foreign Relations Law: Constitutional Fundamentals*, Bloomsbury Publishing, Oxford, 2008, page 129

[34] The common mercial policy is the only express external policy field that falls under the category of exclusive EU competences (Article 3(1)(e) TFEU) and it is debated whether the principle of primacy applies to the CFSP at all

[35] Article 4(4) TEU defines the development cooperation policy as a shared competence that is not subject to pre-emption

[36] As established in Article 210(1) TFEU, this should, however, happen with a high degree of coordination, which is in practice mainly facilitated by Union delegations. See chapter 2, section 5, on joint programming in EU development policy, pages 105-115

[37] See Article 24(1) para 2 TEU and Declarations no 13 and 14 Annexed to the Lisbon Treaty

From the perspective of the Union (now considered without its Member States), there is no hierarchy between policy areas (e.g. CFSP and common commercial policy),[38] no hierarchy between actors (e.g. the Commission and the Council), no hierarchy between instruments (e.g. EIDHR and IcSP), and no hierarchy between policy objectives (e.g. human rights and poverty eradication). Besides the non-hierarchical relations between EU policy areas, the law of EU external relations does not offer a clear-cut solution as to the choice of the right policy area to tackle international concerns. In particular areas that are closely linked on the ground, like the CFSP-development cooperation nexus, and the CFSP and the external dimension of the AFSJ, the choice of the legal basis is a source of interinstitutional conflict.[39] The delimitation between explicit external activities of the Union and the external dimension of internal policies is not straightforward either.[40] The HRVP is a good example of horizontality between actors. Despite the important responsibilities for coherence that the treaties entrust to the HRVP and her coordinating role, she cannot force other EU actors to follow concrete positions on the international scene.[41] Moreover, each policy area has its own instruments, like the development cooperation policy, where, for example, the Instrument for Democracy and Human Rights Worldwide (EIDHR) and the Instrument contributing to Stability and Peace (IcSP) can be used simultaneously in the assistance to a specific developing country.[42] The instrument chosen determines the procedure to be followed and, thus, the specific role of EU actors. By way of example, the EEAS does not play the same role under the EDF and the IcSP. Furthermore, EU institutions work towards objectives, such as poverty eradication and the strengthening of international security that are highly

[38] Before the entry into force of the Lisbon Treaty, ex-Article 47 TEU enshrined the primacy of the *acquis communautaire* over the CFSP. Article 40 TEU has eliminated this unbalance between CFSP and non-CFSP policy areas

[39] Case C-91/05, *Commission* v *Council*, ECOWAS Case, [2008] ECR I-03651, stands out as the seminal example of inter-institutional conflict regarding the correct choice of the legal basis in the CFSP-development cooperation policy interface. Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 72 is a good example of the same type of battle in the context of the CFSP and the external dimension of the AFSJ. See chapter 2, section 4, pages 85-98

[40] The current refugee crisis shows how difficult it is to establish a dividing line between the CFSP and the external dimension of the AFSJ. Operation Sophia, the EU military response to human smuggling and trafficking in the Southern Central Mediterranean was established under a CFSP legal basis only, but there are arguments to claim that a dual CFSP-AFSJ legal basis would have been desirable. See Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) and M. ESTRADA CAÑAMARES, 'Operation Sophia before and after UN Security Council Resolution no 2240 (2015)', *European Papers*, 1, 1, 2016, pages 185-191

[41] See, for instance, Articles 18 and 27 TEU, and Declaration 14 Annexed to the Lisbon Treaty

[42] Regulation 235/2014 and Regulation 230/2014. Notice that, although the IcSP is a *sui generis* instrument, in the Union's action in developing countries it is a development cooperation instrument. See section 4 of chapter 2, pages 91-98

interlinked on the ground.[43] Yet these objectives are typically pursued in the context of policy areas that operate under procedures that are not to affect each other:[44]

> 'CSDP crisis management instruments and crisis response measures under the Instrument for Stability (IfS) pursue mostly short-term objectives, whereas development instruments by nature are oriented towards the long term. Although objectives and decision-making procedures are different, natural synergies and complementarities should be ensured (…). The EU can use, in a coherent manner, different tools and instruments within their own mandates and decision-making processes to deliver on the shared objectives.'

Noticeably, policy documents acknowledge that coherence is not only a matter of political will. There are 'objectives', 'instruments' and 'decision-making processes' to be respected. At the root of legal fragmentation in EU external relations there is the close link that Member States establish between their foreign policies and their sovereignty. The main expression of this link is obviously the *sui generis* nature of the CFSP, which has survived the abolition of the pillar structure after the Lisbon Treaty reforms. Despite the fact that all EU external policies are now part of a single legal order,[45] the CFSP still operates under specific rules and procedures. For example, the jurisdiction of the CJEU in this domain is restricted.[46] Furthermore, the CFSP does not fall under any of the general categories of Union competences, which reinforces its character as a *sui generis* EU competence.[47] This situation is not likely to change in the near future. As shown in Declarations no 13 and 14 Annexed to the Lisbon Treaty, Member States are keen on stressing that the CFSP, the HRVP and the EEAS cannot affect their competence and the extent of their powers to conduct their own foreign policies.

Both the persistence of the *sui generis* nature of the CFSP and the emphasis on the non-encroachment on Member States' foreign policies point to the same reality: the unwillingness of Member States to limit their scope for manoeuvre when it comes to issues that they perceive as being at the core of their sovereignty.[48] The special connection

[43] Articles 3(5) and 21 TEU

[44] See Article 40 TEU and Joint Communication: The EU's comprehensive approach to external conflict and crises (JOIN(2013) 30), page 8

[45] After the abolition of the pillar structure, the EC and the EU have merged under the EU

[46] Article 24(1) para 2 TEU

[47] According to Article 2(4) TFEU: 'The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy'

[48] In the same lines, see: D. THYM, 'The Intergovernmental Constitution of the EU's Foreign, Security and Defence Executive', *European Constitutional Law Review*, 7, 3, 2011, pages 25-26; and U.

between the external relations of Member States and their sovereignty does not only bring about complexity from the perspective of the different policies of the Union (i.e. CFSP and non-CFSP divide).[49] It also has important consequences from the perspective of the relations between the policies of the Union and those of its Member States. As far as the CFSP is concerned, albeit generally requiring the unanimity of the Council, the CFSP cannot affect the 'formulation and conduct' of Member States' foreign policies.[50] This means that, even if Member States, united within the Council, reach a common approach on an international matter,[51] they are still competent to conduct their own foreign policies. Other non-CFSP policy areas, for instance the development cooperation policy, are not subject to pre-emption.[52] The idea that the more external assistance the Union and its Member States provide the merrier is certainly one of the reasons why this policy area falls under this category of competences. It is assumed that 29 development policies working in parallel will result in more assistance to the developing world than if the Union, alone, was in charge of a single EU development policy.[53] However, it is also the case that development policy is a fundamental political tool in the foreign policies of Member States, which also justifies why development cooperation is a non-preemptive shared competence.[54] Besides setting limits to the integration process, the foreign policy-sovereignty link explains, at least to a great extent, structural complexity in external relations law. This is so from the viewpoint of the relations between different EU policy areas (e.g. CFSP-development cooperation), and also from the perspective of the way in which EU competences are defined in the treaties (e.g. the CFSP or the development cooperation policy).

In short, by acting in a coherent manner the Union shows that it has overcome the challenges of a system where multiple policy areas and instruments, with specific policies and roles for EU actors constantly interact.

SCHMALZ, 'The Amsterdam Provisions on External Coherence: Bridging the Union's Foreign Policy Dualism?', *European Foreign Affairs Review,* 3, 1998, page 422

[49] Article 40 TEU

[50] See Article 24(1) para 2 TEU and Declarations no 13 and 14 Annexed to the Lisbon Treaty

[51] E.g. Article 29 TEU

[52] Article 4(4) TFEU. This provision establishes that the policy on humanitarian aid is also a non-preemptive shared competence

[53] In the European Consensus on Development (2006/C 46/01), the Union claimed: 'The EU provides over half of the world's aid', page 1

[54] The political sensitivity of development policy for Member States is clear in the case of joint programming in EU development policy. See chapter 2, section 5, pages 105-115

3.2 The external factor: the EU's self-perception of its potential as an international actor

Coherence would not be an obsession in EU external relations if the Union did not consider it a *conditio sine qua non* to its effectiveness as an international actor:[55]

> 'The EU is stronger, more coherent, more visible and more effective in its external relations when all EU institutions and the Member States work together on the basis of a common strategic analysis and vision.'

The link between the ideas of coherence and effectiveness of the Union as an international actor can be found in the treaties and case law of the Court of Justice. This is especially clear in the context of the CFSP, as can be seen in Articles 24(3) para 2 and 32 para 1 TEU:

> 'The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.'

> 'Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. (…). Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.'

Likewise, we can find a similar association in Article 210(1) TFEU, in the context of the development cooperation policy:[56]

> 'In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences.'

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[55] Joint Communication: The EU's comprehensive approach to external conflict and crises (JOIN(2013) 30), page 3. See also the European Security Strategy (15895/03), which established that: 'The European Union has made progress towards a coherent foreign policy and effective crisis management' (page 11). The European Consensus on Development (2006/C 46/01) claims that it 'identifies priorities which will be reflected in effective and coherent development cooperation programmes at the level of countries and regions', page 8

[56] As regards the association between complementarity and efficiency under this provision see chapter 2, section 4, page 103-105. On the role of the principle of sincere cooperation in advancing coherence and effectiveness, see section 5 in this chapter, pages 32-35

As regards the case law of the CJEU, in the Inland Waterways Cases the Court deemed Member State duties flowing from the principle of sincere cooperation in the context of the negotiation of EU international agreements as essential to:[57]

> 'Facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.'

Often the link between coherence and effectiveness finds its justification in the idea of the EU's actorness. The assumption is that the Union needs to act in a coherent manner to show its identity as an international player, which is indispensable for it to be ultimately effective as regards the objectives it pursues at the international level.[58] The EU acknowledges that the foreign policy domain is one where ascertaining one's power is crucial. Indeed, the way in which actors perceive each other is fundamental in the struggle for power in world politics. By acting coherently, the EU believes that it can be 'a force for positive change'.[59] By being incoherent, it assumes that it can even *disappear* as an international player. The main challenge is obviously the fact that the EU shares the international space with each of its Member States and also that the Union is in relative terms still a very young actor. The Union needs to act coherently to be taken seriously by other actors. By way of example, Simon Nuttall mentions the Iraq War where, to his view: 'differences among the Member States (…) deprived the Union of the credibility it needed to play an effective role.'[60] This idea of a lack of coherence that may lead to the EU not being recognisable on the international scenario shows that the Union's assumption is not that coherence necessarily leads to effectiveness, as some authors seem to understand it, but rather that an incoherent Union cannot be an effective Union.[61]

Being *visible* is obviously not enough to be an effective international actor. By (coherently) adhering to its founding principles, regardless of the policy area or instrument used, the EU shows not only its existence as an international player but also

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[57] Case C-266/03, *Commission* v *Luxembourg* [2005] ECR I-04805, para 60 and Case C-433/03, *Commission* v *Germany*, [2005] ECR I-06985, para 66

[58] In fact, in the pre-Lisbon legal framework, ascertaining the EU's identity was one of the objectives of the CFSP. Currently, it is not an explicit external objective but it is mentioned in the Preamble of the TEU as one of the functions of the CFSP

[59] European Consensus on Development (2006/C 46/01), page 1

[60] S. NUTTALL, 'Coherence and Consistency', in C. MILL and M. SMITH (*eds.*), *International Relations and the EU*, Oxford University Press, 2005, page 94

[61] For Antonio Missiroli the EU assumes that 'by acting unitarily and with a common purpose, the EU (…) also bees ipso facto more efficient and effective'. A. MISSIROLI, *op. cit.* 1, page 182

its *identity* as an international actor that is founded on certain values and principles.[62] This is considered crucial to *persuade* others to adopt reforms in the direction of those values and principles, which constitutes the essence of the external objectives of the Union.[63] This is why the Union's response to the current refugee crisis undermines its position when trying to convince governments of third States of the need to treat their refugees according to human rights and international standards, including refugee law. Perhaps worried about the latest developments in the EU (including the response to the refugee crisis) the Global Strategy for the European Union's Foreign and Security Policy (2016) recalls:[64]

> 'Living up consistently to our values internally will determine our external credibility and influence'.
>
> 'To engage responsibly with the world, credibility is essential. The EU's credibility hinges on our unity, on our many achievements, our enduring power of attraction, the effectiveness and consistency of our policies, and adherence to our values.'

Interestingly, the Preamble of the SEA (1987) linked the idea of coherence to the Union's independence and also to its commitments within the framework of the UN Charter. By doing so, the SEA referred to coherence as a precondition of the EU's identity on the international scene. In this view, coherence is indispensable to show that the Union is an actor that transcends its Member States and, thus, to confirm the *autonomy* of the EU. Moreover, acting in a coherent manner is essential to make a difference in the world as regards the Union's founding principles:

> 'Aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence and in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter.'

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[62] Articles 2, 3 and 21 TEU

[63] In this direction, see: A.C. MARANGONI and K. RAUBE, 'Virtue or Vice? The coherence of the EU's external policies', *Journal of European Integration,* 36, 5, 2014, pages 479-482. See also Articles 3(5) and 21 TEU

[64] Global Strategy for the European Union's Foreign and Security Policy, pages 15 and 10, respectively (note 17)

We may refer to the idea of coherence in the sense of continued adherence to the founding principles of the EU as what the Union perceives as its *qualitative* distinctive feature as an international actor. Coherence also allows the EU to show what it considers its *quantitative* added value as a global player. It is not rare to find references in policy documents to the significance (in quantitative terms) of having the Union and its Member States working alongside each other. It is not unusual to read about the Union's wide array of tools to address international concerns. The European Consensus on Development (2006) refers to both ideas:[65]

> 'The EU, both at its Member States and Community levels, is committed to meeting its responsibilities. Working together, the EU is an important force for positive change. The EU provides over half of the world's aid (…).'
>
> 'The Community has a wide range of modalities for implementing development aid which enable it to respond to different needs in different contexts. These are available to all geographical and thematic programmes and reflect a genuine Community added value.'

That the *identity* and *persuasiveness* of the Union as a global actor justify calls for coherence across EU policies and activities, including in the internal domain, stresses the importance of the external factor in the obsession with coherence. Furthermore, the close link between the notion of coherence and the strengthened EU actorness in the world reinforces the character of coherence as an integrationist goal, aimed at bringing the Union forward as an international actor.[66]

In short, the obsession with coherence is not only linked to the way in which the Union deals with its complex system for EU external relations *internally*. It also has a clear *external* projection, as it is perceived as having a direct impact on the EU's international actorness. The reasons that justify the obsession with coherence in the Union's foreign policy have a remarkable explanatory value as regards the function that coherence is supposed to fulfil in this area. Coherence in EU external relations should bring the EU as an external project forward (the external factor) by evidencing that the Union has overcome the challenges of its complex system for external relations (the internal factor). Even if one thinks of references to coherence in the treaties as devoid of

[65] European Consensus on Development (2006/C 46/01), pages 1 and 17 (respectively)

[66] According to Carmen Gebhard: 'the notion conveys the general aspiration of acting with even more unity, of being more cohesive, and thus of moving closer to an optimum level of integration. Hence, it is positively loaded in the sense that it directly appeals to the very core objectives of integration', C. GEBHARD, *op. cit.* 3, page 110

legal effects, these references say a lot about the nature of the EU as a complex international actor, and about the way in which the Union perceives that it can be most effective as regards its external objectives. There was no need whatsoever to refer to coherence between EU policies and activities 16 times in the treaties. The Global Strategy for the European Union's Foreign and Security Policy (2016) did not need to refer either to coherence in 20 occasions, to consistency in 9 cases, and to the 'EU's comprehensive approach' 4 times.[67]

4 Coherence as the dreamed outcome: the notion of coherence in the EU external action

Elaborating on the notion of coherence, or at least pointing to some of its elements, is essential in understanding what the quest for coherence in the EU external action is about (or at least what it is not about). Yet this is a matter that is often addressed at a superficial level in the literature. Studies on coherence in the Union's foreign policy generally confine themselves to drawing a distinction between the notions of consistency and coherence (often referred to as negative and positive coherence).

The notion of coherence in the external relations of the Union is multidimensional, since it responds to the different elements constituting fragmentation in this field. As stressed by Simon Nuttall, coherence in the Union's foreign policy is 'a term of art' which has 'acquired overtones going well beyond its dictionary meaning.'[68] By way of example, the claim that consistency is a static idea, implying that we can only say that two measures are or not consistent does not hold true in this context. We will identify different degrees of consistency between two EU measures, even if this is not strictly in line with the dictionary definition of consistency. Furthermore, coherence in external action presents specificities in each and every context where it is analysed. It does not mean the same when the CJEU claims that the single procedure for the negotiation and conclusion of international agreements responds to the requirements of 'clarity, consistency and rationalisation' as when the Court establishes that the duty to inform the European Parliament in these procedure 'contributes to ensuring the coherence and consistency' of the different areas of the Union's external action.[69] This may well explain

[67] Global Strategy for the European Union's Foreign and Security Policy (note 17)

[68] S. NUTTALL, *European Foreign Policy*, Oxford University Press, 2000, page 25

[69] See Article 218 TFEU and Case C-263/14, *Parliament* v *Commission*, Tanzania Case, paras 68 and 72

why, despite increasingly referring to coherence in its case law, the Court of Justice is reluctant to elaborate on the concept.[70] However, it does not excuse the academic debate from trying to say something substantial about the notion of coherence in this area. References to coherence in the treaties, official policy documents and the case law of the CJEU provide enough input to engage in this exercise. Claiming that the Union has not managed to build a coherent EU response to a specific international event every time a foreign minister of a Member State sends a message, even if it is substantially in line with Council conclusions on the matter, does not correspond to the way in which coherence is conceived in the law and policy of EU external relations. Although developing a one-sentence definition is not possible, this does not mean that we cannot identify certain elements of the concept. This is what this section is about.

Intra-policy coherence and inter-policy coherence

Coherence can only be measured by comparing different things, but which? The most frequently repeated angles of analysis are vertical and horizontal coherence. While the former focuses on comparing the policies of the Union and those of its Member States, the latter's interest is in the different EU policies, without considering the action of the Member States.[71] Besides these two well-known dimensions for studying coherence, there is an important difference between 'intra-policy coherence' and 'inter-policy coherence'. Intra-policy coherence refers to coherence of the same policy or activity (e.g. the Commission's development cooperation policy on general elections support) in different, yet comparable, contexts (e.g. between 2012 and 2014 or in Kenya and South Sudan in 2014). Inter-policy coherence alludes to coherence between different policies or activities, either from the horizontal perspective (e.g. internal and external EU policies) or from the vertical perspective (e.g. the development cooperation policy and the policies of Member States in the same field). Inter-policy coherence can also be analysed within a specific policy area of the Union. For example, we can analyse coherence between the policies and activities implemented under the many instruments of the development cooperation policy (e.g. EIDHR, EDF). Furthermore, when analysing vertical inter-policy coherence,

[70] For Bart Van Vooren, when trying to define coherence: 'one (…) finds oneself easily trapped between the need for abstraction and the need for a concrete definition of coherence. If the concept is all too abstract, it bees an ideal with little or no real traction for (legal) organisation of the European Union (…). If the concept abandons generality and is too concrete, it loses its guiding characteristics and is nothing but a way to explain and justify what is already in existence.' B. VAN VOOREN, *A paradigm for coherence in EU external relations law: the European neighbourhood policy*, EUI Thesis, 2010, pages 51-52

[71] Surprisingly, the Global Strategy for the European Union's Foreign and Security Policy (2016) refers to horizontal coherence between the EU and its Member States, pages 26 (note 17)

it is common to focus on the actors that are responsible for the actions we are comparing. Nevertheless, the obsession with coherence is an obsession with the policies and activities finally produced. This is why references to coherence between the EU and its Member States are nothing but disguised references to the actions that these actors are responsible for. The Global Strategy for the European Union's Foreign and Security Policy (2016) provides an example of this when it refers to EU and Member State coherence in the context of specific policies:[72]

> 'Echoing the Sustainable Development Goals, the EU will adopt a joined-up approach to its humanitarian, development, migration, trade, investment, infrastructure, education, health and research policies, as well as improve horizontal coherence between the EU and its Member States.'

The distinction between intra and inter-policy coherence is fundamental as the quest for coherence primarily focuses on the latter. There are different arguments supporting this claim. First, the obsession responds to legal fragmentation in EU external relations. In fact, the first calls for coherence date back to the 1970s, when the precursor of today's CFSP, the EPC, was established and had to coexist alongside the external dimension of EC policies. Moreover, the HRVP and the EEAS, arguably the most important institutional innovations regarding coherence after the entry into force of the Lisbon Treaty, are designed to bridge persisting CFSP and non-CFSP fragmentation. They are intended, thus, to ensure coherence between the CFSP and the rest of the Union's policies.[73] Second, when the idea of the effectiveness of the Union as an international actor is linked to the coherent use of its toolbox, the emphasis is on the potential of the EU to organise its multiple policies, instruments and policy fields in a coherent manner. Third, references to coherence in the treaties almost always appeal to coherence between *parallel* policies, activities, actions or areas, instead of to coherence of the same policy, activity, action or area.[74]

[72] Global Strategy for the European Union's Foreign and Security Policy (2016), page 26 (note 17)

[73] See Articles 18 and 27 TEU and the Council Decision establishing the EEAS (2010/427/EU). In the same lines, see Article 22(1) TEU on the role of the European Council regarding the strategic direction of both CFSP and non-CFSP policy areas

[74] By way of example, coherence between policies and activities (Article 7 TFEU), between policies and actions (Article 13(1) TEU), between areas and between areas and policies (Article 21 TEU). Article 16 TEU refers to coherence 'in the work of the different Council configurations' and Article 214(1) TFEU refers to complementarity between 'the Union's measures and those of the Member States' in the field of humanitarian aid

This thesis focuses on vertical and horizontal inter-policy coherence, not on intra-policy coherence. It is particularly interested in the horizontal relations between parallel EU policy areas (i.e. CFSP and development cooperation) and in the vertical relations between those policy areas (as EU competences) and the competences of Member States (i.e. EU and Member States development policies).[75] Although the focus is on comparing different competences and policy areas, referring to horizontal and vertical inter-*policy* coherence stresses that the quest for coherence concerns all policies and activities. Legal mechanisms designed to advance coherence between EU policy areas or between EU and Member States competences are aimed at ensuring coherence between all actions implemented under these policy areas or competences.

Single event coherence and continued coherence

The distinction between 'single event coherence' and 'continued coherence' is essential to understanding the EU's quest for coherence in external action. However, it has been largely ignored in the literature. This distinction brings in the notions of coherence at a certain point in time, on the one hand, and as the result of acting in a similar manner in successive situations, on the other hand.[76] The thesis is interested in both dimensions. Inter-policy coherence generally leads us to imagine *one* international event, where the Union managed or failed to ensure a coherent response (e.g. are current development cooperation and humanitarian aid measures to tackle severe droughts in Ethiopia coherent?). However, inter-policy coherence can also be examined over a long-term timeframe (e.g. was the Union's promotion of democracy under the CFSP and the development cooperation policy coherent between 2010 and 2015?).

Consistency and coherence

Consistency refers to the absence of contradictions between EU policies and activities. Given that these policies are often implemented under different policy areas and instruments, ensuring consistency in external action is already an ambitious goal. For instance, the requirement that the policies and activities of the Union shall 'take all of its

[75] For the sake of simplicity, I will from now on generally refer to policy areas/fields to describe the coexistence between different EU policy fields (when the focus is on the horizontal perspective), and between these policy fields and the competences of Member States on the same matters (when the analysis focuses on the vertical axis)

[76] Article 13(1) TEU establishes that the Union's institutional framework shall 'ensure the consistency, effectiveness and continuity of its policies and actions.' Article 30(2)(d) of the SEA referred to these two dimensions of coherence when it claimed that the Presidency and the Commission should ensure that consistency between the external policies of the EC and the policies of the EPC 'is sought and maintained.'

objectives into account' reminds political actors that they shall always consider the different EU objectives at stake in order to avoid fundamental contradictions.[77] Coherence, on the other hand, refers to the idea of the different policies and activities of the Union reinforcing one another. The requirement to take all EU objectives into account can also be read as a requirement of *comprehensiveness*,[78] in the sense that actors should not only be aware of, but should also contribute to, objectives that are mainly being implemented in other policy areas or instruments. In his Opinion in the 'Mauritius Case', AG Bot argued that, on the basis of coherence, the CFSP needs not only to take account of development objectives; it may also *contribute* to these objectives.[79]

While consistency stresses the idea of separation, coherence comes closer to the notion of a unified whole. Consistency is less ambitious and easily leads us to the notion of continuity, whereas coherence is often used to refer to the idea of multiple *tools* deployed on the basis of common strategies. This is why it refers, in a much clearer manner than consistency, to the Union's wide toolbox for tackling international concerns and to the 'EU's comprehensive approach'.[80] The use of the words consistency and coherence in the recent Global Strategy for the European Union's Foreign and Security Policy (2016) supports this view. References to consistency in this document are repeatedly linked to the Union's policies, values and principles (e.g. 'living up consistently to our values'). Instead, allusions to coherence refer to the strategic use of the EU's wide toolbox and to coherence between the Union and its Member States ('all the tools at our disposal in a coherent and coordinated way').[81]

Since EU policies and activities are implemented under different policy areas and instruments, there is inevitably an important risk of substantive contradictions (i.e. inconsistencies) between them. Fragmentation in external action can also lead to overlaps. For example, the Union may conduct the same activities, pursuing the exact same objectives, under both the CFSP and the development cooperation policy. Even if overlaps do not necessarily lead to substantive contradictions, they are at odds with the notion of coherence, in the sense of complementarity and synergetic action between policies and activities. Overlapping action does not maximise the impact of EU efforts to

[77] Article 7 TFEU

[78] For Anne Claire Marangoni and Kolja Raube: 'coherence makes the EU's commitment to comprehensive and global objectives credible'. A. C. MARANGONI and K. RAUBE, *op. cit.* 63, page 478

[79] Conclusions of AG Bot, Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 126

[80] See section 7 in this chapter, pages 49-53

[81] Global Strategy for the European Union's Foreign and Security Policy (note 17)

advance concrete external objectives, as it is almost by definition inefficient. This is why the idea of delimitation is essential in the quest for coherence in EU external relations. Noticeably, delimitation is not only an expression of the principles of conferral and institutional balance.[82] It does not only refer to treaty articles defining the scope of policy areas and instruments. For example, joint programming in development cooperation is an initiative through which the EU and its Member States divide their tasks to avoid overlaps and maximise the efficiency of their action, as mandated by Article 210(1) TFEU.[83] It is an exercise of delimitation that does not flow from the principles of conferral and institutional balance.

When using the term consistency, the treaties do not only imply the idea of absence of contradictions between policies and activities when they refer to consistency. For example, in the context of the development cooperation policy the treaties refer to the need to ensure that EU and Member States' policies 'complement and reinforce each other'.[84] The focus is on making sure that the EU policy and that of the Member States have a greater impact, because they reinforce each other, than if they did not coordinate at all. As far as the CFSP is concerned, the treaties refer to the effectiveness of the Union as a 'cohesive force' and to the 'convergence' of Member States' actions.[85] The mere reference to a *common* foreign and security policy (CFSP) and a *common* security and defense policy (CSDP) implies an idea that goes far beyond the absence of contradictions between the CFSP and the foreign policies of Member States. The assumption behind the notions of *convergence* and *cohesiveness* is that vertical coherence in the CFSP context is a zero sum game. If Member States unanimously reach a common approach on a CFSP matter, it is assumed that this will ensure both vertical consistency and coherence, as Member States will then simply reproduce the common approach in their own foreign policies. However, this is more of an aspiration than a reality because Member States are still empowered to develop their own foreign policy and the jurisdiction of the CJEU within the CFSP is limited.[86] The fact that the treaties establish how common strategies shall be developed is another piece of evidence supporting the claim that the notion of coherence in the treaties is much more ambitious than the idea of consistency between

[82] See, for all, Articles 7 TFEU and 40 TEU, respectively

[83] This provision refers to coordination between the EU and its Member States in the field of development cooperation as essential to ensure 'complementarity and efficiency in EU and Member States action'. See chapter 2, section 5, on joint programming in EU development policy, pages 105-115

[84] Article 210(1) TFEU

[85] Articles 24(3) para 2 and 32 para 1 TEU

[86] See Declaration 13 and Article 24(1) TEU

different policies and activities. That being said, instead of thinking about a dichotomy between the notions of consistency and coherence, it is more accurate to approach them as a continuum. When the Union and its Member States coordinate their development policies, the aspiration is to ensure *complementarity* (coherence) between EU and Member State action. However, since development cooperation is a shared and non-preemptive competence, the result of these coordination efforts may only be that EU and Member State development policies do not contradict each other. Because of the fragmented nature of EU external relations law, consistency in this field must already be considered a success.

Coherent outcomes and strategic coherence

According to official policy documents concerning EU external action, the Union must not only avoid contradictions between the different *tools* at its disposal; it must also make a *strategic* use of its wide toolbox. Strategic documents on specific matters should inform all measures of EU external action falling within their scope, including across different policy areas, and thus ensure coherence at the level of individual measures. By establishing the Union's priorities on particular matters, common strategies should also maximise the effectiveness of the EU action. For instance, The EU's comprehensive approach to external conflict and crises (2013) claims:[87]

> 'The EU is stronger, more coherent, more visible and more effective in its external relations when all EU institutions and the Member States work on the basis of a common strategic analysis and vision. This is what the comprehensive approach is about.'

The importance of common strategies is not only expressed in policy documents. According to Articles 22(1) and 16(6) para 3 TEU:

> 'On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.
>
> Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States. (…)'

[87] Joint Communication: JOIN(2013) 30, page 3

> 'The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.'

In past few years, there has been a proliferation of common strategies in the field of external relations. However, instead of decisions of the European Council, these documents are taking the form of Council conclusions or joint communications of the HRVP and the Commission.[88]

The importance of common strategic documents in the field of EU external relations should not be underestimated. First, since they do not require a legal basis, they can bridge the CFSP and non-CFSP divide, providing separate fields of EU action with a common direction. Second, given the non-prioritised and open-ended character of EU external objectives, these documents are crucial as they express a common understanding regarding the priorities (and even the scope) of EU policy areas.[89] The strategic direction they provide can then inform the development of individual measures. As recalled by Simon Duke, 'a Union without a clear idea of what it is trying to do and where it is going will remain incoherent.'[90]

The distinction between strategic documents and coherent outcomes at the level of individual measures, a distinction explicit in EU policy documents, as well as evidenced in treaty provisions, reveals that the idea of coherence in EU external relations is thought of as a top-down process. It is assumed that, by obeying a predefined shared strategy; the Union ensures coherence between the policies and activities that fall within the scope of the strategy

Coherence is not unity

Coherence in EU external relations cannot mean unity because coherence must be sought within a fragmented legal structure. Coherence is an obsession in this area precisely because of the existence of a complex legal system characterised by a multiplicity of policies and activities, implemented under different instruments and policy areas. Fragmentation is intrinsic to the quest for coherence.[91] If all policy areas in the

[88] See Article 22 TEU. See also section 7 of this chapter, pages 49-53

[89] See section 4 of chapter 2, pages 82-85

[90] S. DUKE, *op. cit*. 19, page 29

[91] Marise Cremona states that coherence 'does not necessarily imply removal of differences' (…), rather it is about 'recognising the differences and ensuring that they can live together harmoniously', M. CREMONA, *op. cit*. 4, page 32. Uwe Schmalz claims that ensuring coherence 'does not mean overcoming

external domain were exclusive competences of the Union, there would be no obsession with coherence in this field.[92] Since the *sui generis* nature of the CFSP is the main source of complexity in EU external relations, reaching coherent outcomes cannot require the total 'communitarisation' of the CFSP.[93]

However, a certain link between the notions of coherence and unity can hardly be denied.[94] Often this association has to do with the notions of coherence and the EU's actorness on the international scene. To confirm its identity, the Union needs to act coherently to show a degree of 'unity' that can render it recognisable as an actor on the international scene. This idea of coherence, one that comes close to unity, can take the form a 'unified modus operandi', as expressed by AG Tizzano in *Hermès*:[95]

> 'The Community legal system is characterised by the simultaneous application of provisions of various origins, international, Community and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system. That is, one might say, the inherent nature of the system, which, while guaranteeing the maintenance of the realities of States and of individual interests of all kinds, also seeks to achieve a unified modus operandi.'

The link between coherence and unity is also clear in the notion of unity of international representation. In specific contexts, the coherence and effectiveness of the action of the Union can only be ensured if there is unity of EU international representation. The latter is, then, an expression of the principle of sincere cooperation and it is directed towards or instrumental in the coherence and effectiveness of the action of the Union.[96] Furthermore, the idea of coherence comes close to unity in the context of the CFSP (i.e. cohesiveness, convergence).[97] This is so because of the *sui generis* nature of the CFSP as a

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but managing the dual structure' (…) 'dualism management means remedying the negative effects of dualism without, however, eliminating its sources', U. SCHMALZ, *op. cit*. 48, page 426

[92] Article 3 TFEU

[93] Some authors have even claimed that a real communitarisation of the CFSP 'would finally make discussion of consistency irrelevant.' H. G. KRENZLER and H. SCHNEIDER, *op. cit.* 8, page 148

[94] Article 26(2) para 2 TEU refers to 'the unity, consistency and effectiveness of action by the Union', which shows that these are linked but not interchangeable terms

[95] Conclusions of AG Tizzano in Case C-53/96, *Hermès International* v *FHT Marketing*, [1998] ECR I-03603, para 21

[96] Article 4(3) TEU. See, for example, C. HILLION, 'Mixity and coherence in EU external relations: the significance of the duty of cooperation', *CLEER Working Papers* 2, 2009, pages 4-7, and the Conclusions of AG Poiares Maduro (paras 36-37) in Case C-246/07, *Commission* v. *Sweden*, PFOS Case [2010] ECR I-03317

[97] See Articles 24(3) para 2 and 32 para 1 TEU

policy area that is generally subject to the unanimity of the Member States.[98] However, we must not forget that the CFSP coexists with the 28 foreign policies of the Member States. This is why, instead of dreaming of an EU *single* voice, it is more realistic to dream about an EU *single* message, reproduced by many different voices.[99]

Coherence is not effectiveness

The link between coherence and the Union's effectiveness as regards its objectives on the international stage is an abstract and indirect one. The Union assumes that, if it does not ensure coherence between policies and activities, its international actorness is undermined. This impairs its effectiveness in achieving its external objectives, be it international peace and security or good global governance.[100] This is why the link between coherence and the effectiveness of EU foreign policy should not lead to confusion between these two notions. By way of example, coherence may describe the Commission Decision on the annual action programme 2012 for Somalia under the EDF: e.g. it ensured coherence with the Joint Action by which the Council established EUNAVFOR Atalanta.[101] However, analysing the effectiveness of that Commission Decision would require assessing the extent to which the measure managed to advance its objectives (e.g. sustainable development).[102] While the coherence of an individual measure serves the Union's effectiveness as an actor, it cannot be judged by examining the extent to which the measure is ultimately effective on the ground.

5 The legal dimension of coherence in EU external relations

The analysis of the notion of coherence in the external action provides some hints as to how the EU legal framework may contribute to vertical and horizontal inter-policy coherence. As far as the idea of continued coherence is concerned, we should bear in mind that the mere fact that different policies and activities are implemented under the same legal framework brings about a certain degree of coherence. Compliance with the law, by definition, brings about certainty and continuity. Moreover, the study of the

[98] Article 24(1) TEU

[99] For example, the Preamble of the SEA referred to: 'the need for Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests.' Christophe Hillion writes about 'the polyphonic nature of the Union's external action', C. HILLION, *op. cit.* 96, page 3

[100] Article 21(2)(c) and (h) TEU

[101] Decision C(2012) 8041 and Joint Action 2008/851/CFSP

[102] Article 21(2)(d) TEU

notion of coherence has clarified the distinction between coherent outcomes and strategic coherence. In doing so, it has stressed the role of the treaties in establishing how strategic action (considered essential for coherence at the level of individual measures) should develop. This section presents the particular approach of the thesis to the legal dimension of coherence in EU external relations. It conceptualises what can be considered the four main mechanisms foreseen in EU external relations law to secure horizontal and vertical inter-policy coherence. These mechanisms are relevant when coherence is analysed at a certain point in time but also when analysed over a longer term. If the notion of coherence in the external action is context-specific so are these four mechanisms. Coherence could be sought in many different ways. The approach to the legal dimension of coherence presented in this section is further elaborated on at a theoretical level in chapter 2 of the thesis and tested through a case study in chapter 3.[103]

Legal scholars Christophe Hillion and Marise Cremona have developed the idea that there is a whole set of legal rules and principles underpinning coherence in the Union's foreign policy.[104] Their analyses distinguish between different aspects or layers of coherence (e.g. negative and positive coherence), and between different relations or dimensions of coherence (e.g. vertical and horizontal coherence). These categorisations identify certain rules and principles as especially relevant to particular aspects or layers, and to specific relations or dimensions of coherence. The approach of the thesis to the legal dimension of coherence in the external action clearly draws upon the conceptualisations of these two legal scholars. However, it proposes a new way of thinking about the role of law in the quest for coherence in EU external relations. This approach focuses, specifically, on those treaty provisions and legal principles that are important when the notion of coherence in the external action loses its general abstraction and is examined in relation to specific policies and activities that are implemented in *parallel.* What does the law of EU external relations do to ensure coherence between the policies implemented under the common commercial policy and those that fall within the CFSP? How does law secure coherence between the policies of the Union and those of its Member States in the field of humanitarian aid?

Under this approach, the most important principles for ensuring vertical inter-policy coherence are the principles of conferral, mutual solidarity and sincere cooperation. From the horizontal perspective, the principles of institutional balance and

[103] See section 4 of chapter 2 and section 5 of chapter 3, pages 79-105 and 151-170, respectively
[104] M. CREMONA, *op. cit*. 4 and C. HILLION, *op. cit.* 4

interinstitutional sincere cooperation are most relevant. The categorisation I propose is not based on the distinction between the notions of consistency and coherence in EU external relations. Nor does it classify each of the abovementioned principles under either consistency or coherence.[105] I argue that understanding the principles of mutual solidarity and sincere cooperation as essential to the notion of coherence; and conferral and institutional balance as concerned with consistency, is misleading. It undermines the role of the principle of sincere cooperation in the quest for coherence in EU external relations. It also leads to a very narrow conception of the notion of consistency in the EU foreign policy. We should recall that delimitation, which is essential to ensuring coherence in EU external relations, often results from institutions practicing sincere cooperation, as shown in the case of joint programming (EU-Member States) in the field of development cooperation. [106] Furthermore, categorising principles in this manner establishes a dichotomy between conferral and institutional balance, on the one hand, and sincere cooperation and mutual solidarity, on the other hand. This dichotomy implies that the role of these principles in the quest for coherence is to be kept completely separate, which does not seem to be the case. In the Tanzania Case, the CJEU interpreted the duty of information owed by EU institutions to the European Parliament in the negotiation and conclusion of international agreements as important in ensuring coherence between the different areas of the external action.[107] Noticeably, the Court interpreted this information duty as flowing from the principle of interinstitutional sincere cooperation, when it could easily have based it on the principle of institutional balance.[108]

The crucial importance of the principle of sincere cooperation for the effectiveness of the Union is clear from Article 4(3) TEU:[109]

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

There is nothing new in establishing a link between loyalty principles and the effectiveness of the Union's action.[110] Under public international law, this association

[105] For instance, Christophe Hillion establishes a close link between consistency ('to solve legal conflict, a task left to the judiciary') and coherence (where the function of cooperation under ex-Article 3 TEU (now Article 21 (3) TEU) is considered central). C. HILLION, *op. cit.* 4, pages 16-17

[106] See section 5 of chapter 2, pages 105-115

[107] Article 218(10) TFEU

[108] Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 72

[109] See also Article 24(3) TEU (CFSP), Article 210(1) TFEU (development cooperation policy) and Article 13(1) and (2) TEU, as regards interinstitutional sincere cooperation

[110] Case C-105/03, preliminary ruling, *Pupino*, [2005] ECR I-05285, para 42

results from the principle of *pacta sunt servanda*. Member States have created the Union and vested it with a set of objectives. They consequently need to be loyal to the project (show good faith) and work towards those objectives. In a similar direction, Marise Cremona has stated that, by respecting the principles of sincere cooperation (and compliance), Member States 'defend the Community interest', which is a notion elaborated by the CJEU and clearly directed towards the realisation of the Union's objectives.[111] In the context of EU external relations, coherence adds another layer to this argument. Because of both legal fragmentation in this field and the need to strengthen the international actorness of the Union, between loyalty and effectiveness the EU has added the quest for coherence. The link between the sincere cooperation, as it applies to the relations between the Union and the Member States, and the notions of coherence and effectiveness is evident in the case law of the CJEU: [112]

> 'The Court has held that the adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.'

By the same token, institutions need to be loyal to each other to ensure coherence in the external action and, ultimately, the effectiveness of the Union as regards the objectives it pursues on the international stage.[113]

The approach I propose to the legal dimension of coherence in the external action identifies four mechanisms set out in EU external relations law to secure coherence across external policies and activities. These mechanisms are the provision of common objectives, the definition of common approaches, legal delimitation and inter-policy coordination. In the first two the focus is on ensuring that all EU policies and activities

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[111] 'If it is to be used as the basis for Member State obligations based on Article 10 EC it [the notion of Community interest] should be linked to the demands of the Community legal order (…). These imperatives include the autonomy of the Community legal order, its primacy, and a reading of its scope and nature based on *effet utile*: an orientation towards completion of its objectives.' (Emphasis added). M. CREMONA, *op. cit*. 33, page 169

[112] Case C-246/07, *Commission* v. *Sweden*, PFOS Case [2010] ECR I-03317, para 75

[113] Articles 13(1) and (2) TEU. The case of joint programming in EU development cooperation offers a concrete practical example of the sincere cooperation-coherence-effectiveness link, see chapter 2, section 5, pages 105-115

are implemented on the basis of a *shared* substantive framework. Instead, legal delimitation and inter-policy coordination are mechanisms affecting how different EU policies and activities, which are implemented under different policy areas and instruments, *relate* to each other. Moreover, relying on the legal principles and treaty provisions that are most relevant to each of these mechanisms, there is a distinction to be made between coherence through substantive law and coherence through procedural law. The definition of common objectives falls under coherence through *substantive* law, because it concerns how treaty provisions frame the substance of policies and activities. In contrast, the remaining three mechanisms are expressions of coherence through *procedural* law, because in them the legal framework seeks coherence by designing the procedures through which actors should develop EU external relations. Each of these four mechanisms is relevant to ensuring both consistency and coherence, except for legal delimitation, which concerns the notion of consistency only. While the remaining three mechanisms aspire to coherence, they may only lead to consistency between policies and activities. Lastly, legal delimitation is the only mechanism where coherence is sought by legal means alone, which justifies the emphasis on *legal* delimitation.

5.1 Mechanisms for coherence in EU external relations law

Common objectives

The single set of objectives in Article 21 TEU provides all political actors involved in the development of EU external relations with a single *chart* explaining what the Union, as an international player, aims towards.[114] EU actors are, therefore, to implement the different external policies and activities of the Union on the basis of that shared substantive framework. Given the level of abstraction and generality of the single set of objectives, even when followed with the best intentions, this framework will not totally prevent incoherence between specific policies and activities. However, the single set of objectives can bring about a certain degree of coherence between policies and activities, enabling the Union to show a *single* identity on the international stage, regardless of the policy area or the instrument deployed. It should do so when the Union responds to an international matter with different policies and activities, and also when the external

[114] The single set of EU external objectives is also enshrined in Article 3(5) TEU but in a much less elaborated manner than it is in Article 21 TEU. This is why, throughout the thesis, I mention the latter when referring to this legal innovation

action is analysed over time. We shall recall that it is more accurate to think of consistency and coherence as a continuum than as a zero sum game.

In the Tanzania Case, the CJEU referred to the single set of objectives (Article 21(2) TEU) and to the notion of coherence in the external action (Article 21(3) TEU) as justifying why compliance with the rule of law and human rights, as well as respect for human dignity, is required of all EU policies and activities:[115]

> 'As regards, in particular, provisions of the EU-Tanzania Agreement concerning compliance with the principles of the rule of law and human rights, as well as respect for human dignity, it must be stated that such compliance is required of all actions of the EU, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), 21(2)(b) and (3) TEU.'

From this perspective, coherence can be perceived as a commitment to the founding principles of the Union, which must be observed in the external action, both as regards what the EU *upholds* (as shown in the Tanzania Case) and what the Union *promotes* at the international level. The first sentence of Article 21 TEU, which establishes the single set of external objectives and constitutes the most important provision regarding coherence in the external action, reads as follows:

> 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world'.

While the objectives established in Article 21 TEU are open-ended, we ought to bear in mind that, as argued by Joris Larik, this provision constitutes an exceptionally explicit statement of external objectives in comparative law. According to the author, the EU treaties are 'in the vanguard of a global trend'. He writes:[116]

> 'Without doubt, they are among the most verbose in terms of foreign policy objectives, covering all main substantive areas outlined here, and furthermore putting forward additional emphases not usually found in national constitutions.'

Article 21 TEU is obviously the most important treaty article as regards the provision of common objectives in EU primary law. However, there are other treaty articles that

[115] Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 47

[116] J. LARIK, *Foreign Policy Objectives in European Constitutional Law,* Oxford Studies in European Law, 2016, page 124

define external objectives and policy priorities. These provisions are also part of the idea of coherence through substantive law. For instance, the requirement to consider development objectives in all policies affecting developing countries can be read in this light.[117]

Common approaches

That the provision of common objectives does not rule out the possibility of incoherence at the level of individual action explains why the treaties foresee how strategic action (what I call common approaches) shall be defined.[118] The idea of a certain degree of flexibility or political discretion in the design of strategic action is essential to the development of international politics. As long as strategic instruments are elaborated on the basis of the common objectives set out in the treaties, EU actors retain remarkable room for manoeuvre in deciding on the Union's strategic partners and interests. This includes prioritising certain EU objectives over others and choosing a mixture of policies depending on the geographic and material scope of each strategic instrument. Strategic documents can also include references implying when the Union ought to use each of its tools (e.g. CSDP or development cooperation?). They can thus contribute to delimitation, as they may indicate when acting on the basis of specific policy areas and instruments is most adequate.

Like the provision of common objectives, the definition of common approaches provides a shared substantive framework for policies and activities implemented in different strands of EU action. Whether or not these common approaches exist depends on the extent to which EU actors practice sincere cooperation and mutual solidarity.[119] This is why the definition of common approaches is an expression of coherence through procedural law, instead of a case of coherence through substantive law. As strategic policy documents are not directly enforceable before the CJEU, one may think of them as long pages filled with EU platitudes. By the same token, one may argue that they are a

[117] In fact, the requirement of Article 208(1) TFEU is an expression of the 'Policy Coherence for Development' agenda

[118] See, for example, Articles 22 and 16(6) para 3 TEU

[119] In her categorisation of coherence, Marise Cremona considered the importance of strategic documents as expressions of the principle of sincere cooperation. This is why I argue that Leonhard den Hertog and Simon Stross misinterpreted her argument when they defended the need of a 'fourth category of rules of coherence: rules of substantive guidance'. According to them, in the three layers of coherence proposed by Marise Cremona: 'the content of policies as such is not touched by those types of rules', L. HERTOG, and S. STROSS, 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term', *European Foreign Affairs Review*, 18, 2013, page 379. See also M. CREMONA, *op. cit.* 4

matter of simple political will, rather than concrete expressions of the principles of sincere cooperation and mutual solidarity. However, if we recall the extent to which the case law of the Court of Justice concerning the Union's foreign policy relies on strategic policy documents in this area to define the scope of EU policy areas, we will probably approach these documents in a different manner. Perhaps the most relevant example is the extent to which the CJEU relies on the European Consensus on Development (2006) to stress the existence of an agreement between the EU institutions and the Member States over the broad scope of EU development policy. The Court does not question the content of the document. Instead, it emphasises the wide *consensus* reached around it.[120] In fact, the CJEU has found in this policy document guidance for interpreting the scope of the development cooperation policy not provided by the treaties. In doing so, the Court has almost attributed a 'legal status' to a policy document. Likewise, by stressing the idea of a *consensus* around the European Consensus on Development, the CJEU indirectly reminds EU actors to be *loyal* to what they committed to together. Another example is the Court's use of the European Council Declaration on Combating Terrorism (2004)[121] to argue that the Instrument for Stability could contribute to the fight against terrorism. In short, there are indirect ways in which strategic policy documents, as expressions of the principles of sincere cooperation and mutual solidarity (designed to advance coherence in EU external relations) can be important in the reasoning of the CJEU. When assessing the impact of common approaches on coherence we must not only take account of whether they inform individual action, we must also consider if they are relevant in defining the scope or the priorities of EU policy areas.

In the context of the CFSP, strategic policy documents, like Council conclusions on a specific international matter, can be considered *constitutive* of the CFSP. By exercising mutual solidarity, Member States reach common approaches, and thus create CFSP positions regarding particular questions.[122] These approaches should then foster vertical coherence because Member States should reproduce them in their own foreign policies. Finally, even though, strictly, there is no chronological order between the four mechanisms for coherence, strategic policy documents *precede* the choice of the policy area and the instrument to be used, as they should inform all action falling within their substantive scope.

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[120] See the European Consensus on Development (2006/C 46/01) and, for all, Case C-377/12, *Commission* v *Council*, Philippines II Case, para 19

[121] Brussels European Council 25 and 26 March 2004: Presidency Conclusions (9048/04)

[122] See Article 32 para 1 TEU

Legal delimitation

Legal delimitation refers to how the law of EU external relations defines the scope of policy areas and instruments, as well as the role of EU actors, in certain procedures that are particularly relevant to the Union's external action, such as the negotiation and conclusion of international agreements. Firstly, legal delimitation is relevant to ensuring *substantive* coherence between EU policies and activities, which corresponds with the general obsession with coherence in the external action. Secondly, legal delimitation is crucial to ensuring *procedural* coherence, as it mainly affects *how* the Union acts internationally, as opposed to *what* it does at the international level (e.g. the policies it implements).[123] Being able to answer the question 'who does what?' minimises the risk of contradictions and overlaps. Obeying the same rules in response to this question ensures continuity in *how* the Union acts internationally. This is how legal delimitation contributes to coherence in the external action.

Whenever the Union acts through legal measures, rules for choosing the adequate legal basis are an essential part of legal delimitation. These choices, which are expressions of the principles of conferral and institutional balance, determine the policy area that the Union will use to act internationally. According to the Court, these choices must rest on objective factors, which must include the aim and content of the measure that is being adopted.[124] The clarity of the legal framework in defining the scope of policy areas is essential to ensuring consistency (i.e. continuity) over the choice of the legal basis. By way of example, the list of EU competences introduced by the Lisbon Treaty is designed to clarify when the Union is empowered to act, and when doing so remains a competence of Member States.[125] In the Mauritius Case, the Court refers to how the existence of rules underpinning the choice of the legal basis ensures legal certainty and coherence in these choices. The CJEU, thus, implies that these rules bring about continuity over *how* the Union acts internationally:[126]

> 'That interpretation is justified particularly in the light of the requirements relating to legal certainty. By anchoring the procedural legal basis to the substantive legal basis of a measure,

[123] Note that the distinction between substantive/procedural coherence is not to be confused with the idea of coherence through substantive/procedural law. The former refers to the context coherence is analysed (e.g. coherence over the choice of the legal basis and coherence as regards policy choices). The latter refers to the nature of legal norms designed to advance coherence (e.g. coherence through Article 21 TEU (common objectives) and through Article 40 TEU (legal delimitation)

[124] See section 4 of chapter 2, pages 85-98

[125] Articles 2-6 TFEU

[126] Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 60

this interpretation enables the applicable procedure to be determined on the basis of objective criteria that are amenable to judicial review, as noted in paragraph 43 of the present judgment. That ensures consistency, moreover, in the choice of legal bases for a measure. By contrast, the interpretation advocated by the Parliament would have the effect of introducing a degree of uncertainty and inconsistency into that choice, in so far as it would be liable to result in the application of different procedures to acts of EU law which have the same substantive legal basis.'

However, the EU legal framework does not offer a clear-cut solution as regards the choice of the substantive legal basis, which is evident from the many judgements of the CJEU on this matter.[127] This is why delimitation is also sought through other mechanisms, namely the definition of common approaches and inter-policy coordination. That the law of external relations is not conclusive in relation to the choice of the legal basis also explains why there is no consistency over these choices.[128]

Furthermore, we shall bear in mind that the choice of the legal basis also determines the specific instrument that the Union will use to respond to an international matter (e.g. a CSDP military operation or the IcSP). Given the variety of instruments in the external action, the clear definition of the scope of each instrument is also important to avoid overlaps and contradictions between the policies and activities implemented under different instruments. In certain cases, the scope of instruments is defined in the treaties (e.g. CSDP military operations). In other instances, this issue is a matter of secondary law (e.g. IcSP).[129]

Besides the choice of the legal basis, rules clarifying the duties of EU actors in the negotiation and conclusion of international agreements are also part of legal delimitation. In the Inland Waterways Cases, coherence guided the Court's interpretation of Member State duties flowing from the principle of sincere cooperation.[130] The CJEU found that Luxembourg and Germany had breached this principle because they ignored 'concerted Community action at the international level'. This was so because the Commission had started to negotiate an international agreement on behalf of the Union. By taking unilateral action, Germany and Luxembourg rendered it impossible to ensure the coherence in the Union's action. The single procedure for the negotiation and conclusion

[127] See, for all, Case C-130/10, *Parliament* v *Council,* Sanctions Case, paras 42-49 and Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 52

[128] See section 5 in chapter 3, pages 160-165

[129] See Annex 2 of this thesis

[130] Case C-266/03, *Commission* v *Luxembourg* [2005] ECR I-04805, para 60 and Case C-433/03, *Commission* v *Germany*, [2005] ECR I-06985, para 66

of international agreements, introduced by the Lisbon Treaty, is designed to clarify the roles of each EU actor in this complex procedure.[131] In the Tanzania Case, the Court extended its case law on the duties of Member States flowing from the principle of sincere cooperation, which it established in the Inland Waterways Cases, to the principle of interinstitutional cooperation within the single procedure of Article 218 TFEU:[132]

> 'Indeed, the European Union must ensure, in accordance with Article 21(3) TEU, consistency between the different areas of its external action, and the duty to inform which the other institutions owe to the Parliament under Article 218(10) TFEU contributes to ensuring the coherence and consistency of that action (see, by analogy, as regards the cooperation between the EU institutions and the Member States, judgment of 2 June 2005, *Commission* v *Luxembourg*, C-266/03'.

The question of *how* the EU acts internationally (i.e. procedure) is obviously relevant to the *image* that the Union presents to the outside the world. The negotiation of international agreements is a negotiation with *external* partners. However, this question, as opposed to *what* the Union does at the international level (i.e. substance), seems to be important only in the legal dimension of the quest for coherence. References to coherence in EU policy documents do not refer to coherence as a continued way of *proceeding* internationally. This is perhaps the clearest piece of evidence that coherence is not only a political ambition. It is a *legal* ambition too. Together with an obsession with *substantive* coherence between policies and activities, there is an obsession with legal delimitation as a means to ensure *procedural* coherence across EU policy areas and instruments. Legal delimitation is considered essential in securing the coherence of EU action and its international representation (Inland Waterways Cases), and coherence between the different *areas* of the Union's external action (Tanzania Case).

Inter-policy coordination

Inter-policy coordination refers to the processes through which the different actors responsible for policies that are closely linked on the ground organise their action. By coordinating, EU actors minimise the existence of contradictions and overlaps between their respective policies and, therefore, maximise the complementarity and efficiency of their action. While the definition of common approaches *precedes* the choice of the policy

[131] Article 218 TFEU
[132] Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 72

area and the instrument that the Union shall use to tackle a specific international matter, inter-policy coordination *follows* these choices. In the development of common approaches, the focus is on providing substantive guidance for *all* policies and activities falling within the scope of the approach. Inter-policy coordination aims at avoiding contradictions and overlaps between *specific* actions that are being implemented in parallel. As far as horizontal inter-policy coherence is concerned, coordination is important because the choice of the legal basis does not prevent the existence of overlaps and contradictions between policies and activities. Moreover, since explicit external competences are often shared and not subject to preemption, EU and Member States policies are implemented in a truly *parallel* manner. This is why vertical inter-policy coordination is essential to 'promote the complementarity and efficiency' of EU and Member State action.[133]

Inter-policy coordination takes essentially two forms. The first form is institutional coordination, where the different actors responsible for the development of policies coordinate their action. For example, vertical institutional coordination in the field of EU development cooperation is conducted *directly* between the Union and its Member States. In particular, it mainly happens between EU delegations and Member State embassies where development assistance is provided. [134] The second form of inter-policy coordination is what I call 'awareness'. The treaties require all EU objectives to be taken into account to ensure coherence between EU policies and activities, as well as complementarity between EU and Member State action.[135] These requirements remind EU actors that, when developing a specific measure, they must show awareness regarding other actions of the Union that are relevant to the current measure and seek to complement them.

The law of EU external relations shows a preference for entrusting important tasks regarding vertical and horizontal inter-policy coordination to actors that can be considered 'intermediaries'. [136] For instance, the HRVP shall ensure horizontal inter-

[133] Article 210(1) TFEU

[134] Articles 210 and 221(2) TFEU. See section 5 of chapter 3, pages 151-170

[135] See Articles 7, 210(1) and 214(6) TFEU

[136] When referring to the Lisbon Treaty reforms that had not yet entered into force, Marise Cremona stated: 'Not only will there be a number of different actors to coordinate, a number of different actors will have responsibility for that coordination', M. CREMONA, 'Coherence through Law: What Difference will the Treaty of Lisbon make?', Hamburg Review of Social Sciences, 3, 1, 2008, page 34. Note that I do not intend to present a comprehensive overview of the coordinating roles of EU actors in the external action, but to offer certain examples supporting the claim that there is a predilection for *mediation* in inter-policy coordination

policy coordination between CFSP and non-CFSP policies, although she is not the main actor responsible for these policies. This is why Article 21(3) para 2 TEU reads as follows:

> 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, *assisted by* the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.'

The President of the European Council and the HRVP shall *facilitate* vertical inter-policy coordination by, respectively, presiding and taking part of the work of the European Council, which consists of the Heads of State or Government of the Member States.[137] In its role as President of the Foreign Affairs Council, the HRVP also *facilitates* vertical inter-policy coordination in the particular context of the CFSP.[138]

Besides, there is another way in which the HRVP (and the EEAS as her assisting body) play a role in inter-policy coordination. The HRVP (assisted by the EEAS) conducts the CFSP, for instance by preparing proposals to the development of this policy area.[139] On the other hand, the EEAS contributes to the programming and management cycle of certain external assistance instruments falling within the development cooperation policy.[140] Because of their nature, by entrusting the HRVP and the EEAS with specific tasks over CFSP and non-CFSP policy areas, it is assumed that horizontal and vertical coherence *across* policy areas is strengthened.[141] For example, in the programming process of development assistance instruments, the EEAS should bring in CFSP considerations. We must not forget that the HRVP is elected by the European Council and conducts the CFSP as mandated by the Council.[142] The EEAS, which was established in a *Council* decision, is composed of officials coming from the Commission and the Council, and it includes personnel from the diplomatic services of Member States.[143] In this case the focus is not on how the HRVP and the EEAS *mediate* between

[137] Article 15(2) TEU
[138] Article 18(3) TEU
[139] Article 18(2) TEU and Article 2(1) of the Council Decision establishing the EEAS (2010/427/EU)
[140] Article 9 of the Council Conclusion establishing the EEAS (2010/427/EU); notice that this provision includes other external assistance instruments falling outside the scope of the development cooperation policy, like the European Neighbourhood and Partnership Instrument
[141] The same logic applies to the important roles of the HRVP and the EEAS in the definition of common approaches. See section 7 of this chapter, on Coherence and the EU's comprehensive approach
[142] Articles 18(1) and (2) TEU
[143] Article 27(3) TEU and Article 6 of the Council Decision establishing the EEAS (2010/427/EU)

the actors that are mainly responsible for EU external policies. Instead, the assumption is that the HRVP and the EEAS, by nature, 'embody' these actors, and the policies they are responsible for.

5.2 Coherence and 'Too much constitutional law in the European Union's Foreign Relations?'

The four mechanisms for coherence foreseen in the treaties are underpinned by legal rules and principles. However, the law of EU external relations does not play the same role in all of them. As regards the provision of common objectives and the establishment of legal delimitation rules, EU primary law seeks to *actively* contribute to coherence. It clarifies the legal framework and it establishes rules that should have a direct impact on coherence. In the definition of common approaches and inter-policy coordination, EU primary law establishes how coherence should be developed. However, in these two mechanisms, the law takes a more *passive* role, leaving ample room for manoeuvre to political actors to decide how coherent they want their action to be. This explains why I argue that EU primary law is mainly concerned about ensuring consistency between policies and activities implemented in parallel in the Union's foreign policy. In the two mechanisms where EU external relations law is most active, the idea of bringing about *clarity* in the legal framework is essential. In fact, coherence can be considered one of the reasons why treaty provisions concerning the Union's external action are particularly lengthy. The quest for coherence can be said to explain, at least partly, why, as stated by Bruno de Witte, there might be 'too much constitutional law' in EU foreign policy.[144] The single set of objectives, which is an exceptionally explicit statement of international objectives in comparative law,[145] clarifies *what* EU actors shall aim for, regardless of the policy area. The single procedure for the negotiation and conclusion of international agreements clarifies *how* EU actors must act within this procedure. It establishes certain duties that must be complied with regardless of the substantive legal basis chosen to conclude an international agreement (and, by extension, the policy area that the agreement falls within). In the Mauritius Case, the Court recognised that the single procedure of Article 218 TFEU was introduced by the Lisbon Treaty in order 'to satisfy

[144] B. DE WITTE, 'Too much constitutional law in the EU's Foreign Relations', in M. CREMONA and B. WITTE (eds.), *EU Foreign Relations Law: constitutional fundamentals*, Hart, 2008

[145] See J. LARIK, *op. cit.* 116, page 124

the requirements of clarity, consistency and rationalisation'.[146] It is unquestionable that behind the over codification of EU external relations law lies the Member State fear that the EU may encroach upon their competence to conduct their own foreign policies. However, I claim that legal reforms aimed at clarifying the scope of EU competences are essential to ensuring coherence in EU external relations.

Arguing that there are many treaty provisions and legal principles underpinning the idea of coherence in EU external relations is the same as saying, in reverse, that if coherence in the external action results from respecting these provisions and legal principles, it amounts to a commitment to the law. If this commitment concerns the substantive legal framework, coherence is mainly a commitment to *promoting* the principles the Union is founded on.[147] When the focus is on *how* the Union acts internationally, regardless of the substance of its policies and activities, the focus is on *upholding* what the Union is founded on in the development of its external relations (i.e. respect for the rule of law). By continuously acting according to legal norms, the Union is in a better position to persuade its interlocutors that they should also do so. It is, therefore, better placed to be ultimately effective as regards its external objectives (e.g. respect for the rule of law). By repeatedly negotiating and concluding international agreements on the basis of the rules set out in Article 218 TFEU, the Union acts coherently and with an *identity* recognisable to its international partners. It shows, undoubtedly, a complex and inflexible *modus operandi*. But it also shows that the EU is an international organisation that acts according to legal rules.[148] The same can be said regarding an arrangement to organise the action of the Union and its Member States within an international organisation. Such an arrangement, which is an expression of the principle of sincere cooperation, ensures continuity over the way in which the Union acts within the organisation.[149] Other actors may complain about the arrangement, but the Union confirms its *identity* as an actor bound by rules.

[146] Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 52

[147] Article 21(1) TEU

[148] Interinstitutional litigation regarding this procedure, which in certain cases has even led to annulment of international agreements, does not, however, contribute to the Union presenting a coherent image in the world

[149] See a similar example in Case C-25/94, *Commission* v *Council*, FAO Case [1996] ECR I-01469

6 Coherence in EU primary law: a legal principle?

The question as to whether coherence qualifies as a principle of EU law, as opposed to simply a principle guiding political action, is a matter of debate. It is a deliberate choice to leave discussing this issue until near the end of chapter 1. After a long time reflecting about the notion of coherence, alone and with other students and professors, I take the view that the legal debate attributes too much relevance to the question of the legal nature of coherence. By desperately attempting to establish a clear-cut separation between what falls within and lies outside the legal sphere, the debate misses the opportunity to discuss the really interesting questions about the role of law in the quest for coherence. If coherence is not a legal principle, the notion of coherence is still relevant from a legal perspective, as it influences legal reform and it is used in the case law of the CJEU. If coherence is a legal principle, and even if it were a principle imposing obligations of a substantive nature, coherence would still contribute to the broad political ambition of coherence in EU external relations, as many issues will always escape the legal domain. That being said, a legal study on coherence in EU external relations cannot omit the question of the legal nature of coherence.

Coherence is obviously not a technical legal principle pertaining to the legal sphere only. It is not a principle like legal certainty or proportionality. However, there are formal and functional arguments defending the idea that coherence constitutes a principle of EU external relations law. As for the formal argument, the location of coherence under Article 7 TFEU indicates that it is a principle of general application to the Union.[150] Coherence can also be found in Article 21(3) TEU, on general provisions on the EU external action. Since the entry into force of the Lisbon Treaty, these two provisions are within the jurisdiction of the Court of Justice.[151] The lack of a clear legal concept of coherence and the fact that the Court has referred to coherence as a requirement are not conclusive arguments against the notion of coherence as a legal principle.[152] We must recall that there are other values and principles of EU law, such as the rule of law, for

[150] Article 7 TFEU falls under Title II ('Provisions having a general application') of Part I ('Principles'). For an interpretation in the same direction, see: C. HILLION, *op. cit*. 4, page 4

[151] Before the entry into force of the Lisbon Treaty, the most prominent provision regarding the principle of coherence, old Article 3 TEU, was excluded from the jurisdiction of the CJEU. Notice that Christophe Hillion refers to the principle of coherence as a '*principe justiciable'*. C. HILLION, *op. cit*. 9, pages 5-7

[152] 'One of the characteristics of the principle of coherence is its lack of legal nature: the term coherence is in common usage and does not for the time being designate a specific legal concept', P. GAUTTIER, *op. cit.* 3, page 24

which there is no clear legal notion. On the other hand, as in the case of coherence, the Court has referred to legal certainty, a general principle of EU law, as a requirement.[153]

Besides formal considerations, the functional argument for considering coherence as a principle concerns its role in *directing* the law of EU external relations. Coherence provides a shared sense of direction to certain legal norms that are essential in advancing coherence in this field.[154] It explains the existence of certain legal provisions and guides the interpretation of certain legal norms, as opposed to simply guiding political action. Perhaps the greatest example of the claim that coherence guides the interpretation of legal rules and principles can be found in the Tanzania Case.[155] The CJEU interpreted the duty of information owed by EU institutions to the Parliament in the negotiation and conclusion of international agreements as flowing from the principle of interinstitutional sincere cooperation.[156] While, if analysed in isolation, any legal scholar would consider this duty an expression of the principle of institutional balance, the Court connected it to sincere cooperation. It did so because it looked at this information duty from the perspective of its role in ensuring coherence between different areas of the external action. Moreover, coherence is an obsession, not only with *what* the Union does externally (i.e. the *substance* of its policies and activities), but also with *how* it acts internationally (i.e. the *procedures* it uses to implement policies and activities). The obsession with the procedure is specific to the legal dimension of coherence, as the idea of coherence as a broad political ambition is only interested in *what* the Union does. It confirms that coherence is, not only a broad political objective, but also a principle concerning the way in which the Union develops its external relations. Furthermore, the obsession with coherence does not only justify the existence of provisions in the treaties calling for coherence in the Union's foreign policy. According to the Court, legal innovations like the single procedure for the negotiation and conclusion of international agreements have been introduced 'to satisfy the requirements of clarity, consistency and rationalisation'.[157] Perhaps the greatest example of the idea that coherence guides the interpretation of legal norms

[153] Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 60

[154] For Christophe Hillion, coherence is a 'function of other EU legal principles'. According to Marise Cremona, coherence provides 'a context and rationale' for the functioning of other legal principles in EU external relations. C. HILLION, *op. cit*. 4, page 18 and M. CREMONA, *op. cit.* 4, page 59

[155] Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 72

[156] Article 218(10) TFEU

[157] Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 68

Since the entry into force of the Lisbon Treaty, coherence is within the jurisdiction of the CJEU. The question is whether the Court may ever enforce it as a qualitative obligation, linked to the substance of EU policies and activities. This possibility should not be underestimated.[158] That the link between the idea of coherence and the Union's objectives is an abstract one, as well as the general non-interventionist role of the CJEU in the field of EU external relations (where the Court is reluctant to decide on policy choices), are arguments to think that the Court will avoid enforcing coherence as a qualitative obligation.[159] A case like *Dermoestética*, where the CJEU used coherence as a benchmark against which to assess the adequateness of certain restrictions to freedom of establishment and to provide services, is difficult to imagine in the area of external relations. The Court found that the restrictions introduced by the Italian Government were not appropriate to guarantee the protection of public health since they were *inconsistent*.[160] References to coherence in recent cases concerning the Union's foreign policy, like the Tanzania Case, seem to indicate that the CJEU is more inclined to use the strengthened position of coherence in the current treaty framework to reinforce its guiding character in the interpretation of other procedural and substantive treaty provisions and legal principles, rather than to create new obligations for EU actors.

7 Coherence and the EU's comprehensive approach

Jan Wouters *et al* have written about the comprehensive approach as the likely successor to coherence as the preferred 'rhetorical device' in EU external relations.[161] Indeed, references to coherence linked to the Union's wide array of tools to tackle certain international concerns are increasingly replaced by references to the EU's comprehensive approach to these matters. For instance, when the EU claims that it takes a

[158] Christophe Hillion argues that the principle could be enforced as a qualitative obligation linked, *inter alia*, to the substantive content of instruments. He recalls that, like coherence, the principles of subsidiarity and proportionality were also considered eminently political guidelines but they have nevertheless bee central in the reasoning of the CJEU. C. HILLION, *op. cit.* 9, pages 5-7

[159] See M. CREMONA, 'A Reticent Court? Policy Objectives and the Court of Justice', in M. CREMONA and A. THIES (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Hart Publishing, 2014

[160] According to the CJEU, Italy 'introduced a prohibition on advertising medical and surgical treatments on national television networks while at the same time making it possible to broadcast such advertisements on local television networks.' Case C-500/06, *Corporación Dermoestética*, [2008] ECR I-05785, para 39. In the same direction, see for instance Case C-243/01, *Gambelli and others*, [2003] ECR I-13031, paras 26 and 67

[161] 'Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities', Directorate-General for External Policies, Policy Department, PE457.111, AFET, 2013, page 28

comprehensive approach in Somalia, it essentially refers to the fact that it deploys multiple tools to tackle the problems affecting Somalia.

In fact, we must distinguish between two different uses of the expression the 'EU's comprehensive approach' in the field of external relations. The 'EU's comprehensive approach' names certain strategic policy documents (i.e. common approaches) in the area of external relations. By way of example, we can refer to the EU's comprehensive approach to external conflict and crises to allude to a strategic document on a matter whose implementation will require, *inter alia*, CFSP, development cooperation policy and humanitarian aid actions. This concrete idea of the 'EU's comprehensive approach' has rapidly led to the 'EU's comprehensive approach' as an abstract idea linked to the Union's wide toolbox. When the EU's comprehensive approach is referred to in this sense, it directly appeals to the role of the EU as an international actor. That the EU connects its wide toolbox to its added value and, ultimately, effectiveness as an international actor has already been discussed in this chapter. The wide toolbox is part of what the Union perceives as its *quantitative* added value as an international actor. The idea of the EU's comprehensive approach is the next step in this perception. There are two circumstances that can be said to explain the emergence of the idea of the EU's comprehensive approach. The first one is *internal* and refers to the fact that, after the entry into force of the Lisbon Treaty, the EU has an institutional structure (namely, the HRVP and the EEAS) that is designed to bridge the CFSP and non-CFSP divide, and to strengthen the actorness of the Union as a global actor. This institutional set-up has brought about a proliferation of integrated strategies to external concerns under the heading 'comprehensive approach'. Be it through Council conclusions or joint communications, comprehensive approaches in the field of external relations can be linked to the HRVP and the EEAS.[162] The second circumstance that explains the EU's comprehensive approach is *external* as it refers to how States and international organisations perceive today's world. The Union realises that there is a general understanding of today's world as a complex *world.* For instance, before the adoption of the Global Strategy for Foreign and Security Policy (2016), the EEAS website claimed:[163]

[162] The Joint Communication: The EU's comprehensive approach to external conflict and crises (JOIN(2013) 30) explicitly refers to the existence of a new institutional framework, whereby the EU has 'the increased potential and the ambition (…) to make its external action more consistent, more effective and more strategic', page 2

[163] The Global Strategy for Foreign and Security Policy (2016) refers to the world as a 'complex world' in 4 cases (note 17)

> 'Our world today is more connected, contested and complex. (…). An *EU Global Strategy on Foreign and Security Policy* will enable the Union to identify a clear set of objectives and priorities for now and the future. On this basis the European Union can align its tools and instruments to ensure that they have the greatest possible impact.'

With the narrative of the 'EU's comprehensive approach', the HRVP and the EEAS have turned the Union's complex system for EU external relations into the EU's best characteristic. They have turned the EU's wide toolbox into the distinctive feature of the Union as an international actor. The Union tells the world that it is in a *unique* position to present integrated responses to international matters:[164]

> 'The European Union and its Member States can bring to the international stage the unique ability to combine, in a coherent and consistent manner, policies and tools ranging from diplomacy, security and defence to finance, trade, development and human rights, as well as justice and migration. This contributes greatly to the Union's ability to play a positive and transformative role in its external relations and as a global actor.'

This idea of uniqueness seems to really have had an impact on EU officials. In an interview with an EEAS official, he claimed that the EU is better placed than the majority of its Member States to adopt a comprehensive approach to security and development concerns. He founded this claim on the observation that most Member States no longer deploy military and civilian operations alone, and take part instead in EU and NATO efforts.[165]

Given the benefits of the idea of the comprehensive approach to the Union's actorness, the question arises, then, as to whether EU comprehensive approaches (as specific documents) are really based on the need to tackle different concerns in an integrated manner or if the Union is exploiting this for its own purposes, among others to legitimise itself as a particularly or even uniquely well-placed actor.[166] That the Council has adopted Conclusions on the EU's comprehensive approach (2014), without referring to any particular context, points to the idea that it is certainly at least as much about *us* as

[164] Council Conclusions: The EU's Comprehensive Approach (9644/14), page 2. This idea of uniqueness is nothing new in public international law. See A. BRADFORD and E. POSNER, 'Universal Exceptionalism in International Law', *University of Chicago Law School: Chicago Unbound*, 2011

[165] Interview with an EEAS official, 2.4.2014

[166] This constitutes a fundamental critique of Niagalé Bagoyoko and Marie V. Gibert to the incorporation of the security-development nexus in EU external relations. N. BAGOYOKO, M. V. GIBERT, 'The linkage between security, governance and development: the European Union in Africa', 45, *Journal of Development Studies*, 5, 2009

about *the world.* Even if we assume that this is the case, comprehensive approaches are not only about how the Union projects itself in the world. Closer attention to the idea of the EU's comprehensive approach in policy documents shows a broader notion than the one presented so far. The comprehensive approach is not only about having a wide toolbox; it is also about using it in a coherent manner. We can consider this the third use of the EU's comprehensive approach. We must not forget that:[167]

> 'The European Union and its Member States can bring to the international stage the unique ability to combine, in a coherent and consistent manner, policies and tools ranging from (…)'.

From this perspective, the comprehensive approach is not simply describing a fact (i.e. the Union has different tools). It is showing an aspiration, as policy documents recognise the legally fragmented nature of EU external relations. In The EU's comprehensive approach to external conflict and crises (2013), the HRVP and the Commission highlighted:[168]

> 'The approach is based on the full respect of the different competences and respective added value of the EU's institutions and services, as well as of the Member States, as set out in the Treaties.'

Although there are certainly reasons to argue that the Union is exploiting the generally held perception of global challenges as interconnected and complex, it is not only doing so to legitimise itself as a particularly well-equipped actor. The EU is also using this perception to justify, internally, the need for integrated strategies that it considers essential to ensuring coherence between its different policies and activities. This is why the EU's comprehensive approach is, fundamentally, the new word to refer to the role of strategic policy documents in the attempt to use the toolbox in a coherent manner.[169] Each comprehensive approach (i.e. strategic policy document) is directed at advancing coherence at the level of individual measures:[170]

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[167] Council Conclusions: The EU's Comprehensive Approach (9644/14), page 2

[168] Joint Communication: The EU's comprehensive approach to external conflict and crises (JOIN(2013) 30), page 4

[169] In an interview with an EEAS official (2.4.2014) he repeatedly used the expressions 'strategic coherence' and 'comprehensive approach' in an interchangeable manner

[170] Council Conclusions: The EU's Comprehensive Approach (9644/14), page 1

> The Council stresses that the comprehensive approach is both a general working method and a set of concrete measures and processes to improve how the EU, based on a common strategic vision and drawing on its wide array of existing tools and instruments, collectively can develop, embed and deliver more coherent and more effective policies, working practices, actions and results.

Comprehensive approaches correspond to the definition of common approaches as one of the mechanisms foreseen in EU external relations law to advance coherence between policies and activities. They are the result of *legal* institutional reforms, and expressions of sincere cooperation (i.e. joint communications of the HRVP and the Commission) and mutual solidarity (i.e. Council conclusions), which are essential to adopt them. They should inform EU action when a specific international event arises and also ensure continued coherence.

8 Chapter conclusions

There are essentially four conclusions to chapter 1 of this thesis. The first conclusion is that the obsession with coherence in the Union's external action, as manifested in primary law and policy documents, responds to the legally fragmented system for EU external relations. It is an obsession with ensuring coherence between policies and activities that are implemented under different policy areas and instruments. For example, the ambition to make a coherent use of the wide toolbox to tackle international concerns, which is recurrent in policy documents, is a disguised reference to the challenges created by the fact that the EU's tools form part of *separate* strands of action. In other words, the legal framework is a fundamental *cause* (i.e. the *internal* factor) behind the quest for coherence in the Union's foreign policy.

The second conclusion of the chapter is that the notions of consistency and coherence are multidimensional. This is why it is most accurate to think about these concepts as a continuum than as specific stages to reach. There are many elements to take into account when assessing whether two activities are consistent and/or coherent. For instance, common approaches can bring about consistency across EU activities over the understanding of the scope of the development cooperation policy. However, it may be the case that common approaches do not prevent substantive contradictions between specific activities. In fact, this is why I argue that not only coherence, but also consistency is a matter of degree in EU external relations. Furthermore, efforts aimed at

ensuring complementarity between different policies and activities, like EU and Member State coordination between development programmes, may only manage to ensure consistency.

The third conclusion is that there are different ways in which EU primary law contributes to ensure coherence between policies and activities, which can be categorised under four mechanisms for coherence: common objectives, common approaches, legal delimitation and inter-policy coordination. If the first conclusion claims that law is a fundamental *cause* behind the quest for coherence, the third conclusion argues that law tries to be part of the *solution.* The fact that EU primary law takes a more active role in providing common objectives and defining legal delimitation rules, than in the remaining two mechanisms for coherence explains why I state that EU external relations law is fundamentally concerned about ensuring a certain degree of consistency across policies and activities.

Besides, the chapter argues that there is an *external* factor that is equally important as the internal one in understanding the obsession with coherence. It is assumed that, by acting in a coherent manner in the development of its external relations, the Union strengthens its international actorness, which is indispensable for it to be effective as regards its external objectives. The fourth conclusion of this chapter is that, in fact, there are two ways in which coherence contributes to the EU's effectiveness as an external project. A close analysis of the notion of coherence in primary law and policy documents reveals a difference between what I call 'soft power coherence' and 'pragmatic coherence'. Both are important in ensuring that the different policies and activities of the EU do not appear as though they result from totally separate strands of Union's action. The distinction between soft power and pragmatic coherence refers to the different purposes coherence serves and is, thus, important in understanding why coherence is important for the EU. However, it does not affect the notion of coherence and the four mechanisms for coherence, which are relevant to both soft power and pragmatic coherence.

Soft power coherence allows the EU to show what it considers its *qualitative* added value as an international actor. The assumption is that, by acting on the basis of the *principles* the Union is founded on, the EU shows its *identity* as an external project. This is considered important for the Union to be well positioned to influence its external partners in the direction of its external objectives. To put it bluntly, soft power coherence

corresponds to the Union practising what it preaches in the development of its external relations. Article 21 TEU is the best expression of this idea in the treaties. On the other hand, the function of pragmatic coherence is to show that the Union is an actor that can *deliver.* The link between coherence and the EU's effectiveness as regards its external objectives is more straightforward in pragmatic coherence than in soft power coherence. By way of example, if the Member States reach a CFSP common approach on an international matter (and respect it in the development of their foreign policies), the Union, as an actor, is taken more seriously by other international powers. If the EU and its Member States ensure complementarity between their respective development programmes, the *efficiency* of EU funds is maximised. This increases the potential of the EU to make a real difference as regards its development objectives. In the Global Strategy for the European Union's Foreign and Security Policy (2016), the HRVP states that:[171]

> 'The EU's credibility hinges on our unity, on our many achievements, our enduring power of attraction, the effectiveness and consistency of our policies, and adherence to our values.'

She confirms that this is a reference to soft power coherence when she claims, in the following sentence that:

> 'In this fragile world, soft power is not enough: we must enhance our credibility in security and defence. To respond to external crises, build our partners' capacities and protect Europe, Member States must channel a sufficient level of expenditure to defence, make the most efficient use of resources, and meet the collective commitment of 20% of defence Budget spending devoted to the procurement of equipment and Research & Technology.'

Federica Mogherini is not ignorant of the fact that, in times of EU crisis, the emphasis on soft power coherence of the days of the Lisbon Treaties needs to be complemented with a strong focus on pragmatic coherence.

[171] Global Strategy for the European Union's Foreign and Security Policy (2016), pages 44-45 (note 17)

Chapter 2
The CFSP-development cooperation nexus

1 Introduction to chapter 2

The security-development nexus is a widely accepted policy approach under which security and development challenges affecting many countries in the world are perceived as closely intertwined. It assumes that conflict leads to poverty, and vice versa. The Union has not been an exception in adopting this viewpoint. References to the vicious cycle between poverty and conflict are common in EU policy documents. Beside the explicit allusions to the security-development nexus, there are also less obvious ways in which the idea of the nexus can be said to have an important impact in the EU external action. This is so at the policy level, and also as far as the law of EU external relations is concerned. Sections 2 and 3 of this chapter focus on the idea of the security-development nexus as a policy approach. They explore the notion and its emergence on the international stage. They also analyse how the EU has adopted the security-development nexus in its external agenda, as well as the position of the thesis as regards the nexus. In section 4, I refer to the security-development nexus in the case law of the CJEU. Chapter 3 shows the extent to which the security-development nexus is important in the overall action of the Union is Somalia, as well as in concrete legal acts concerning the engagement of the EU in this country. The security-development nexus in the external action of the Union cannot be understood without also considering the quest for coherence in this field. In fact, the idea of the nexus justifies efforts aimed at advancing horizontal coherence between the CFSP and the development cooperation policy, which are implemented in *parallel.* This is why the security-development nexus is a paradigmatic case for studying inter-policy coherence in EU external relations. It also explains why, within the EU legal framework, the security-development nexus essentially corresponds to the CFSP-development cooperation nexus.

Section 4 is the backbone of this chapter. It applies the four mechanisms for inter-policy coherence foreseen in EU external relations law, presented in chapter 1, to the context of the CFSP-development cooperation nexus. The idea presented in chapter 1 mainly focuses on EU primary law. This section also takes into consideration relevant legal innovations in secondary law for inter-policy coherence, like the Instrument

contributing to Stability and Peace (IcSP). It also considers the case law of the CJEU over the choice of the legal basis in the CFSP-development cooperation nexus. Since the thesis is interested in vertical inter-policy coherence, it also analyses the *parallel* coexistence of EU and Member State development policies. This explains why section 5 focuses on joint programming in EU development policy as an example of a concrete exercise aimed at ensuring complementarity between the development policies of the Union and those of its Member States. The last section of chapter 2 is somehow a bridge between the rather theoretical approach of chapters 1 and 2 of the thesis, and the more empirical character of chapter 3. Although still at a theoretical level (i.e. the analysis does not focus on any particular country or region), the examination of joint programming offers concrete examples of important arguments put forward, at a rather abstract level, in chapters 1 and 2 of the thesis.

2 The security-development nexus as a global policy approach

The security-development nexus is, today, a widely accepted approach to two fundamental challenges in many countries of the world: the need to tackle security concerns and to promote long-term development. States and international organisations alike have adopted the view that these two challenges are interdependent, and they repeatedly emphasise the importance of designing common strategies covering both. By way of example, the 5th principle of the OECD Principles for Good International Engagement in Fragile States and Situations (2007) emphasises the need to recognise the links between political, security and development objectives. The Resolution of the UN General Assembly establishing the 2030 Agenda for Sustainable Development (2015) includes as one of its goals 'peace, justice and strong institutions'.[172] It is assumed that measures promoting development have spill over effects over security objectives and vice versa, which justifies the need for integrated approaches.

Although often referred to as self-evident, this view is the result of a specific international context. After the Cold War, the notions of development and security were both broadened. As explained by Christian Buger and Pascal Vennesson, development was widened to include – together with economic issues – institutional change, as a result

[172] UNGA Resolution: Transforming our world: the 2030 Agenda for Sustainable Development (A/RES/70/1) and OECD Principles for Good International Engagement in Fragile States and Situations (2007), available at:
http://www.oecd.org/dac/governance-peace/conflictfragilityandresilience/docs/38368714.pdf

of the limited success of previous development policies. Similarly, beside the threat of war between nations, the idea of security incorporated the need to ensure a certain degree of economic and political stability.[173] This change in perception put the focus on developing countries as, in the last decades, stability concerns (e.g. internal conflict or civil war) have been more pronounced in these countries. In fact, the broadening of the notions of security and development shows a fundamental shift in the understanding of the root causes of security and development shortcomings. These challenges start being conceived as partly a result of the inability or unwillingness of States to serve their citizens, which is referred to as weak governance in the less severe cases and State fragility in the most complex ones. For example, David Cammack *et al* refer to fragile states as lacking:[174]

> 'Capacity or will to perform certain functions that contribute to the security and well-being of a country's citizens.'

The European Commission claims that 'governance concerns the state's ability to serve its citizens', and it considers that state fragility refers to:[175]

> 'Weak or failing structures and to situations where the social contract is broken due to the State's incapacity or unwillingness to deal with its basic functions, meet its obligations and responsibilities.'

The security-development nexus is, therefore, linked to the perception that the reasons that ultimately explain security and development shortcomings are connected.

In fact, we must distinguish between a formal or limited approach to the security-development nexus, and a practical or far-reaching approach. The limited approach simply refers to what is considered a descriptive analysis of reality, i.e. the vicious cycle

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[173] C. BUGER and P. VENESSON, 'Security, Development and the EU's Development Policy', *EUI*, 2009, page 8. As for the redefinition of the notions of development and security after the Cold War see also: D. CHANDLER, 'The security-development nexus and the rise of 'anti-foreign policy', *Journal of International Relations and Development*, 10, 2007, page 367; and A. HURWITZ and G. PEAKE (rapporteurs), 'Strengthening the Security-Development Nexus: Assessing International Policy and Practice Since the 1990s', *International Peace Academy*, 2004, pages 1-2

[174] D. CAMMACK, K. CHRISTIANSEN, D. LEOD and A. ROCHA MENOCAL, 'Donors and the fragile state agenda: a survey of current thinking and practice', Report submitted to the Japan International Cooperation Agency, *Overseas Development Institute*, London, 2006, pages 16-18

[175] Communication: Governance and Development (COM(2003) 615), page 3 and Communication: Towards an EU response to situations of fragility (COM(2007) 643), page 5. The Commission has also referred to governance as concerned with: 'the rules, processes and behaviour by which interests are articulated, resources are managed, and power is exercised in society.' Communication: Governance in the European Consensus on Development (COM(2006) 421), page 3

between poverty and conflict. The idea is very simple: conflict leads to poverty, and vice versa. Instead, the far-reaching or practical approach addresses the question as to how the vicious cycle can be broken. It concludes that the only possible way of breaking the cycle is to tackle governance shortcomings, which are at the root of both security and development challenges. The practical approach to the security-development nexus has two fundamental consequences. First, it leads to a situation where governance support is a central part of security and development policies alike. This means that the dividing line between these two policies is no longer clear. Second, even in areas where security and development policies keep their fields of action separate (e.g. education is clearly a development policy), the security-development nexus stresses the need to ensure complementarity between development and security policies. This is so because the activities that tackle security challenges contribute to development objectives, and vice versa. The far-reaching approach to the security-development nexus justifies why common strategies guiding security and development policies are considered crucial. This is so whenever the main focus is on governance support (e.g. strategies on statebuilding and peacebuilding), but also when it is not (e.g. strategies on crisis management and conflict prevention).

As shown in these examples, many notions concerning the different ways in which external actors engage in situations of fragility are linked to the idea of the security-development nexus. Statebuilding, peacebuilding, crisis management and conflict prevention are frameworks grouping certain problems affecting the most vulnerable States in the world. Often these notions imply a certain idea of chronological order. For instance, while conflict prevention mainly addresses situations where conflict has not yet emerged, statebuilding generally tackles the problems resulting from conflict. What these notions undoubtedly share is the assumption that no conflict prevention, crisis management, statebuilding or peacebuilding strategy will succeed if it does not consider the role of security and development policies in each of these particular situations. This is why these notions are often in the title of strategies designed to inform the implementation of security and development policies. They can be considered expressions of the security-development nexus approach.

The idea of a nexus between the notions of security and development is subject to fundamental critiques. For example, it is argued that there is not enough evidence to

claim that there is a casual link between poverty and conflict (and vice versa).[176] We shall recall that the limited approach to the security-development nexus is generally used as a description of reality. Moreover, the nexus is often perceived as an excuse to tackle the security concerns of Western States. That the nexus developed at the end of the Cold War, when Western States stopped being concerned about the threat of war between nations, supports this critique. If the security-development nexus describes a reality, this reality predates the fall of the Berlin Wall. This position has obviously been intensified since the September 11 attacks and the Global War on Terror.[177] By addressing poverty and conflict wherever they occur, Western States tackle the threat of global terrorism. For example, they minimise the risk of terrorists taking control over certain territories, where they can get organised and commit attacks, both in the territories that they control and abroad. The presence of ISIS in Syria and Iraq is a clear example of why Western States may be interested in tackling security and development concerns outside their borders. That the security-development nexus is an excuse to protect Western interests abroad corresponds to one of the two ways in which the security-development nexus is criticised as a 'securitisation of development'. It is argued that Western States provide development aid to ensure their own security at home. Probably alluding to this idea, Mark Duffield has claimed that the nexus constitutes a 'reproblematisation of underdevelopment as dangerous'.[178] However, we must not forget that the provision of development assistance has always been instrumentalised for the strategic objectives of actors providing it, be it security objectives or objectives of a different nature. For instance, through political conditionality, States use development aid to pressure governments receiving it to comply with the rule of law, promote democracy and respect human rights. Likewise, States use development aid as part of geopolitical strategies.[179] By way of example, the considerable external support given to development in Ethiopia, which justifies its consideration as an 'aid darling', partly results from the fact that external actors perceive Ethiopia as the only *stable* State in the Horn of Africa. From this perspective, the

[176] See, for instance: D. CHANDLER*, op. cit.* 173, pages 365-366

[177] See, for all: J. BOONSTRA and N. SHAPOVALOVA, 'Thinking security, doing development? The security-development nexus in European policies towards Tajikistan', *EUCAM*, 12, 2012, page 7. As for the same critique in the particular context of the aftermath of the 9/11 terrorist attacks see: W. HOUT, 'Between Development and Security: the European Union, governance and fragile states', in W. HOUT (ed.), *EU Strategies on Governance Reform: Between Development and State-building*, Routledge, London, 201, page 141

[178] M. DUFFIELD, *Global governance and the new wars: the merging of development and security,* Zed Books, 2001, page 28

[179] See, for all: D. CHANDLER, *op. cit*. 173, page 365

securitisation of development is nothing new. That being said, the narrative of the security-development nexus is generally presented as focusing on the security and development challenges of the developing country concerned alone. This is why, if the nexus is used as an excuse to legitimise external involvement in developing States to actually tackle the security concerns of external powers, it constitutes an especially *hypocritical* expression of the securitisation of development. Besides, the security-development nexus brings about a shift in the understanding of the responsibility for poverty and conflict in developing countries. Global inequalities and the effects of colonisation are no longer at the root of these problems. Instead, poverty and conflict in developing countries are perceived as the result of internal deficiencies. For instance, Mark Duffield argues that this shows a 'reworking of imperialism', since it legitimates outside involvement.[180] In particular, it legitimises the intervention of external powers in developing countries and the provision of advice to their governments. Furthermore, the effectiveness of the nexus in the resolution of development and security concerns is debated. Some authors point out that integrated strategies may not be the most effective way to address development and security shortcomings. The most important concern is that these approaches tend to rely on generalisations and often overlook the specific problems in the context where concrete measures are implemented. It is also argued that integrated strategies underestimate how development and security, as distinct policies, differ in their ultimate objectives, as well as in their time frames for action and working processes.[181] Criticism of the security-development nexus as the 'securitisation of development' often highlights that the nexus subverts the specific nature of development objectives.

3 The security-development nexus in the EU agenda

The EU is no exception in adopting the security-development nexus. The formal or limited approach to the nexus is often mentioned in policy documents. Likewise, as an expression of the far-reaching approach to the security-development nexus, support of the governance sector is essential in the agendas of the CFSP and the development cooperation policy. Furthermore, the proliferation of strategic documents designed to

[180] M. DUFFIELD, *op. cit.* 178, pages 28, 32 and 42

[181] In this direction see: C. BUGER and P. VENNESSON, *op. cit.* 173, page 5 and W. HOUT, *op. cit.* 177, page 152

guide the implementation of CFSP and development cooperation measures is also linked to the far-reaching approach to the nexus.

3.1 Incorporation as a policy approach

Since the beginning of the 2000s, explicit references to the security-development nexus have been constant in strategic instruments regarding the development cooperation policy and/or the CFSP. The European Security Strategy (2003) stated that 'security is a precondition for development', and also claimed that 'a number of countries are caught in a cycle of conflict, insecurity and poverty'. [182] The European Consensus on Development (2006) established:[183]

> 'Without peace and security development and poverty eradication are not possible, and without development and poverty eradication no sustainable peace will occur'.

This definition of the nexus in the European Consensus on Development (2006) has become commonplace in policy documents. [184] From the Council Conclusions on Security and Development (2007) onwards, the EU refers literally to the security-development nexus[185] and even devotes particular sections of policy documents to the idea of the nexus.[186]

Not surprisingly, alongside the first explicit references to the security-development nexus, the Union also started focusing on (good) governance as being fundamental to security and development challenges. In its Communication on Governance and Development (2003), the Commission claimed:[187]

> 'The structures and the quality of governance are critical determinants of social cohesion or social conflict, the success or failure of economic development, the preservation or deterioration of the natural environment as well as the respect or violation of human rights and fundamental freedoms.'

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[182] European Security Strategy (15895/03), page 2

[183] European Consensus on Development (2006/C 46/01), page 7

[184] See, for all, the Council Conclusions: Security and Development (15097/07), page 2 and the Report on the Implementation of the European Security Strategy (17104/08), page 8

[185] Council Conclusions: Security and Development (15097/07), page 3

[186] See, for instance, the Report on the Implementation of the European Security Strategy (17104/08), page 1 and the Communication: An Agenda for Change (COM(2011) 637), page 6

[187] COM(2003) 615, page 3. Similar examples can be found in the Communication: Governance in the European Consensus on Development (COM(2006) 421) and in the 6th recital of the preamble of the Development Cooperation Instrument. Regulation (EC) no 1905/2006 establishing a financing Instrument for Development Cooperation

Likewise, under the heading 'State Failure', the European Security Strategy (2003) established:[188]

> 'Bad governance – corruption, abuse of power, weak institutions and lack of accountability – and civil conflict corrode States from within. In some cases, this has brought about the collapse of State institutions. Somalia, Liberia and Afghanistan under the Taliban are the best known recent examples. Collapse of the State can be associated with obvious threats, such as organised crime or terrorism. State failure is an alarming phenomenon, that undermines global governance, and adds to regional instability.

Alongside the increased focus on governance issues to explain security and development shortcomings, the notion of governance itself broadened. In 2003, the Commission recognised that the approach of Member States and other third States providing development aid to governance was:[189]

> 'Shifting from an initial focus limited on economic processes and administrative efficiency towards greater concern for issues of democracy, justice and participation'.

The way in which the EU defines governance in strategic documents in the field of external relations is far from being systematic. However, we can find, what can be considered a comprehensive notion of (good) governance, often called democratic governance:[190]

> 'As the concepts of human rights, democratisation and democracy, the rule of law, civil society, (…), and sound public administration gain importance and relevance as a society develops into a more sophisticated political system, governance evolves into good governance.'

In other instances, the Union refers to a fairly thin idea of governance, together with other elements (e.g. democracy, rule of law) that are part of the comprehensive notion of governance. For instance, the European Consensus on Development (2006) claims:[191]

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[188] European Security Strategy (15895/03), page 6

[189] Communication: Governance and Development (COM(2003) 615), page 18

[190] Communication: Governance and Development (COM(2003) 615), page 4. In the Communication: Governance in the European Consensus on Development (COM(2006) 421), the Commission referred to 'democratic governance', page 6

[191] European Consensus on Development (2006/C 46/01), page 8. Find more examples of the non-comprehensive approach to governance in the European Consensus on Development (2006/C 46/01), page 15, the Communication: Towards an EU response to situations of fragility (COM(2007) 643), page 9 and the Council Conclusions: Security and Development (15097/07), page 8

> 'The Community development policy will have as its primary objective the eradication of poverty in the context of sustainable development, including pursuit of the MDGs, as well as the promotion of democracy, good governance and respect for human rights'.

The thin idea of governance emphasises that certain elements of the comprehensive notion of governance are, in themselves, founding principles of the Union and an essential part of its external objectives.[192] According to Laurent Pech, through governance reform, the EU aims at promoting democracy, the rule of law and human rights as three 'intertwined and mutually reinforcing principles'.[193] The extent to which governance reform has been prioritised in the development cooperation policy[194] has led the Commission to claim:[195]

> 'While governance and capacity building should indeed be high on the development cooperation agenda, poverty reduction and the other MDGs remain the overriding objectives of EU development policy, as laid down in the European Consensus on Development. Good governance, though a complementary objective, is basically a means towards the ends represented by these priority objectives.'

Mostly recently, the HRVP and the Commission have claimed:[196]

> 'Insecurity and instability are frequently generated or exacerbated by a lack of effective and accountable security systems. Helping partner countries to reform their security systems supports the EU's objectives of peace and stability, inclusive and sustainable development, state-building and democracy, the rule of law, human rights and the principles of international law.'

The governance agenda can be considered one of the consequences of the far-reaching approach to the security-development nexus. Another such consequence is the development of strategic policy documents that, by virtue of their thematic or geographic

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[192] Article 21(1) and (2)(b) TEU. This provision also refers to 'good global governance' as an external objective of the EU. However, this objective refers to the 'international system', not so to good governance in specific third States (Article 21 (2)(h) TEU)

[193] L. PECH, 'Rule of law as a guiding principle of the European Union's external action', *CLEER,* Working Papers 2012/3, page 3

[194] Governance was already identified as a priority area of the development cooperation policy in the Communication: The European Community's Development Policy (COM(2000) 212)

[195] Communication: Governance in the European Consensus on Development (COM(2006) 421), page 20. See also the European Consensus on Development (2006/C 46/01), page 2. We must not forget that Article 208(1) TFEU establishes that the development cooperation policy 'shall have as its primary objective the reduction and, in the long term, the eradication of poverty.'

[196] Joint Communication (JOIN(2016) 31), page 2

scope, cover policies and activities implemented under the CFSP and the development cooperation policy. The EU's comprehensive approach to external conflict and crises (2013) and the EU Sahel Strategy Regional Action Plan 2015-2020 (2015) are two obvious examples in this regard.[197] I analyse the role of strategic documents covering CFSP and development cooperation measures in section 4 in this chapter.

3.2 Critiques and the approach of the thesis

The security-development nexus in the EU external action can be questioned from at least three different perspectives. Firstly, the answer to the question regarding 'whose security' the Union is protecting with the security-development nexus approach is unclear. Is the Union *securitising* its development cooperation policy to protect its internal security? There are remarkable examples in strategic documents stressing the idea that, in its involvement in the developing world, the EU is very much worried about its own security. For instance, the European Security Strategy (2003) recognised 'State Failure' as a 'Key Threat' to the security of the Union and it also claimed:[198]

> 'The best protection of our own security is a world of well-governed democratic states.'

The European Council Declaration on Combating Terrorism of 25 March 2004, which was adopted following the Madrid train bombings (2004), called for counter-terrorist objectives to be integrated into external assistance programmes, while emphasising 'the threat posed by terrorism to our society'.[199] Moreover, according to The EU's comprehensive approach to external conflict and crises (2013), conflict prevention:[200]

> 'Helps protect EU interests and prevent adverse consequences on EU security and prosperity.'

Secondly, there are reasons to argue that the nexus is leading to a situation where EU actors perceive the CFSP and the development cooperation policy as interchangeable tools. If one defends the idea that security and development policies have distinct natures, with their own *modus operandi* and objectives, this is obviously problematic. In an interview with a DEVCO official in April 2014, he explained that Member States were interested in closing the two CSDP missions in the Democratic Republic of Congo (i.e.

[197] Joint Communication (JOIN(2013) 30) and Council Conclusions (7823/15), respectively
[198] European Security Strategy (15895/03), pages 6 and 12
[199] Brussels European Council 25 and 26 March 2004: Presidency Conclusions (9048/04)
[200] Joint Communication (JOIN(2013) 30), page 6

EUPOL and EUSEC Congo).[201] In response, the Government of Congo expressed its concern about the possibility of no longer receiving the support provided by these two missions. In light of this situation, he claimed, the Member States and the EEAS were trying to convince the Commission to replace these two missions with equivalent development cooperation funding. This seems to indicate that the Member States and the EEAS think of the CFSP and the development cooperation policy as interchangeable EU tools to tackle certain external objectives.[202] Thirdly, we may argue that the Union exploits the existence of interconnected challenges on the ground in order to legitimise its role as an international actor. In fact, the security-development nexus allows the Union to appear as a particularly well-equipped actor to respond to the idea of the nexus. The nexus allows the Union to present the wide array of tools at its disposal to address security and development challenges.[203]

While the thesis does not aim to make a contribution in the fields of political science and international relations, it is useful to explain the position it takes to the security-development nexus. The idea of the nexus as a self-evident truth (i.e. the vicious cycle) constitutes an over-simplification of reality. Underdevelopment is not necessarily dangerous.[204] Moreover, it can hardly be denied that, in its engagement in developing countries, the Union is concerned with protecting its own security. It is also true that the idea of the nexus suggests that conflict and poverty in developing countries are the responsibility of these countries alone. The nexus legitimises outside involvement, not because Western States feel a certain responsibility for the effects of colonisation and global inequalities, but because Western States (as 'well governed States') feel entitled to tell the governments of developing countries what to do. Furthermore, there are arguments to defend that the nature of the CFSP and the development cooperation policy are, indeed, different and that the idea of the nexus creates a risk for the specific character of these policy areas. I also believe that the Union is exploiting the idea of the security-development nexus to present what it considers its *quantitative* added value as a global actor (i.e. its wide toolbox to tackle international matters).

[201] Interview with a DEVCO official, 1.4.2014. These two CSDP missions were 'completed' in January 2015

[202] See section 4 of this chapter, pages 85-98

[203] N. BAGOYOKO and M. V. GIBERT, *op. cit*. 166. See also sections 3 and 7 of chapter 1, pages 13-22 and 49-53, respectively

[204] I respond here to the idea that the security-development nexus brings about 'a reproblematisation of underdevelopment as dangerous', see M. DUFFIELD, *op. cit*. 178, page 28

Despite all of these caveats, there are reasons to argue that the security-development approach is defendable in relation to certain problems affecting developing countries. First, although the idea of a vicious cycle is simplistic, there are plenty of concrete examples supporting the idea that conflict contributes to poverty and that extreme poverty is not conducive to peace. By way of example, extreme poverty can easily lead to conflict over the distribution of very scarce natural resources, and conflict will not encourage international investment, making it especially difficult to find the way out of poverty. If security and development challenges are intertwined, it is justifiable to address them in an integrated manner to ensure that CFSP and development cooperation measures reinforce each other. Second, it is undeniable that the EU is concerned with its own security when it refers to the security-development nexus. However, it is also true that, whenever policy documents become less general and instead focus on specific regions and countries, references to security and development concerns in developing countries become context-specific. For example, in the Conclusions on a Strategic Framework for the Horn of Africa (2011), the Council claimed:[205]

> 'Persistent poverty, often the result of conflict, destroys the stability on which economic growth and investment depend, has denied many of the people of the region the hope of the better future that they deserve.'

Even when strategic documents are not confined to particular countries or regions, policy documents also include references to notions where the idea of the security-development nexus is presented as primarily focusing on the challenges faced in third States. This is the case for references to human security, energy security and food security in developing countries. For instance, the 'Report on the European Security Strategy' (2008) stated:[206]

> 'We have worked to build human security, by reducing poverty and inequality, promoting good governance and human rights, assisting development, and addressing the root causes of conflict and insecurity'.

Furthermore, Article 21 TEU, which enshrines the EU's single set of external objectives, explicitly establishes that one of the objectives of the external action is to safeguard the security of the EU.[207] In the context of the CFSP, the treaties explicitly refer to the duality

[205] Council Conclusions: Horn of Africa (16858/11), page 7
[206] Report on the Implementation of the European Security Strategy (17104/08), page 3
[207] Article 21(2)(a) TEU

between the promotion of international security and that of the Union's own security. While the TEU refers to the security of the EU as an integral part of the CFSP, it also establishes that the Union may use CSDP civilian and military missions to strengthen international security.[208] As long as the security-development nexus is not based on the EU's security *alone*, that the Union also protects its own security with this policy approach is consistent with the treaties. Finally, the Union has been criticised for exploiting the existence of an international consensus around the security-development nexus to legitimise its role as an international actor. As long as this is not the only reason behind the adoption of the approach, this criticism does not seem enough of an argument to reject the idea of a nexus between the notions of security and development.

4 The legal dimension of coherence in the CFSP-development cooperation nexus

According to the Council, the security-development nexus:[209]

> 'Should inform EU strategies and policies in order to contribute to the coherence of EU external action, whilst recognising that the responsibilities and roles of development and security actors are complementary but remain specific.'

This statement establishes a direct link between the security-development nexus and the quest for coherence in the external action of the Union. The Preamble of the Instrument contributing to Stability and Peace (IcSP) explicitly refers to this statement of the Council. Moreover, Article 1(1), on the subject matter and objectives of the IcSP, states:[210]

> 'This Regulation establishes an instrument (the 'Instrument contributing to Stability and Peace') which provides, for the period from 2014 to 2020, direct support for the Union's external policies by increasing the efficiency and *coherence of the Union's actions* in the areas of crisis response, conflict prevention, peace-building and crisis preparedness, and in addressing global and trans-regional threats.'

In fact, the link between the security-development nexus and the obsession with coherence in EU external relations provides yet another argument against the

[208] Articles 24(1) and 42(1) TEU

[209] Council Conclusions: Security and Development (15097/07), page 2. Another example in the same direction can be found in the Communication: An Agenda for Change (COM(2011) 637), page 11 and in the Joint Communication: Capacity building in support of security and development – Enabling partners to prevent and manage crises (JOIN(2015) 17), page 3

[210] Regulation 230/2014 establishing the IcSP

incorporation of the nexus in the EU agenda. Adding to the criticism presented in section 3, one may also claim that the Union is *instrumentalising* the idea of a nexus between the notions of security and development to defend steps towards horizontal inter-policy coherence (i.e. CFSP-development cooperation).[211] Because of the non-affectation clause between CFSP and non-CFSP policy areas,[212] ensuring complementarity between policies and activities implemented under the CFSP and development cooperation is especially challenging. This is why the existence of an international consensus around the security-development nexus helps the Union to justify efforts towards complementarity between the CFSP and the development cooperation policy. Determining the relative weight of the security-development nexus, on the one hand, and the quest for coherence, on the other hand, in the adoption of an instrument like the IcSP is outside the scope of the thesis. What is relevant is that the Union has incorporated the nexus as a policy approach, that it connects it to its quest for coherence, and that together these two concerns justify *legal* developments. This is why the security-development nexus is a paradigmatic case to use in analysing horizontal inter-policy coherence in the Union's foreign policy.

In this section, I examine four mechanisms in EU external relations law to secure inter-policy coherence in the context of the CFSP-development cooperation nexus. These mechanisms are introduced at a general level (i.e. without focusing on particular policy areas or instruments) in chapter 1 of the thesis.[213] First, the treaties provide common objectives for all policies and activities forming part of the EU's external action. Second, the treaties indicate that common approaches (i.e. strategic policy documents) covering policies and activities implemented under different policy areas and instruments will be drawn up. Third, the framework of the treaties (complemented by the case law of the CJEU) establishes legal delimitation rules, which determine the scope of EU policy areas and instruments. Legal delimitation rules also establish the role of each EU actor in procedures that are especially important in the external action, like the negotiation and conclusion of international agreements. Fourth, the treaties foresee how inter-policy coordination (e.g. CFSP-common commercial policy) ought to happen.

[211] Note the parallelism between the instrumentalisation of the security-development nexus for the purposes of advancing coherence, and the instrumentalisation of the idea of the 'EU's comprehensive approach', which is also designed to promote coherence in EU external relations. As regards the latter, see section 7 of chapter 1, pages 49-53

[212] Article 40 TEU

[213] See section 5 of chapter 1, pages 36-45

Following from these four mechanisms, the current section proposes four theoretical claims that can be inferred from EU primary law. In fact, these claims are based on certain expressions used in the treaties and case law of the Court, but they do not reproduce these expressions literally. For example, under inter-policy coordination I present the claim 'the Council and the Commission shall ensure consistency between the different areas of its external action and shall cooperate to that effect', which recalls the terminology used in Article 21(3) TEU. The four claims I propose are not exhaustive, which means that other questions could have been considered. However, the four theoretical claims are especially representative of the function the mechanisms in the treaties to secure coherence in the external action are supposed to fulfil. The analysis focuses only on the CFSP and the development cooperation policy, but the claims are presented at a general level to emphasise that they are extensible to other policies and activities coexisting in *parallel* in the external action. The idea of organising the analysis around four theoretical claims aims to stress how the case study of chapter 3 tests, in light of practice, the legal framework presented in this section. Furthermore, the difference between single event coherence and continued coherence is relevant to the examination conducted in this section. The main focus is on single event coherence, that is: coherence between policies and activities analysed at a certain point in time. However, the analysis will also include references to continued coherence, i.e. coherence between policies and activities analysed in a long-term perspective.

Before addressing the four mechanisms in the context of the CFSP-development cooperation nexus, it is necessary to define the exact scope of the CFSP-development cooperation nexus as the thematic case of this thesis to study horizontal (and vertical) inter-policy coherence in EU external action. Determining the scope of the nexus is relevant for understanding the analysis conducted in the current section. Likewise, this definition is crucial for reading the case study in chapter 3, as the latter responds to the four theoretical claims of the current section with four empirical claims.

4.1 Scope of the CFSP-development cooperation nexus as the thematic case of this thesis

By examining the CFSP-development cooperation nexus the thesis studies the horizontal and vertical dimensions of the quest for coherence in the EU external action. When examining the CFSP and the development cooperation policy, I am also interested in understanding inter-policy coherence between the CFSP and the development

cooperation policy, on the one hand, and the competences of Member States in the same areas, on the other hand.[214] In what follows, I present the main features of the CFSP and the development cooperation policy as *separate* policy areas, in order to justify using the specific scope of the nexus as the thematic case of this thesis. I reflect on the similarities and differences between the CFSP and the development cooperation policy insofar as these are relevant to how the mechanisms for coherence operate in each. For example, a great deal of the policies and activities implemented under the CFSP and the development cooperation policy are defined in legal measures. This means that mechanisms for coherence, such as legal delimitation, constrain political action in a very similar manner in both policy areas. However, I do not undertake a comprehensive study of the treaty definition of the CFSP and the development cooperation policy as EU policy areas (and competences). Nor do I provide an extensive analysis of the institutional landscape of EU external action.

The CFSP is a *sui generis* policy area of the Union. It is subject to specific rules and procedures, including the unanimity of votes of the European Council and the Council as a general rule, the exclusion of legislative acts, and the limited jurisdiction of the CJEU.[215] The procedures of the CFSP (and the powers of the institutions within these procedures) are to be kept separate from those of other EU policy areas.[216] However, the specific character of the CFSP substantially changed after the entry into force of the Lisbon Treaty. In the context of the pillar structure, the CFSP was part of the EU legal order. It coexisted with the EC, as the legal order integrating most external policy areas (e.g. the development cooperation policy). With the abolition of the pillar structure, brought about by the Lisbon Treaty reforms, all external policy areas (including the CFSP) are now part of the EU, as a single legal order.[217] This is important from the perspective of the jurisdiction of the Court of Justice within the CFSP. Given that principles of EU law apply to the entirety of EU action, the restricted jurisdiction of the Court in CFSP matters excludes adjudication on these principles.[218]

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[214] Understandably, studies on the legal dimension of the security-development nexus focus on the horizontal dimension only. See, for instance, S. BLOCKMANS and M. SPERNBAUER, 'Legal Obstacles to Comprehensive EU External Security Action', *European Foreign Affairs Review,* 18, Special Issue, 2013 and H. MERKET, 'The EU and the Security-Development Nexus: Bridging the Legal Divide', *European Foreign Affairs Review,* 18, Special Issue, 2013

[215] Article 24(1) TEU

[216] Article 40 TEU

[217] Title V of the TEU

[218] In this direction, see for example: D. THYM, *op. cit*. 48, page 30

The most important treaty provision regarding the substantive scope of the CFSP is Article 24(1) TEU:

> 'The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.'

Moreover, the treaties refer to certain CFSP instruments, like the appointment of EU special representatives and the deployment of CSDP military and civilian missions.[219]

The European Council and the Council, the EU institutions that represent the Member States of the Union, are in charge of the development of the CFSP.[220] The HRVP conducts the CFSP, for instance by chairing the Foreign Affairs Council,[221] which is the configuration of the Council concerned with the CFSP. Moreover, the HRVP (assisted by the EEAS) presents proposals to the Council on CFSP matters, including recommendations regarding international agreements.[222] Together with the President of the European Council, the HRVP represents the Union in CFSP matters.[223] Institutional structures that are important in the definition and implementation of the CFSP (e.g. the EU Intelligence and Situation Centre) are under the EEAS, and thus under the control of the HRVP.[224] The European Parliament is regularly consulted and informed about the CFSP and can address questions and recommendations concerning this policy area.[225] Moreover, the European Parliament plays a role in the negotiation and conclusion of CFSP agreements. When international agreements concern exclusively the CFSP, the Parliament must be informed at all stages.[226] When international agreements concern CFSP and non-CFSP matters, the Parliament must, moreover, present its *consent* in certain cases (e.g. association agreements), and be consulted in other instances.[227]

Furthermore, although the CFSP is clearly under the control of Member States, its interaction with the foreign policies of Member States can be considered legally 'awkward'. The TFEU defines the CFSP as a Union competence but does not determine

[219] See Articles 33 and 42(1) TEU
[220] Articles 15(2) and 16(2) TEU
[221] Article 18(3) TEU
[222] Article 18(2) TEU, Council Decision establishing the EEAS (2010/427/EU) and Article 218(3) TFEU
[223] Articles 15(6) and 27(2) TEU
[224] Article 4 of the Council Decision establishing the EEAS (2010/427/EU)
[225] Article 36 TEU
[226] Article 218(10) TFEU. See also Case C-658/11, *Parliament* v *Council*, Mauritius Case and Case C-263/14, *Parliament* v *Commission*, Tanzania Case
[227] Article 218(6) letters (a) and (b) TFEU

which category of competences the CFSP falls within.[228] Moreover, the Member States attached a Declaration to the Lisbon Treaty stating that the CFSP does not affect their responsibilities to conduct their own foreign policies.[229] Be it as it may, given the role of Member States within the CFSP and the open-ended character of Article 24(1) TEU, it is difficult to foresee a scenario where the CJEU would be asked to determine whether a CFSP legal act encroaches upon the competences of Member States to develop their own foreign policies.

Unlike the CFSP, the development cooperation policy is an ordinary policy area of the Union. It is subject to the ordinary legislative procedure, which means that the Parliament and the Council jointly adopt legislative acts that are fundamental for its implementation. [230] Moreover, the development cooperation policy is a shared competence that is not subject to pre-emption. This means that EU action on development cooperation does not prevent Member States from conducting their development policies and, thus, exercising their competence in this area.[231] Because of the open-ended character of development objectives and the non-preemptive nature of the development cooperation policy, it is difficult to imagine a case where the Court were to decide if the powers of the EU in this field had been misused. On the institutional side, the Commission represents the Union on development cooperation matters, and presents proposals regarding legislative acts and recommendations on international agreements affecting the development cooperation policy.[232] The HRVP chairs the Foreign Affairs Council, which is the configuration of the Council that is most relevant to the development cooperation policy, and it is one of the Vice-Presidents of the Commission.[233] The Parliament plays an important role (i.e. consultation or consent) in the negotiation and conclusion of international agreements concerning the development cooperation policy.[234]

Besides, Article 208(1) TFEU refers to the substantive scope of this policy area:

> 'Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the

[228] Article 2(4) TFEU
[229] Declaration no 13 attached to the Lisbon Treaty
[230] Article 209(1) TFEU
[231] Article 4(4) TEU
[232] Article 17(2) and (1) TEU; Article 218(3) TFEU
[233] Articles 27(1) TEU and 17(4) TEU
[234] See Article 218 (a) and (b) TFEU. See also Case C-658/11, *Parliament* v *Council*, Mauritius Case

objectives of development cooperation in the policies that it implements which are likely to affect developing countries (…).'

As regards the relations between the CFSP and the development cooperation policy, the treaties establish a non-affectation clause.[235] The choice of the legal basis (i.e. CFSP or development cooperation) protects the procedures to implement CFSP and non-CFSP policy areas, and the powers of the institutions within these procedures. The CFSP and the development cooperation policy coexist in the Union's external action in a truly *parallel* manner. This scenario is fundamentally different from the one in place before the Lisbon Treaty entered into force. When the EC and the EU constituted separate legal orders, the focus was on protecting the scope of Community competences from the Union. If a legal act could have been adopted on the basis of EC competences, an EU legal basis was not acceptable.[236] The abolition of the pillar structure of the Lisbon Treaty has eliminated the previous imbalance and led to a situation where the choice of the legal basis essentially protects the powers of the institutions, rather than the substantive scope of competences.

Although seemingly completely different, the CFSP and the development cooperation policy share important similarities. First, both policy areas coexist with the competences of Member States to conduct their own foreign and development policies in a *parallel* manner. The action of the Union does not prevent Member States from exercising their competences on foreign and development policy. Second, the treaty provisions on the CFSP and those regarding the development cooperation policy refer to the commitment of the Union to the UN. CSDP missions and operations are to comply with the principles of the UN Charter, and the development cooperation policy 'shall comply with the commitments and take account of the objectives' approved in the context of the UN.[237] This means that both the CFSP and the development cooperation policy contribute to objectives determined within *other* international organisations. Third, a *single* EU institution directs the policies and activities implemented under the CFSP and the development cooperation policy: the Council in the CFSP and the Commission in the development cooperation policy. As regards the CFSP, this statement is obvious in the

[235] Article 40 TEU

[236] 'The Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provision which also fall within a competence conferred by the TEC on the Community'. Case C-91/05, *Commission* v *Council*, ECOWAS Case [2008] ECR I-03651, para 77. Ex-Article 47 TEC established the primacy of the *acquis communautaire* over EU competences

[237] Articles 42(1) and 208(1) TEU

treaties. Article 26 TEU states that the European Council is to identify the general guidelines and strategic lines of the CFSP. The Council then takes the necessary decisions to define and implement the CFSP on the basis of the guidance provided by the European Council. Very differently, the treaties establish that the development cooperation policy is subject to the ordinary legislative procedure, which means that the Council and the Parliament are in charge. Indeed, legislative acts define the instruments of the development cooperation policy. For example, the EIDHR is the result of a Regulation adopted under the ordinary legislative procedure, which establishes the budget and the scope of the instrument.[238] Likewise, the Council and the Parliament play an essential role in the negotiation and conclusion of international agreements affecting the development cooperation policy. While the Council authorises the opening of negotiations and concludes these agreements,[239] the Parliament is either consulted or must give consent to them. Nevertheless, the Commission makes decisions defining the *policy* priorities of the development cooperation *policy* in each country where the Union is providing development assistance. For instance, should the EU support the governance sector in Somalia? If so, should this be done under the EDF or under the IcSP? This points to the fourth similarity between the CFSP and the development cooperation policy, namely that most decisions on the policies and activities of the Union in CFSP and development cooperation are included in *legal* acts. These legal measures take the form of Commission decisions and Commission implementing decisions, in the case of the development cooperation policy, and of Council decisions, as regards the CFSP.

Lastly, there are two differences between the CFSP and the development cooperation policy that are worth mentioning. First, while the development cooperation policy is a heavily proceduralised policy area, the CFSP is clearly not. The legal framework for the CFSP, including its instruments, is essentially defined in the treaties. In CFSP decision-making processes, the path between the treaties and the final legal acts where the Union defines the main lines of the policy is very short, which makes the CFSP a flexible policy area. This situation is substantially different in the case of the development cooperation policy, which is an extremely proceduralised policy area, whose instruments are defined in secondary law.[240] First, the whole repertoire of development cooperation instruments are defined in legislative acts, like the Regulation establishing the EIDHR. Second, there

[238] Regulation 235/2014
[239] Article 218(2) TFEU
[240] While TEU provisions on the CFSP are very extensive (i.e. the entire Chapter 2) the TFEU devotes four articles only to the development cooperation policy (i.e. Articles 208-211 TFEU)

is a never-ending list of decisions defining the Union's development cooperation *policy*. By way of example, an instrument like the Development Cooperation Instrument (DCI) has its own programmes, like the pan-African programme and the civil society and organisations and local authorities programme. Each of these programmes has its strategy paper and its multiannual indicative programme, as well as an annual programme, and all of them are adopted under Commission decisions.[241] This means that a decision to support the education sector of a specific country is not the result of an individual act, but of a long decision-making process.

The second remarkable difference between the CFSP and the development cooperation policy is the *centre* of the decision-making process. In the development cooperation policy, crucial decisions regarding the definition and the implementation of development programmes are in-country decisions, which means that they are essentially taken wherever the aid is provided. The current Union delegations (Commission delegations before the Lisbon Treaty) are the focal point in this regard.[242] In contrast, CFSP decisions are not in-country decisions. Even when the CFSP is implemented on the ground, as in the case of EUNAVFOR Atalanta, the control of the implementation of the CFSP lies elsewhere. For example, EUNAVFOR Atalanta, the Union's maritime operation fighting piracy off the Somali coast, is commanded from Northwood (UK), where Atalanta has its operational headquarters. [243]

The CFSP-development cooperation nexus is 'a good excuse' to examine the mechanisms foreseen in EU primary law to ensure inter-policy coherence in the external action of the Union. It is an interesting context in which to analyse the four mechanisms as regards horizontal inter-policy coherence between the CFSP and the development cooperation policy. Moreover, it is also a representative case to study the role of two of these mechanisms (i.e. the definition of common approaches and inter-policy coordination) in advancing coherence between the development policy of the Union and the policies of Member States in this area. This constitutes the scope of the CFSP-development nexus as the thematic case of this thesis.

As far as vertical inter-policy coherence is concerned, the common objectives of Article 21 TEU should be observed in the development of Member States competences. However, this provision mainly refers to the objectives of the Union as an international

[241] See chapter 3 and Annex 2
[242] Ex-Article 20 TEC and Article 220 TFEU
[243] http://eunavfor.eu/ (last visited: 17 August 2015)

organisation of conferred powers.[244] The choice of the legal basis, which is the crucial delimitation rule to decide whether the Union or the Member States are entitled to act internationally, is not particularly interesting in the two analysed policy areas. This is so because of the truly parallel character of the policies of the Union and those of Member States on CFSP and development cooperation. This is why the provision of common objectives and the definition of legal delimitation rules play a secondary role in advancing vertical inter-policy coherence in these two policy areas. Moreover, in the context of the CFSP, inter-policy coordination is not particularly relevant either. Common approaches (e.g. Council conclusions) are essential to ensuring vertical inter-policy coherence over the CFSP. However, the treaties do not refer to common approaches within the CFSP as guidelines that shall inform the implementation of the CFSP and the foreign policies of Member States as two totally separate areas of action. On the contrary, it is assumed that whenever there is a CFSP common approach Member States will simply reproduce this approach in their foreign policies. Once a common approach exists, the role of actors like the HRVP is to remind Member States of the common approach, rather than to ensure coordination between the CFSP and their foreign policies.[245] This is why the quest for coherence in the CFSP context is, above all, a quest towards reaching common approaches, as the expression of Member State mutual solidarity and sincere cooperation. The process that precedes the existence of a common approach is essentially an institutional matter (e.g. does the HRVP manage to convince Member States?). The thesis is interested in common approaches insofar as they are an interim step towards ensuring coherence between concrete policies and activities implemented under different policy areas, not so the finish line of the quest for coherence. This is why coherence within the CFSP (i.e. between EU and Member States on CFSP-related topics) is outside the scope of the thesis.[246]

Finally, under the CFSP and the development cooperation policy the Union deploys plenty of different instruments. This is an intrinsic part of legal fragmentation in EU external relations. These instruments will be an important part of the analysis, especially in chapter 3. However, the choice of the CFSP-development nexus as the thematic case

[244] Article 7 TFEU

[245] Article 27(1) TEU establishes that the HRVP shall contribute to the development of the CFSP and 'shall ensure implementation of the decisions adopted by the European Council and the Council'. The duties of the Council and the HRVP under Article 24(3) TEU can be read in the same light

[246] Note that, because of the *sui generis* nature of the CFSP, in fact everything the Union does under this policy area (including measures contained in legal acts) could be considered a 'common approach'. However, the idea of common approach of this thesis refers to policy documents only

of this thesis puts the emphasis on coherence between the policies and activities implemented under different policy areas (and competences), instead of on the interaction between different instruments.

4.2 Mechanisms for coherence in EU external relations law: theoretical claims

Theoretical claim no 1: the principles and objectives set out in Article 21 TEU ensure consistency between the different areas of the Union's external action

The single set of EU external objectives established in Article 21 TEU responds to the Union's impetus to advance coherence and strengthen its actorness on the international stage, through the reforms introduced by the Lisbon Treaty. Following the abolition of the pillar structure, the EU has become a single international actor.[247] In line with this important change, Article 21 TEU provides the institutions responsible for the implementation of EU policy areas with a single *chart* stating what the Union should aim at outside its borders. From this perspective, the different policy areas and instruments interacting in the external action are mere tools through which the Union promotes its external objectives. Article 21(3) TEU explicitly claims:

> 'The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.'

This statement is immediately followed by:

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

This justifies theoretical claim no 1, which must be read under the provision of common objectives as one of the mechanisms foreseen in the treaties to advance coherence in the CFSP-development cooperation nexus.

Together with the specific policy objectives defined in the provisions regulating the CFSP and the development cooperation policy, EU actors must consider the general objectives of Article 21 TEU. For example, while the primary objective of the development cooperation policy is the eradication of poverty, the implementation of this

[247] Article 47 TEU

policy field must also 'promote an international system based on stronger multilateral cooperation and good global governance'.[248] Moreover, the requirement to consider development objectives in all policies affecting developing countries is important in the CFSP-development cooperation nexus. In fact, this requirement is the legal translation of the long-standing agenda of the Union on policy coherence for development.[249]

Reflecting on how external objectives were defined before the entry into force of the Lisbon Treaty provides interesting insight into the security-development nexus in the EU agenda, as well as into the purpose that Article 21 TEU serves. Before the Lisbon Treaty, CFSP and development cooperation objectives were listed under the treaty provisions regulating these policy areas. However, there were certain objectives that these two policy areas shared. The treaty articles on the development cooperation policy and those regarding the CFSP included:[250]

> 'The general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.'

Although referred to as 'a general objective', the only external policy areas where the treaties mentioned these objectives were the CFSP, the development cooperation policy and the area of economic, financial and technical cooperation with third countries.[251] Treaty provisions regulating other policy areas, like the common commercial policy, did not refer to the promotion of democracy, human rights and the rule of law. That the CFSP and the development cooperation policy came together around these objectives can be considered an expression of the governance agenda that characterises both. In fact, the definition of the elimination of poverty as the main objective of the development cooperation policy, which was introduced by the Lisbon Treaty, can be read as a response to the central (and perhaps too central) character that the governance agenda has acquired in the development cooperation policy.[252]

Furthermore, attention to the legal framework that preceded the entry into force of the Lisbon Treaty provides arguments to claim that Article 21 TEU is designed to

[248] Article 208(1) TFEU establishes that the campaign against poverty is the main objective of the development cooperation policy. This objective is also listed in Article 21(2)(d) TEU. Besides, Article 21(2)(h) TEU refers to the promotion of good global governance

[249] This requirement was introduced in EU primary law by the Treaty of Maastricht

[250] Ex-Article 177 TEC; ex-Article 11 TEU, regarding the CFSP, included an almost identical sentence

[251] Ex-Article 181a TEC

[252] Ex-Article 177 TEC referred to the campaign against poverty in developing countries as one of the objectives of the development cooperation policy, together with other objectives like sustainable economic and social development of the developing countries

strengthen the international actorness of the Union. Prior to the Lisbon Treaty, external policy areas of the EC were listed together with its internal policy fields. For example, Title XX of the TEC, on development cooperation, followed Titles XVIII and XIX on research and technological development and the environment, respectively. This means that the difference between the internal and the external dimensions of the European project were not clearly defined. Once this distinction became clear, as in the current legal framework, Article 21 TEU was introduced to determine what the external dimension of the European project is about. In particular, paragraph 1 establishes that the external objectives of the Union correspond to the principles upon which the EU is founded on and 'which it seeks to advance in the wider world'. Moreover, paragraph 3 establishes that the Union shall *respect* the principles and *pursue* the objectives set out in paragraphs 1 and 2. Therefore, there is a clear duality between what the Union shall *uphold* and *promote* in its external action, and both should mirror what the Union is founded on. This is substantially different than the situation that preceded the entry into force of the Lisbon Treaty. Ex-Article 6 TEU referred to the principles the Union is founded on. However, there was no explicit reference to the idea that the EU's external objectives mirror its founding principles. Neither was there a reference to the need to uphold the principles the Union is founded on in the external action. The way in which Article 21 TEU is supposed to ensure coherence between policy areas coexisting in the Union's foreign policy is very much linked to what the EU considers its *qualitative* added value as an international actor. Namely, that it is an international organisation that is founded on certain principles, and that it shows its commitment to them by *upholding* and *promoting* these principles (objectives) in its external action.

The single set of external objectives would not be problematic if it were not the case that it is settled case law of the Court of Justice that the choice of the legal basis (i.e. CFSP or development cooperation?) must be based on the *aim* and content of the measure that is being adopted. There is a clear conflict between two different mechanisms foreseen in the treaties to advance horizontal inter-policy coherence. The provision of common objectives is clearly in tension with the choice of the legal basis as a fundamental part of legal delimitation. The latter is examined under theoretical claim no 3.

Theoretical claim no 2: the Union identifies its strategic interests and objectives relating to the CFSP and to other areas of the external action of the Union

Immediately after providing all EU actors with a single set of objectives, the treaties establish that common approaches covering CFSP and non-CFSP matters shall be elaborated. Article 22(1) TEU reads as follows:

> 'On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union. Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States. (…)'

Because of the level of abstraction of the single set of objectives, even if observed with the best intentions, the objectives of Article 21 TEU cannot prevent the existence of inconsistencies between policies and activities concerning a specific country or topic. By defining common approaches, the European Council can mitigate this problem. Article 22 TEU justifies theoretical claim no 2, which falls under the definition of common approaches as a second mechanism for inter-policy coherence foreseen in the treaties.

Common approaches covering CFSP and development cooperation matters are commonplace. However, instead of in decisions of the European Council, these approaches are generally included in joint communications of the HRVP and the Commission, and in Council conclusions. This is not against the spirit of Article 22 TEU, as paragraph 2 of this provision establishes that the HRVP (for the CFSP) and the Commission (for other areas of external action) may submit joint proposals to the Council. For example, the EU's comprehensive approach to external conflict and crises (2013) was reflected in a joint communication from the HRVP and the Commission, and later confirmed in conclusions of the Council.[253] Another example can be found in the Council Conclusions on the Sahel Regional Action Plan 2015-2020 (2015), which refer to the Joint Communication of the HRVP and the Commission on 'Supporting closer cooperation and regional integration in the Maghreb/Algeria, Libya, Mauritania, Morocco and Tunisia'.[254] The most recent expressions of horizontal common approaches

[253] Joint Communication (JOIN(2013) 30) and Council Conclusions (9644/14)
[254] Joint Communication (JOIN(2012) 36)

to the security-development nexus are the Joint communications of the HRVP and the Commission on Capacity Building in support of Security and Development (April 2015) and Elements for an EU-wide strategic framework to support security sector reform (July 2016).[255]

Since common approaches are defined in documents that are devoid of legal effects, their real impact on inter-policy coherence is often questioned. The fact that these documents are essential in the case law of the Court of Justice and in the preambles of secondary law measures supports that they indeed play an important role in the Union's quest for coherence. The European Consensus on Development (2006) is central to the Court's definition of the scope of the development cooperation policy.[256] Likewise, the CJEU alluded to the European Council Declaration on Combating Terrorism (2004) to decide that the Instrument for Stability could contribute to the fight against terrorism.[257] The Preamble of the IcSP explicitly refers to the Council Conclusions on Security and Development (2007) to justify why the new instrument is needed.[258] We should also bear in mind that the title of a policy document is not conclusive of its scope. The recent Global Strategy for the European Union's Foreign and Security Policy (2016), which has the signature of the HRVP, includes many references to the development cooperation policy.[259]

From the perspective of vertical inter-policy coherence in development cooperation (i.e. EU-Member States), EU common approaches concerning development objectives should inform the policies of Member States. For example, this is the case of the Council Conclusions on the EU's comprehensive approach to external conflict and crises (2014).[260] The policy coherence for development agenda, which is always included in development cooperation strategic documents, is not only a commitment of the EU but also of the Member States. The Council Conclusions: Increasing the Impact of EU Development Policy: an Agenda for Change (2012) claimed:[261]

> 'In the light of these challenges and new realities, the Council welcomes the Commission Communication on "Increasing the impact of EU Development Policy: An Agenda for Change" which builds on the European Consensus on Development, and on the EU

[255] Joint Communications (JOIN(2015) 17 and JOIN(2016) 31)
[256] European Consensus on Development (2006/C 46/01)
[257] Brussels European Council 25 and 26 March 2004: Presidency Conclusions (9048/04)
[258] Council Conclusions (15097/07) and Regulation (EU) no 230/2014 establishing an IcSP
[259] Global Strategy for the European Union's Foreign and Security Policy, pages 3, 8 and 10 (note 17)
[260] Council Conclusions (9644/14)
[261] Council Conclusions (9369/12), page 3

commitments to eradicate poverty and to aid volumes, aid and development effectiveness and Policy Coherence for Development (PCD).'

Common approaches that are relevant to ensuring vertical inter-policy coherence in development cooperation are not always defined within the EU. The EU and most of its Member States are members of the Development Assistance Committee (DAC) of the OECD.[262] The DAC is an international forum bringing together many of the largest aid providers. The US, Norway and Japan are also DAC members. The IMF, UNDP and the World Bank participate as observers. Being part of the DAC has far-reaching consequences regarding the implementation of development policies. For instance, in the implementation of their development cooperation policies, DAC members shall respect DAC recommendations and follow DAC guidelines. Moreover, DAC members commit to reaching a certain threshold of Official Development Assistance (ODA). To qualify as ODA, development aid must fulfil certain criteria, like having economic development and welfare as its main objective, and being directed to certain countries (ODA recipients). Furthermore, DAC members are subject to peer-review of their development policies, and they participate in OECD DAC high-level meetings. DAC members commit to principles agreed in these high-level meetings, like the principles for good international engagement in fragile States and situations.[263] Furthermore, the OECD leads the international agenda on aid effectiveness (currently named Global Partnership for Effective Development Co-operation), which means that it organises high-level meetings on aid effectiveness, where commitments and principles are set out. For example, the Paris High Level Forum on Aid Effectiveness (2005) gave place to the Paris Declaration on Aid Effectiveness. This Declaration establishes principles that are very important in the implementation of EU and Member State development cooperation policies. Two examples are the principles of ownership and alignment, which establish that developing countries shall set their own strategies, and that donor countries must align with these strategies. The Busan Partnership Agreement, which resulted from the Fourth High Level Meeting on Aid Effectiveness held in Busan in 2011, sets out the latest commitments within the aid effectiveness agenda. Lastly, on 25 September 2015 the UN General Assembly adopted a Resolution establishing the 2030 Agenda or

[262] Article 220(1) TFEU states that the Union shall establish 'all appropriate forms of cooperation' with different international organisations, among which the OECD

[263] These principles were agreed at the 2007 OECD DAC High Level Meeting (see note 172)

Development. This Agenda replaces the MGD and sets 17 goals, including 'no poverty' and 'peace, justice and strong institutions'.[264]

The fact that vertical inter-policy coherence does not only take place within the Union is not surprising. Articles 208(2) and 211 TFEU read as follows:[265]

> 'The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.'

> 'Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations.'

Finally, joint programming in development cooperation, which is analysed in section 5 of this chapter, falls partly under the definition of common approaches and partly under inter-policy coordination. Joint programming refers to the process through which the Union and its Member States coordinate their development programmes towards a specific third State. It falls under two different mechanisms for coherence because it consists of three different stages. While the first stage defines a common approach, stages two and three are better placed under inter-policy coordination. In stage one, the EU and the Member States agree upon a joint strategy towards the development challenges faced in a particular country. Stages two and three are considered under theoretical claim no 4b. There is a second argument for considering joint programming under the definition of common approaches. Joint programming is a commitment of the Union within the OECD-led aid effectiveness agenda, and it is strongly underpinned by principles developed in this context, like the principles of ownership and alignment.

Theoretical claim no 3: the aim and content of a European act determines its legal basis

When the EU decides to act in the external domain, rules to decide on the appropriate legal basis (i.e. CFSP or development cooperation?) are important to ensuring an adequate division of tasks ('who does what?'). This minimises the risk of overlapping

[264] As regards the 2030 Agenda for Development, the website of DEVCO states: 'The EU has played an important role in shaping the 2030 Agenda, through public consultations, dialogue with our partners and in-depth research. The EU will continue to play a leading role as we move into the implementation of this ambitious, transformative and universal Agenda that delivers poverty eradication and sustainable development for all.' See http://ec.europa.eu/europeaid/policies/european-development-policy/2030-agenda-sustainable-development_en (last visited: 12 August 2016)

[265] See also C-403/05, *Parliament* v *Commission*, Philippines Case [2007] ECR I-09045, para 57

policies and activities between the CFSP and the development cooperation policy. The absence of a clear idea of what should be tackled under each policy area can lead to overlaps, as it can result in the EU responding with CFSP and development cooperation measures to the exact same matter and for the exact same purpose. Besides the obvious problem of efficiency that overlapping activities cause, whenever CFSP and development cooperation measures overlap the risk of substantive contradictions in the action of the Union increases exponentially. This is so, because the CFSP and the development cooperation policy are implemented under different procedures. For example, either the Council (CFSP) or the Commission (development cooperation policy) will generally play a central role in these procedures. Moreover, from the viewpoint of continued coherence, choosing the appropriate tool is important in preventing the EU from appearing as an arbitrary actor. By way of example, the Union may operate today under the CFSP, when it should do so under the development cooperation policy. If this is the case, it is likely that it will rightly respond to the same concern in the future under the development cooperation policy. This will give the impression of an incoherent actor. The situation described is at odds with the Court's statement according to which basing the choice of the legal basis on legal rules ensures consistency and legal certainty over these choices.[266]

According to settled case law of the CJEU, the choice of the legal basis 'of a European act (…) must rest on objective factors amenable to judicial review, which include the aim and content of that measure.'[267] As far as the relationship between the CFSP and the rest of EU policy areas is concerned, the choice of legal basis protects the procedures for implementing CFSP and non-CFSP policy areas, and the powers of the institutions within these procedures.[268] The phrasing used by the Court implies that the choice of legal basis can be founded on additional criteria. However, attention to the relevant case law in the external domain shows that the aim and content test is the fundamental benchmark used by the CJEU to decide on the appropriateness of the legal basis. Only if the measure pursues a twofold aim or has a twofold component, without one being incidental to the other, must it exceptionally be founded on the different corresponding legal bases, as long as the procedures for each legal basis are compatible.[269] Furthermore, EU institutions are subject to the aim and content test every single time

[266] Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 60
[267] Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 43
[268] Article 40 TEU
[269] See, for instance, Case C-130/10, *Parliament* v *Council,* Sanctions Case, para 42-49

that they adopt a legal act. That a measure is the direct implementation of another one is not enough of an argument to justify the legal basis chosen. According to the Court:[270]

> The fact that the contested joint action was implemented by other decisions adopted under the TEU, the legality of which the Commission has not challenged, cannot determine the outcome of the presented case. For the legal basis for an act must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other Union measures which might, in certain cases, display similar characteristics.'

In the specific context of the CFSP-development cooperation nexus, the Court has had the chance to clarify what it understands by the 'aim' and 'content' of a legal act:[271]

> While there may be some measures, such as the grant of political support for a moratorium or even the collection and destruction of weapons, which fall rather within action to preserve peace and strengthen international security or to promote international cooperation (being CFSP objectives), the decision to make funds available and to give technical assistance to a group of developing countries is capable of falling both under development cooperation policy and the CFSP.

By measure (i.e. content), the Court refers to the activity the Union is supporting. By aim, the CJEU alludes to the EU external objective(s) that the measure promotes. The analysis of the goals pursued and the means used to attain these goals determines whether a single legal basis is needed or if a dual legal basis is required, instead. This test assumes that there are certain 'aims' and 'contents' belonging to specific EU policy areas.

The non-affectation clause in Article 40 TEU establishes that the choice of legal basis (i.e. CFSP or development cooperation) protects procedures and institutional prerogatives, rather than the substantive scope of policy areas. However, after the entry into force of the Lisbon Treaty, the CJEU continues to base its judgements regarding the choice of the legal basis on the aim and content test. This means that the CJEU is still taking the view that there are 'aims' (i.e. EU external objectives) belonging to specific policy areas. Otherwise it would make no sense to claim that the aim and content test determines if a single or a dual legal basis is required. That the substance of a measure

[270] Case C-91/05, *Commission* v *Council*, ECOWAS Case [2008] ECR I-03651, para 106
[271] *Ibid*, para 105

(i.e. its aim and content) justifies the legal basis chosen is consistent with the Court's statement according to which: [272]

> 'It is the substantive legal basis of a measure that determines the procedures to be followed in adopting that measure'.

The choice of the legal basis in the context of the CFSP-development cooperation nexus is, however, highly problematic. This is so both as far the content and the aim parts of the test are concerned. By admitting that security and development challenges are closely intertwined, many measures (i.e. content) are perceived as essential both to security and development objectives (i.e. aim). The most notable case is the one of measures falling within the governance agenda of the Union. In line with the far-reaching effects on the adoption of the security-development approach, measures supporting governance support are essential in the CFSP and development cooperation alike. Besides, in the ECOWAS Case the fight against the proliferation of Small Arms and Light Weapons (SALW) was considered to contribute to economic and social development (development objectives, according to the CJEU), as well to the preservation of peace and the strengthening of international security (CFSP objectives for the Court).[273] Once the content part of the test is not conclusive, the attention necessarily shifts to the aim, leaving the matter largely dependent on how institutions justify their actions. This is surely the reason why the Court did not utilise a test considering only the aim in the first place. By way of example, the Commission can provide technical assistance to the governance sector in South Central Somalia, arguing that it is essential to the recovery and reconstruction of this part of the country, and thus to promote sustainable development. At the same time, the Council can provide the same type of assistance arguing that it is necessary to ensure stability and security in South Central Somalia.[274]

The shared 'content' is the first part of the problem regarding the choice of the legal basis in the CFSP-development cooperation nexus. At this stage, establishing a distinction between the aims of the CFSP and those of the development cooperation policy is still possible. As soon as the idea of a nexus between the notions of security and development is accepted, it is assumed that any CFSP measure has spill over effects over development objectives and vice versa. The main objective pursued should determine the

[272] Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 57
[273] Case C-91/05, *Commission* v *Council*, ECOWAS Case [2008] ECR I-03651
[274] See section 5 of chapter 3, pages 160-170

legal basis (e.g. CFSP measure), and the spill over effects should be considered incidental effects in the objectives of the other policy area (e.g. poverty reduction). In the ECOWAS Case, the Court recognised the existence of specific CFSP and development cooperation objectives. It also referred to the difference between main and ancillary objectives in the context of the nexus:[275]

> 'Nevertheless, a concrete measure aiming to combat the proliferation of SALW may be adopted by the Community under its development cooperation policy only if that measure, by virtue of its aim and its content, falls within the scope of the competences conferred by the TEU on the Community in that field. That is not the case if such a measure, even if it contributes to the economic and social development of the developing country, has as its main purpose the implementation of the CFSP.'

However, the final decision of the Court in the ECOWAS Case did not respect the difference between main and incidental objectives. The CJEU concluded that the Union's support for a financial programme to prevent the accumulation of SALW pursued development cooperation objectives because it *contributed* to the elimination or reduction of *obstacles* to the economic and social development of West African countries. Measures addressing obstacles or problems the solution to which is a prerequisite to development cooperation objectives do not have as their *main* aim the promotion of development objectives. The main aim of these measures is to pursue security objectives that are indispensable for development objectives. This is why I argue that in the ECOWAS Case the Court should have decided that CFSP objectives were the main objectives, whereas development cooperation ones were incidental. The distinction between main and ancillary objectives should be central in the context of the CFSP-development cooperation nexus. Under the current legal framework, an interpretation like the one in the ECOWAS Case would require a dual CFSP and development cooperation policy legal basis in a great number of cases. This is especially problematic because the Court does not seem to be willing to accept the possibility of dual CFSP and non-CFSP legal bases.[276]

The shared 'aim' is the second part of the problem regarding the choice of the legal basis in the CFSP-development cooperation nexus. In recent years, the Union pursues

[275] Case C-91/05, *Commission* v *Council*, ECOWAS Case [2008] ECR I-03651, para 71

[276] The Court has precluded the use of CFSP/non-CFSP legal bases in the context of restrictive measures since using a dual legal basis requires that the procedures for each legal basis are compatible. See, for instance, Case C-130/10, *Parliament* v *Council,* Sanctions Case, paras 42-49

objectives under the development cooperation policy that have traditionally been considered objectives of the CFSP. *De facto*, this was already observable before the Lisbon Treaty entered into force. By arguing that certain measures are *indispensable* to pursue development objectives, the development cooperation policy had already supported measures whose main objective was arguably a security objective. In the ECOWAS Case, this reasoning led the Court to conclude that the measure with which the Council supported ECOWAS in the fight against the proliferation of SALW should have been adopted under the development cooperation policy.[277] The Court provided different arguments in favour of a measure like the one in ECOWAS falling under the substantive scope of the development cooperation policy. In particular, it referred to *Portugal* v *Council* and to the Philippines Case, where it defined the broad scope of development objectives.[278] Moreover, it explicitly mentioned the reference to the security-development nexus in the European Consensus on Development (2006). Paragraphs 65 and 66 of the ECOWAS Case read as follows:

> 'Articles 177 EC to 181 EC, which deal with cooperation with developing countries, refer not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, in compliance also with commitments in the context of the United Nations and other international organisations'.
>
> 'In addition, it follows from the Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, entitled 'The European Consensus [on Development]' (OJ 2006 C 46, p. 1) that there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community's new development policy necessarily proceed via the promotion of democracy and respect for human rights'.

[277] 'Certain measures aiming to prevent fragility in developing countries, including those adopted in order to bat the proliferation of small arms and light weapons, can contribute to the elimination or reduction of obstacles to the economic and social development of those countries.' Case C-91/05, *Commission* v *Council*, ECOWAS Case [2008] ECR I-03651, para 68

[278] See C-268/94, *Portugal* v *Council* [1996] ECR I-06177 and C-403/05, *Parliament* v *Commission*, Philippines Case [2007] ECR I-09045. Notice that, although this case law is still relevant to determine the scope of the development cooperation policy, it was coined when the treaties did not establish the campaign against poverty as the main objective of this policy area. See Article 208(1) TFEU

What has changed after the entry into force of the Lisbon Treaty (and the introduction of the single set of objectives) is the *openness* with which development cooperation policy instruments admit that they pursue objectives that had classically been considered by the Court as CFSP objectives. The clearest example is the Regulation establishing the Instrument contributing to Stability and Peace (IcSP), which lists among its objectives:[279]

> 'To address specific global and trans-regional threats to peace, international security and stability.'

The IcSP is a *sui generis* instrument of the development cooperation policy. It is designed to complement long-term development cooperation, and it is not managed by DEVCO. The Service for Foreign Policy Instruments (FPI), which is a Commission service physically placed under the EEAS and under the authority of the HRVP, manages the IcSP. However, the Regulation establishing the IcSP determines as its legal basis Articles 209(1) TFEU (i.e. development cooperation) and 212(2) TFEU (i.e. economic, financial and technical cooperation with third countries). This means that, as far as the Union's engagement in developing countries is concerned, the IcSP is an instrument for development cooperation. The IcSP is designed to tackle certain situations (e.g. conflict prevention, crisis management) where security and development objectives are essential. In fact, it adds even more complexity to the choice of the legal basis in the CFSP-development cooperation nexus. The IcSP can be used for certain measures in the context of situations, like 'crisis response, conflict prevention, peace-building and crisis preparedness', as well as 'global and trans-regional threats'.[280] Since the coexistence of development and CFSP policies and activities is particularly acute precisely in these situations, the IcSP has added even more fuzziness (and uncertainty) to the choice of the legal basis between the CFSP and the development cooperation policy.

In view of this situation, there is no clear notion of the relative contents of the CFSP and the development cooperation policy. There is no clear idea either regarding the specific aims that these policy areas are concerned about. Therefore, the role of legal delimitation rules in ensuring consistency over the choice of the legal basis (i.e. CFSP or development cooperation?) is highly debatable. Theoretical claim no 3, according to which the aim and content of a measure determines its legal basis, is debatable, to say the least. The treaties put the CJEU in a very difficult position, which justifies why the Court

[279] Article 1 of Regulation 230/2014 establishing an IcSP
[280] *Ibid*

cannot be totally blamed for its not so satisfying responses. For example, in the Tanzania Case the CJEU does exactly what it argued against in the ECOWAS Case.[281] It concludes that the EU-Tanzania agreement falls under the CFSP because it directly implements the Joint Action by which the Council established EUNAVFOR Atalanta. The latter was adopted under a CFSP legal basis.[282] However, when the Court explains what Atalanta is about it is implicitly providing evidence to support the idea that the EU-Tanzania agreement falls within the substantive scope of the CFSP:[283]

> 'The Agreement constitutes an instrument whereby the European Union pursues the objectives of Operation Atalanta, namely *to preserve international peace and security*, in particular by making it possible to ensure that the perpetrators of acts of piracy do not go unpunished.'

The Philippines II Case clearly demonstrates that the Court of Justice is still defining the scope of policy areas by reference to their specific policy objectives. The CJEU decides that the framework agreement between the Philippines and the EU has been adequately adopted under a single development cooperation legal basis. This is so because the provisions contained in the agreement concerning readmission of nationals of the contracting parties, transport and the environment:

> 'Do not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect in relation to the latter objectives.'[284]

Although in a less obvious manner, the Tanzania Case provides another argument in the same direction. According to the Court:[285]

> 'As regards, in particular, provisions of the EU-Tanzania Agreement concerning compliance with the principles of the rule of law and human rights, as well as respect for human dignity, it must be stated that such compliance is required of all actions of the EU, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), 21(2)(b) and (3) TEU. That being the case, the Court must also assess that agreement in the light of its aim.'

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[281] Case C-91/05, *Commission* v *Council*, ECOWAS Case [2008] ECR I-03651, para 71

[282] 'Were there to be no such operation, that agreement would be devoid of purpose.' Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 51

[283] Case C-263/14, *Parliament* v *Commission*, Tanzania Case, para 54

[284] C-377/12, *Commission* v *Council*, Philippines II Case, para 59 (see also para 39)

[285] Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 47

Although the rule of law and human rights, as well as respect for human dignity, constitute EU external objectives, the CJEU does not consider them as determining factors in ascertaining the aim of the EU-Tanzania agreement. The Court seems to draw a distinction between two different types of EU objectives in Article 21 TEU. On the one hand, the single set of objectives includes objectives that can be central in any measure, regardless of the policy area, because they do not *define* a particular policy area (e.g. rule of law). On the other hand, Article 21 TEU includes objectives that are intrinsic to what specific policy areas are about. For example, the main concern of the development cooperation policy is the campaign against poverty. The objectives that define particular policy areas determine the legal basis chosen (i.e. 'the Court must also assess that agreement in the light of its *aim*'). We should bear in mind that the Court could have referred to Article 21 TEU when deciding that the EU-Tanzania agreement falls under the CFSP, and it did not.

A comprehensive reading of the treaties provides arguments in favour of the idea that the single set of objectives was not introduced to render all treaty provisions including specific policy objectives and the whole case law of the Court over the choice of the legal basis meaningless. As far as the CFSP-development cooperation nexus is concerned, the notion of security mainly concerns the CFSP, while poverty reduction is the main objective of the development cooperation policy. Furthermore, we shall recall that, as a policy approach, the security-development nexus assumes that security and development objectives, while closely intertwined, are promoted under *different* strands of action, which justifies the need for integrated strategies. This is why I read Article 21 TEU as a reminder that all external policies and activities of the Union are part of a single external action.[286] When actors implement specific measures, they shall choose the adequate legal basis according to the objectives defined in treaty provisions regulating each policy area, complemented with the case law of the Court regarding the scope of EU policy areas. Moreover, they shall take account and contribute to other EU objectives.[287] When these 'other' objectives mirror the principles that the Union is founded on (e.g. respect for human dignity), EU actors can always make substantive contributions to these objectives. The EU-Tanzania agreement, adopted under a single CFSP legal basis,

[286] My reading of Article 21 TEU corresponds to the provision of common objectives as one of the mechanisms foreseen in the treaties to ensure horizontal inter-policy coherence. However, it is analysed here, instead of under theoretical claim no 1, because the single set of objectives is also central as regards legal delimitation

[287] This is required from all policies and activities of the Union, both internal and external, in Article 7 TFEU

included provisions concerning compliance with the rule of law and human rights, as well as respect for human dignity. When the objectives that do not justify the legal basis chosen are core objectives of other policy areas, EU actors can (and shall) *incidentally* contribute to these objectives.[288] Article 7 TFEU implicitly supports the idea that objectives are essential in determining the scope of policy areas when it refers to the objectives of the Union and the principle of conferred powers:

> '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.'

Be it as it may, the abolition of the previous imbalance between the EC and the EU external competences and the introduction of the single set of objectives encourage actors to consider the incidental effects of each measure they adopt over other objectives that are mainly promoted under different policy areas. This is why these legal innovations have great potential in leading towards inter-policy coherence in the external action of the Union. We shall recall that the primacy of the *acquis communautaire* over EU competences discouraged the Council to refer to the incidental effects of its acts over other policy areas, like the development cooperation policy. In the ECOWAS Case, the fact that the measure of the Council referred to the (incidental) development objectives that the CFSP measure contributed to led the CJEU to conclude that the measure should have been adopted under the development cooperation policy. The Court protected the *acquis.* Under the current legal framework, this kind of reference should be commonplace.

However, the line between what constitutes a main objective and an incidental objective is thin. This is why, by not recognising a distinction between general and specific policy objectives in Article 21 TEU, the CJEU (willingly or unwillingly) promotes efforts towards complementarity between policies and activities implemented under different policy fields. It encourages actors to take into consideration the incidental effects of their measures over other objectives of the Union, which are mainly implemented under different policy areas. From this perspective, the CJEU protects the spirit of the non-affectation clause and Article 21 TEU. However, the ambiguity that characterises the reasoning of the Court in cases concerning the choice of the legal basis under the current legal framework can also bring about other effects. By not clarifying on

[288] 'The Union's other policies, such as the CFSP, must therefore take account of the objectives of development cooperation and may therefore contribute to those objectives, which is consistent with the requirement of consistency of the Union's external action. Conclusions of AG Bot (para 126) in Case C-658/11, *Parliament* v *Council*, Mauritius Case

what exact grounds EU institutions should take these decisions, the Court (willingly or unwillingly) supports certain developments in EU secondary law, like the IcSP. The CJEU has not clarified whether, on the basis of Article 21 TEU, legal measures adopted under a specific policy area (e.g. development cooperation policy) can substantively promote objectives that are not contemplated in the treaty provisions regarding this policy area. I refer to this phenomenon, whose 'constitutionality' has neither been denied, nor confirmed by the Court, as 'the liberalisation of EU external objectives'.

There are different arguments in favour of the liberalisation of EU external objectives in the CFSP-development cooperation nexus. First, it ensures a certain degree of consistency across EU policy areas, because the CFSP and the development cooperation policy can contribute to the same objectives (e.g. international peace and security). Second, it brings about flexibility for political actors, because the choice of the legal basis becomes less constraining. From this perspective, the liberalisation of objectives has the potential to maximise the cases in which the Union responds to international matters. It can increase the room for manoeuvre of actors to decide what tool (i.e. policy area or instrument) they want to use in each case. Therefore, it can contribute towards strengthening the presence and visibility of the Union at the international level. Third, the liberalisation of objectives seems to be leading to a situation where the development cooperation policy integrates traditional CFSP objectives, and not vice versa. Because of the *sui generis* nature of the CFSP, from an EU integrationist perspective this can be considered great news.

However, there are also many reasons for deep concern about the liberalisation of EU external objectives. First, the fact that there are no clear rules for determining the appropriate legal basis creates doubt as to whether these choices can effectively protect the procedures and the institutional balance between CFSP and non-CFSP policy areas.[289] Second, that development cooperation funds are used to address 'transnational threats to international security and stability' puts into question whether the development cooperation policy has as its *main* objective the campaign against poverty. Security and stability at the international level have an impact on poverty. However, can measures promoting these objectives be justified as having poverty reduction as their *main* objective? That the development cooperation policy incorporates security objectives that were classically considered as CFSP objectives may be applauded from an EU

[289] Article 40 TEU

integrationist perspective. However, it is also leading to a situation where the treaty-defined nature of the development cooperation policy is challenged. Third, as regards the Union's quest for coherence between the CFSP and the development cooperation policy, we shall distinguish between coherence in a specific context (i.e. the Union's action in a particular third State), and coherence as a commitment to acting consistently over time. As for the former, we may argue that what the Union gains in terms of coherence by providing actors in charge of different policy areas with responsibility over the same objectives, gets lost as soon as it becomes evident that these actors operate under completely different procedures. Because of legal fragmentation in EU external relations, entrusting all actors with the same responsibilities is prone to overlaps and contradictions. In fact, assuming that, because of the single legal order, the different policy areas of the Union are simply different tools to be used in the most convenient manner (i.e. the question as to 'who does what' is no longer relevant) can be considered naïve. Lastly, not having clear rules to decide on the choice of the legal basis leads to a situation where there is no certainty as to when the Union will use the CFSP or the development cooperation policy.

Military boots under the development cooperation policy

The analysis of the choice of legal basis in the context of the CFSP-development cooperation nexus cannot overlook the recent Joint Proposal of the HRVP and the Commission to modify the IcSP. The main objective of the proposal is to amend the Regulation establishing the IcSP, so as to be able to use this instrument to fund military activities.

In April 2014, in two separate interviews with an EEAS and a DEVCO official, I inquired about the choice between CFSP/development cooperation, without referring to any treaty provision.[290] Both officials mentioned Article 41(2) TEU as the key to elucidating whether military aid can or cannot fall within the scope of the development cooperation policy. This was, for them, the only grey area where it was not clear whether the development cooperation policy could operate. Article 41(2) TEU reads as follows:

> 'Operating expenditure to which the implementation of this Chapter gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having

[290] Interview with an EEAS official, 1.4.2014 and with a DEVCO official, 27.3.2014

military or defence implications and cases where the Council acting unanimously decides otherwise.'

The official from DEVCO referred to this provision to argue that military training cannot be financed by the development cooperation policy, because it falls within the exception mentioned in Article 41(2) TEU (i.e. military aid cannot be charged to the Union budget). In contrast, the official from the EEAS claimed that the exception of Article 41(2) TEU refers to CSDP military operations. The Joint Proposal of the HRVP and the Commission to modify the IcSP, if adopted, will clarify the doubts expressed by the interviewed officials. The Joint Proposal intends to include the following paragraph under Article 1 of the IcSP:[291]

'Where Union assistance is provided to the security sector actors, this may also include military actors under exceptional circumstances as provided for in Article 3a, in particular in the context of a wider security sector reform process and/or capacity building in support of security and development in third countries, in line with the overarching objective of achieving sustainable development.'

According to the proposal, the Union needs to be able to directly support military actors in third countries when the EU objectives concerning security sector reform cannot be promoted by supporting non-military actors.[292] The proposal confirms that, despite its *sui generis* character, the IcSP is an instrument of the development cooperation policy, whenever it affects developing countries:

'The legal basis of this legislative proposal is Article 209(1) and Article 212(2) of the TFEU. Considering the broad scope of development cooperation, the financing of capacity building (training and equipment support) in the security sector on the basis of Article 209/212 TFEU is not per se excluded only because of the military nature of the beneficiary. Taking into account the objectives of the Union's development cooperation, i.e. to contribute to the pursuit of the sustainable development of developing countries, financing of the military is possible under exceptional circumstances'.

[291] SWD(2016) 222 and SWD(2016) 225. Notice that this proposal is the continuation of two Joint Communications of the HRVP and the Commission addressing the security-development nexus (JOIN(2015) 17 and JOIN(2016) 31)

[292] The fact that the Committee on Development of the Parliament has recently called 'for the creation of a dedicated instrument for financing security expenses linked to development cooperation' seems to imply that the Parliament would be willing to support this proposal. See the Report on the future of the ACP-EU relations beyond 2020 (2016/2053(INI)), Committee on Development, European Parliament, para 27

While the proposal refers to the 'overarching objective of achieving sustainable development', it establishes that the EU shall provide assistance to contribute, in particular, to the achievement of stable, peaceful and inclusive societies.

Theoretical claim no 4a: the Council and the Commission ensure consistency between the different areas of the Union's external action and cooperate to that effect

Article 21(3) para 2 TEU establishes:

> 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.'

This provision can be considered an 'updated version' of the oldest expression of coherence in EU primary law. Article 30(5) of the SEA (1987) stated:

> 'The external policies of the European Community and the policies agreed in European Political Co-operation must be consistent. The Presidency and the Commission, each within its own sphere of competence, shall have special responsibility for ensuring that such consistency is sought and maintained.'

When the EPC was created in 1970, legal fragmentation in EU external relations began to materialise. The EPC, which can be considered the initial version of the CFSP, had to coexist with the external policies of the EC. The reference to coherence in Article 30(5) SEA responded to the duality brought about by the EPC (i.e. EC-EPC). Although the scenario has changed significantly since 1970, the *sui generis* nature of the CFSP shows that the duality that the EPC created persists. Article 21(3) para 2 TEU is influenced by the divide between CFSP and non-CFSP policy areas. We shall recall that Articles 7 TFEU and 13(1) TEU, which are of general application to the entirety of EU action, refer to coherence between policies and activities/actions. In a very different manner, Article 21(3) TEU refers to coherence 'between the different *areas* of its external action and between these and its other policies'.[293]

The reference to coherence in Article 21(3) TEU is the most important expression of the horizontal dimension of the Union's quest for coherence in the external action. It

[293] The fact that Article 22(1) TEU refers to 'the common foreign and security policy and to other areas of the external action of the Union' supports this view

applies to the four mechanisms for coherence foreseen in the treaties. For example, I have referred to it under theoretical claim no 1, regarding the provision of common objectives. However, there is a reason why Article 21(3) TEU justifies theoretical claim no 4a, concerning horizontal inter-policy coordination as the last mechanism of the treaties to advance coherence. Article 21(3) TEU identifies the Council and the Commission as the actors that are mainly responsible for ensuring horizontal inter-policy coherence in the EU foreign policy. As far as the CFSP-development cooperation nexus is concerned, the Council and the Commission are the main actors responsible for developing and implementing the CFSP and the development cooperation policy respectively. This is why, as an expression of the principle of interinstitutional sincere cooperation enshrined in Article 21(3) TEU, the Council and the Commission will have to coordinate CFSP and development cooperation action. Otherwise they will not ensure coherence between the policies and activities implemented under these policy areas, as required by the treaties. Together, the Council and the Commission shall coordinate their actions. Independently, when adopting specific CFSP or development cooperation measures, they are to show awareness regarding measures implemented under the other policy area and seek to complement them. There is a difference between strengthening coherence by showing 'awareness', on the one hand, and by and expressing the incidental objectives of a measure, on the other hand.[294] When showing awareness (i.e. cross-referencing), EU actors may (or may not) refer to the objectives pursued in the measure they seek to complement. The focus is on ensuring complementarity between concrete measures. For example, a development cooperation measure supporting capacity building within the ministry of security cannot ignore the existence of a CSDP civilian mission, which is supporting the same ministry in the development of a national security strategy. On the contrary, by mentioning the incidental objectives of a measure, EU actors show that they have considered how their measure contributes to other external objectives of the Union. The latter does not assume the existence of two measures implemented in parallel. For example, a development cooperation measure can mention that education support in Somalia addresses the root causes of piracy, conflict and instability.[295]

[294] Ideally, however, references to the incidental objectives of a given legal measure should take into consideration existing EU measures promoting these objectives, as otherwise coherence between policies and activities, as envisaged in Articles 7 TFEU and 21(3) TEU, will not be ensured

[295] Decision C(2015) 5034

The treaties show a preference for entrusting coordinating activities in the external domain to 'intermediaries' like the HRVP, as shown in Article 21(3) TEU. For example, the HRVP chairs the FAC.[296] Moreover, the law of EU external relations entrusts the HRVP and the EEAS with responsibilities over the design of external policies and activities. As far as the CFSP-development nexus is concerned, the HRVP (assisted by the EEAS) prepares proposals for the development of the CFSP.[297] Moreover, the EEAS contributes to the programming and management cycle of certain external assistance instruments falling within the development cooperation policy, like the EDF and the Development Cooperation Instrument (DCI).[298] Either as an embodiment of the policy areas where it plays a role (e.g. CFSP and development cooperation) or of the institutions it brings together (e.g. Council, Commission, Member States), the EEAS responds to the Union's quest for coherence. That the EEAS, as a body that is directly under the HRVP, was going to assist the HRVP in conducting the CFSP was clear from the treaties.[299] However, the role of the EEAS in non-CFSP policy areas was debated, both before and after the Council Decision establishing the EEAS (2010) was adopted. What follows provides an overview of the legal discussion that surrounded the creation of the EEAS. In the context of the thesis, this discussion is particularly interesting in what concerns the role of the EEAS within the development cooperation policy and the security-development nexus.

The development cooperation policy and the EEAS

The entry into force of the Lisbon Treaty provided the legal basis for the creation of the EEAS. The treaties envisaged the establishment of a European External Action Service to assist the HRVP in fulfilling her mandate.[300] During the first months of 2010, negotiations took place between the EU institutions involved in the constitution of the new body. As a result, on 26 July 2010, the Council Decision establishing the organisation and functioning of the EEAS was finally adopted.[301] On 1 January 2011, the first transfer of staff was carried out and the new body started operating.[302] The scope of the EEAS gave rise to important debates before the adoption of the Council Decision

[296] Article 18(3) TEU
[297] Article 18(2) TEU and Article 2(1) of the Council Decision establishing the EEAS (2010/427/EU)
[298] Article 9 of the Council Decision establishing the EEAS (2010/427/EU)
[299] Article 27(3) TEU
[300] Article 27(3) TEU
[301] Council Decision establishing the EEAS (2010/427/EU)
[302] A new step in the setting-up of the EEAS: Transfer of Staff on 1 January 2011 (IP/10/1769)

establishing it and also afterwards. According to Sophie Vanhoonacker and Natasja Reslow,[303] before the adoption of the Council Decision there was an important debate between those who defended a 'maximalist' approach and those who wanted a 'minimalist' solution for the EEAS. Maximalists thought that the EEAS should have responsibilities over the CFSP, the common commercial policy, the development cooperation policy and other policies like the neighbourhood and the enlargement policies. Minimalists believed that the scope of the EEAS should be restricted to the CFSP. What was generally agreed from both perspectives was that the EEAS should include DG Relex (from the Commission) and the Policy Unit, together with DG External and Political-Military Affairs (from the General Secretariat of the Council).[304] As regards the positions held by Member States, Sophie Vanhoonacker and Natasja Reslow explain the content of a Joint Progress Report of the HRVP and the Commission to the European Council of 2005.[305] According to this Report, while a few Member States considered that the EEAS should be restricted to the CFSP, an equally small number argued that the body should also have a say on policy areas such as the European neighbourhood policy, the development cooperation policy and enlargement. The majority of Member States were in favour of an in-between solution, and there was consensus over the non-inclusion of the common commercial policy. Sophie Vanhoonacker and Natasja Reslow also mention the decision regarding the inclusion of military bodies and the EU Situation Centre as a source of confrontation in the preparatory works on the establishment of the EEAS. For instance, the Presidency Report to the European Council on the EEAS (2009) stated that, in order to enable the HRVP to conduct the CSDP, military issues and the EU Situation Centre should be part of the EEAS. This position was also defended by Simon Duke who claimed that excluding military staff from the EEAS 'would have the effect of bifurcating the civilian and military aspects of crisis management'.[306]

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[303] S. VANHOONACKER and N. RESLOW, 'The European External Action Service: Living forwards by understanding backwards', *European Foreign Affairs Review,* 15, 2010

[304] DG Relex was the DG for external policy of the Commission. It ceased to exist with the launch of the EEAS. The Policy Unit was part of the General Secretariat of the Council, and was under the responsibility of the HR. DG External and Political-Military Affairs of the General Secretariat of the Council was the DG in charge of CFSP matters. The entire staff of DG External and Political-Military Affairs was transferred to the EEAS on 1 January 2011

[305] Joint Progress Report to the European Council by the HR and the Commission (9956/05)

[306] Swedish Presidency Report to the European Council: The EEAS (14930/09) and S. DUKE, 'The Lisbon Treaty and External Relations', 2008/1, *EIPASCOPE*

Once the Council Decision on the EEAS was adopted, controversy mainly focused on whether including the development cooperation policy under the scope of the EEAS was the right decision. On the one hand, it was argued that if development cooperation were not included under the scope of the EEAS, the impetus for coherence of the Lisbon Treaty reforms would fall short. For instance, Steven Blockmans and Simon Duke claimed:[307]

> 'Attempts to hermetically seal development cooperation under a Commission blanket would fly in the face of the spirit of the Lisbon Treaty, which remains the creation of a more coherent, effective and visible Union on the international scene'.

On the other hand, the development community argued that the development cooperation policy should not be subject to CFSP objectives. The fear was that development cooperation policy funds would be *instrumentalised* for security purposes. Moreover, it was argued that the short-term objectives of the CFSP and the long-term objectives of the development cooperation policy are irreconcilable.

Besides the political debate, the inclusion of the development cooperation policy under the scope of the EEAS led to a legal discussion as to whether the treaties provided the necessary legal basis for the EEAS to play a role over the development cooperation policy. As explained by Steven Blockmans and Simon Duke, a coalition of almost the entire community of development NGOs asked the law firm White&Case to elaborate a legal analysis of the Council Decision on the EEAS.[308] According to this analysis, the Lisbon Treaty extends no powers to the EEAS or to the HRVP to implement stages of the development cooperation policy, so the role of the EEAS should be confined to the EEAS. The analysis of White&Case also claimed that Article 17(1) TEU establishes that it is an exclusive power of the Commission 'to execute the budget and manage the programmes, to exercise coordinating, executive and management functions and to initiate the Union's annual and multiannual programming with a view to achieving inter-institutional agreements'. In a very different manner, Steven Blockmans and Simon Duke argued that the Council Decision on the EEAS attributes the EEAS particular (not exclusive) responsibilities in the preparation of Commission decisions in the programming cycle of external assistance instruments. Therefore, it does not encroach

[307] S. BLOCKMANS and S. DUKE, 'The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service', *CLEER Legal Brief*, 2010, page 14

[308] *Ibid*, page 2

upon the management functions of the Commission. The authors also stressed that the campaign against poverty, which constitutes the main objective of the development cooperation policy, is also a general external objective of the Union, so it applies to all areas of EU external action.[309] In their view, because of Article 21 TEU, it is not the intention of the treaties to limit action in the development cooperation policy solely to the Commission.

Theoretical claim no 4b: the Commission promotes complementarity between the policies of the Union and the Member States on development cooperation

Article 210 TFEU reads as follows:

> '1. In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.
>
> 2. The Commission may take any useful initiative to promote the coordination referred to in paragraph 1.'

This provision implies that vertical inter-policy coherence (i.e. complementarity) in the field of development cooperation requires coordination between the Union and its Member States. It also establishes that the Commission will take the lead in organising this coordination. In the case of horizontal inter-policy coordination, the treaties entrust important responsibilities to actors that can be considered 'intermediaries'. The role of the Commission under Article 210(2) TFEU cannot be read in the same direction. The Commission is the main actor responsible for the development and implementation of the development cooperation policy. This is why the Commission is no 'intermediary'. It will seek coordination between the policies it is responsible for and those of the Member States. Article 210(1) and (2) TFEU justify theoretical claim no 4b, under vertical inter-policy coordination.

Given that the development cooperation policy is a shared and non-preemptive competence, coordination, as an expression of the principle of sincere cooperation

[309] Articles 208(1) TFEU and 21(2)(b) TEU

between the Union and the Member States[310] is especially relevant in this context because the policies of the Union and those of the Member States in this field are implemented in a *truly* parallel manner.[311] Furthermore, the centre of the decision-making process in the development cooperation policy is wherever the assistance is provided. This is why the role of Union delegations and Member States' diplomatic and consular missions is central to ensuring vertical inter-policy coordination in EU development cooperation.[312] That coordination takes place mainly on the ground facilitates this process enormously, as the institutional set-up on the ground is much simpler than the complex institutional structures in Brussels.

Joint programming in development cooperation, which is analysed in section 5 of this chapter, is a particularly good example of vertical inter-policy coordination in EU development cooperation led by the Commission. It fits perfectly into the spirit of Article 210 TFEU. Joint programming consists of three steps. In step one, the EU and the Member States agree on a joint strategy regarding the development challenges of a specific partner country. In step two, they determine 'who will do what' as regards their joint strategy. In step three, they define indicative allocations per sector and per donor. We shall note how step two stresses the character of the development cooperation policy as a non-preemptive shared competence. Because of the truly parallel nature of EU and Member States' competences in development cooperation, legal delimitation rules do not respond to the question 'who does what'. This is why delimitation, which is essential for avoiding substantive contradictions and overlaps, is a matter of inter-policy coordination. When joint programming exercises lead to stage three, they are best placed under inter-policy coordination as one of the four mechanisms of the treaties for securing coherence in the external action. However, it is often the case that joint programming does not go beyond the definition of a joint cooperation strategy. This is why I have also considered joint programming under theoretical claim no 2, regarding the definition of common approaches.

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[310] Article 4(3) TEU. As regards the general application of the principle of sincere cooperation, see Case C-266/03, *Commission* v *Luxembourg* [2005] ECR I-04805, paras 57 and 58

[311] According to Marise Cremona: 'if the EC acts in a field of non-pre-emptive shared competence, such as development cooperation, the need for coherence clearly emerges and is recognised in the Treaty'. M. CREMONA, *op. cit.* 4, page 17. In his Conclusions in Case C-246/07, *Commission* v. *Sweden*, PFOS Case [2010] ECR I-03317, AG Maduro stated: 'the duty of loyal cooperation between the Community and the Member States has particular significance in the exercise of competences under the Treaty: this is all the more so where those competences are shared'

[312] Notice that Article 221(2) TFEU establishes that EU delegations 'shall act in close cooperation with Member States' diplomatic and consular missions.' See also: Articles 3(1) and 5(9) of the Council Decision establishing the EEAS (2010/427/EU)

Lastly, inter-policy coordination between the Union and its Member States in development cooperation does not only take place within EU delegations and Member States' diplomatic and consular missions. Because of the commitments of the Union (and its Member States) within other international organisations, such as the OECD and the UN, coordination between the EU and the Member States will also be facilitated by these other international organisations. For example, the fact that the EU and most of its Member States are members of the OECD DAC has important consequences for how inter-policy coordination is organised on the ground.

We shall note that close attention to Article 210(1) TFEU shows that the quest for vertical inter-policy coherence in development cooperation is a quest for *complementarity*, as an essential requisite for maximising the *efficiency* of EU and Member State development programmes. The link between the coherence and effectiveness of the Union's action in EU primary law is often connected to the abstract idea that, by acting in a coherent manner, the Union strengthens its actorness on the international stage (i.e. its autonomy, its identity), which renders it more effective as an actor. The complementarity-efficiency link in Article 210(1) TFEU is a much less abstract idea. Complementarity ensures that EU and Member State development funds are invested in the most *efficient* manner. This is essential to ensuring the effectiveness of the Union as an actor whose development assistance has a real impact on the ground. However, the emphasis on the term *efficiency* in Article 210(1) TFEU explains why third actors, like OECD DAC members and the UN, are also crucial for coordination. In fact, the OECD welcomes joint programming between the EU and its Member States. While the strengthened actorness of the Union is not a major concern for the OECD, increasing aid effectiveness is.

5 Joint programming in EU development cooperation

Joint programming is a recent development in EU development cooperation that illustrates many issues discussed in chapters 1 and 2 of the thesis. Above all, it is a concrete example of vertical inter-policy coordination. It also shows that the centre of the decision-making process in the field of development cooperation lies wherever aid programmes are going to be implemented. Moreover, the case of joint programming provides an insight into Union (and Member States) commitments within the OECD-led aid effectiveness agenda. It also shows the role of the EEAS in promoting vertical inter-

policy coordination in the field of development policy. Furthermore, this section offers a concrete case of the sincere cooperation-coherence-effectiveness link, which is presented at an abstract level in chapter 1 of the thesis. It also reflects on the perceived tension between strengthening the coherence of the Union as an actor and protecting the autonomy of Member States as independent international actors.

5.1 A commitment to the international aid effectiveness agenda

Joint programming in development cooperation refers to the process through which the Union and its Member States jointly prepare their aid programmes for a specific developing country. Joint programming processes should be operational in 40 or more partner countries by 2017.[313] According to the Global Strategy for the European Union's Foreign and Security Policy (2016):[314]

> 'A strong EEAS working together with other EU institutions lies at the heart of a coherent EU role in the world. Efforts at coherence also include policy innovations such as the "comprehensive approach to conflicts and crises" and joint programming in development, which must be further enhanced.'

The Council Conclusions for Busan (2011) establish that joint programming comprises three different steps. The first step is the joint analysis and joint response to the national development strategy of the partner country identifying priority sectors of intervention. The second step is the in-country division of labour (i.e. identification of who is working in which sectors). The third step is the indicative financial allocation per sector and per donor.[315]

The first element of joint programming concerns the identification of the specific needs of the partner country and the definition of the overall lines of the EU's response. The Union promotes the use of the development strategy or plan of the partner country as the basis of joint programming, as an expression of the principles of ownership and alignment. Whenever possible, the choice of the EU's strategic sectors of intervention should be based on national policy documents.[316] Once the main lines of the EU (and

[313] Mexico High Level Meeting Communiqué, 16 April 2014, page 12, outcome document of the First High Level Meeting of the Global Partnership for Effective Development Co-operation, available at: http://effectivecooperation.org/wpcontent/uploads/2014/07/ENG_FinalConsensusMexicoHLMCommunique.pdf (last visited: 29 August 2016)

[314] Global Strategy for the European Union's Foreign and Security Policy (2016), page 49 (note 17)

[315] Council Conclusions (16773/11), page 27

[316] Communication: An Agenda for Change (COM(2011) 637)

Member State) response have been drawn, the question as to 'who does what' becomes central. The second step of joint programming consists in a division of labour between the different actors involved (EU, Member States and 'like-minded' donors).[317] Each actor should focus on a limited number of sectors, according to its comparative advantages.[318] Prior to carrying out the division of tasks, 'mapping' exercises are essential to have a clear picture about who is doing what and how. The first and second stages should finally lead to the definition of indicative financial allocations, in stage three of the process. In the third stage, donors commit to allocating certain sums of money to the sectors where they will operate and within the framework of the agreed strategy. Furthermore, joint programming cannot succeed without a certain degree of synchronisation of the programming and planning cycles of all actors involved (i.e. donors and partner country). This is so because if the EU and its Member States decide to jointly address the needs of a State by sharing a strategy and dividing the work among themselves they will necessarily have to operate on the basis of similar timeframes.[319]

In the best-case scenario, the three core elements of joint programming, which I refer to as the three steps of the process, should be included in a single joint programming document. In the context of the programming process of the 11th EDF and the Development Cooperation Instrument (DCI) for 2014-2020, the joint programming documents should have been agreed upon before EDF and DCI programming documents were concluded. This would have allowed these programming documents to incorporate the results of the joint programming exercise. In practice, however, this proved difficult.[320] In the case of Ethiopia, for example, a Joint Cooperation Strategy was signed in 2013, but the second and third steps of the initiative were not concluded before the 11th EDF programming documents were adopted.[321] Consequently, the national indicative programme (NIP) for Ethiopia's 11th EDF was not able to reflect on the

[317] Notice that joint programming is open to 'like-minded' non-EU donors. Council Conclusions for Busan (16773/11), page 28

[318] See, for example, the EEAS-Commission Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014-2020, 15 May 2012, pages 9 and 13, available at:
https://ec.europa.eu/europeaid/sites/devco/files/14_05_11_progr_instructions_cover_page_clean.pdf (last visited: 30 August 2016)

[319] Instructions for 11th EDF and DCI programming, page 12 (note 318)

[320] Notice that the EEAS and the Commission even considered the possibility of joint programming documents replacing EDF and DCI multi-annual indicative programmes (MIPs) if they contained 'all the elements required for a MIP', Instructions for 11th EDF and DCI programming, page 15 (note 318)

[321] European Union+ Joint Cooperation Strategy for Ethiopia, 27 January 2013, available at: http://capacity4dev.ec.europa.eu/joint-programming/document/eu-joint-cooperation-strategy-ethiopia-27012013-0 (last visited: 29 August 2016)

specific financial commitments resulting from joint programming. Besides the exchange of information accompanying joint programming, other benefits of the initiative include the reduction of aid fragmentation, overlapping activities and funding gaps, as well as the lowering of transaction costs for donors and partner countries alike.[322] This is why, for joint programming to have a real impact, its three core elements must be completed. Nevertheless, in line with its gradual and multi-step character, joint programming can be said to occur in a partner country as soon as the EU and its Member States have decided to work towards a joint programming document.[323]

The ambiguous boundaries between joint programming and joint implementation in EU policy documents are probably the main cause of confusion regarding the initiative. Commitments to joint programming are often accompanied by references to joint implementation. For instance, in the Mexico Communiqué, under the heading 'EU Joint Programming: Helping to Manage Diversity', the EU committed to foster joint implementation.[324] However, the Council Conclusions for Busan should mitigate any conceptual fuzziness since they clearly indicate that 'joint programming does therefore not encompass bilateral implementation plans.' [325] Indeed, the limits of joint programming are in indicative financial allocations per sector, where the projects chosen by the EU and its Member States in the sectors where they are active are not specified. Despite the clear dividing lines between joint programming and joint implementation, no one should be surprised if both are referred to together, since the former clearly paves the way for the latter.[326] By way of example, if joint programming leads to an effective division of labour between EU donors, it will make sense for the actors that remained active in a given sector to work together, for instance through co-financing and delegated cooperation arrangements. [327] Finally, despite not being an integral part of joint programming, a common results framework should accompany the initiative.[328] If, based on the results of joint programming, a donor phases out of a specific sector this donor

[322] On the problems that joint programming is called to mitigate, see the Communication on an EU Code of Conduct on Division of Labour in Development Policy (COM(2007) 72), page 3

[323] Instructions for 11th EDF and DCI programming, page 12 (note 318)

[324] Mexico High Level Meeting Communiqué, 16 April 2014, page 12 (note 313)

[325] Council Conclusions for Busan (16773/11), page 27

[326] Notice that Article 210(1) TFEU, which provides the legal basis for joint programming in development cooperation policy, refers to the possibility of Member States contributing to the implementation of Union programmes

[327] See, for instance, the European Consensus on Development (2006/C 46/01), para 31. 'Delegated cooperation is a practical arrangement where one donor (a lead donor) acts with authority on behalf of one or more other donors (the delegating donors or silent partners). Communication on an EU Code of Conduct (COM(2007) 72), page 7

[328] Communication: An Agenda for Change (COM(2011) 637), page 11

will have to be satisfied with the way the actors that remained active in the sector measure their success.

The promotion of certain elements of joint programming, such as joint studies and analyses and the division of work in the context of country strategies, can be found in development cooperation policy documents from the early 2000s. These activities were presented in the framework of the EU's efforts to maximise the effectiveness of its external action, following the increase in the number of external partners, instruments and financial resources in the development cooperation policy.[329] The first explicit reference to 'joint multi-annual programming' in development cooperation policy appeared in the Report of the Ad Hoc Working Party on Harmonisation (2004).[330] In it, joint programming was listed among the recommendations put forward by the working party in the context of the Union's preparation for the Second High Level Forum on Harmonisation and Alignment for Aid Effectiveness (Paris, 2005). In the subsequent European Consensus on Development (2006), the EU confirmed its commitment to working towards joint programming as a means of pushing the international aid effectiveness agenda forward.[331] That joint programming efforts were not intended to stop at the level of joint studies and analyses of the situation in the partner country was clearly addressed in the Commission Communication on country strategy papers and joint programming (2007).[332] The Commission referred to a possible second stage of joint programming, whereby the actors involved could share a joint response strategy including common cooperation objectives, division of labour and financial allocations. However, in practice joint-programming exercises did not move beyond the rather vague phase of joint analyses. Following the scant success of previous initiatives, and convinced that 'who does what' was the key issue to address in order to enhance complementarity among EU donors, the Union designed an EU Code of Conduct on Division of Labour

[329] Statement by the Council and the Commission of 20 November 2000 on the European Community's development policy and Guidelines for strengthening operational co-ordination between the Community, represented by the Commission, and the Member States in the field of External assistance (5431/01)

[330] Report of the Ad Hoc Working Party on Harmonisation: Advancing Coordination, Harmonisation and Alignment: the contribution of the EU (14670/04)

[331] European Consensus on Development (2006/C 46/01)

[332] Communication: Increasing the impact of EU aid: a common framework for drafting Country Strategy Papers and Joint Multiannual Programming (COM (2006) 88)

in Development Policy. This code presented joint programming as a 'pragmatic tool' to advance the division of labour.[333]

The real commitment to joint programming as the main EU contribution to the international aid effectiveness agenda materialised in the Council Conclusions for Busan (2011):[334]

> 'In order to show leadership in Busan and beyond (…), the EU will improve and strengthen joint programming at the country level.'

While acknowledging that joint programming is not an exclusive EU initiative, the Council mentioned that the Union would be its driving force. As to why there was renewed momentum to commit strongly to joint programming in international fora at this point in time, three reasons can easily be identified. These reasons appear in the introductory pages of the Agenda for Change, adopted just one month before the Council Conclusions for Busan. First, the EU was convinced that the work towards the MDG needed to be accelerated as the 2015 target was approaching. Second, HRVP and the EEAS provided 'new opportunities for more effective development cooperation'. Third, as a result of the economic and financial crisis, aid effectiveness was considered more important than ever before. The EU commitment to joint programming put forward in Busan was confirmed in the Mexico Communiqué, resulting from the First High Level Meeting of the Global Partnership for Effective Development Cooperation (2014). Under the section 'voluntary initiatives', the EU committed to promoting the extension of joint programming and indicated that the initiative 'should be operational in 40 or more partner countries by 2017.'[335]

The close ties between policy developments on joint programming within the EU development cooperation policy and the Union's commitment to the international aid effectiveness agenda show that joint programming cannot be understood without the latter. In fact, joint programming gives effect to a set of principles designed in international aid effectiveness fora (e.g. alignment, synchronisation, concentration, ownership), it is open to like-minded donors, and it does not require that all of its

[333] Communication: An EU Code of Conduct (COM(2007) 72) and Council Conclusions: An Operational Framework on Aid Effectiveness (15912/09)
[334] Council Conclusions (16773/11)
[335] Mexico Communiqué (see note 313)

Member States take part.[336] Furthermore, it is listed as one of the commitments of all signatories to the Busan Partnership Agreement and the Mexico Communiqué.[337]

5.2 A striking example of vertical inter-policy coordination

Joint programming fits perfectly with the spirit of Article 210 TFEU. Since it is an in-country exercise, Union delegations (qua Commission) are taking the lead. One could argue that the shift from Commission to Union delegations is irrelevant as far as joint programming is concerned, because the Commission is still the actor that is leading the exercise.[338] However, after the entry into force of the Lisbon Treaty, Union delegations are an integral part of the EEAS. As a consequence, delegations chair meetings between heads of mission and heads of cooperation, where joint programming is mainly discussed.[339] Before the entry into force of the Lisbon Treaty, the chair of these meetings rotated between the Commission delegation and the embassies of Member States. The fact that Union delegations now chair these meetings allows a persistent attempt to convince Member States about the added value of joint programming. They can include joint programming in the agenda of each and every meeting with the diplomatic missions of Member States touching on development aid matters. This why, if joint programming becomes the rule in the near future, the initiative might turn into an example of the impact of the EEAS in promoting vertical inter-policy coherence in the field of development cooperation. We must not forget that joint programming in development cooperation policy has been on the agenda for around a decade, with little success in terms of specific commitments until very recently.

The central character of Union delegations within joint programming does not mean the EEAS and DEVCO (Brussels) are not involved in joint programming. In fact, they provide support to delegations throughout the process. For example, they elaborate the guidelines on the basis of which joint programming is conducted, and they organise joint

[336] See, for instance, the Council Conclusions for Busan (16773/11), page 28

[337] Outcome documents of the Fourth High Level Forum on Aid Effectiveness (Busan, 2011) and the First High Level Meeting of the Global Partnership for Effective Development Co-operation (Mexico City, 2014), respectively

[338] Ex-Article 20 TEU and Article 221 TFEU

[339] Meetings of heads of mission bring together the ambassadors of Member States and the head of the Union delegation, whereas meetings of heads of cooperation reunite the heads of cooperation of the embassies of Member States and the head of cooperation of the Union delegation, who is a DEVCO official

programming workshops where best practices are shared.[340] The headquarters of the EEAS and DEVCO are essential in the endorsement and adoption phases of agreed joint programming documents.[341] However, the responsibility to reach all the necessary agreements that can ultimately lead to a joint programming document lies with Union delegations.

Furthermore, joint programming matches perfectly the nature of development cooperation policy as a non-preemptive shared competence.[342] The initiative is an attempt to coordinate EU and Member State development policies, and it can never result in Member States being prevented from exercising their competence in the field of development cooperation. Despite the leadership of Union delegations and the use of the EU framework, in heads of cooperation and heads of mission meetings on joint programming Member States exercise their national development cooperation policies. They coordinate certain aspects of these policies collectively and with the Union's development policy.[343] Nevertheless, Member States are very reticent to engage in joint programming exercises. The leading role of the Union and confusion regarding the limits between joint programming and joint implementation has led to questioning whether the initiative respects the character of development cooperation as a non-preemptive shared competence. In this regard, we should bear in mind that Member States are totally free to decide on the arrangements they want to enter to.[344] Furthermore, there is also a case to argue that, given the broad interpretation of the Court regarding Member States' duties flowing from the principle of sincere cooperation, a Member State could be found in breach of the principle if it disregards its commitments in joint programming documents. For example, we can imagine a case where the EU modifies its EDF programming

[340] See, for example, the Instructions for 11th EDF and DCI programming, page 13 (note 318). For example, a regional joint programming workshop was held in Addis Ababa on 13-14 March 2014 bringing together Union delegations from Central, East and Southern Africa

[341] On the procedure spanning from the in-country agreement on a joint programming document until its final adoption and formalisation, see the Instructions for 11th EDF and DCI programming, page 13 (note 318)

[342] Article 4(4) TFEU. More proof that joint programming makes sense for non-preemptive shared competences is that the other policy field in which it is being developed is the European Research Area, which falls into the exact same category of EU competences (Article 4(3) TFEU)

[343] Notice that in Case C-316/91, *Parliament* v *Council,* [1994] ECR I-00625, the CJEU established that, due to the distribution of powers in development cooperation policy, Member States were free to provide the financial cooperation required by the Fourth ACP-EEC Convention by setting up the 7th EDF and directly assuming responsibility over it. The fact that both the Community and the Member States were part of the Convention, the decision-making process by which the EDF had been established, and the responsibilities of Community institutions over its administration were not considered determining factors for the expenditure to qualify as of the Community

[344] 'Joint programming respects Member States sovereign decisions e.g. on choice of partner countries and level of financial allocations in these countries', Council Conclusions for Busan (16773/11), page 27

documents following commitments made in joint programming documents (e.g. phases out in a specific sector), while a Member State does not act accordingly. There is a case to argue that the Court could determine that the Member State failed to comply with the principle of sincere cooperation by not respecting an agreement by which it 'intended to enter into a binding commitment' towards the other Member States and the EU.[345] Interestingly, in this context the principle of sincere cooperation appears as an expression 'of Community solidarity' not only between the Member States and the EU, but among Member States.[346]

There are reasons to argue that Member States' uneasiness regarding joint programming is best explained by non-legal arguments. Member States fear that joint programming undermines their individual visibility in the partner countries where it is implemented. The so-called 'visibility challenge' has two dimensions. First, Member States are concerned about the visibility of their actions, which may be diluted if these actions need to recognise that they are part of a joint EU strategy. The visibility challenge was addressed at the 'EU Joint Programming Guidance Workshop', held in Stockholm in 2014. In this Workshop, it was explained that Member States could claim credit for the whole EU strategy, and keep 'national stickers' on their projects and programmes, while mentioning that they are part of a common strategy.[347] Besides, there is another dimension to the visibility challenge, which is less explicit but perhaps even more important. As a result of the division of tasks conducted in stage two of joint programming, each donor is only active in a limited number of sectors. This means that that not all donors will sit at the table with the relevant counterparts from the partner country. For example, if a donor has phased out of the education sector, this donor will not participate in meetings with the minister of education. In fact, both dimensions of the 'visibility challenge' show that Member States see a tension between strengthening the actorness of the Union and protecting their autonomy as independent international actors. By engaging in joint programming, Member States promote complementarity

[345] Note the clear parallelism between the possible scenario presented and the FAO Case, where the Council was found to have breached the duty of cooperation, by disregarding an arrangement with the Commission on a coordination procedure regarding Community and Member States' action within the FAO Conference. According to the Court, the arrangement was 'a fulfilment of that duty of cooperation between the Community and its Member States within FAO', by which 'the two institutions intended to enter into a binding commitment towards each other'. Case C-25/94, *Commission* v *Council*, FAO Case [1996] ECR I-01469, para 49

[346] C. HILLION, *op. cit.* 96, page 8

[347] Joint Programming Workshop: State of Play, Stockholm, 11-12 September 2014, EEAS, Development Cooperation Coordination Division and DEVCO, Aid and Development Effectiveness and Financing

between their development policies, and those of the Union. They make it possible for the Union to be recognised at the international level as a *single* actor, despite its legally fragmented nature. However, there is a price to be paid. Strengthening the international actorness of the Union may come at the cost of not sitting at all tables and, and having to include the EU flag next to the national flag.[348]

5.3 A test case for the sincere cooperation-coherence-effectiveness link

The link between the principle of sincere cooperation and the coherence and effectiveness of the Union's action is recognised in the treaties and by case law of the CJEU.[349] The case of joint programming stands out as a particular example of this three-dimensional link. By exercising sincere cooperation and ensuring complementarity between their respective development policies (which is what joint programming is about) the EU and the Member States reinforce the role of the Union as an actor. When the EU and the Member States act in a coordinated manner, the political weight of the Union (now considered together with its Member States) in partner countries is strengthened. According to the Council:[350]

> 'Joint EU approaches (…) will collectively leverage more progress that can be achieved individually by Member States and the Commission'.

When the actorness of the Union is strengthened, it gains the leverage to be effective as regards its objectives, be these development objectives or not.[351] By ensuring complementarity, as a particular expression of coherence, the Union and the Member States appear to the partner country as a block. When this is the case, the persuasiveness of the Union to convince the third State to act in the direction of the EU objectives increases significantly. This can be essential in the promotion of democracy and the rule

[348] Notice that the Member States fears as regards joint programming support the idea that the development cooperation policy is not only a non-preemptive competence because of the idea of the more aid the better. Development cooperation has a very sensitive political nature in the foreign policies of Member States. Interestingly, Stephan Klingebiel *et al* have interestingly referred to the existence of a limit or 'right level' of aid coordination that Member States will be ready to accept. S. KLIENGEBIEL, P. MORAZAN, M. NEGRE, 'Scenarios for Increased EU Donor Coordination: What Is the Right Level of Aid Coordination?', 7 DIE Briefing Paper 2014

[349] See chapter 1, section 3, pages 19-23

[350] Council Conclusions: An Operational Framework on Aid Effectiveness (15912/09)

[351] 'A Europe that delivers more, better and faster in the fight against global poverty; a more vocal Europe, with a political impact that matches the level of its financial generosity', Communication: An EU Code of Conduct (COM(2007) 72), page 3

of law, as well as respect for human rights, which are essential objectives of the Union within the governance agenda.

From a slightly different perspective, by exercising sincere cooperation, Member States divide their tasks, an exercise which is fundamental in avoiding contradictions, overlaps and funding gaps. Complementarity between EU and Member State development policies maximises the efficiency of these policies. Complementarity (i.e. coherence) ensures that EU and the Member States funds have the greatest impact possible as regards the objectives pursued (i.e. effectiveness). From this perspective, the sincere cooperation-coherence-effectiveness link is better understood when read in the reverse direction (i.e. effectiveness-coherence-sincere cooperation). The attempt to make the most efficient use of EU funds leads the Union to realise that it needs to coordinate (internally) it if it really wants to have an impact on the ground. We shall recall that the origins of joint programming can be found in the OECD-led aid effectiveness agenda.

Whether joint programming will become commonplace in the years to come largely depends on the extent to which Member States are willing to assume the costs of the initiative over the visibility of their own development policies. Even if they are reluctant to strengthen the international actorness of the Union, Member States should sign joint programming documents as a response to their commitments within the international aid effectiveness agenda.

6 Chapter conclusions

There are four conclusions to chapter 2 of this thesis. The first and most important conclusion is that the quest for coherence in the Union's external action is undermining the importance of legal delimitation in EU law. In fact, there is a clear tension between the definition of the scope of policy areas, which is part of legal delimitation, and the provision of common objectives, as another mechanism for coherence in EU external relations law. Legal delimitation is not only important for coherence. It is essential to protect the *procedural* scope of policy areas, and thus to comply with the principles of conferral and institutional balance. Likewise, legal delimitation is necessary to protect the treaty-defined *substantive* scope of policy areas. For example, legal delimitation should provide the framework to answer the questions: what are the objectives of the development cooperation policy, and what is the role of the European Parliament in promoting these objectives? From the perspective of coherence, underestimating the

importance of legal delimitation can be considered naïve. First, by not having clear rules to define the scope of policy areas, the legal framework cannot ensure consistency over the choice of the legal basis (i.e. CFSP or development cooperation?). Instead of appearing as an actor that is bound by legal rules, the Union portrays the image of an *arbitrary* actor whose way of acting is unpredictable. Second, providing all actors with the same objectives does not necessarily lead to complementarity across policies and activities. Instead, it can alter the *substantive* scope of EU policy areas and lead to the absolute dominance of one objective (i.e. security?), to the detriment of others, across policy areas. Third, since policy areas and instruments have their own procedures, providing all actors with the same objectives increases the risk of overlaps and substantive contradictions. The case of joint programming in development cooperation shows that the question 'who does what?' is essential in ensuring complementarity (and efficiency) of EU and Member State development programmes. Hence it is reasonable to claim that the same question should be central in the horizontal relations between EU policy areas. In view of these arguments, the Union needs to strike a balance between promoting coherence through the provision of common objectives, and defining legal delimitation rules. Under the current legal framework, which is unavoidably problematic, this balance can be ensured if the single set of objectives is understood as an invitation to take account of the *incidental* objectives of each of the Union's actions. From this perspective, Article 21 TEU does not enable actors operating within a specific policy field to make *substantial* contributions to objectives that are central to the treaty definition of a different policy area. This interpretation protects the procedural and substantive scope of policy areas, and contributes to coherence in EU external relations.

The second conclusion of this chapter is that the impact of the quest for coherence on legal delimitation in EU law is exemplified by the CFSP-development cooperation nexus. Besides the tension between common objectives and legal delimitation, the security-development nexus is a good example of a tension between common approaches and legal delimitation. The idea of the nexus was introduced as a policy approach to ensure complementarity between the CFSP and development cooperation policy. However, the nexus has created serious problems for the functioning of legal delimitation rules, rendering consistency over the choice of the legal basis almost impossible. We must not forget that the promotion of security objectives under the development cooperation policy predates the entry into force of the Lisbon Treaty. Because of the far-reaching

effects of the security-development nexus, including its use in the case law of the CJEU, it is not easy to defend the notion that the main objective of the development cooperation policy is the campaign against poverty. This provides *legal* arguments to those who argue against the security-development nexus as a *securitisation* of development. Interestingly, the HRVP (and the EEAS as her assisting body) are behind the proposal to reform the IcSP to include direct contributions to military activities. This also provides *legal* support those who argued that the roles of the HRVP and the EEAS over development cooperation would bring about a *securitisation* of development. Furthermore, the impact of the security-development nexus on EU external relations law confirms the importance of strategic policy documents in this area of EU law.

The third conclusion of this chapter is that vertical inter-policy coherence in EU development policy confirms the importance of pragmatic coherence (as opposed to soft power coherence). On the one hand, by coordinating their development programmes, EU and Member States increase the complementary of their actions. This contributes to the efficiency of their funds, and is an expression of the aid effectiveness agenda that the EU and most of its Member States are committed to. On the other hand, the case of joint programming shows the significance, in terms of EU's real power, of having the Union and its Member States appearing as a block before a third State.

Lastly, the fourth conclusion of chapter 2 of this thesis is that the quest for coherence often conflicts with other interests. The case of the CFSP-development nexus provides two concrete examples. On the one hand, while the lack of clear rules for defining the scope of policy areas cannot ensure consistency over the choice of the legal basis (i.e. CFSP or development cooperation?), there are arguments to defend this situation. The fact that actors have more room for manoeuvre to choose what tool (i.e. policy area or instrument) they want to use in each case can contribute towards strengthening the presence and visibility of the Union at the international level. It maximises the cases in which the Union responds to international matters. While this flexibility cannot ensure coherence, it contributes to a particular understanding of the Union's effectiveness as an international actor. On the other hand, the case of joint programming demonstrates that Member States perceive a tension between the increased actorness of the Union and their autonomy as independent international actors.

Chapter 3

The Union's action in Somalia: selected legal acts

1 Introduction to chapter 3

The aim of this chapter is twofold. It provides practical examples of both the security-development nexus in EU external relations and the idea of the Union's wide toolbox to tackle international concerns. It also presents the findings of the case study, which test the mechanisms for coherence set out in the treaties in the context of the CFSP-development cooperation nexus in Somalia.

The results of the case study are presented in the form of empirical claims to highlight that they mirror the theoretical claims of chapter 2. Although the theoretical claims are based on the CFSP-development cooperation nexus, they are formulated at a general level to stress that these claims can be analysed in other contexts. In contrast, the empirical claims are confined to the CFSP-development cooperation nexus because this is the scope of the case study. In fact, although the CFSP-development nexus provides the possibility of drawing conclusions beyond the scope of the nexus, the findings of the case study concern the nexus alone. The analysis conducted in chapter 2 is also important to understand the specific scope of the CFSP-development cooperation nexus as the thematic case of the thesis. For example, the EU humanitarian aid is outside the scope of the case study.

To conduct the case study, I selected 14 legal acts concerning Union action in Somalia between 2008 and 2014. These acts can be easily identified in Annex 2 of this thesis because they appear in italics. Seven of these acts have a CFSP legal basis, and the remaining seven have been adopted under a development cooperation legal basis. The legal acts of the case study constitute a representative sample of the different instruments (and programmes) forming the Union's toolbox. The legal measures analysed cover two years before the entry into force of the Lisbon Treaty (2008-2009), five years of the current legal framework (2010-2014), and four years since the EEAS was launched (2011-2014). This is important because the analysis compares the current legal framework to the one in force before the Lisbon Treaty was adopted. The relevant context for understanding the legal acts of the case study is provided in sections 3 and 4 of this chapter.

While the findings of the case study are based on 14 legal acts, they take into consideration the analysis of the long list of documents presented in Annex 2. Moreover, the case study does not examine policy coherence. The thesis argues that the mechanisms for coherence set out in the treaties are aimed at ensuring substantive coherence between policies and activities. However, it also claims that ensuring coherence in terms of results is not, at least for the time being, a qualitative obligation for political actors. This is why this thesis is not interested in examining substantive coherence in terms of results. In contrast, it focuses on whether the mechanisms for coherence set out in the treaties are fit for purpose. The case study focuses on legal measures. There are two reasons explaining this choice. First, the thesis analyses the legal dimension of the Union's quest for coherence, and it is the case that legal rules and principles are most constraining when EU actions require a legal basis.[352] Second, the thesis is interested in the role of law as regards specific policies and activities interacting in EU external action. Since the Union is an organisation of conferred powers, most decisions defining policies and activities are contained in legal measures.[353]

2 Somalia since the 1960s: main events, fundamental challenges and general international response

The Somali State became independent in July 1960. The new State merged territories that were, at the time, controlled by the UK (the north) and Italy (the south). However, the idea of a State was new in Somalia, as the identity of its citizens was based on clan membership. The crucial importance of clans in Somalia can be considered to be one of the fundamental reasons behind State collapse.[354]

[352] However, the mechanisms for coherence can be said to apply to all policies and activities of the Union, regardless of the nature of a measure. The Council Note on EU statements in multilateral organisations (2011) is an example showing that even legal delimitation is also relevant when the Union does not act through legal measures. This Note determines that statements by EU actors responsible for the external representation of the EU can only be prefaced by 'on behalf of the EU' if they 'refer exclusively to actions undertaken by or responsibilities of the EU in the subject matter concerned including in the CFSP'. In every other instance, the expression 'on behalf of the EU and its Member States' has to be employed. Note from the General Secretariat of the Council to Delegations (15901/11)

[353] See section 3 of chapter 1, pages 13-18

[354] According to Neyire Akpinarli: 'the concept of a state was foreign to the inhabitants. Originally Somali society was posed of clans.' N. AKPINARLI, *The fragility of the failed state paradigm: A different international law perception of the absence of effective government*, Martinus Nijhoff Publishers, 2009, page 34. For Walter S. Clarke and Robert Gosende: 'clanism lies at the root of the country's collapse.' W. CLARKE and R. GOSENDE, 'Somalia: Can A Collapsed State Reconstitute Itself?', R. I. ROTBERG (ed.), *State failure and State weakness in a time of terror*, World Peace Foundation, Booking Institution Press, 2003, page 132

The attempt to establish a democratic State in Somalia did not last long. In October 1969, the President of Somalia, Abdirashid Ali Shermarke, was assassinated. A military dictatorship was then established, under the rule of General Mohamed Siad Barre. The Somalia of Barre was highly centralised and had a single political party. The General considered the murder of Ali Shermarke a 'Marxist revolution' and announced that Somalia would become a socialist State. In the midst of the Cold War, Somalia positioned itself under the influence of the Soviet Union, who heavily supported Barre until the Ogaden War (1977-1978). For Siad Barre, clan-related groups were an obstacle to modernity and were banned. He recuperated an old idea of the Somali nation, according to which a part of North-western Kenya, the Ethiopian region of Ogaden and the current territory of Djibouti belong to Somalia. In 1977, the General tried to conquer what is now Djibouti, as well as the Ethiopian Ogaden. As for the former, with important support from France, Djibouti managed to stop Barre and proclaimed its independence from France in June 1977. The conflict regarding the Ogaden region led to the 'Ethio-Somali War' or the 'Ogaden War' between 1977 and 1978. This war is a clear example of how external geostrategic interests in the Cold War affected regional and national politics in Africa. On the one hand, the Soviet Union, who had supported Barre during his first years in power, saw new opportunities in an alliance with Marxist Ethiopia (the traditional US ally in the Horn of Africa). On the other hand, the US ended its cooperation with Ethiopia, allegedly because of reported human rights violations, and became closer to the Somalia of Siad Barre. In the Ogaden War, the Soviet Union and Cuba strongly supported the Ethiopian forces, which finally defeated the Somali troops.[355]

The defeat in the Ogaden War and the execution of six generals from a major Somali clan, accused by Barre of terrorism against the State, offered the right context for opposition groups to flourish and organise. A conflict started between Barre and different clans trying to control certain parts of the territory. By the end of 1989, having lost all its international and domestic allies (including the US), the national government only controlled the area around Mogadishu, and Barre was ironically referred to as 'the mayor

[355] Neyire Akpinarli argues that the support given by the Soviet Union and the US to the dictatorship of Siad Barre explains the ignorance of the international munity as regards the 'the corruption, repression, and human rights violations' under this regime. N. AKPINARLI, *ibid*, page 36. For Walter S. Clarke and Robert Gosende, once the Cold War was over the relevance of Somalia 'was to be measured only by the misery of its people'. W. CLARKE and R. GOSENDE, *ibid*, page 139

of Mogadishu'.[356] In January of 1991, Siad Barre fled the country, and the State finally collapsed. A civil war then started between different opposition groups competing for power. In May 1991, the former British protectorate in the north proclaimed its independence as Somaliland.[357]

Lidwien Kapteijns provides some relevant information regarding the economic situation in which the regime of Siad Barre left Somalia.[358] According to the author, the civil war disrupted all productive activities, such as the banana production. Water and electricity supply in Mogadishu were inexistent. Inflation was so high that, according to Kapteijns, government salaries could only cover the needs of a family of a few days of tea and sugar. Moreover, inland from Mogadishu, people seemed to live on only sorghum or maize porridge with a little bit of tea and milk. The fighting in Mogadishu in 1991-1992 between clan leaders aggravated the humanitarian crisis in Somalia, and complicated enormously the provision of international humanitarian assistance.[359]

In 1992 the conflict and the famine in Somalia became central in the resolutions of the UNSC. In January 1992, the Security Council established an arms embargo against Somalia.[360] In April, after the conflicting parties had signed a cease-fire in New York, the UNSC set UNOSOM, a peacekeeping operation to provide humanitarian assistance in Mogadishu and the surrounding area and to control the cease-fire.[361] A few months later, in August 1992, the US, together with a small number of allies, set 'Operation Provide Relief', which complemented UNOSOM and focused on airlifting humanitarian assistance to particular areas of South-central Somalia, avoiding Mogadishu.[362] Soon it became evident that, with these interventions, humanitarian aid could not reach those in need. In December 1992, the US launched 'Unified Task Force' (UNITAF) or 'Operation Restore Hope'.[363] This was a much more robust operation than 'Operation

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[356] W. CLARKE and R. GOSENDE, *op. cit*. 354, page 130

[357] Somaliland is not internationally recognised as an independent State, but functions *de facto* as such. The region of Puntland, in the north-east of Somalia, proclaimed its autonomy within Somalia in 1998

[358] L. KAPTEIJNS, *Clan Cleansing in Somalia: The Ruinous Legacy of 1991*, Pennsylvania Studies in Human Rights, 2012, pages 93-95

[359] Neyire Akpinarli explains that, according to UN estimates, only 30% of the aid reached those in need. N. AKPINARLI, *ibid*, page 36. Walter S. Clarke and Robert Gosende state that the fighting in Mogadishu (1991-1992) provoked 35.000 casualties among civilians. W. CLARKE and R. GOSENDE, *op. cit*. 354, page 140

[360] UNSC Resolution 733 (1992), para 5

[361] UNSC Resolution 751 (1992). Later, UNSC Resolution 767 (1992) expanded the mandate of UNOSOM to the whole country

[362] UNSC Resolution 775(1992)

[363] According to Neyire Akpinarli, while the centre of the operation was the facilitation of humanitarian relief, the use of the phrase 'use all necessary means' in UNSC Resolution 794 (1992) implied the use of force under Article 42 of the UN Charter. N. AKPINARLI, *op. cit*. 359, page 42

Provide Relief' (it brought together a coalition of around 20 States) and it was also active in Mogadishu. The mandate of UNITAF focused on clearing the most important roadways in Somalia for the delivery of humanitarian assistance, leaving political considerations for a future UN intervention. Consequently, in March 1993 the UNSC launched UNOSOM II, whose mandate focused primarily on reconstruction. In two separate attacks in June and October 1993, local military groups killed 24 Pakistani soldiers and 18 US soldiers. By March 1994, the US had withdrawn its combat forces from Somalia. The UNSC first redefined the mandate of UNOSOM II, limiting it to the provision of humanitarian assistance, and finally closed the operation in March 1995.[364]

Between 1996 and 2004, external intervention to support peace and reconciliation in Somalia mainly focused on the organisation of national reconciliation conferences and seminars. After the September 11 attacks, Somalia became of particular interest to the international community. It was perceived that the lack of government made Somalia a suitable territory for the emergence of terrorism. In 2004, after many failed attempts, the Somali national reconciliation conference held in Kenya adopted a transitional federal charter, establishing a number of transitional federal institutions. It established a parliament, and also a government, appointing a President and a Prime Minister. In October 2004, in a meeting held in Stockholm between the transitional federal government and the international community, it was agreed that the UN would take a leading role in coordinating international efforts to support the transitional federal institutions of Somalia. In June 2006, an International Contact Group on Somalia (ICG) was established in order to coordinate efforts in the peace and reconciliation process. In February 2006, the transitional parliament had its first session on Somali soil, in the city of Baidoa.[365]

Despite the results of the 2004 national reconciliation conference, in early 2006 the Union of Islamic Courts managed to control Mogadishu and an important part of South Central Somalia. The Union of Islamic Courts provided justice services to the Somalis on the basis of *sharia* law, as well as other services, like food and health. Under the rule of the Courts, checkpoints in Mogadishu disappeared.[366] However, justice based on *sharia*

[364] UNSC Resolution 897 (1994) and UNSC Resolution 954 (1994), respectively

[365] Council Conclusions (7650/06), page 2

[366] When writing about his stay in Mogadishu in September 2006, Stig Jarle Hansen states: 'I was happy witnessing the unusual sights and sounds of that autumn: Somali girls walked past us at night laughing and gossiping; we drove across the entire city without passing a single checkpoint, with only one guard from the Sharia Courts to take care of us.' S. J. HANSEN, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005-2012*, Oxford University Press, 2013, page 2

law was brutal. According to Stig Jarle Hansen, the reason why the Courts managed to acquire certain support among the Somali population is that all other options, from democracy to clanism, had been tried and had failed.[367] When Ethiopia declared its support for the transitional federal government of Somalia, Libya and Saudi Arabia and Eritrea proclaimed their support for the Union of Islamic Courts and the conflict in Somalia acquired a regional dimension. Towards the end of 2006, the government of Ethiopia, concerned about the risks that the Courts created for its own territorial integrity, decided to invade Somalia. Ethiopia was supported by the US, who disliked the idea of an Islamist regime in the Horn of Africa.[368] The occupation of Ethiopia did not end until January 2009.

From 2006 to 2016, the security situation in Somalia has been a cause of concern. In December 2006 the UNSC authorised a regional peacekeeping operation led by IGAD and the AU to protect the transitional government of Somalia. This operation was named IGASOM.[369] However, it never materialised and was replaced by AMISOM: the AU Mission to Somalia, which has been active since 2007.[370] In June 2008, piracy attacks in the Gulf of Aden led the UNSC to authorise foreign warships to enter into Somali waters to repress acts of piracy and armed robbery at sea by all necessary means. Also in the summer of 2008, the transitional federal government concluded the Djibouti Peace Agreement, as an important step towards establishing dialogue with the opposition. The agreement included a set of measures to stop violence and asked the UN to authorise and deploy an International Stabilisation Force in Somalia. In fact, AMISOM was designed as a short-term operation that would handover to an UN support operation. In its Resolution 1910 (2010), the UNSC referred to Al-Shabaab for the first time explicitly. Since then it has repeatedly condemned the terrorist attacks perpetrated by the organisation. For example, in the Resolution 2297 (2016), the UNSC condemns:

[367] 'Democracy, nationalism, Marxism and clanism had been tried out and had yielded little for the Somalis. In the end religion, employed as a political ideology, had only weak rivals to contend with, although clanism in different forms remained important.' *Ibid,* page 4

[368] According to Christopher Clapham, Ethiopia 'was able to gain the support, both military (notably through satellite intelligence) and diplomatic, of the United States, to which an overtly Islamist regime in a strategically sensitive part of the post-9/11 world was unthinkable.' C. CLAPHAM, 'Peacebuilding without a State: the Somali Experience', in D. CURTIS and G. A. DZINESA (eds.), *Peacebuilding, Power and Politics in Africa*, Cambridge Series of African Studies Series, Ohio University Press, 2012

[369] UNSC Resolution 1725 (2006)

[370] UNSC Resolution 1744 (2007)

> 'Recent Al Shabab attacks in Somalia and beyond, expressing serious concern at the ongoing threat posed by Al Shabab, and underlining its concern that Al Shabaab continues to hold territory and extort revenue in Somalia.'

In Resolution 2297 (2016), the UNSC also states that the conditions are not yet appropriate for the deployment of a UN peacekeeping mission.[371] The UNSC authorises AMISOM to maintain the deployment of around 22,000 uniformed personnel until end May 2017.[372] To the present day, Burundi, Djibouti, Ethiopia, Kenya, Uganda and other African nations have been contributing nations to AMISOM.

As an integral part of the fight against Al-Shabaab, between 2014 and 2015 a joint military operation between the Somali military, AMISOM and the US was launched in Southern Somalia. As part of this operation, on 1 September 2014, a US airstrike killed Al-Shabaab leader Moktar Ali Zubeyr. Additional senior Al-Shabaab commanders were also killed or died in combat. Moreover, in 2013 the UNSC established a UN Assistance Mission in Somalia (UNSOM).[373] Its mandate is to help the Government in its stabilisation efforts and to assist the Government of Somalia in coordinating international donor support on security sector assistance.

On the political side, the last decade has also seen important changes. In April 2009 an international conference on security in Somalia was held in Brussels. It was convened by the UN Secretary General and hosted by the EU. In 2012, there were international conferences on Somalia in London and Istanbul. In 2012, the transition formally concluded with the adoption of a provisional constitution, the selection of a federal parliament and the election of a new President. It was agreed that the federal parliament would set benchmarks until 2016, when general elections would take place. In February 2013, there was another international conference in Brussels, co-hosted by the EU and Somalia. The Conference focused on building a new political order in Somalia, promoting its socio-economic development and establishing the rule of law and security. It resulted in the endorsement of the New Deal Compact for Somalia between Somalia and the international community. The Compact was designed to guide reconstruction of Somalia, based on the Busan New Deal Principles for Fragile States. It is structured around five peace and statebuilding goals. The Compact recognises the importance of sustained monitoring and foresees a high-level partnership forum to discuss its

[371] UNSC Resolution 2297 (2016)
[372] UNSC Resolution 2297 (2016)
[373] UNSC Resolution 2093 (2013)

implementation and a central mechanism for strategic coordination. In November 2014, the first ministerial high level partnership forum on Somalia was held in Copenhagen, to take stock of joint progress and challenges since the New Deal Conference in Brussels and agree on the necessary actions and steps required to achieve the Somali Compact goals by 2016 (Vision 2016). The Vision 2016: Framework for Action is a plan of the Government of Somalia laying down the foundations for a new Somalia and for realising the Somali Compact. In July 2015, the second ministerial high level partnership forum on Somalia was held in Mogadishu and in February 2016 the third one was organised in Istanbul. The meeting in Istanbul reviewed the steps leading to the Vision 2016, especially before the elections in September 2016. In Resolution 2297 (2016), the UNSC welcomes the steps taken and encourages no more delays for the elections that are planned for September 2016:[374]

> 'President Hassan Sheikh's and the FGS's commitment to an inclusive and credible electoral process in 2016 and underlines the Council's expectation that there should not be an extension of electoral process timelines for either the executive or legislative branches, *underlines* the importance of implementing the electoral process set out in the 22 May 2016 Presidential decree without further delay, *calls on* all parties to engage constructively to achieve this and *emphasizes* that this year's electoral process is a critical step towards one person one vote elections in 2020 and in this regard *urges* the National Leadership Forum to adopt a roadmap to the 2020 elections.'

3 Union action in Somalia: context

3.1 EU approach to Somalia in the last decade

The EU has been a very active player in the response to the challenges faced by Somalia over the last few years. Since the adoption of a transitional federal charter in 2004, the Union has continuously supported the transitional federal institutions and it has also been militarily active in Somalia and the Horn of Africa. Moreover, the EU has been one of the main providers of development and humanitarian aid, and it has played an important role in coordinating the efforts of international donors.[375] In conclusions adopted in July 2016, the Council reaffirmed its commitment to the future of Somalia:[376]

[374] UNSC Resolution 2297 (2016)

[375] In November 2011, the Council referred to the Union as 'the largest donor in Somalia'. Council Conclusions (16855/11), page 5

[376] Council Conclusions (11238/16)

> 'The EU reaffirms its strong commitment to a peaceful and prosperous future for Somalia, and will continue to support the sustainable development and security of the country in the post-electoral period.'

The Union has repeatedly expressed its concern regarding the humanitarian situation in Somalia, resulting from successive droughts and continuous violence, and the important difficulties facing humanitarian organisations.[377] In certain instances, the situation has been affected by famine. For example, in October 2014 the Council claimed:[378]

> 'The EU expresses deep concern at the deteriorating humanitarian crisis in Somalia due to drought, continued conflict, restricted flow of commercial goods into areas affected by military operations and surging food prices, and urges all parties to allow safe, timely and unhindered humanitarian access to all areas by humanitarian agencies.'

As regards specific data on poverty in Somalia, in 2014 the Commission borrowed data from the World Bank to state:[379]

> 'The majority of Somalis today live in poverty and vulnerability. Extreme poverty (less than USD 1 person/day) is estimated at 53,4% and general poverty (less than USD 2 person/year) reaches 73.4%. GDP per capita is estimated to be only USD 288 far below the Sub-Saharan average and unemployment is estimated to be 54% with youth unemployment (age 18 to 29) reaching 67% - one of the highest rates in the world. 2 More than 1 million Somalis are acutely food insecure and in need of emergency humanitarian assistance among them 63% of the 1.1 million internally displaced people. 2.4 million Somalis are food insecure.'

References to the humanitarian crisis and to the difficult access to humanitarian relief are often accompanied by calls to all parties to respect human rights and humanitarian law.[380] The EU has also stressed the challenges created by the internal displacement of hundreds of thousands of Somalis.[381]

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[377] In July 2009, the Council claimed: 'the situation in Somalia remains one of the worst humanitarian crises in the world.' Council Conclusions (12441/09), page 2

[378] Council Conclusions (14465/14), page 6: 'the famine has expanded to six regions of southern Somalia, including Mogadishu, and threatens to further expand across the south affecting nearly half of the population.' Council Conclusions (16855/11), page 2

[379] Decision C(2014) 671, Annex 1, pages 2-3

[380] Council Conclusions (8791/07), page 2

[381] Council Conclusions (16855/11), page 4

In December 2007, the Union referred for the first time to the threat of piracy off the Somali coast, in the Horn of Africa and beyond.[382] In November 2011, the Council mentioned Al-Shabaab for the first time, and condemned its attacks in Somalia and in neighbouring countries as well as the taking of hostages. The Union considered the threat created by Al-Shabaab not only to Somalia and its neighbouring countries but also to the international community as a whole:[383]

> 'The EU condemns the continued attacks on Somali civilians by Al Shabaab, including the bomb attacks of 4 and 18 October in Mogadishu. It is particularly concerned about the extension of such attacks to neighbouring countries, including Kenya, and the kidnap of European citizens and calls for their immediate release. Such attacks threaten not just neighbouring countries but the international community as a whole.'

> 'Instability in Somalia is posing a growing challenge not only to the security of the people in Somalia but also to the region and the rest of the world, through terrorism, piracy and the proliferation of weapons.'

As regards donor coordination in Somalia, the EU has repeatedly recognised the leading role of the UN in coordinating international support to the institutions of Somalia, as decided in the Stockholm meeting of October 2004.[384] Council conclusions on Somalia often refer to UNSC resolutions and to statements of the President of the UNSC. For example, in 2007 the Council recognised the leadership of the UNSG's Special Representative for Somalia:[385]

> 'The Council welcomes the reinvigorated role of the International Contact Group on Somalia under the leadership of the SRSG and stays committed to participation in this mechanism, including at field level.'

The priorities of the Union over the last decade, as expressed in conclusions of the Council, have essentially been: disarmament, demobilisation and reintegration (DDR),

[382] Council Conclusions (16394/07), page 2
[383] Council Conclusions (16855/11), page 2 and Council Conclusions (7889/11), page 2, respectively
[384] Council Conclusions (15145/04), pages 2-3
[385] Council Conclusions (6252/07), page 3

as well as internal reconciliation, security sector reform and reconstruction.[386] According to the UN:[387]

> 'DDR activities are crucial components of both the initial stabilization of warn-torn societies as well as their long-term development.'

These priorities signal that the Union's main objective has been stabilisation and governance support, under both the CFSP and the development cooperation policy. For example, in 2007 the Council claimed:[388]

> 'The promotion and protection of human rights, the restoration of the rule of law, democracy and good governance in Somalia, is the only effective way to provide social and economic recovery and to eradicate the threat of terrorism.'

Hence it is not surprising that the idea of the Union's comprehensive approach, covering security and development policies, has been central in Somalia. Consistently, there has been a clear prioritisation of governance support, as this is considered essential to security and development challenges alike. Already in 2006, the Union alluded to its comprehensive strategic framework for Somalia.[389] In December 2007, it referred to:[390]

> 'A comprehensive approach to the Somali crisis, covering the political, security and humanitarian facets.'

The Union has also stressed that long-term assistance from international partners cannot be effective without a stabilisation of the security situation: [391]

> 'The Council supports the ambition of the new Transitional Federal Government to focus on the development and strengthening of national capacity in the security sector. The security sector should be firmly committed to the rule of law, respect for human rights, and the principles of good governance and accountability.'

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[386] See, for example, Council Conclusions (15145/04), page 2 and Council Conclusions (10157/09), page 3

[387] UN peacekeeping website, http://www.un.org/en/peacekeeping/issues/ddr.shtml (last visited: 16 August 2016)

[388] Council Conclusions (9621/07), page 2

[389] Council Conclusions (7650/06), page 3

[390] Council Conclusions (16394/07), page 2

[391] Council Conclusions (10157/09), page 2 and Council Conclusions (10157/09), page 1, respectively

> 'The Council notes that a stable security environment in Somalia is vital for building state institutions, providing adequate humanitarian aid, kick-starting recovery efforts and reducing the threat of piracy.'

Moreover, the EU has recognised that the fight against piracy off the Somali coast forms part of the comprehensive approach to Somalia. Linking the fight against piracy at sea to on-land long-term development cooperation is a clear example of the security-development nexus approach:[392]

> 'Containment at sea will be further strengthened by efforts to tackle the root causes of piracy, focused on improving livelihoods, economic opportunities and the rule of law.'

The Union has also referred to its wide toolbox to tackle the challenges faced in Somalia:[393]

> 'Successful EU delivery and responsiveness in the Somali peace process remains essential to support a comprehensive political solution which would bring long term stability to Somalia. The EU remains ready to *make full use of all existing instruments* to attain this objective.'

The security-development nexus and the governance agenda in Somalia translate into two huge priorities: security sector reform and support for the government of Somalia. The Union has been a strong supporter of security sector reform. In fact, the Council has recently confirmed its intention to extend the mandates of its current CSDP missions and operation in Somalia and the Horn of Africa until December 2018. It has justified this decision as a means to enhance the EU's comprehensive approach in Somalia (and the Horn of Africa), and in particular the security-development nexus.[394]

A clear example of the Union's commitment to security sector reform in Somalia during the last years is its continued support to AMISOM. Even before this AU operation was launched, the EU had already committed 15 million EUR.[395] The Union has referred to AMISOM as essential for the provision of humanitarian assistance, and also in the fight against Al-Shabaab. In 2014, when AMISOM was heavily debated because of multiple cases of sexual exploitation by AMISOM soldiers, the EU admitted its concerns but defended the operation, nevertheless.[396]

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[392] Council Conclusions (7889/11), page 5
[393] Council Conclusions (16394/07), page 4 (emphasis added)
[394] Council Conclusions (11238/16)
[395] Council Conclusions (5546/07), page 3
[396] Council Conclusions (14465/14), page 4

The continued support to the transitional federal institutions (later, the government) has constituted the other main priority of the Union in Somalia over the last few years. In the first years that followed the adoption of the transitional federal charter in 2004, the Union's support to the transitional federal institutions was even referred to as 'unequivocal'.[397] For example, the EU claimed:[398]

> 'The EU reaffirms its commitment and stands ready to continue to support Somalia throughout the electoral process, in full respect of the sovereignty, territorial integrity, political independence and unity of the country.'

> 'The Council condemns the use of force by all sides and emphasises that the problems of Somalia can only be solved by political means, building on the Transitional Federal Charter.'

The Union has repeatedly stressed that the transitional federal institutions should ensure that all stakeholders (e.g. clan elders, Islamic leaders, civil society) are engaged in an inclusive reconciliation process. It has also mentioned that the government of Somalia should be broad-based, and reach out to all sectors of the Somali society.[399] However, the Union has undoubtedly positioned itself on the side of the transitional federal institutions of Somalia. A clear example is the EU's response to the role of the Union of Islamic Courts (UIC) in 2006. When the UIC controlled certain parts of the territory of Somalia, the EU clearly defended the transitional federal institutions. The Union did not even refer to the fact that the UIC controlled a part of the territory and were supported by an important part of the population:[400]

> 'The Council expresses its deep concern about the continuing tensions in Somalia between the UIC and the TFIs. The Council reconfirms its support to the TFIs as the only legitimate political representation in Somalia as defined in the Transitional Federal Charter (TFC).'

Likewise, the Union has minimised the role of clan leaders in Somalia and it has avoided referring to Somaliland as a *de facto* independent State. Moreover, although the Union

[397] See, for example, Council Conclusions (7650/06), page 2
[398] Council Conclusions (15145/04), page 3 and Council Conclusions (9621/07), page 2
[399] See, for example, Council Conclusions (5546/07), page 3 and Council Conclusions (15145/04), page 2
[400] Council Conclusions (12877/06), page 2

has acknowledged problems in the action of the government of Somalia, it has maintained its support. For instance, in October 2014, the Council claimed:[401]

> 'The EU remains concerned by continuing reports of humanitarian law and human rights violations, including extrajudicial killings, violence against women and children, recruitment and use of children, attacks against journalists and arbitrary detentions. The fight against impunity for these crimes is essential. The EU encourages the Federal Government of Somalia to take concrete measures to implement fully its human rights roadmap adopted in August 2013 and to continue implementing its action plans on children and armed conflict.'

However, from the 'unequivocal' support in the years immediately after the adoption of the transitional federal charter in 2004, the Council moved towards a position where it started to demonstrate its perhaps not such unconditional support to Somalia. For example:[402]

> 'The pace and degree of such progress will determine the extent of continued or additional EU support to the TFIs.'

> 'The EU recognizes that these tasks are interdependent and it is committed to provide targeted support for their full implementation, provided the TFIs demonstrate the political will to deliver effectively, improve financial transparency and accountability, and take effective action to tackle corruption.'

By the same token, while in the first years the Council avoided referring to Somaliland and Puntland, it later recognised the need to support regional governments too:[403]

> 'The Council encourages constructive engagement from all regions of Somalia, including Puntland and Somaliland, in building an environment of trust and cooperation to mutual benefit.'

> 'Regions of Somalia such as Puntland, Somaliland, as well as other local actors, including Ahlu Sunna Wal Jama'a, will be further supported by the EU as long as they continue to make progress in providing services, enhancing the Somali reconciliation process, combating Al Shabab and developing their cooperation with the TFIs and other regional actors.'

[401] Council Conclusions (14465/14), page 3. Similar concerns were expressed in Council Conclusions (12463/13), page 5

[402] Council Conclusions (16855/11), pages 3 and 4

[403] Council Conclusions (12441/09), page 2 and Council Conclusions (16855/11), page 5

In fact, there is a slight difference between Council conclusions and Commission decisions on development cooperation as regards the support to the institutions of Somalia. This difference is a matter of detail, since the support to the governance sector is an absolute priority in the EU's action in Somalia, including as regards development cooperation. However, the Commission admits in a more open manner the deficiencies of the transitional federal institutions, and it has been much more critical as regards their performance. This may simply be the case because Council conclusions are more public than Commission financing decisions in EU development cooperation, which generally do not reach the public. In 2008 the Commission claimed:[404]

> 'Three years into the transition, the TFIs have achieved few tangible results in that regard; the conflict has intensified, with various armed groups opposing the TFIs and their Ethiopian military supporters.'

Even in 2014, when the transition had formally concluded, the Commission claimed:[405]

> 'Public sector systems that should provide support and protection to the population are almost inexistent due to the lack of a formal unified state and effective governance structures.'

Moreover, the Commission is much more explicit about the comparably better situation in Somaliland and Puntland:[406]

> 'Peace and stability pay. Somaliland and Puntland have attracted the majority of international development aid due to their capacity to ensure an acceptable level of security and their public institutions have some capacity to administer.'

As regards the current political situation, the Commission is also more critical than the Council. In 2015, the Commission stated:[407]

> 'However, political and institutional progress is fragile and many of the actual 'transition' tasks still remain to be accomplished, notably the delivery of a final constitution and democratic elections by 2016. The government has made initial progress in establishing the executive and a better functioning parliament, as well as engaging with sub-national regions

[404] Decision C(2008) 8403, Annex 1, page 1
[405] Decision C(2015) 671, Annex 1, page 2
[406] Decision C(2015) 671, Annex 1, page 4. The Commission also expressed that Somaliland and Puntland were doing better in C(2008) 8403, Annex 1, page 1 and considered the need to coordinate with the authorities of Somaliland and Puntland in C(2008) 8403, Annex 2, page 1
[407] Decision C(2015) 671, Annex 2, page 2

and aspiring Federal Member States (FMS). In the north, political settlements are more advanced. Somaliland is reaching its fifth electoral cycle while Puntland is working to re-establish a democratisation trajectory for its institutions. Challenges still remain in the exercise of fundamental freedoms, and in South-Central in particular violations of human security, human rights and a high rate of gender based violence including recruitment of child soldiers persist with impunity. While many parts of South-Central Somalia remain outside of the control of the FGS, the recent recovery of significant territory from Al-Shabaab (AS) by the African Union Mission in Somalia (AMISOM) and the Somalia National Armed Forces (SNAF) has resulted in a pressing need for increased assistance to newly accessible areas. If the population in those areas does not experience tangible 'peace dividends' in a short timeframe, there is a high risk that gains will be reversed.'

In contrast, in its conclusions on Somalia adopted in July 2016, the Council claims:[408]

'The forthcoming electoral process in Somalia is a milestone for the Somali people and Somali politics. It will have long-lasting implications for the security, stability and development of Somalia, and the wider region. The EU welcomes the progress, both at central and regional level, since the establishment of the Federal Government of Somalia (FGS) in 2012. This progress reflects the achievements, despite great challenges, of the Somali people themselves, and the close relationship with the international community through the 2013 Somali Compact.'

'The new Federal leadership emerging from the electoral process will have to take on crucial challenges. In this context, the EU highlights the importance of finalising the constitutional review process with a clear timeline. The new constitution must ensure a balance of power between the bicameral legislature, the President and the FGS, and clarify the relationship between the central institutions and the federal member states.'

The continued support of the Union to the institutions of Somalia and to its territorial unity, as well as to AMISOM, which are especially clear in Council conclusions, are in line with UNSC resolutions. Moreover, the Union's approach to Somalia can be considered a particular example of the security-development nexus approach and the governance agenda, which appear rather abstract in policy documents. The approach to Somalia shows the implications of prioritising governance reform in EU external action. In the case of Somalia, prioritising the governance agenda means supporting a particular part of the story, and concentrating on measures that are not necessarily the most

[408] Council Conclusions (11238/16)

effective way of reducing poverty. The challenges faced by Somalia more than ten years after the transition started are reasons to question the international governance agenda. When analysing why international intervention failed in Somalia, Christophe Clapham claims:

> 'Since there was no State, there was no incentive for clan leaders to moderate their behaviour to maintain an instrument of governance they could all use.'[409]

Be it as it may, the overall approach of the Union to Somalia over the last decade is *consistent* with the security-development nexus approach and with the governance agenda, which are defined at a general level in EU policy documents.

3.2 Cooperation under the Cotonou framework

Somalia is a member of the African, Caribbean and Pacific (ACP) Group of States and is part of the ACP-EU Partnership Agreement, which was signed in Cotonou on 23 June 2000 and revised in Luxembourg on 25 June 2005 and in Ouagadougou on 22 June 2010.[410] The Cotonou Agreement, as it is generally known, is a fundamental framework for the implementation of the EU's development cooperation policy in Somalia. It is a mixed agreement bringing together 78 APC States, on the one hand, and the EU and its Member States, on the other hand.[411] It constitutes one of the largest financial and political frameworks in North-South cooperation.

The organisation of the ACP Group of States came into being in 1975 with the Georgetown Agreement, which constitutes its fundamental charter. It was created with the aim of coordinating cooperation between its members and the EU. Over the years, the Group extended its objectives. The Lomé Convention, which can be considered the first predecessor of the Cotonou Agreement, was also signed in 1975. However, relations between the EU and the ACP date back to before 1975. In fact, the Lomé Convention

[409] According to Christopher Clapham: 'Somalia cannot even properly be characterized as a failed State: there is simply no state that could be said to have failed. (…). The elements out of which a state must be constructed are equally non-existent. The shells of the burnt-out ministry buildings of what used to constitute the Somali government contain no bureaucrats, nor is there any cadre of qualified people, waiting in the wings, who could be organized into a new machinery of government.' C. CLAPHAM, *op. cit*. 368

[410] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as amended in Ouagadougou (OJEU L 287, 4.11.2010)

[411] Cuba is a member of the ACP Group of States but not a signatory to the Cotonou Agreement. Visit the website of the ACP Group in: http://www.acp.int/ (last visited: 28 August 2016)

replaced the Convention of Yaoundé (1963), which connected the then EEC to former colonies of some of its Member States. The objective of the Cotonou Agreement is:[412]

> 'To promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.'

The Agreement is built on three elements: political dialogue, trade and development cooperation. First, Article 8 enshrines regular political dialogue between the parties. The Agreement also contains essential elements clauses and a consultation procedure aimed at finding common solutions when concerns regarding respect for human rights, democratic principles and the rule of law arise.[413] Appropriate measures, including the suspension of cooperation, are foreseen if no common solutions are found. Second, the Cotonou Agreement includes a trade component, which mainly concerns the negotiation of Economic Partnership Agreements (EPA). These agreements, grant special conditions to ACP countries to promote their development and gradual integration into the global economy, must be compatible with WTO rules. Third, the Agreement has a development cooperation leg, which is the oldest purpose of the ACP-EU Partnership. According to Article 55, the objective of 'development finance cooperation' is to support ACP countries in pursuing the objectives of the Agreement through financial resources and technical assistance. The development cooperation component of the Agreement is strongly based on the principle of ownership:[414]

> 'Development finance cooperation shall be implemented on the basis of and be consistent with the development objectives, strategies and priorities established by the ACP States, at national, regional and intra-ACP levels.'

The security-development nexus is central in the Cotonou Agreement, particularly after its 2010 revision. Article 11 is devoted to 'peace building policies, conflict prevention and resolution, response to situations of fragility' and it provides the clearest references to the nexus that can be found in the Agreement:[415]

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[412] Article 1 of the Cotonou Agreement (see note 410)

[413] Article 96, Cotonou Agreement

[414] Article 56(1), Cotonou Agreement. See also Article 4, which refers to the principle of ownership of ACP countries in the implementation of the three dimensions of the Agreement

[415] See also page 14 of the Preamble of the Cotonou Agreement

'The Parties acknowledge that without development and poverty reduction there will be no sustainable peace and security, and that without peace and security there can be no sustainable development.'

'The interdependence between security and development shall inform the activities in the field of peace building, conflict prevention and resolution which shall combine short and long-term approaches, which encompass and go beyond crisis management. Activities to tackle new or expanding security threats shall, inter alia, support law enforcement, including cooperating on border controls, enhancing the security of the international supply chain, and improving air, maritime and road transport safeguards.'

The Agreement was signed in 2010 for a 20-year-period, which means that it will expire in 2020. This explains why, in the last years, the debate regarding the future of the ACP-EU Partnership was reached both the ACP countries and the EU. There is a common understanding that there is a decline in common interests between the two sides of the Partnership, which justifies reconsidering it.[416] On the side of the ACP Group of States, the increasing relevance of emerging powers is influencing the preferences of developing countries regarding who their strategic partners should be. Moreover, within the Group, there are crucial differences in the economic and social development of each country and, thus, in their priorities.

Sandra Bartelt mentions multiple symptoms and causes why the Partnership is endangered.[417] The fact that the current version of the treaties no longer establishes a special status for the ACP Group of States and the tendency of the EU towards regionalisation are symptomatic of the decreasing importance of the Partnership. Moreover, the fact that the ACP-EU Partnership has never really emerged as an actor in international fora is, according to the author, another reason why the Partnership may not last. Finally, the general perception that the Cotonou Agreement ultimately results from colonial history is also listed as a challenge for the future of the Partnership.[418]

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[416] In their Joint Consultation Paper on the future of the Partnership of 2015, the HRVP and the Commission claimed that it is necessary to analyse the extent to which the Partnership 'remains valid for the future'. Joint Consultation Paper from the HRVP and the Commission: Towards a new partnership between the European Union and the African, Caribbean and Pacific countries after 2020 (JOIN(2015) 33). See also the study on this issue by ECDPM: *'The future of ACP-EU relations post-2020: an overview of relevant analysis by ECDPM',* Version 1, December 2014

[417] S. BARTELT, 'ACP-EU Development Cooperation at a Crossroads? One Year after the Second Revision of the Cotonou Agreement', *European Foreign Affairs Review*, 17, 2012

[418] Note that the Lomé Convention resulted from the UK accession into the EU in 1973 and, therefore, to the will to extend the existing preferential treatment for former French African colonies to countries in the Caribbean and the Pacific

Cooperation under the JAES

Article 2 of the Cotonou Agreement establishes among its fundamental principles:

> 'Particular emphasis shall be put on regional integration, including at continental level.'

In the particular context of peace and security policies, Article 11 of the Agreement recalls:

> 'The Parties emphasise the important role of regional organisations in peace building and conflict prevention and resolution and in tackling new or expanding security threats with, in Africa, a key responsibility for the African Union.'

The tendency towards focusing on continental and regional organisations to address problems faced by Africa constitutes one of the challenges for the future of the ACP-EU Partnership.[419] In fact, together with the ACP-EU Partnership, the Africa-EU Partnership has been institutionalised under the Joint Africa-EU Strategy (JAES), which was agreed in Lisbon in 2007.[420]

The JAES is considered a long-term strategic partnership and in involves the celebration of regular summits, as well as the adoption of biannual action plans. It essentially pursues four objectives and strategic priorities, namely: peace and security; governance and human rights; trade and regional integration; and key development issues. Under peace and security, which is again listed as one of the main priorities of the JAES Roadmap 2014-2017,[421] the JAES promotes three intertwined priorities, namely: enhanced political dialogue to reach common positions and to implement common approaches on challenges to peace, security and stability in Africa, Europe and globally; effective functioning of the African Peace and Security Architecture (APSA) to address peace and security challenges in Africa; and predictable funding for peace support operations undertaken by the AU or under its authority.

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[419] In its recent report on the future of ACP-EU relations, the Committee on Development of the European Parliament defended the future of the ACP-EU Partnership but recognised that, while the parts that are universal must be maintained (e.g. commitment to good governance), work must be carried out according to the principle of subsidiarity. According to the Parliament, work must take place in 'regional agreements that are tailored to specific regional needs and to the mutual interests existing between the EU and the respective region.' Report on the future of the ACP-EU relations beyond 2020 (2016/2053(INI)), Committee on Development, European Parliament, para 1

[420] Relevant information regarding the JAES can be found at: http://www.africa-eu-partnership.org/en (last visited: 13/08/2016)

[421] The Roadmap 2014-2017 was adopted at the 4th EU-Africa Summit held in Brussels on 2-3 April 2014

The objective of the APSA, which is a concept that was developed by the AU, is to provide a continental-wide framework for solving conflict related issues in Africa. The EU is one of the most notable supporters of the APSA. By supporting the APSA, the EU aims at addressing peace and security challenges in Africa, including prevention and post-conflict reconstruction. Supporting the APSA means, for instance, ensuring predictable funding for African-led peace support operations, the effective functioning of the Peace and Security Council of the AU and supporting the initial operational capability of an African Standby Force.

4 Union action in Somalia: CFSP-development cooperation toolbox (2008-2014)

Annex 2 of this thesis provides a long list of legal measures concerning Somalia adopted under the CFSP and the development cooperation policy between 2008 and 2014. This list is not exhaustive, but it provides an overview of the different EU instruments utilised by the Union when acting in a particular third State. The elaboration of this Annex has been difficult. While all Council decisions in the list are published in the OJEU, the analysed Commission decisions are not. There is no legal obligation for the Commission to publish its financing decisions in the field of development cooperation in the OJEU. However, making these decisions available online would be desirable.[422] According to the Regulation regarding public access to European Parliament, Council and Commission documents:[423]

> 'Institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.'

Most financing decisions in development cooperation are not directly accessible in the online register of documents of the Commission.[424] Some of them are not even listed in the register, because they do not have a reference number. In fact, this is why the expression 'reference number missing' can be read next to certain decisions in the Annex. In certain cases, Commission decisions are not available in the public register, yet they can be found through different search channels in the Commission's website. Moreover,

[422] Article 297(2) TFEU only establishes a duty of publication in the OJEU for decisions that do not establish to whom they are addressed

[423] Article 12(1) of Regulation 1049/2001

[424] Commission's online register of documents: https://ec.europa.eu/transparency/regdoc/ (last visited: 24/08/2016)

as a result of document request procedures, I was often provided with unfinished documents. If one considers procedural coherence as a continued way of acting on the basis of rules and principles (i.e. soft power coherence), the lack of transparency of the Commission is a cause for concern. Not only does it create a problem of accountability, it also creates a problem of coherence.

The objective of this section is to show the many instruments that the Union has at its disposal to tackle the problems faced by Somalia and how this wide toolbox creates challenges for coherence in EU external action. In fact, policies and activities that are intertwined by reason of their subject form part of different instruments, which means that they are implemented under different procedures. The idea of the Union's wide toolbox is generally approached from a political perspective. However, we should keep in mind that each and every instrument presented in this section has a legal nature, as it is implemented on the basis of specific treaty provisions (e.g. CFSP restrictive measures) or based on legal measures resulting from the ordinary legislative procedure (e.g. IcSP). In fact, the many tools interacting in the Union's external action expressions of the idea of legal delimitation, as one of the mechanisms for coherence set out in the treaties. Furthermore, the toolbox also illustrates the wide array of interlocutors of the Union in the development of external relations. The EU cooperates with Somalia at the national, regional, continental and ACP levels.

4.1 Overview of the toolbox

Development cooperation under the EDF

EDF

The development cooperation element of the Cotonou Agreement is mainly financed through the EDF. The analysed period covers two multiannual financial frameworks of the EDF. Between 2008 and 2013 the relevant multiannual framework was the 10th EDF, and between 2014 and 2020 the relevant one is the 11th EDF. The total amount of these two multiannual financial frameworks was decided in Decisions of the ACP-EC Council of Ministers: Decision 1/2006, as regards the 10th EDF, and Decision 1/2013, on the 11th EDF.[425] The first of these decisions modified the Cotonou Agreement, inserting a new Annex (Annex 1b) on the multiannual financial framework 2008-2013. The second

[425] 2006/608/EC and 2013/321/EU, respectively

one adopted Annex 1c of the Cotonou Agreement regarding the multiannual financial framework 2014-2020.

Given the *sui generis* nature of the EDF as an external assistance instrument that implements a mixed agreement, the EDF is subject to its own financial rules and procedures.[426] The EDF is funded outside the EU budget, and directly by Member States. The issue as to whether the EDF should be part of the EU budget, which is generally known as the *budgetarisation* of the EDF is debated. For example, in its report on the future of the ACP-EU Partnership, the Parliament claims that the expiry of the Cotonou Agreement and the 11th EDF in 2020 provides the right context to:[427]

> 'Finally decide on the budgetisation of the European Development Fund in order to enhance efficiency and effectiveness, transparency, democratic scrutiny, accountability and the visibility and coherence of EU development financing.'

The multiannual financial frameworks of the EDF are divided into three main blocks: national cooperation, regional cooperation and intra-ACP/inter-regional cooperation. Somalia receives assistance from these three levels of cooperation.

Somalia and the Cotonou Agreement

Between 2008 and 2014 Somalia held two different statuses under the Cotonou Agreement. Between 2008 and 2013, Somalia was granted special support from the EDF. The Cotonou Agreement foresees situations in which ACP States, which were party to previous ACP-EU conventions, cannot sign or ratify the Agreement due to the lack of normally established government institutions. In these situations, the ACP-EU Council of Ministers can accord special support for these countries, which can only include institution building and economic and social development activities. In particular, Decision no 3/2001 of the ACP-EU Council of Ministers accorded this type of support to Somalia. In 2007, the EU deemed it necessary to increase the funds allocated to Somalia from the 9th EDF 'to ensure continuation of the support to the population of Somalia

[426] The relevant Council regulations on the implementation of the 2008-2013 (10th EDF) and 2014-2020 (11th EDF) multiannual indicative programmes and regarding their financial regulation are: Council Regulations 617/2007 and 215/2008 (the 10th EDF) and 2015/322 and 2015/323 (11th EDF)

[427] Report on the future of the ACP-EU relations beyond 2020 (2016/2053(INI)), Committee on Development, European Parliament, para 24

until the entry into force of the 10th EDF', which gave rise to Decision no 3/2007 of the ACP-EU Council of Ministers.[428]

In 2008, the ACP-EC Council of Ministers adopted Decision 2/2008 on an allocation of resources to Somalia from the 10th EDF.[429] Since Somalia was still not a signatory of the Cotonou Agreement, Somali authorities could not sign the regular country strategy paper and national indicative plan for Somalia for the period 2008-2013 (10th EDF). The Commission alone adopted the country strategy paper and the special support programme for Somalia for 2008-2013.[430] The overall objective of this strategy was to help establish a peaceful and secure environment in Somalia, and to reduce poverty by providing basic social services and increasing economic activity. In this framework, the critical intermediary political goal was to support the delivery of the two main outcomes of the transitional period (2005-2009): a new constitution adopted by referendum, and democratically elected institutions.

In May 2013, the Council adopted Decision 2013/258/EU on the Union's position to be adopted on behalf of the EU within the ACP-EU Council of Ministers concerning the status of Somalia in the Cotonou Agreement. In particular, the Decision approved Somalia's request for observer status and subsequent accession to the Cotonou Agreement. On the basis of this Decision, in June 2013, the ACP-EU Council of Ministers adopted Decision 2013/322/EU accepting Somalia's request to accede to the Cotonou Agreement.

In June 2014, once Somalia had become a full member of the Cotonou Agreement, the Government of the Republic of Somalia and the Commission signed the national indicative programme for Somalia (2014-2020), approving the allocation for Somalia under the 11th EDF. The national indicative programme established that its priorities were those of the Somali Compact, namely: [431]

> 'Achieve a stable and peaceful federal Somali through inclusive political processes; establish unified, capable, accountable and rights based Somali security institutions providing basic safety and security for its citizens; establish independent and accountable justice institutions capable of addressing the justice needs of the people of Somalia by delivering justice for all; revitalise and expand the Somali economy with a focus on livelihood enhancement, employment generation, and broad-based inclusive growth; and increase delivery of

[428] 2007/462/EC
[429] 2008/951/EC
[430] Decision C(2009) 6794
[431] Decision C(2014) 3715

equitable, affordable and sustainable services that promote national peace and reconciliation among Somalia's regions and citizens and enhance transparent and accountable revenue generation and equitable distribution and sharing of public resources.'

Besides the assistance received under the national programme, Somalia has also benefited from EDF funds channelled through regional, continental and all-ACP levels of cooperation. Under the category of regional cooperation, the relevant programme for Somalia is the ESA-IO regional programme. This programme provides funding for regional organisations in Eastern and Southern Africa and the Indian Ocean.[432] It consists of a cross-regional envelope and a sub-regional one.

The ESA-IO regional programme is important for Somalia mainly because, through it, the Union cooperates with the Inter-Governmental Authority on Development (IGAD). IGAD's mandate focuses on the Horn of Africa region and has a broad scope involving regional integration, economic cooperation and social development, peace and security, humanitarian affairs and natural resource management.[433] Moreover, continental and all-ACP cooperation is funded through the Intra-ACP programme, which comprises global, all-ACP initiatives, as well as pan-African initiatives. As far as Somalia is concerned, the most important element of the Intra-ACP programme is the APF, which was established in 2004 in response to a request by African leaders and is an essential EU tool towards strengthening the APSA and implementing the JAES. The APF is one of the pan-African initiatives of the Intra-ACP programme. Through it, the EU has provided predictable funding to African peace support operations and relevant capacity building at the regional and continental level.[434] Under the APF, the EU has continuously supported AMISOM.

Development cooperation beyond the EDF

Although the EDF is the main instrument in the implementation of the development cooperation policy in Somalia, the Union provides assistance to Somalia through many other thematic instruments and programmes. By way of example, through the EIDHR

[432] The ACP countries included in the ESA-IO region are: Angola, Botswana, Burundi, Comoros, DRC, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe

[433] IGAD's activities concern Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, Uganda and South Sudan

[434] Regarding the security-development nexus in the context of the APF, see M. CARBONE, 'An Uneasy Nexus: Development, Security and the EU's African Peace Facility', *European Foreign Affairs Review*, 18, Special Issue, 2013

the EU has supported local stakeholders and civil society organisations in promoting positive changes as regards human rights and fundamental freedoms in Somalia.[435] EU actions implemented under the IfS and the IcSP have also addressed the problems faced by Somalia.[436] Furthermore, the Instrument for Development Cooperation (DCI) is also relevant, mainly because the recently created Pan-African programme (PanAf) falls under this instrument. The PanAf is the Union's instrument specifically devoted to the implementation of the JAES. Besides the PanAf, under the Civil Society Organisations and Local Authorities programme of the DCI, Somalia has repeatedly received support for in-country interventions contributing to governance and development processes. Moreover, under the programme Cooperation with third countries in the areas of Migration and Asylum (also of the DCI), Kenya, Djibouti and Yemen have received funding to improve protection and provide immediate assistance to Somali refugees displaced in the Horn of Africa.[437]

CFSP

The Union has also made an extensive use of its CFSP instruments in its action in Somalia between 2008 and 2014. It has imposed restrictive measures and appointed EU Special Representatives with mandates comprising Somalia.[438] Furthermore, under the CSDP, the Union has been (and still is) more active in the Horn of Africa than it is anywhere else in the world. It has launched EU NAVCO, EUNAVFOR Atalanta, EUTM Somalia, EUCAP Nestor and the Operations Centre. All of these are still active, with the exception of EU NAVCO, whose activities where absorbed by EUNAVFOR Atalanta.

In the analysed period, the Union imposed sanctions against Somalia following successive UNSC resolutions. These sanctions consisted of a general arms embargo against Somalia and of restrictive measures against individuals. The many legal acts on restrictive measures adopted between 2008 and 2014 respond to modifications of the sanctions regime in successive UNSC resolutions. As regards the arms embargo, the Union has included exemptions to accommodate African-led military operations in

[435] In fact, Somalia often appears as one of the developing countries receiving the greatest sums under the EIDHR. See, for example, Decision C(2010) 1614

[436] As regards the scope of the IcSP, see chapter 2, section 4, pages 91-98

[437] Decision C(2009) 10089

[438] Note that restrictive measure against Somalia are considered CFSP measures because they have been adopted on the basis of: CFSP common positions and joint actions (before the entry into force of the Lisbon Treaty) and CFSP decisions (under the current treaty framework). See ex-Article 301 TEC and Article 215 TFEU, respectively

Somalia, and to facilitate humanitarian assistance activities. By way of example, in February 2007, the Council adopted Common Position 2007/94/CFSP giving effect to UNSC Resolution 1725 (2006), which introduced an exemption to the arms embargo decided in UNSC Resolution 733 (1992). In view of a planned IGAD military operation in Somalia (IGASOM), the UNSC introduced an exemption to the arms embargo for such operation. The exemption applied to supplies of weapons and military equipment and technical training and assistance intended solely for the support of or use by IGASOM. However, IGASOM never materialised and was replaced by AMISOM. In June 2007 the Council adopted Common Position 2007/391/CFSP, following UNSC Resolution 1744 (2007), which introduced another exemption to Somalia's arms embargo, in this case in view of the launch of AMISOM. In parallel, the Council adopted Regulation 631/2007, translating into concrete terms the common position that had just been adopted. An example of an exemption for humanitarian purposes can be found in Decision 2010/231/CFSP, implementing UNSC Resolution 1916 (2009). This Resolution eased some restrictions and obligations under the sanctions regime to enable the delivery of supplies and technical assistance by international, regional and sub-regional organisations and to ensure the delivery of UN humanitarian assistance. The Union has also required extra-efforts from States regarding Somalia's arms embargo. In March 2010, the Council adopted Decision 2010/126/CFSP, giving effect to UNSC Resolution 1907 (2009), which called upon States to inspect all cargoes in their territory coming from or going to Somalia, if a State had information to believe that the cargo contained items whose supply, sale, transfer or export was prohibited under the arms embargo.

As far as restrictive measures against individuals are concerned, in February 2009 the Council adopted Common Position 2009/138/CFSP, giving effect to UNSC Resolution 1844 (2008), which was adopted to punish:

> 'Those who seek to prevent or block a peaceful political process, or those who threaten the TFIs of Somalia or AMISOM by force, or take action that undermines stability in Somalia or the region'.

Later on, the Union adopted successive legal measures approving and then replacing annexes containing lists of persons affected by individual sanctions, following the updates from the UN Sanctions Committee. For example, in September 2011 the Council adopted Implementing Regulation (EU) no 956/2011 replacing the Annex

regarding the list of individuals to whom the restrictive measures would apply following the adoption of Decision 2011/635/CFSP.

Between 2008 and 2014 the Union also used its CFSP toolbox to appoint and/or extend the mandate of Special Representatives (EUSR) with responsibilities over Somalia. In December 2007, the Union had appointed an EUSR to the AU,[439] whose role was essentially to work towards EU objectives regarding support of African efforts to build a peaceful, democratic and prosperous future for the continent as set out in the JAES. Gary Quince was the last to fulfil this role and his mandate expired in 2014.[440] In December 2011, the Council appointed Alexander Rondos as the EUSR for the Horn of Africa to provide a regional response by the Union to the challenges in the Horn of Africa region.[441] The mandate of Mr Rondos is extremely broad and it includes, *inter alia:* to work in close coordination with the UNSG Special Representative for Somalia and the AU; to contribute actively to actions and initiatives leading to further stabilisation and post-transition arrangements for Somalia; to support the development of the security sector in Somalia, including through the CSDP missions and operation in Somalia and AMISOM, as well as working closely with Member States; to encourage and support effective political and security cooperation and economic integration in the region through the Union's partnership with the AU and sub-regional organisations like IGAD.[442]

CSDP

The Union's engagement in the Horn of Africa is a good demonstration of the CSDP repertoire as it includes a maritime military operation (i.e. EUNVAFOR Atalanta), a military training mission (i.e. EUTM Somalia) and a mission with an important rule of law component (i.e. EUCAP Nestor). In 2008, the UNSC stressed:[443]

> 'The threat that acts of piracy and armed robbery pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and international navigation.'

[439] Joint Action 2007/805/CFSP
[440] Council Decision 2013/383/CFSP
[441] Council Decision 2011/819/CFSP
[442] Article 3(1)(e) Council Decision 2013/527/CFSP
[443] UNSC Resolution 1816 (2008)

The UNSC authorised States to use all necessary means to repress acts of piracy and armed robbery at sea. In particular, it encouraged States 'interested in the use of commercial maritime routes off the coast of Somalia' to actively respond to piracy off the Somali coast. EUNAVCO was the first response of the Union to the demands of the UNSC.[444] It was a military coordination action (an EU Coordination Cell) to support the activities of Member States deploying military assets in theatre. On the launch of EUNAVFOR Atalanta, also in 2008, the military coordination cell was closed.[445]

Atalanta's objective is to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. Its mandate has been repeatedly amended. For example, in December 2009 the Council entitled the Operation to contribute to the monitoring of fishing activities off the Somali coast.[446] In March 2012, the Council extended the area of operations of Atalanta to include Somali internal waters and Somali land territory.[447] The Decision also established the conditions under which suspects arrested and detained in the internal or territorial waters of States other than Somalia should be transferred. Moreover, because of the area of operations of Atalanta and the many countries affected by piracy off the Somali coast and in the Indian Ocean, the Operation involves the participation of several third States. For example, Atalanta requires the adoption of agreements on the status of the Operation in the territory of third States, like the bilateral agreements between the EU and Somalia, Djibouti and Seychelles.[448] Moreover, the Operation also requires agreements on the conditions of transfer of suspected pirates and associated seized property from Atalanta to third States. The famous (or infamous) EU-Mauritius and EU-Tanzania Tanzania are examples of this type of agreements.[449] Thirdly, several third States, like Norway, Croatia, Montenegro, Ukraine and Serbia, play an active role in Atalanta, and participate in its Committee of Contributions.[450]

[444] Joint Action 2008/749/CFSP
[445] Joint Action 2008/851/CFSP
[446] Council Decision 2009/207/CFSP
[447] Council Decision 2012/174/CFSP
[448] See, respectively, Council Decisions 2009/29/CFSP, 2009/88/CFSP and 2009/916/CFSP
[449] Council Decisions 2011/640/CFSP and 2014/198/CFSP, respectively. Note that these agreements gave place to litigation before the CJEU. See Case C-658/11, *Parliament* v *Council*, Mauritius Case and Case C-263/14, *Parliament* v *Commission*, Tanzania Case
[450] See, for example, Council Decision 2009/356/CFSP regarding the contribution of Norway to Atalanta and Council Decision 2009/359/CFSP, on the consequent establishment of a Committee of Contributors, where Norway is represented

The objectives of Atalanta are complemented by EUCAP Nestor, which is active since July 2012.[451] The latter's mandate includes, *inter alia*: to assist authorities in the region in achieving the efficient organisation of the maritime security agencies carrying out the coast guard function; to assist Somalia in developing its own land-based coastal police capability supported by a comprehensive legal and regulatory framework; and to provide assistance in strengthening national legislation and the rule of law through a regional legal advisory programme, and legal expertise to support the drafting of maritime security.

On-land, the Union has provided training to the Somali security forces through EUTM Somalia, which was launched in February 2010.[452] Finally, the EU Operations Centre, which has been active since March 2012, provides support in the field of operational planning and conduct of the CSDP in the Horn of Africa and in the Sahel region. Its objective is to increase efficiency, coherence synergies amongst CSDP missions and operations within both regions.[453]

4.2 Similar policies and activities under different instruments: the toolbox as a challenge for coherence

The lines that follow demonstrate that similar policies and activities are simultaneously implemented under different instruments of the Union's CFSP and development cooperation toolbox. Although this situation does not necessarily lead to incoherent policies and activities, it obviously adds an extra challenge for coherence, as the procedures for the implementation of these instruments, including the roles of EU actors within these procedures, differ.

Peace and security

At the national level, peace and security in Somalia are promoted under the EDF's national programme for Somalia, the IcSP and EUTM Somalia.

Under the EDF's national programme for Somalia,[454] the Union has contributed to strengthening the security sector by supporting, *inter alia*: [455] recruitment, training and

[451] Article 3 of Council Decision 2012/389/CFSP
[452] Council Decision 2010/96/CFSP
[453] Article 1 of Council Decision 2013/725/CFSP
[454] Decisions C(2012) 8041 and C(2015) 671, Annex 1
[455] Interestingly, development cooperation measures regarding Somalia often consider reforms of the judiciary as support to the security sector

equipment for police officers and the judiciary; the initiation of structural reforms of the judiciary, including through technical assistance, capacity building and provision of basic support. Under the IfS, the Union has supported a programme to reduce the impact of explosive threats to the Somali population.[456] This is remarkable since Article 11(3) of the Cotonou Agreement – the framework of the EDF – establishes:

> 'Particular emphasis shall be given to the fight against antipersonnel landmines and explosive remnants of war.'

At the supra-national level, the EU promotes peace and security in Somalia by supporting the APSA. The APSA has been promoted under the EDF's Intra-ACP programme and, in particular, under the APF. Besides supporting AMISOM,[457] the Union has promoted the APSA by, for example:[458] supporting African training centres; making general contributions to the APSA; funding training exercises of APSA structures; supporting the AU in the establishment of a command, control, communication and information system for African-led peace support operations; and supporting the network of AU liaison offices. Moreover, under the ESA-IO regional programme of the EDF, the Union has also supported the peace and security mandates of regional organisations, which constitutes an essential part of the APSA. In this context, the Union has, for instance, supported IGAD's mediation and preventive diplomacy efforts for the conflict in Somalia.[459]

Counter-piracy and maritime security

Under the EDF's ESA-IO regional programme, the Union has funded a programme for the implementation of a regional maritime security strategy, which is known as MASE.[460] The purpose of the programme is to strengthen the capacities in the judiciary, legal and police areas of Horn of Africa countries to arrest, transfer, detain and prosecute pirates, as well as to disrupt the financial networks of pirate leaders. Moreover, the Union has funded similar activities with an action to support the maritime transport sector in

[456] Decision C(2011) 9459
[457] See, for example, Decisions C(2008) 8606, C(2011) 8878, C(2012) 6536
[458] See Decisions C(2012) 1479, C(2011) 5379, C(2011) 5481, C(2013) 8911 and C(2013) 8959, in this order
[459] Decision C(2015) 3379
[460] See, for example, Decision C(2011) 7682

Somalia, funded under the EDF's Intra-ACP programme.[461] The coincidence in terms of objectives between these measures and the mandate of EUCAP Nestor is obvious.

Food security

The ESA-IO regional programme (EDF) has also been utilised to support IGAD's livestock policy initiative, with the objective of enhancing the contribution of the livestock sector to sustainable food security and poverty reduction in the IGAD region, including Somalia.[462] Under the Food Facility Regulation, the EU has funded a measure to increase food availability for vulnerable Somali households.[463] The objective of the measure was to contribute to increased food security and to develop a private sector-led economy by, for instance, rehabilitating irrigation land. The EDF's national programme for Somalia in the analysed period has also promoted food security, even though often under titles like 'economic development programme for growth and resilience' or 'economic development programme'.[464] Measures under the national programme for Somalia have been directed at supporting households that are food insecure to built more resilient livelihood and have enhanced food security. Under this programme the Union has repeatedly supported the Food Security and Nutrition Analysis Unit, whose aim is to ensure that all relevant stakeholders have access to appropriate information for emergency response and development planning.

Education

At the national level, the education sector has been supported under the EDF's national programme for Somalia.[465] The activities promoted have been, *inter alia*: strengthening the capacity of partner administrations and institutions; increase equitable access to relevant formal and non-formal education and training; and strengthening the pedagogical skills of primary and secondary education teachers.

At the supranational level, for instance in 2014 the Union contributed to an initiative called Global Partnership for Education under the DCI and under the Intra-ACP programme of the EDF, simultaneously.[466] Moreover, under the PanAf (DCI) the Union

[461] Decision C(2012) 8992
[462] Decision C(2010) 2213
[463] Decision C(2010) 1614
[464] See Decisions C(2008) 8403, C(2012) 8041, C(2013) 8477 and C(2015) 671
[465] Decisions C(2008) 8403, Annex 2, C(2011) 8662 and C(2012) 8041, Annex 5
[466] Decisions C(2014) 7887, Annex 3 and C(2014) 8589, Annex 4, respectively

supported the AU with a measure towards harmonisation of higher education programmes in Africa.[467]

The JAES

EU measures supporting the JAES illustrate the tension between the ACP-EU Partnership and the Africa-EU Partnership. The JAES is supported under the pan-African initiatives of the EDF and through the PanAf programme of the DCI. Through the former, the Union provides support to the AU, not only for AMISOM, but also for other matters that are not necessarily linked to peace and security. For example, under the Intra-ACP programme the Union has financed the JAES support mechanism and the AU Commission through the AU support programme.[468] The creation of the PanAf programme under the DCI was motivated by the lack of a specific EU instrument to support the JAES. However, it creates a divide in the Union's support to the AU, which is currently assisted through the EDF and the DCI. Under the PanAf programme of the DCI, the Union has funded, *inter alia*: the AU capacity in election observation, AU research grants, and the JAES support mechanism and communication.[469]

Lastly, the adoption of the Africa Trust Fund adds even more complexity to the toolbox presented in this section.[470] The objective of the Fund is to address crises in certain African regions, including the Horn of Africa. It is designed to, *inter alia*: support migration management; address the root causes of destabilisation; promote security and development and address human rights abuses.

5 The legal dimension of coherence in the CFSP-development cooperation nexus

5.1 Mechanisms for coherence in EU external relations law: empirical claims

The empirical claims of this section respond to the theoretical claims presented in section 4 of chapter 2. This is why the arguments that are put forward in this section should be considered together with those formulated in chapter 2.[471] All empirical claims concern horizontal inter-policy coherence between the CFSP and the development cooperation policy. Empirical claims no 2 and 4b also consider vertical coherence in EU development

[467] Decision C(2014) 8513
[468] Decisions C(2012)1998 and C(2013) 9357
[469] Decision C(2014) 8515
[470] This instrument was adopted in 2015 and is, thus, outside the analysed period. Commission Decision on the establishment of a EU Emergency Trust Fund (C(2015) 7293)
[471] See section 4 of chapter 2, pages 79-105 and Annex 1 of the thesis

cooperation. However, the case study only focuses on EU legal acts, which means that the vertical axis is only considered from the perspective of the Union towards its Member States, and not vice versa.

Empirical claim no 1: the principles and objectives set out in Article 21 TEU ensure a certain degree of consistency between CFSP and development cooperation measures, but not coherence

This claim results from the examination of the statement of objectives in the selected legal acts. The analysis distinguishes between two types of objectives. On the one hand, the development of democracy and the rule of law, as well as respect for human rights and fundamental freedoms. These external objectives correspond to the principles the Union is founded on.[472] On the other hand, the analysis focuses on the objectives that define the CFSP and the development cooperation policy: international security (i.e. CFSP) and economic and social development, as well as poverty eradication (i.e. development cooperation policy).[473] Lastly, the analysis reflects on the effects of the 'liberalisation' of objectives in the CFSP-development cooperation nexus. The case study shows that this is a long-standing process, which the introduction of the single set of objectives can be considered to confirm. It refers to the tendency towards disconnecting external policy areas from the objectives that have traditionally characterised them, allowing other policy areas to promote these objectives. The analysis concludes that, in the CFSP-development cooperation nexus, the liberalisation of objectives contributes to ensuring a certain degree of consistency across policies and activities, because it increases the cases in which the same objectives are promoted under different policy areas. However, the legal acts examined show that the liberalisation of objectives does not lead to the notion of coherence (i.e. complementarity, creation of synergies, comprehensiveness) between the objectives pursued in policies and activities implemented under different policy areas. It is not leading to a situation where actors take account of all the different EU objectives at stake, including those promoted under different policy areas. In contrast, the liberalisation of objectives can be said to be changing the scope of the development cooperation policy.

[472] Article 21(1) TEU
[473] Articles 21 and 24 TEU; Article 208 TFEU

Democracy, rule of law, human rights: the governance agenda

These intertwined objectives were set out in treaty provisions regulating the CFSP and the development cooperation policy before the entry into force of the Lisbon Treaty.[474] Under the current legal framework, they can be found in Article 21(2)(b) TEU. This means that these are general objectives of EU external action.[475] The development of democracy and the rule of law, as well as respect for human rights and fundamental freedoms is an essential part of the governance agenda that characterises the CFSP and the development cooperation policy. The EU assumes that poverty and conflict cannot be prevented if States are unable or unwilling to serve their citizens. In fact, the governance agenda is an expression of the security-development nexus approach. Hence it is not surprising that governance reform, in general, and specific measures directed at developing democracy and the rule of law, as well as respect for human rights are central in the legal acts analysed. The Council Decision establishing EUTM Somalia provides a clear example of what the governance agenda is about:[476]

> 'In order to contribute to strengthening the Somali Transitional Federal Government (TFG) as a functioning government serving the Somali citizens.'

The action on support to State building and peace building sectors of the EDF's annual action programme 2014 for Somalia mentions among its objectives:[477]

> 'Rule of Law and Security: human security and justice enhanced through strengthened institutions and greater citizen access to policing and justice services that address key grievances and injustice, with a particular focus on justice for women, children and minorities.'

In a similar manner, one of the tasks of EUCAP Nestor is:[478]

> 'To provide assistance in strengthening national legislation and the rule of law through a regional legal advisory programme, and legal expertise to support the drafting of maritime security and related national legislation.'

[474] Ex-Article 11 TEU and ex-Article 177 TEC, respectively
[475] Case C-263/14, *Parliament* v *Commission*, Tanzania Case
[476] Article 1(1) Council Decision 2010/96/CFSP
[477] C(2015) 671, Annex 2, page 1
[478] Article 3(1)(e) of the Council Decision 2012/389/CFSP

Security, poverty, economic and social development: the security-development nexus

One of the effects of adopting the security-development nexus is the prioritisation of governance reform in the agendas of both the CFSP and the development cooperation policy. Another such consequence is that security and development objectives begin to be seen as closely intertwined. This justifies the need to consider the effects of security measures over development objectives that are mainly promoted under development policies and vice versa. In the legal acts analysed development cooperation measures admit their direct contribution to security objectives, but these statements of intention are not directly accompanied by references to CFSP measures. On the other hand, none of the selected CFSP legal measures refers to its impact on economic and sustainable development or on poverty reduction. A clear example is the Union's support to Mogadishu's port security. When this activity is financed through the IfS, the Union claims:[479]

> 'Functioning port facilities in Mogadishu are critical to the stability of the capital and the country and essential for social and economic recovery.'

Although EUCAP Nestor provides a similar support, the Decision establishing this CSDP mission does not include any reference to how port security contributes to development objectives.[480]

Development cooperation measures supporting the education sector provide good examples of the nexus between security and development. For example, the action concerning support for the education sector under the EDF's annual action programme 2008 for Somalia argues that illiteracy:[481]

> 'Has resulted in the adult population and the youth suffering as a "lost generation" in education terms, carrying a risk in worsening fragility/increasing conflicts. Lessons learnt showed it is possible to generate a fair amount of hope in a war torn environment (through training and employment prospects).'

The liberalisation of EU external objectives: towards comprehensiveness?

The selected legal acts show that the liberalisation of objectives in the CFSP-development nexus is a process that began before the introduction of the single set of objectives

[479] Decision C(2011) 9459, page 14
[480] Council Decision 2012/389/CFSP
[481] Decision C(2008) 8403, page 4

brought about by the Lisbon Treaty reforms. While this process may ensure a certain degree of consistency across policies and activities, it does not lead to the positive idea of coherence (i.e. comprehensiveness). While development cooperation measures consider – and substantially contribute to – security objectives, they do not refer to CFSP measures where these objectives are also developed. Furthermore, CFSP measures do not take account of development objectives. This is problematic from the perspective of the general requirement of Article 7 TFEU and, in particular, as far as the policy coherence for development agenda enshrined in Article 208(1) TFEU is concerned. It is also at odds with the security-development nexus approach.

In contrast, the liberalisation of objectives can be said to be causing a change in scope in the development cooperation policy. Noticeably, while all development cooperation measures refer to *security* challenges in Somalia, only two of them refer to *poverty*. This is especially worrying after the entry into force of the Lisbon Treaty as the campaign against poverty is now the main objective of the development cooperation policy.[482] The resilience programme of the EDF's annual action programme 2014 for Somalia stands out as the only legal act that refers to this legal innovation:[483]

> 'Working with the most vulnerable populations to build their resilience is in line with Resilience Communication and also a fundamental part of poverty reduction which is the ultimate aim of EU development policy.'

The statement of objectives in CFSP and development cooperation measures seems to indicate different perceptions regarding the possibility of being subject to litigation before the CJEU regarding the choice of legal basis. While CFSP measures avoid any reference to development objectives, development cooperation measures do not seem to be concerned with recognising their contribution to international security objectives. As this situation does not change in measures adopted before and after the entry into force of the Lisbon Treaty, it can be considered reminiscent of the primacy of the *acquis communautaire* that the treaties no longer enshrine.[484] In short, when the reminiscence of the primacy of the *acquis* meets the liberalisation of objectives, the result is a change in the scope of the development cooperation policy. In contrast, these two circumstances do not seem to be bringing about increased complementarity between CFSP and

[482] Article 208(1) TFEU
[483] Decision C(2015) 671, Annex 1
[484] Ex-Article 47 TEU and Article 40 TEU

development cooperation measures. The case study confirms the tension between the provision of common objectives and the definition of legal delimitation rules, which is explained in chapter 2 of this thesis, and analysed again under empirical claim no 3 of the current section.[485]

Empirical claim no 2: CFSP and development cooperation measures are guided by strategic documents, but not shared ones

This claim results from the analysis of the strategic documents mentioned in the selected legal acts. While CFSP measures are based on Council conclusions and UNSC resolutions, development cooperation measures focus on strategic documents of the Government of Somalia or are designed by external actors such as the UN and the World Bank. In both cases, external actors play a fundamental role in defining the priorities of the Union.

As far as the development cooperation policy is concerned, the Joint Strategy Paper for Somalia (2008-2013), which is the main strategic document for the 10th EDF country programme for Somalia, was based on the priorities of the Reconstruction and Development Programme. This programme was the result of a participatory joint needs assessment led by the World Bank and UNDP. On the basis of the Reconstruction and Development Programme, the EU, together with Denmark, Finland, France, Italy, Sweden, UK, and Norway, developed a Joint Strategy Paper (2008-2013). This Strategy corresponds to the first stage of EU joint programming.[486] It identified as crosscutting issues: gender, the environment, conflict prevention, and the fight against HIV. For example, the action to support the education sector in the EDF's annual action programme 2008 for Somalia was consistent with the crosscutting issues identified in the Joint Strategy Paper, since it clearly prioritised female participation in primary and secondary school:[487]

> 'The options of gender affirmative support include: girls only primary schools, girls only classes in secondary education; reduced/subsidised school fees for disadvantaged girls (about 3,500 in total in the trial period); conditional cash transfers/vouchers to girls. These will be complemented by pedagogical work such as: reviewing curricula, strengthening Educational

[485] See section 4 of chapter 2 of this thesis, pages 85-98

[486] See section 5 of chapter 2 on joint programming in EU development cooperation, pages 105-115

[487] Decision C(2008) 8403, Annex 2, pages 2-3. We shall bear in mind that Article 1 of the Cotonou Agreement (see note 410) establishes that 'systematic account shall be taken of the situation of women and gender issues in all areas — political, economic and social.'

Development Centres (or similar institution), gender specific/sensitising training for teachers.'

The national indicative programme for Somalia under the 11th EDF focuses on the priorities established in the Somali Compact and states:[488]

'EU joint programming for Somalia will take the form of the Compact. EU Member States have been, together with the EU institutions, party to preparation of the Compact from the very initial stages and have subscribed to its mutual accountability framework as well as to align their support to the Compact priorities and the below coordination mechanisms. These mechanisms will provide common platforms for policy dialogue and will offer the opportunity for better synergies and division of labour between donors, including progressive alignment between EU's and EU member states' intervention.'

Individual measures falling within the national indicative programme for Somalia (2014-2015) specify that they are based on the Somali Compact. For example, the action on support to statebuilding and peacebuilding sectors under the EDF's annual action programme for Somalia 2014 claims:[489]

'This Action is part of the wider 'Compact Response Programme' and aims to respond rapidly to the commitments made by the EU to support the priorities of the Federal Government of Somalia (FGS). These objectives are in line with the Peace-building and State-building Goals (PSG) of the New Deal for Engagement in Fragile States, notably PSGs 1, 2 and 3'.

When the Union is contributing to actions led by international organisations, it incorporates the priorities defined by other international organisations. A clear example is to be found in a measure supporting explosive contamination clearance funded under the IfS. This measure takes the UN strategy for the recovery and stabilisation of Mogadishu as its guiding instrument.[490]

'The UN Strategy for the Recovery and Stabilisation of Mogadishu which sets out sustainable initiatives that will improve the lives of the population and focuses on three sectors: human security, basic services and employment.'

[488] Decision C(2014) 3715, Annex, page 16
[489] Decision C(2015) 671, Annex 2, page 1
[490] Decision C(2011) 9459, page 3

Surprisingly, none of the analysed measures mention the European Consensus on Development (2006) and only one refers to the Council Conclusions adopting a Strategic Framework for the Horn of Africa (2011):[491]

> 'The measures provided for in this Decision are consistent with the political objectives and overall engagement of the EU in Somalia, as well as will the EU Strategic Framework for the Horn of Africa.'

Certain legal acts mention Commission communications, like the one on a thematic strategy for food security.[492] Only one of the legal measures analysed refers to the Agenda for Change (2011):[493]

> 'The proposed programme has been designed based on the outcome of extensive consultations with the main stakeholders in Somalia. It is also based on the New Deal Compact for Somalia, and on several EU and Global Development Policies such as the MDGs, the EU Strategy for Africa, the EU Agenda for Change, the Development Assistance Committee of the Organisation for Economic Cooperation and Development (OECD-DAC) Fragile States principles particularly Principle 7, the New Deal for interventions in fragile states and the Comprehensive Africa Agriculture Development Programme (CAADP).'

In contrast, beside explicit references to the OECD framework, such as the one in this fragment, most Commission decisions refer to OECD principles like ownership, alignment or concentration. For example, the action on education sector support under the EDF's annual action programme for Somalia 2008 claims:[494]

> 'The proposed method of implementation is therefore centralised management, albeit in close consultation with the respective Somali Administrations in the three Zones, in particular the Ministry of Education, Transitional Federal Government. This will ensure improved ownership.'

This is not surprising as the Cotonou Agreement establishes that development finance cooperation shall be:[495]

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[491] Council Conclusions: Horn of Africa (16858/11) and C(2013) 3009, Annex, page 1. Notice that this strategy has been replaced by The EU Horn of Africa Regional Action Plan 2015-2020, adopted in the Council Conclusions 13363/15

[492] Decision C(2008) 8403, Annex 3

[493] Decision C(2015) 671, Annex 1, pages 6-7

[494] Decision C(2008) 8403, Annex 2, page 5

[495] Article 56 of the Cotonou Agreement (see note 410)

> 'Guided by the internationally agreed aid effectiveness agenda, cooperation shall be based on ownership, alignment, donor coordination and harmonisation, managing for development results and mutual accountability.'

In contrast, CFSP measures refer to Council conclusions and UNSC resolutions. The fact that Council decisions establishing CSDP missions and operations refer to UNSC Resolutions is important (sometimes even essential) to their international legality. For example, EUTM Somalia claims:[496]

> 'In its Resolution 1872 (2009) on the situation in Somalia, adopted on 26 May 2009, the United Nations Security Council (UNSC) stressed the importance of the re-establishment, training, equipping and retention of Somali security forces, and urged Member States and regional and international organisations to offer technical assistance for the training and equipping of the Somali security forces. In its Resolution 1897 (2009), adopted on 30 November 2009, the UNSC recalled its previous resolutions and reaffirmed its respect for the sovereignty, territorial integrity, political independence and unity of Somalia.'

> 'In its conclusions of 27 July 2009, the Council decided to step up the engagement for promoting peace and development in Somalia. To this end, the Council studied the possibilities for the Union to contribute to international efforts, including in the field of security.'

The case study shows that the priorities of the Union do not only result from strategy policy documents of the EU (i.e. top-down coherence), but are essentially externally driven (i.e. bottom-up coherence). In fact, the Commission does not refer to the common approaches that should ensure both vertical and inter-policy coherence, like conclusions of the Council and the Union's strategic frameworks for the Horn of Africa.[497] Even within the development cooperation policy, the Commission refers to different common approaches depending on the specific programme or instrument implemented. From the viewpoint of CFSP-development cooperation coherence, the case study demonstrates that the Council and the Commission are looking into different directions to guide their action. While the Council looks into the UNSC, the Commission looks into the Government of Somalia and leading international actors on the ground like the UN and the World Bank.

[496] Indents 1 and 2 of the Preamble of the Council Decision 2010/96/CFSP

[497] Strategic Framework for the Horn of Africa (Council Conclusions: 16858/11) and EU Horn of Africa Regional Action Plan 2015-2020 (Council Conclusions: 13363/15)

Empirical claim no 3: the statement of objectives and activities of CFSP and development cooperation measures is not conclusive of the legal basis used for their adoption

According to settled case law of the CJEU, the aim and content of a European act determines its legal basis. It determines whether a single legal basis is needed or if a dual legal basis is required. This test, which the Court continues to refer to in its case law following the entry into force of the Lisbon Treaty, assumes that there are specific contents and aims pertaining to specific policy areas as otherwise it would make no sense to claim that the test determines the legal basis. The analysis of the examined legal acts shows that this is not the case. Neither the content, nor the aims pursued are conclusive of the policy area chosen, and practice does not seem to have found any alternative criteria leading to coherence. What tool the Union uses depends, exclusively, on who decides to act. EU actors thus have considerable flexibility to decide whether the CFSP, the development cooperation policy or the IcSP is most adequate. The price to be paid is that there is no consistency over the choice of the legal basis, because the same content and the same aims are pursued under different legal bases. The idea that when Member States are the actors on the ground the legal basis chosen is the CFSP, whereas if this is not the case, the development cooperation policy is used is not conclusive either. As will be analysed, there is a development cooperation measure contributing to an action implemented by DfID. I refer to the activity supported and the objectives promoted because development cooperation measures include sections on 'activities' and 'objectives' that correspond to the Court's idea of 'content' and 'aim', respectively, in the Court's case law. I also consider the IcSP, as a *sui generis* development cooperation instrument.

The activity supported is often not conclusive of the legal basis chosen

Union action in Somalia over the last few years offers striking examples regarding the difficulty of distinguishing between measures that fall naturally under the CFSP and activities that require a development cooperation policy legal basis.[498]

The EU has facilitated technical advice to governance structures both under the development cooperation policy and the CFSP. Under the IcSP, the Union has funded

[498] Section 4 of this chapter shares similarities with empirical claim no 3. However, while the former provides a general overview of the Union's toolbox, the latter presents a more detailed analysis focusing specifically on the choice of legal basis (i.e. CFSP or development cooperation). See pages 148-151

the provision of technical assistance to the Ministry of National Security of the Government of Somalia to develop a National Security Plan, a National Intelligence Plan and a Countering Violent Extremism policy. Likewise, under EUCAP Nestor, the EU has supported the Government of Somalia (and other national governments in the Horn of Africa) in the drafting of maritime security and related national legislation.[499] This is not surprising because it is part of the governance agenda.

Another example is the training provided for the Somali military and police forces. The EU has covered troop allowances and salaries for the police of AMISOM and financed the training of the Somali military forces under the EDF (by supporting AMISOM) and under EUTM Somalia.[500] Moreover, the Union has also funded the Somali police under the EDF's national programme for Somalia.[501]

The Union has provided protection to vessels chartered by the World Food Programme off the Somali coast and, on land; it has supported the military protection of the Federal Institutions of Somalia. It has done so under EUNAVFOR Atalanta and through its support to AMISOM under the European Development Fund.[502] Lastly, under the Instrument for Stability, the Union has supported capacity building activities for local authorities to monitor security in the Mogadishu port area. As part of one of EUCAP Nestor's tasks, the EU has assisted authorities in the Horn of Africa 'in achieving the efficient organisation of the maritime security agencies carrying out the coast guard function.'[503] In all of these cases, if, without knowing the legal basis chosen, we were asked which policy area the Union has used we could probably not provide the right answer.

The content does determine the legal basis in certain cases. This is so in certain measures that focus on issues different than institution building and which are not justified by the existence of a situation of crisis and/or conflict. For instance, support for the education sector, which is a social development measure central to Union action in Somalia, is always conducted under development cooperation policy instruments, like the European Development Fund.[504] The content is also decisive in the choice of the legal basis when the treaties determine that a given instrument falls within a certain policy area. This is the case for sanctions that can be adopted under the CFSP or the AFSJ but

[499] Decisions C(2014) 9580 and 2012/389/CFSP, respectively
[500] Decision C(2008) 8606 and 2010/96/CFSP, respectively
[501] Decision C(2015) 671, Annex 2, page 3
[502] Council Decision 2008/851/CFSP and Decision C(2008) 8606, respectively
[503] Decisions C(2011) 9459 and 2012/389/CFSP, respectively
[504] See, for instance, Decision C(2008) 8403

cannot be development cooperation policy measures.[505] In the case of Somalia, the Union has adopted restrictive measures against Somalia and against individuals, and it has always done so under CFSP legal bases.[506] Likewise, successive decisions on the appointment and extension of the mandate of the EU Special Representative for the Horn of Africa, Alexander Rondos, have been based on CFSP legal bases.[507] Despite the fact that Mr Rondos is mandated to bridge the gap between the CFSP and the development cooperation policy, the decision to appoint an EU special representative must always be based on a CFSP legal basis.[508]

When the activity supported is not conclusive of the legal basis chosen, the statement of objectives is often a matter of reasoning

The risk stemming from being able to fund the same activities under the CFSP and the development cooperation policy is that it becomes difficult to assess whether political actors really intended to pursue the objectives they argue they wanted to pursue. EU measures in support of the governance sector in Somalia are a good example in this regard. Under the EDF, the Union has supported federal, regional and local institution building. In particular, the EU has trained and equipped local authorities to manage tax revenues; it has provided basic infrastructure, equipment and technical assistance to regional and federal governments and parliaments; and it has offered recruitment and training for federal and regional civil services. In a similar manner, under the IcSP, the EU has funded the emerging interim administrations of South Central Somalia:[509]

> 'Through a range of tailored technical support and capacity building measures for emerging administrations.'

While the content of these two measures is similar, the objectives political institutions argued they were promoting are very different. The action under the EDF aims at advancing:[510]

[505] Council Decision 2010/231/CFSP; Articles 215 and 75 TFEU
[506] See, for instance, Regulations 478/2014 and 432/2013, respectively
[507] Council Decision 2015/440/CFSP
[508] Article 33 TEU
[509] Decisions C(2008) 8403, Annex 1 and C(2014) 9580, respectively
[510] Decision C(2008) 8403, page 2

> 'Reconciliation, democracy and governance at federal, regional and local levels, allowing the delivery of a new constitution adopted by referendum and democratically elected institutions at the end of the transitional period.'

This is so even though the Commission decision foresees no activity that one can directly link to the promotion of reconciliation and democracy. However, by including these objectives, the Commission connected its measure to the key objectives of Somalia's transitional period (2004-2009) that had been decided at the National Reconciliation Conference held in Kenya between 2002 and 2004. In contrast, the measure under the IcSP claims to aim at:[511]

> 'Supporting the stabilisation of districts recently taken from AS and new interim administrations in South Central Somalia by contributing to a multi-donor trust fund.'

In this case, by linking its action to providing stability in a situation of crisis, the Union justified the choice of the IcSP. If the situation described in this IcSP measure qualified as a situation of crisis (i.e. access to newly accessible areas), we may wonder why the police support provided under the EDF's annual action programme 2014 for Somalia was not also provided under the IcSP:[512]

> 'In this context the reform and development of the civilian police remains a critical priority. In Puntland the security sector has yet to embark on a process of institutional reform and development. In South Central Somalia the Somali police force has limited reach beyond the capital Mogadishu and their functions are limited to providing basic patrols and escorts. However, a strategic action plan for the police now exists at the federal level as well as a recruitment and deployment plan for newly accessible areas, and senior officers are steadily developing technical capability for criminal investigations and the gathering of evidence.'

In fact, Union action in Somalia shows that, in the Union's action in fragile states, almost every measure can be justified as tackling these situations. Somalia has been in crisis, in need of conflict prevention and peace-building measures and has posed a threat to international peace and security for the whole period covered by the case study. Paradoxically, it is in contexts of state fragility, like the case of Somalia, where the EU deploys its full CFSP and development cooperation policy artillery, and thus when being

[511] Decision C(2014) 9580, Annex, page 4
[512] Decision C(2015) 671, Annex 2, page 3

able to clearly define what falls under each of these policy areas becomes most important. This is why the IcSP further complicates what was already a difficult choice.

The statement of objectives is often not conclusive of the legal basis chosen

This is so either because there is only a reference to shared objectives or because of reference to objectives that define another policy area. EUTM Somalia and EUCAP Nestor are clear examples. According to the Decision on its establishment, with EUTM Somalia the Union conducts a military training mission:[513]

> 'In order to contribute to strengthening the Somali Transitional Federal Government (TFG) as a functioning government serving the Somali citizens.'

EUCAP Nestor, on the other hand, is tasked with the objective:[514]

> 'To assist the development in the Horn of Africa and the Western Indian Ocean of a self-sustainable capacity for continued enhancement of their maritime security including counter-piracy and maritime governance.'

While the content of these two CSDP operations is undoubtedly fit to pursue CFSP objectives it could also form part of development cooperation measures. This is why, by not mentioning the specific objectives the measure aims towards, the Council does not recognise the existence of a parallel policy area, the development cooperation policy area, under which similar activities could also be conducted.

The silence of CFSP measures contrasts with the extent to which development cooperation measures are explicit as regards the development objectives they promote, and also the security ones. This is part of the liberalisation of objectives analysed under empirical claim no 1. This is the case for the Union's contributions to AMISOM through the APF of the EDF.[515]

> 'The overall aim is to promote long-term peace, security and good governance in Somalia. It is based on an objective which is widely accepted internationally, namely to initiate and accomplish all the planning involved in the creation of an environment conducive to national reconciliation, lasting peace and stability in a united Somalia, where human rights

[513] Article 1 of Council Decision 2010/96/CFSP
[514] Article 1 of Council Decision 2012/389/CFSP
[515] Decision C(2010) 5930, Annex, page 3

are respected, the protection of all citizens assured and internally displaced persons and refugees can return home in safety and dignity.'

While the Court would probably justify these as *obstacles* or prerequisites to development objectives that need to be tackled under the CFSP, one may doubt whether these are *mainly* development objectives, or only *incidental* development objectives.

The liberalisation of objectives may ensure a certain substantive coherence but renders procedural coherence impossible and makes it difficult to avoid substantive contradictions and overlaps of a different nature.

Empirical claim no 4a: there is no manifest coordination between the Council and the Commission; the Commission refers to CFSP measures (but not vice versa)

An increase in efforts regarding inter-policy coordination can be observed in the period analysed. This can be perceived in CFSP measures and also in development cooperation measures. In development cooperation, these efforts translate into increased 'awareness' as regards measures implemented under different policy areas, including the CFSP. In contrast, in the case of the CFSP inter-policy coordination efforts focus on entrust the HRVP with vague mandates regarding institutional coordination. However, nothing indicates that CFSP and development cooperation measures are effectively coordinated. In the Somalia Donor Group, the actors that are really responsible for development cooperation programmes periodically sit together to discuss coordination. In contrast, the kind of institutional coordination foreseen in CFSP measures is mediated (i.e. via the HRVP). Even when coordination concerns actors on the ground (e.g. Head of EUCAP Nestor and Union delegations in the region) the actors involved are left to decide if and when they want to coordinate.

In its provision on 'coherence of EU response', the Council Decision on the establishment of EUNAVFOR Atalanta states:[516]

'The Presidency, the SG/HR, the EU Operation Commander and the EU Force Commander shall closely coordinate their respective activities regarding the implementation of this Joint Action.'

Later, the Council Decision establishing EUCAP Nestor, in its Article 14 on 'consistency of the Union's response and coordination' claims:[517]

[516] Article 8 of the Joint Action 2008/851/CFSP

'The HR shall ensure the consistency of the implementation of this Decision with the Union's external action as a whole, including the Union's development programmes.'

This Article also adds paragraphs on the institutional relations that the head of the mission will maintain with relevant actors in the region, including the Union delegations, Member States' heads of mission, and other CSDP operations. The role of the EEAS in ensuring horizontal inter-policy coordination is not considered.[518] Moreover, there are obvious reasons to question whether the HRVP can fulfil this role for all CSDP missions and operations across the planet. The fact that none of the analysed development cooperation measures mentions the role of the HRVP in coordinating CFSP and development cooperation efforts is another argument to put into question whether she is leading this coordination. The vague character of references to inter-policy coordination (i.e. CFSP-development cooperation) in CFSP measures contrasts with the degree of detail with which these measures regulate coordination with States and other CSDP actions. The Committee of Contributors of EUNAVFOR Atalanta and EUTM Somalia, which bring together EU and non EU States participating in these CSDP actions, are great examples of this.[519] The creation of the Operations Centre as a tool that is specifically designed to foster coherence within and amongst CSDP missions and operations in the Horn of Africa and in the Sahel region are also examples of the same idea.[520]

As regards the increase in 'awareness' in development cooperation measures, for instance an act adopted under the IfS in 2011 in the field of explosive contamination does not mention CFSP action in Somalia. In 2014, an action under the IcSP aimed at contributing to stability in Mogadishu, refers to the complementarity of assistance provided under CSDP missions as well as humanitarian aid.[521] The same can be said about the EU's contributions to AMISOM. While in the first few years references to the CFSP are scarce, later we find very explicit references to the EU's comprehensive

[517] Article 14 of the Council Decision 2012/389/CFSP. A similar reference can be found in Article 7 of Council Decision 2010/96/CFSP (EUTM Somalia)

[518] The EEAS is only mentioned in IfS and IcSP measures, as it is responsible for the implementation of these measures, together with the Commission. See Decisions C(2011) 9459 and C(2014) 9580

[519] PSC Decisions Atalanta 7/2009 (2009/758/CFSP) and EUTM Somalia/1/2011 (2011/815/CFSP), respectively

[520] Council Decision 2012/173/CFSP

[521] Decision C(2014) 9580

approach to Somalia, detailed information about the different CSDP missions deployed and about the humanitarian assistance provided:[522]

> 'The EU's support to AMISOM is an important part of its comprehensive approach to Somalia, guided by its strategic framework for the Horn of Africa, encompassing active diplomacy, security support and development assistance.'

Towards the end of the analysed period, we can even find sections on 'complementarity, coordination and follow-up'. In the EDF's annual action programme 2014 for Somalia, the Commission claims:[523]

> 'This Action contributes to the wider 'comprehensive approach' of the EU support to Somalia, covering active diplomacy in support of the political process, security sector support and development assistance'.
>
> 'Support to the security sector is closely coordinated with three Common Security and Defense Policy (CSDP) missions for Somalia and other instruments such as the African Peace Facility (APF), the Regional Indicative Programme and Maritime Security Programme.'

The increase in 'awareness' efforts is remarkable. However, as long as cross-referencing other EU measures is not accompanied by concrete references regarding how different measures can complement each other's objectives these references will not be a real drive for coherence.

Empirical claim no 4b: coordination between the Commission and the Member States is externally driven the Commission refers to measures of other donors (including Member States)

The most relevant frameworks for coordination between the EU and its Member States include the whole donor community. This is not to say that the EU does not coordinate with its Member States. For instance, the Joint Strategy Paper (2008-2013) was the main strategic document for the implementation of the 10th EDF in Somalia. The Union, its Member States and Norway signed it. Nevertheless, coordination between the EU and its Member States is often externally driven.

[522] Decision C(2013) 3009, Annex, page 2. See also Decision C(2010) 5930
[523] Decision C(2015) 671, Annex 2, pages 6-7

In 2006, the Reconstruction and Development Programme that resulted from the joint needs assessment led by the UN and the World Bank, and which provided a strategic framework for assistance over the next five years, established that the Somalia Donor Group, the NGO Consortium and the UN Country Team would nominate representatives who would meet monthly in the Executive Committee of a dedicated body for the Coordination of International Support to Somalia (CISS). The CISS was the main framework for coordination of international support to Somalia between 2008 and 2012. It agreed on common international positions to be taken forward with Somali counterparts at all levels. An Executive Committee was its governing structure, which was co-chaired by the UN and the World Bank. It had different sector committees, which are often mentioned in EU legal acts, like the education sector committee.[524]

As regards the structures for coordination that followed the Somali Compact (2013), there is a working group for each of the five Peace and State-Building Goals of the Compact, and sub-working groups, and all of them meet on a regular basis. For example, PSG working group 1, on constitution, elections and federalism, and PSG Working Group 3 on justice. The national indicative programme of the EDF's country programme for Somalia (2014-2020) refers to EU joint programming as a commitment of the EU and its Member States to the coordination mechanisms set out in the Somali Compact. It claims:[525]

> 'These mechanisms will provide common platforms for policy dialogue and will offer the opportunity for better synergies and division of labour between donors, including progressive alignment between EU's and EU member states' intervention.'

Besides the existence of frameworks to coordinate individual actions of different donors, the case of Somalia shows the existence of many joint programmes, comprising the EU, Member States and other donors, and often led by international organisations. For example, the EDF's annual action programme for Somalia 2008 established action that involved the pooling of funds from donors and was implemented by FAO. According to the Commission, FAO 'has a de facto monopoly and added value in terms of information systems management'.[526] Another example is the Somalia Stability Fund, which is a multi-donor fund supported by the EU, the UK, the Netherlands, the UAE,

[524] Decision C(2008) 8403, Annex 2
[525] Decision C(2014) 3715, Annex, page 16
[526] Decision C(2008) 8403, Annex 3, page 3

Denmark, Norway and Sweden. A Secretariat Office, comprising two representatives from the UK Department for International Development (DfID), administers the fund. Besides the Secretariat Office, a Joint Donor Committee constitutes the ultimate governance mechanism deciding on the use of the Fund and funding allocations. The annual action programme 2014 establishes that a part of the action will be implemented with DfID. This annual action programme also refers to the World Bank Multi-Partner Trust Fund and to the UN Multi-Partner Trust Fund for Somalia. The EU states that it will support:

> 'The re-engagement of the World Bank with Somalia and recognises its unique implementation capacity with regards to the financing aspect of the New Deal framework.'

As far as 'awareness' is concerned, the Commission considers its Member States as other donors. When it refers to the actions of other actors, it generally does not establish a distinction between the measures of Member States and those of other donors. In the EDF's annual action programme 2014 for Somalia, the Commission claims:[527]

> 'It will also collaborate with several emergency and development operations financed by traditional donors such as USAID, DFID, WB, Norway, Italy, Denmark, Netherlands, Germany, France, Spain, etc.'

> 'On police support, the EU closely coordinates with Japan who is the other key donor in this area, with the UK /DfID a future contributor.'

Rather than real complementarity efforts, these references constitute an acknowledgment of the existence of other measures complementing the new measure. The Union does not refer to how exactly the action that is being adopted will complement existing efforts. It merely shows awareness of what other donors are doing. This is not only the case as far as vertical coherence in EU development cooperation policy is concerned. This is also the case between the different measures of the Union's development cooperation, without considering the action of Member States. For instance, the action of governance sector support under the EDF's annual action programme for Somalia 2008 claims:[528]

> 'Other measures complementing the proposed intervention include contributions through the African Peace Facility and the Instrument for Stability in support of the deployment of

[527] Decision C(2015) 671, Annex 1, page 5; Annex 2, page 7, respectively
[528] Decision C(2008) 8403, Annex 1

AMISOM and support to the Transitional Federal Institutions through the Instrument for Stability.'

6 Chapter conclusions

When assessing if the mechanisms for coherence set out in the treaties are effective in the case of Somalia, the distinction between soft power coherence and pragmatic coherence becomes useful again. The legal measures of the case study and the analysis conducted in the introductory sections of this chapter provide arguments in favour of the claim that the Union can be said to ensure a degree of consistency sufficient to render it recognisable as an international actor. The Union is the actor presented in Article 21 TEU, and it acts according to its general approach to State fragility spelt out in policy documents. Engagement in Somalia over the last decade confirms that the security-development nexus has not only been formally incorporated into the agenda, but is also a reality in EU external action. The link between the notions of security and development, and the absolute prioritisation of support for the governance sector, which are repeatedly mentioned in policy documents, are a fact. Although the EU's response to the problems faced by Somalia can be criticised, the approach is consistent with the priorities set out at a general level in strategic policy documents. Moreover, the prioritisation of the development of democracy and the rule of law, as well as respect for human rights and fundamental freedoms, is not only a matter of policy prioritisation. Both before and after the entry into force of the Lisbon Treaty, the treaties enshrined these principles as CFSP and development cooperation objectives.[529] In general terms, political actors seek to advance vertical and horizontal inter-policy coherence according to the mechanisms set out in the treaties. If these mechanisms are not effective, political actors cannot be blamed alone. Commission decisions include sections on 'complementarity actions' and 'donor coordination', which can be said to fall under vertical inter-policy coordination via awareness, in the first case; and via institutional coordination, in the second case. These decisions also identify their objectives and activities in a systematic manner. This forms part of the Court's aim and content test to choose the appropriate legal basis, and thus of legal delimitation as another mechanism for coherence. As regards horizontal coherence in the CFSP-development cooperation nexus, CFSP decisions entrust important responsibilities regarding institutional coordination to the HRVP, just as the

[529] Ex-Article 11 TEU and ex-Article 177 TEC; Article 21(2)(b) TEU

treaties do. Furthermore, CFSP and development cooperation measures show that the Union is committed to international multilateralism. The Union responds to priorities identified by external actors, like the UN and OECD, and invites third States to form part of its actions. For example, Norway is part of EU joint programming in development cooperation, and many third States participate in EUNAVFOR Atalanta. Cooperation with external actors is foreseen in treaty provisions on the CFSP and the development cooperation policy.[530] Moreover, Article 21 TEU states that that the Union shall work towards a high degree of cooperation in all fields of international relations and must:

> 'Promote an international system based on stronger multilateral cooperation and good global governance.'

Both CFSP and development cooperation measures are guided by EU strategic documents. By way of example, Council conclusions are important in CFSP measures. The EU and Norway joint strategy paper (2008-2013) was central in the implementation of the national programme for Somalia under the 10th EDF. Furthermore, the extent to which the development of EU external relations is proceduralised ensures a certain degree of consistency and predictability over time. This is especially true in the case of the development cooperation policy, where individual measures fall under annual action programmes, which at the same time implement multiannual indicative programmes. There is certainly room for improvement, but the areas in which CFSP and development cooperation measures are *consistent* allow the EU to show its *identity* as an international actor and, thus, to advance the notion of soft power coherence.

When the analysis is less abstract and focuses on whether the mechanisms for coherence are able to secure pragmatic coherence in the case of Somalia, the assessment is not so positive. A distinction must be made between vertical coherence in EU development policy and horizontal coherence in the CFSP-development cooperation nexus. While the mechanisms for coherence seem to be effective in the first case, they encounter important problems in the latter case. Paradoxically, the mechanisms for coherence are much more relevant in the relations between EU and Member States separate *competences* in the field of development cooperation, than in the interaction between CFSP and development cooperation as EU external *policy areas.* There are

[530] See, for example, Articles 42(1) and 208(1) TFEU

essentially four findings resulting from the case study presented in section 5 of this chapter.

The first finding is that there is a difference between ensuring coherence across policies and activities and 'playing the game of coherence'. The comparison between vertical coherence in EU development policy and horizontal coherence in the CFSP-development cooperation nexus reveals this difference. For example, development cooperation measures refer to institutional frameworks for coordination, where the EU and Member States periodically discuss their development programmes. In contrast, the role of the HRVP in organising institutional coordination between the CFSP and the development cooperation policy, which is mentioned in CFSP measures, seems to be more of a general reminder of the treaty-defined role of the HRVP than a real drive for coherence. Moreover, development measures from the analysed period show an increase in 'awareness' as regards CFSP action. However, as long as cross-referencing is not accompanied by real institutional coordination and/or complementarity in terms of objectives, the increase seems to be more about filling in new templates than a real means for coherence in the CFSP-development cooperation nexus.

The second finding of the case study is that different dimensions of coherence can be in tension. The conclusions to chapter 2 of this thesis stress the existence of tensions between coherence and other interests. The case study shows that there are also conflicting interests within the idea of coherence in EU external action, depending on the specific context where we analyse coherence. We must bear in mind that there is only a maximum number of strategic documents that actors can respond to. While measures often refer to multiple policy documents, effectively they respond to the priorities identified in a single document. Depending on the strategic document that is central to a given measure, a particular dimension of coherence is strengthened, often to the detriment of others. There is an important tension between context-specific coherence and the overall coherence of EU external action. For example, there is a tension between intra-programme or intra-instrument coherence in EU development cooperation and the overall coherence of the development cooperation policy (and between this and other fields of EU action, like the CFSP). The fact that each instrument (and even each programme) has its indicative programme, which identifies specific priorities, ensures coherence in the measures that fall under this instrument, but complicates coherence across instruments. In fact, EU action in Somalia confirms that the abstract idea of the Union's wide toolbox to tackle international concerns is not only a buzzword. There are

plenty of instruments implemented in parallel under the CFSP and the development cooperation policy, as well as a long-list of legal acts falling under each of these instruments. This, by itself, renders the quest for coherence in EU foreign policy especially challenging. In fact, section 4 provides reasons to claim that legal delimitation through the definition of the scope of legal instruments is not exactly conducive to coherence, as many instruments can be utilised to facilitate the same type of assistance.

The importance of external actors in defining the Union's priorities in Somalia highlights the tension between context-specific and overall coherence of EU external action. External actors, like the UN or the World Bank, are concerned with ensuring complementarity between donors' actions in particular areas (e.g. reconstruction of Mogadishu). While this may increase the efficiency of specific EU measures, it may come at the expense of the overall coherence and efficiency of EU action (i.e. CFSP-development cooperation nexus). The latter is important for the Union to make the most out of its different policy fields, and also to present its unified identity regardless of the policy area or instrument deployed. By way of example, the focus on context-specific coherence may explain why Commission decisions do not refer to Council conclusions (i.e. common approaches), which should ensure top-down coherence between CFSP and development cooperation measures. In fact, the role of external actors reveals not only a tension between context-specific and overall coherence, but also tensions between: external and internal coherence, top-down and bottom-up coherence, vertical and horizontal coherence, and pragmatic and soft power coherence.

Third, the case study shows that the Union behaves in Somalia as a security actor in the CFSP and as a development actor in the development cooperation policy, which confirms that the nature of these policy areas is different. The Commission and the Council are not guided by the same common approaches. While the Commission looks at the actors on the ground (particularly, at the Government of Somalia), the Council looks at the UNSC. Moreover, the Council and the Commission engage in different inter-policy coordination frameworks. In EU development cooperation, the weak character of legal delimitation (i.e. EU and Member States operate in a truly parallel manner) is mitigated by inter-policy coordination, because the EU and the Member States cooperate as donors. This cannot be said about the CFSP-development cooperation nexus. While the Commission takes part in donor coordination frameworks, the Council coordinates CSDP missions and operations with participant third States, as well as with other CSDP actions. Furthermore, the implementation of the development

cooperation policy is informed by OECD principles that stress the importance of national ownership, as well as predictability of the assistance offered. In contrast, CFSP measures do not provide certainty for partner countries, as they are only established for short periods of time and then successively extended. The distinct nature of the CFSP and the development cooperation policy is relevant because it provides evidence to claim that the legal debate has overestimated the importance of the CFSP and non-CFSP legal divide in the quest for coherence in EU external action.[531] In fact, it provides arguments to suspect that, were the CFSP an ordinary EU competence, ensuring coherence in the CFSP-development cooperation nexus would remain a challenge.

Fourth, the case of Somalia provides arguments in favour of the importance of legal delimitation rules in ensuring horizontal inter-policy coherence in the CFSP-development cooperation nexus. The case study shows that there is no consistency over the choice of the legal basis (i.e. CFSP or development cooperation). The aim and content test does not work, and practice has not found alternative criteria to ensure consistency over these choices. In fact, the choice of the legal basis in the context of the single set of objectives reveals a tension between substantive and procedural coherence, and both are relevant to the idea of soft power coherence. The liberalisation of external objectives contributes to *substantive* coherence (i.e. different EU actors promote the same objectives). However, it also leads towards a situation where *procedural* coherence is not ensured (i.e. the Union proceeds in an inconsistent and unpredictable manner). Moreover, the case of Somalia demonstrates that the CFSP and the development cooperation policy are EU policy areas of a different nature. The Union behaves in Somalia as a security actor in the CFSP, and as a donor in the development cooperation policy. This is why the fact that EU actors can promote the same objectives under both policy areas is prone to substantive contradictions and overlaps, which minimise the efficiency of the Union's action. Lastly, the case study shows that the liberalisation of external objectives is bringing about effects that can be said to differ from its intentions. While CFSP legal acts are reluctant to refer to their incidental effects over development objectives, it is difficult to argue that poverty reduction, or even sustainable development, are the main objectives of development cooperation. The liberalisation of objectives has an impact on the substantive scope of EU policy areas. In contrast, even when development cooperation measures show 'awareness' as regards CFSP ones, they merely

[531] See, for example, the position of H. G. KRENZLER and H. SCHNEIDER regarding the communitarisation of the CFSP (note 8)

acknowledge the existence of other measures in the same field. They do not explain how the new measure seeks to complement the objectives pursued in existing CFSP actions. The clear-cut separation between 'awareness' and complementarity in terms of objectives seems to indicate that the liberalisation of objectives is not bringing about the expected comprehensiveness of EU objectives.

Conclusions of the thesis

1 Introduction to the conclusions of the thesis

The thesis stems from the observation that, despite the many references to coherence in external action in the treaties and case law of the CJEU, the examination of this question has remained at a rather abstract level in legal literature. It analyses the concept of coherence in external relations, and disentangles the different ways in which the legal framework is supposed to advance coherence. Based on this analysis, I propose a categorisation of the legal rules and principles that are relevant to the struggle for coherence around four mechanisms set out in primary law. The thesis argues that these mechanisms can be tested in particular areas of policy action. The case of the CFSP-development cooperation nexus in the Union's action in Somalia is an example of such a test. It does not provide a conclusive assessment of the suitability of the legal framework *vis-à-vis* the quest for coherence. However, it puts forward a set of findings that can be used to think about how the law of EU external relations could more effectively promote coherence in this field. Section 3 of these conclusions reflects on some of these findings.

The broad nature of coherence as the 'issue at stake' in this thesis has multiple consequences. On the one hand, coherence is not confined to the legal sphere, as it is ultimately a political ambition. On the other hand, the legal effects of coherence are to be found in its guiding nature in the design and interpretation of other legal norms.

These elements render the research topic of this thesis unavoidably challenging, as the legal effects of coherence often hide behind other legal rules and principles that are more obviously constraining for policy actors. However, the topic gives the opportunity to show that there are concepts in EU primary law – like coherence – which, despite seemingly innocuous, are able to explain certain legal innovations and play a role in the case of law of the Court of Justice. Furthermore, the broad character of coherence allows the thesis to reflect upon the interaction between law and politics in external relations, as well as about the external dimension of the EU as a political project. The thesis argues that the different purposes that coherence serves are linked to the Union's actorness and its effectiveness at the international level. It also claims that coherence can be in conflict with other priorities (what I call extrinsic tensions), such as the interests of individual Member States. In fact, the challenges of coherence often correspond to the challenges that the Union faces as an external project. This is why the quest for coherence is

illustrative of the external dimension of the EU as a supranational integration project. It is a reminder of the context in which legal norms operate.

2 'Coherence, coherence'

It has been a central objective of this thesis to provide arguments supporting the claim that the idea of coherence in external action is neither as vague nor as irrelevant as it may appear at face value. The fact that the ambition of coherence extends to everything the Union does and its goal-oriented nature are some of the reasons why references to it are generally abstract and ambiguous. However, if the focus is on trying to understand how coherence is sought between particular policies and activities coexisting in external action, it is possible to transform the abstract idea of coherence into a more tangible one. The thesis identifies different dimensions of the notion, as well as different purposes it serves. It also demonstrates that the ways in which the law of external relations tries to contribute to coherence can be organised around certain mechanisms, which can be tested in practice.

2.1 A multifaceted notion

Coherence can be thought of as comprising the ideas of consistency (i.e. no contradictions) and complementarity between policies and activities. There are, however, many other dimensions of coherence. The core notions of consistency and coherence are central regardless of the perspective from which we analyse the issue. Nevertheless, depending on the angle we take, we will identify many ways in which policies and activities can be said to be consistent or not, coherent or not. Do we focus on coherence as regards the procedures followed in the development of EU external relations (i.e. procedural coherence) or on coherence of the policies and objectives promoted (i.e. substantive coherence)? Are we interested in coherence at a certain point in time or in coherence as a continued way of acting (i.e. continued coherence)? Do we analyse coherence as regards the principles the Union is founded on or coherence in relation to specific policy choices?

Moreover, when the idea of coherence is not analysed in isolation, but in the context of the purposes it serves, it becomes clearer why advancing it is relevant. In fact, the quest for coherence adds an extra layer to the link between loyalty and effectiveness, which results from the principle of *pacta sunt servanda* in public international law, and

from the principles of sincere cooperation and mutual solidarity, in EU law.[532] It is assumed that coherence is essential to promote the idea of soft power coherence. By acting in a coherent manner, the Union shows its 'qualitative added value as an international actor'. It confirms that it is an international organisation that is founded on certain principles, which it seeks to advance around the world. This is important for the Union to be well positioned to influence other actors to act in the direction of its external objectives, and be thus effective as an international actor. Often this abstract and indirect link between coherence and effectiveness is replaced by a more concrete connection between these two notions. Coherence is not only relevant for the Union to present an identity to external partners. It is also considered that it maximises the efficiency of EU action, showing that the Union is an actor that makes a reasonable use of its resources, and which can make a real difference as regards its international objectives. Coherence also advances the idea of pragmatic coherence.

Furthermore, the theoretical analysis has argued that there is a link between coherence and certainty of EU external action that has been confirmed by the CJEU.[533] The findings of the case study have also explained that the strategic priorities of developing partner countries are crucial in the definition of the assistance that the EU provides. By acting coherently, the Union grants predictability to its partners, which explains why coherence does not only serve EU purposes.

The analysis of the notion also indicates that the quest for coherence is more multifaceted than it seems. This has two important consequences. First, law and policy measures designed to advance coherence need to take account of its different dimensions, as otherwise what contributes to a given aspect of coherence may be detrimental to a different one (i.e. intrinsic tensions of coherence). Second, the question as to whether two policies and activities are coherent or not can hardly be answered with a yes or a no. The research confirms that coherence is not a zero sum game. The case of Union action in Somalia demonstrates that it is possible to ensure coherence in certain dimensions (e.g. consistent promotion of the principles the Union is founded on), while at the same time acting in an incoherent manner as regards other aspects of the query (i.e. lack of coherence over the choice of the legal basis).

[532] See section 5 of chapter 1, pages 34-35
[533] Case C-658/11, *Parliament* v *Council*, Mauritius Case, para 60

2.2 Mechanisms for coherence in EU external relations law

In order to examine the legal dimension of coherence from EU primary law to a financing decision of the Commission supporting the education sector in Somalia, the thesis categorises the different ways in which the law of external relations seeks to advance coherence around four mechanisms. These mechanisms are examined in each chapter. From the rather theoretical and abstract approach of chapter 1, chapter 2 focuses on the thematic case of the CFSP-development nexus. Chapter 3 complements the former with an analysis of that case in the context of Union action in Somalia.

The proposed mechanisms are helpful in understanding the approach of the thesis to the role of law as regards coherence. The idea of a *mechanism* highlights that legal rules and principles are perceived as *means* towards coherence as a broad political ambition. This is why the thesis has not analysed policy coherence, but the extent to which the legal framework seems to be conducive to policy coherence. Moreover, while the definition of the mechanisms relies on treaty provisions and case law of the CJEU, it is based on a broad interpretation of the role that law plays in advancing coherence in external action. Besides focusing on explicit references to coherence in EU primary law, the proposed mechanisms include less obvious ways in which the legal framework can be said to have an impact on coherence. By way of example, strategic policy documents like the European Consensus on Development (2006) are considered expressions of the principle of sincere cooperation guided towards coherence, which play an important role in the case law of the CJEU. This is why the definition of common approaches constitutes one of the four mechanisms for coherence in external relations law.

Categorising the role of law as regards the quest for coherence around different mechanisms, and then presenting the results of the research in the form of theoretical and empirical claims, makes it possible to easily identify differences between the way in which legal rules and principles are supposed to operate and how they really operate in the development and implementation of policy action. Rather than providing the ultimate test of the adequateness of these mechanisms, the thesis provides a theoretical framework to think about the legal aspect of coherence at the level of policy action. The case of the CFSP-development cooperation nexus shows that this framework can be tested in practice. The outcome is summarised in Annex 1 of this thesis.

2.3 Extrinsic and intrinsic tensions affecting coherence

The quest for coherence is confronted with different tensions that are either extrinsic (i.e. tension between coherence and other interests) or intrinsic (i.e. tension between different dimensions of coherence).

The political sensitivity of external relations explains legal fragmentation in this area. It also explains why Member States are often concerned about EU and Member State joint action (i.e. vertical coherence), which can strengthen the Union's international actorness to the detriment of their individual actorness. The fears and ambivalences of Member States regarding the external dimension of the EU constitute a fundamental extrinsic tension affecting coherence. The reticence to an initiative like joint programming in EU development cooperation, which has been analysed in chapter 2, is an example of this idea. In fact, the crucial responsibility of Member States in ensuring coherence in external relations has led Simon Nuttall to claim that coherence has been used as an excuse. According to the author:[534]

> 'The more the institutional structure of European foreign policy-making has developed, and become complex, the more complaints there have been about a lack of coherence in the process, sometimes to the point where serious failures of foreign policy have been ascribed to it, even if the criticism has amounted to little more than the truism that the member states could not agree to follow a common political line.'

However, the quest for coherence in external relations is not limited to the obstacles created by Member States. The fact that the EU does not operate in isolation on the international scene explains a tension between what external actors demand from the Union and the law of EU external relations (including the mechanisms for coherence). While legal delimitation is important to protect the substantive scope of policy areas and to advance coherence in external action, external actors ask from the Union to promote security, stability and peace under the development cooperation policy.

Moreover, the link between coherence and effectiveness of Union action competes with another idea of effectiveness whereby acting coherently is a second order problem. In this case, the priority is to maximise the cases in which the EU responds to international concerns. Under this idea of effectiveness, inconsistency over the choice of legal basis is not a problem for the effectiveness of the EU as an international actor.

[534] S. NUTTALL, *op. cit.* 60, page 93

Besides these extrinsic tensions, the quest for coherence is also affected by internal tensions. The different dimensions of coherence can be in tension. For example, there can be conflicts between context-specific coherence and the overall coherence of EU external action. The fact that the Intra-ACP programme is implemented on the basis of its own strategic documents might ensure coherence in measures falling under it. However, this can happen at the expense of overall coherence in EU development cooperation, since other instruments and programmes will be guided by different strategies.

The legal framework can be perceived as a source of intrinsic tensions of coherence as legal reform aimed at ensuring particular dimensions of coherence is creating problems for other aspects. The single set of objectives illustrates a clear tension between substantive and procedural coherence. While it can advance substantive coherence (i.e. the same objectives can be promoted under different strands of EU action) it does so at the expense of procedural coherence (i.e. it cannot prevent incoherence over the choice of the legal basis). The creation of instruments designed to advance coherence over particular topics, which overlap with the material scope of existing instruments, is another example of legal reforms that can bring about tensions of coherence. For instance, the PanAf programme of the DCI has been created to provide a specific instrument to support the JAES. However, it will coexist with pan-African initiatives of the EDF's Intra-ACP programme.

3 Analysing EU external relations law from the viewpoint of coherence

3.1 The interaction between law and policy

Approaching the law of external relations from the perspective of coherence illustrates the close interaction between law and policy in this field. Instead of drawing a watertight distinction between the roles of law and policy in the quest for coherence, the thesis takes the view that these are two different means contributing to the same end. Law and policy are both responsible for advancing coherence between different policies and activities of EU external action. Manifestations of coherence in policy documents are essential in understanding the legal aspect of the query. By the same token, it is not possible to grasp the obsession with coherence in policy documents without considering the legal framework underpinning coherence in external action. Policy documents implicitly refer to legal fragmentation as an important challenge for coherence. The trendy idea of the

EU's comprehensive approach is, in fact, a disguised reference to the role of strategic policy documents (i.e. common approaches) in advancing coherence between policies and activities. Recurrent references to the Union's wide toolbox to tackle international concerns in policy documents imply the challenges created by the whole repertoire of *legal* instruments coexisting in EU external action.

Just as the political dimension cannot be understood without the legal dimension, the latter is part and parcel of a politicised context. We must not forget that legal complexity in external relations responds to Member States' political sensitivities. Being aware of the political context in which the law of EU external relations operates is also essential in understanding that Article 21 TEU is a striking example of the idea of soft power coherence (i.e. 'the qualitative added value of the EU as an international actor'). The Court's interpretation of Member State duties flowing from the principle of sincere cooperation in the Inland Waterways Cases was influenced by the idea of the Union's actorness on the international scene.[535] The far-reaching effects of the security-development nexus, which is a policy approach linked to the quest for coherence, demonstrates the extent to which policy has an impact on the legal framework. If the proposal to modify the IcSP (enabling the EU to directly fund military activities under the development cooperation policy) is approved, it will be a remarkable example of the *legal* effects of the security-development nexus.

The structure of the thesis is illustrative of the interaction between law and policy in external relations. Chapter 1 examines the policy/political aspect of the obsession with coherence in the first sections, and then focuses on the legal dimension of the query. Chapters 2 and 3 take the same approach regarding the security-development nexus and the analysis of the former in the context of Union action in Somalia.

3.2 A critical approach to the law of external relations

The study of the role of law in the quest for coherence in external action leads to a reflection about how the legal framework could more effectively promote it. Given the broad nature of the object at hand, this reflection extends to the law of external relations in general.

The law of EU external relations seems to underestimate the interactions between law and policy in this field. On the one hand, there are reasons to argue that the legal

[535] See section 3 of chapter 1, page 20

framework underestimates its effects over policy action. The creation of instruments supposedly aimed at ensuring coherence in external action which overlap with existing ones (e.g. IcSP) is an example of this idea. Underestimating the impact of legal reform over policy action leads to unexpected legal effects. By way of example, the 'liberalisation of objectives', which has been confirmed by the single set of objectives, does not seem to be bringing about the expected complementarity of EU objectives promoted under different policy areas. In contrast, it is arguably having an impact on the substantive scope of policy areas, like the development cooperation policy.

On the other hand, the legal framework underestimates the specificities of the policy contexts in which legal rules and principles must be applied. By way of example, the findings of the case study conducted in chapter 3 lead to the conclusion that the CFSP and the development cooperation policy have a completely different *modus operandi*. The EU behaves in Somalia as a security and as a development actor. However, the mechanisms for coherence set out in the treaties and developed in secondary law do not reflect this reality. This renders the quest for coherence in the CFSP-development cooperation nexus highly problematic. For example, the Commission and the Council are guided by different strategic documents and take part in different coordination frameworks. This limits the potential of common approaches and inter-policy coordination as mechanisms towards inter-policy coherence.

The legal debate seems also inclined to establish watertight distinctions between the matters of EU external relations that fall under the scope of legal research, and those that IR and political science literature should address. The extent to which the legal literature has focused on whether coherence is a principle of EU law, assuming that if it is not the idea of coherence is devoid of legal effects, is a clear example of the artificial creation of a strict distinction between law and policy. The degree to which the substantive dimension of coherence (i.e. as opposed to the procedural one) has been ignored in legal literature can be said to be another such example. Somehow the legal debate seems to assume that the role of law within the quest for coherence is confined to the procedural dimension of the query. Nevertheless, the thesis shows that there are not so evident ways in which law can affect policy and vice versa. Article 21 TEU is a proof that the legal framework intends to have an impact on substantive coherence.

This thesis provides arguments to claim that legal reform in EU external relations ought to consider more carefully the interaction between law and policy in this field. While the quest for coherence is often perceived as a choice of political actors alone, this

thesis demonstrates that there are different ways in which the legal framework can make it easier or more difficult for political actors to advance coherence in external action. In fact, political actors must ensure coherence under a legal framework that does not clearly delimit the scope of policy areas, and which includes a whole range of instruments that are potentially overlapping.

Finally, in the introduction to the thesis I claimed that I do not share the view that legal research should be confined to the analysis of those legal norms that most obviously constrain political action. Hopefully this piece of research has been able to show that, by limiting its scope in this way, the legal debate misses the opportunity of making sense of important developments in EU external relations law, and to engage in a reflection about the politicised context in which legal rules and principles operate in this field.

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[536] Note that, in order to avoid an unnecessary duplication, all legal measures that are relevant to sections 4 and 5 of chapter 3 are not listed here but in Annex 2

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Annex 1

Mechanisms for coherence in EU external relations law

Chapter 1 Coherence in EU external relations and the law		Chapter 2 The CFSP-development cooperation nexus	Chapter 3 The Union's action in Somalia: selected legal acts
Mechanisms for coherence		**Theoretical claims**	**Empirical claims**
Common objectives	**1**	The principles and objectives set out in Article 21 TEU ensure consistency between the different areas of the Union's external action	The principles and objectives set out in Article 21 TEU ensure a certain degree of consistency between CFSP and development cooperation measures, but not coherence
Common approaches	**2**	The Union identifies its strategic interests and objectives relating to the CFSP and to other areas of the external action of the Union	CFSP and development cooperation measures are guided by strategic documents, but not shared ones
Legal delimitation	**3**	The aim and content of a European act determines its legal basis	The statement of objectives and activities of CFSP and development cooperation measures is not conclusive of the legal basis used for their adoption
Horizontal inter-policy coordination	**4a**	The Council and the Commission ensure consistency between the different areas of the Union's external action and cooperate to that effect	There is no manifest coordination between the Council and the Commission; the Commission refers to CFSP measures (but not vice versa)
Vertical inter-policy coordination	**4b**	The Commission promotes complementarity between the policies of the Union and the Member States on development cooperation	Coordination between the Commission and the Member States is externally-driven; the Commission refers to measures of other donors (including Member States)

Annex 2

Union action in Somalia: CFSP and development cooperation toolbox (2008-2014)

Outline*

1 Development cooperation under the EDF

- 1.1 National programme for Somalia
- 1.2 ESA-IO regional programme
- 1.3 Intra-ACP programme
  - 1.3.1 APF
  - 1.3.2 Beyond the APF

2 Development cooperation beyond the EDF

- 2.1 IfS and IcSP
- 2.2 EIDHR
- 2.3 DCI
  - 2.3.1 Pan-African programme
  - 2.3.2 Beyond the Pan-African programme
- 2.4 Food Facility Regulation

3 CFSP

- 3.1 Restrictive measures against Somalia
- 3.2 EUSR for the Horn of Africa
- 3.3 EUSR for the African Union

4 CSDP

- 4.1 NAVCO
- 4.2 EUNAVFOR Atalanta
- 4.3 EUTM Somalia
- 4.4 Operations Centre
- 4.5 EUCAP Nestor

** Notice that the 14 legal acts examined in the case study appear in italics*

1 Development cooperation under the EDF

National programme for Somalia

Decision no 2/2008 of the ACP-EC Council of Ministers of 18 November 2008 on the allocation of resources to Somalia from the 10th European Development Fund (2008/951/EC)

Council Decision of 27 May 2013 on the position to be adopted on behalf of the European Union within the ACP-EU Council of Ministers concerning the status of the Federal Republic of Somalia in relation to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part (2013/258/EU)

Decision no 2/2013 of the ACP-EU Council of Ministers of 7 June 2013 concerning the request made by the Federal Republic of Somalia for observer status with regard to, and subsequent accession to, the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part (2013/322/EU)

Strategy papers and multiannual indicative programmes

Commission Decision on the adoption of the EU and Norway Joint Country Strategy Paper and Special Support Programme for Somalia (C(2009)6794)

Commission Decision of concerning an allocation of special support to Somalia from the 10th European Development Fund and adopting an addendum to the Country Strategy Paper and Special Support programme for Somalia (SSSP) 2008-2013 (C(2011)5638)

Commission Decision of 11.6.2014 on the adoption of the National Indicative Programme between the European Union and Somalia (C(2014)3715)

Annual action programmes

Commission Decision on the Annual Action Programme 2008 in favour of Somalia to be financed from the 10th European Development Fund (C(2008)8403)

Commission Decision of 25 November 2009 on the Annual Action Programme 2009 in favour of Somalia to be financed from the 10th European Development Fund (C(2009)9114)

Commission Decision of 24.11.2011 on the Annual Action Programme 2011 in favour of Somalia to be financed from the 10th European Development Fund (C(2011)8662)

Commission Decision of 7.11.2012 on the Annual Action Programme 2012 in favour of Somalia to be financed from the 10th European Development Fund (C(2012)8041)

Commission Decision of 4.12.2013 on the Annual Action Programme 2013 in favour of Somalia to be financed from the 10th European Development Fund (C(2013)8477)

Commission Decision of 4.12.2013 modifying Decision C(2012)8041 on the Annual Action Programme of 2012 in favour of Somalia to be financed from the 10th European Development Fund: Support for Governance and Security Sectors IIII (C(2013)8764)

Commission Decision of 31.7.2014 modifying Decision C(2011)8662 on the Annual Action Programme of 2011 in favour of Somalia to be financed from the 10th European Development Fund and the Bridging Facility: Operational support (air transport) services (C(2014)5547)

Commission Decision of 4.2.2015 on the Annual Action Programme 2014 in favour of Somalia to be financed from the European Development Fund Bridging Facility (C(2015)671)

1.2 ESA-IO regional programme

Strategy papers and multiannual indicative programmes

Commission Decision on the adoption of the Regional Strategy Paper and Regional Indicative Programme between the European Community and the Region of Eastern and Southern Africa and the Indian Ocean (C(2008)6826)

Commission Decision of 17.5.2013 revising the 10th European Development Fund indicative allocation for the Eastern and Southern Africa – Indian Ocean Region as a result of an ad-hoc review (C(2013)2841)

Commission Decision of 22.5.2015 on the adoption of the Regional Indicative Programme between the European Union and Eastern Africa, Southern Africa and the Indian Ocean (EA-SA-IO) (C(2015)3379)

Annual action programmes

Commission Decision of 02.08.2012 on the Annual Action Programme 2012 in favour of the Eastern and Southern Africa and the Indian Ocean region to be financed from the 10th European Development Fund (C(2012)5387)

Commission Decision of 19.11.2013 on the Annual Action Programme 2013 in favour of the Eastern and Southern Africa and Indian Ocean region to be financed from the 10th European Development Fund (C(2013)7958)

Individual measures

Commission Decision of 22 April 2010 on an action not foreseen in the Annual Action Programme 2010 in favour of Eastern and Southern Africa and Indian Ocean Region to be financed from the 10th European Development Fund (C(2010)2213)

Commission Decision of 20.10.2011 on a measure in favour of Eastern and Southern Africa/Indian Ocean region – Indian Ocean Commission (IOC) – to be financed from the 10th European Development Fund (C(2011)7682)

Commission Decision of 8.5.2013 on the adoption and financing of an ad hoc measure to Promote Regional Maritime Security (MASE) in favour of the Eastern and Southern Africa and Western Indian Ocean (ESA-IO) region, to be financed from the 10th European Development Fund (C(2013)2388)

1.3 Intra-ACP programme

Strategy papers and multiannual indicative programmes

Commission Decision on the adoption of the intra-ACP Strategy Paper and Indicative Programme between the European Community and the ACP Group of States (C(2009)1501)

Commission Decision of 13.11.2015 on the adoption of the 2014-2020 Strategy Paper and Indicative Programme for intra-ACP cooperation between the European Union and the ACP Group of States (C(2015)7766)

Annual action programmes

Commission Decision of 16.11.2012 on the Annual Action Programme 2012 in favour of Intra-ACP cooperation to be financed from the 10th European Development Fund (C(2012)8392)

1.3.1 APF

Strategy papers and multiannual indicative papers

Décision de la Commission relative au programme d'action triennal de la Facilité de soutien à la paix pour l'Afrique, 2011-2013, à financer sur les ressources du 10e Fonds européen de développement (C(2011)6096)

Commission Decision of 17.12.2012 amending Commission Decision C(2011)6096 on the three-year action programme for the African Peace Facility 2011-2013, to be financed from the 10th European Development Fund (C(2012)9578)

Commission Decision of 23.7.2013 on a second amendment to Commission Decision C(2011)6096 on the three-year action programme for the African Peace Facility 2011-2013, to be financed from the 10th European Development Fund (C(2013)4541)

Commission Decision of 15.7.2014 on the 2014-2016 action programme of the African Peace Facility to be financed from the European Development Fund Bridging Facility and the 11th European Development Fund (C(2014)4907)

Commission Decision of 23.2.2015 amending Commission Decision C(2014) 4907 of 15 July 2014 on the 2014-2016 Action Programme of the African Peace Facility in favour of the African Union Commission to be financed from the European Development Fund Bridging Facility and the 11th European Development Fund (C(2015)1254)

Individual measures

Commission Decision regarding an action under a programme financed from the 9th European Development Fund: African Mission in Somalia (AMISOM) (C(2008)8606)

Commission Decision on an allocation of funds under the African Peace Facility programme to be financed from the 10th European Development Fund: African Mission in Somalia (AMISOM III) (C(2009)10011)

Commission Decision of 1.09.2010 On an allocation of funds under the African Peace Facility programme to be financed from the 10th European Development Fund: African Union Mission in Somalia (AMISOM IV) (C(2010)5930)

Commission Decision of 22.03.2011 On an allocation of funds under the African Peace Facility programme to be financed from the 10th European Development Fund: African Union Mission in Somalia (AMISOM V) (C(2011)1822)

Commission Decision of 29.07.2011 on an action to be financed under the African Peace Facility from the 10th European Development Fund: African Peace and Security Architecture Support Programme (C(2011)5379)

Commission Decision on an allocation of funds under the African Peace Facility from the 10th European Development Fund: African Union Mission in Somalia (AMISOM VI) (C(2011)8878)

Commission Decision of 23.02.2012 on an action to be financed under the African Peace Facility from the 10th European Development Fund: African Union Mission in Somalia (AMISOM VII) (C(2012)1255)

Commission Decision of 12.03.2012 on an action to be financed under the African Peace Facility from the 10th European Development Fund: Support to the African Training Centres in Peace and Security (C(2012)1479)

Commission Decision of 20.09.2012 on an allocation of funds under the African Peace Facility from the 10th European Development Fund: African Union Mission in Somalia (AMISOM VIII) (C(2012)6536)

Commission Decision of 19.3.2013 on an allocation of funds under the African Peace Facility from the 10th European Development Fund: African Union Mission in Somalia (AMISOM IX) (C(2013)1563)

Commission Decision of 24.5.2013 on an allocation of funds under the African Peace Facility from the 10th European Development Fund: African Union Mission in Somalia (AMISOM X) (C(2013)3009)

Commission Decision of 23.8.2013 on an allocation of funds to be financed under the African Peace Facility from the 10th European Development Fund: Amani Africa II Support Programme (C(2013)5481)

Commission Decision of 6.9.2013 on an allocation of funds under the African Peace Facility from the 10th European Development Fund: African Union Mission in Somalia (AMISOM XI) (C(2013)5640)

Commission Decision of 13.12.2013 on an allocation of funds under the African Peace Facility from the 10th European Development Fund: Support to the establishment of a Command, Control, Communication and Information System (C3IS) for African-led peace support operations (C(2013)8911)

Commission Decision of 16.12.2013 on an individual measure in favour of Intra-ACP countries to be financed under the African Peace Facility from the 10th European Development Fund (C(2013)8957)

Commission Decision of 16.12.2013 on an individual measure in favour of the African Union liaison offices to be financed under the African Peace Facility from the 10th European Development Fund (C(2013)8959)

1.3.2 Beyond the APF

Unclassified measures

Commission Decision of on the Specific Action Programme on support expenditure linked to the European Development Fund for 2009-2011 in favour of all ACP countries and OCTs to be financed from the 10th European Development Fund (C(2008)7478)

Commission Decision of 16.12.2011 on the Work Programme 2012 for the Technical Centre for Agricultural and Rural Cooperation ACP-EU (CTA) to be financed from the 10th European Development Fund (C(2011)9548)

Commission Decision of 13.12.2012 on a technical cooperation facility in favour of Intra-ACP cooperation to be financed from the 10th European Development Fund (C(2012)9721)

Commission Decision of 21.03.2011 on a measure in favour of Intra-ACP cooperation to be financed from the 10th European Development Fund (C(2012)1998)

Commission Decision of 4.10.2013 on an ad-hoc measure in favour of the Intra-ACP Cooperation to be financed from the 10th European Development Fund (C(2013)6612)

Commission Decision of 4.12.2013 on an individual measure in favour of all ACP States to be financed from the 10th European Development Fund (C(2013)8758)

Commission Decision of 19.12.2013 on the 2013 support measure in favour of Intra-ACP cooperation to be financed from the 10th European Development Fund (C(2013)9357)

Commission Decision of 30.1.2014 on the non-establishment of entitlements and on the recovery of ineligible expenses incurred by the African Union Commission (C(2014)381)

Commission Decision of 24.11.2014 on the adoption of an individual measure in favour of intra-ACP cooperation to be financed from the European Development Fund Bridging Facility (C(2014)8589)

2 Development cooperation beyond the EDF

2.1 IfS and IcSP

Commission Implementing Decision adopting an Exceptional Assistance Measure under the Instrument for Stability in favour of Somalia: Creation of conditions for safe access and recovery in south central Somalia (C(2011)9459)

Commission Implementing Decision of 12.12.2014 on the Exceptional Assistance Measure 'Support to enhanced stability and security in Somalia' to be financed from the General Budget of the European Union (C(2014)9580)

2.2 EIDHR

Commission Decision of 15.04.2009 on the Annual Action Programme 2009 for the European Instrument for the promotion of Democracy and the Human Rights worldwide (EIDHR) to be financed under Articles 19 04 01 and 19 04 03 of the general budget of the European Communities (C(2009)2635)

Commission Decision of 18.03.2010 on the Annual Action Programme 2010 for the European Instrument for the promotion of Democracy and Human Rights worldwide (EIDHR) to be financed under Articles 19 04 01 and 19 04 03 of the general budget of the European Union (C(2010)1614)

Commission Implementing Decision on the Annual Action Programme 2012 for the European Instrument for Democracy and Human Rights (EIDHR) (*reference no missing*)

2.3 DCI

2.3.1 Pan-African programme

Strategy papers and multiannual indicative programmes

Commission Implementing Decision of 30.7.2014 adopting a Multiannual Indicative Programme for the Pan-African programme for the period 2014-2017 (C(2014)5375)

Annual action programmes

Commission Implementing Decision of 20.11.2014 on the Annual Action Programme 2014 for the Pan-African Programme to be financed from the general budget of the European Union (C(2014)8513)

2.3.2 Beyond the Pan-African programme

Civil Society Organisations and Local Authorities

Commission Decision of 12.08.2008 on the 2008 Annual Action Programme for the thematic programme 'Non State Actors and Local Authorities in Development', to be financed under Articles 21 03 01 and 21 03 02 of the general budget of the European Communities (C(2008)4187)

Commission Decision of 08.06.2010 on the Annual Action Programme 2010 for the thematic programme 'Non State Actors and Local Authorities in Development' to be financed under Articles 21 03 01 and 21 03 02 of the general budget of the European Union (C(2010)3581)

Commission Implementing Decision of 12.05.2011 on the Annual Action Programme 2011 for the thematic programme 'Non State Actors and Local Authorities in Development' to be financed by the general budget of the European Union (C(2011)3126)

Commission Implementing Decision of 29.4.2013 on the thematic Annual Action Programme 2013 for 'Non-State Actors and Local Authorities in Development' to be financed from the general budget of the European Union (C(2013)2333)

Commission Implementing Decision of 28.10.2014 on the Annual Action Programmes for 2014 and 2015 Part 1 'Civil Society Organisations and Local Authorities' to be financed from the general budget of the European Union (C(2014)7987)

Cooperation with third countries in the areas of Migration and Asylum

Commission Decision of 11.12.2009 approving special measures for the Horn of Africa in the area of migration and asylum to be financed under Budget line 19.02.01 of the general budget of the European Union (C(2009)10089)

Global Public Goods and Challenges

Commission Implementing Decision of 22.10.2014 on the Annual Action Programme 2014 for the 'Global Public Goods and Challenges (GPGC) in the areas of Migration and Asylum' to be financed from the general budget (C(2014)7585)

Commission Implementing Decision of 29.10.2014 on the Annual Action Programme 2014, 2015 and 2016 for the 'Human Development' theme of the Global Public Goods and Challenges programme to be financed from the general budget of the European Union (C(2014)7887)

2.4 Food Facility Regulation

Commission Decision of 24.04.2009 for implementing the facility for rapid response to soaring food prices in developing countries to be financed under Article 21 02 03 of the general budget of the European Communities in 2009 (C(2009)3068)

CFSP

3.1 Restrictive measures against Somalia

Council Common Position 2009/138/CFSP of 16 February 2009 concerning restrictive measures against Somalia and repealing Common Position 2002/960/CFSP

Council Decision 2010/126/CFSP of 1 March 2010 amending Common Position 2009/138/CFSP concerning restrictive measures against Somalia

Council Decision 2010/231/CFSP of 26 April 2010 concerning restrictive measures against Somalia and repealing Common Position 2009/138/CFSP

Council Regulation (EU) no 356/2010 of 26 April 2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia

Council Regulation (EU) no 1137/2010 of 7 December 2010 amending Regulation (EC) no 147/2003 concerning certain restrictive measures in respect of Somalia

Council Decision 2011/635/CFSP of 26 September 2011 amending Decision 2010/231/CFSP concerning restrictive measures against Somalia

Council implementing Regulation (EU) no 956/2011 of 26 September 2011 implementing Articles 12(1) and 13 of Regulation (EU) no 356/2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia

Council Decision 2012/388/CFSP of 16 July 2012 amending Decision 2010/231/CFSP concerning restrictive measures against Somalia

Council Regulation (EU) no 641/2012 of 16 July 2012 amending Regulation (EU) no 356/2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia

Council Regulation (EU) no 642/2012 of 16 July 2012 amending Regulation (EC) no 147/2003 concerning certain restrictive measures in respect of Somalia

Council Decision 2012/633/CFSP of 15 October 2012 amending Decision 2010/231/CFSP concerning restrictive measures against Somalia

Council Regulation (EU) no 941/2012 of 15 October 2012 amending Regulation (EC) no 147/2003 concerning certain restrictive measures in respect of Somalia

Council implementing Regulation (EU) no 943/2012 of 15 October 2012 implementing Article 12(1) and Article 13 of Regulation (EU) no 356/2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia

Council Decision 2013/201/CFSP of 25 April 2013 amending Decision 2010/231/CFSP concerning restrictive measures against Somalia

Council Regulation (EU) no 431/2013 of 13 May 2013 amending Regulation (EC) no 147/2003 concerning certain restrictive measures in respect of Somalia

Council Regulation (EU) no 432/2013 of 13 May 2013 amending Regulation (EU) no 356/2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia

Council Decision 2013/659/CFSP of 15 November 2013 amending Decision 2010/231/CFSP concerning restrictive measures against Somalia

Council Regulation (EU) no 1153/2013 of 15 November 2013 amending Regulation (EC) no 147/2003 concerning restrictive measures in respect of Somalia

Council Decision 2014/270/CFSP of 12 May 2014 amending Council Decision 2010/231/CFSP concerning restrictive measures against Somalia

Council Regulation (EU) no 478/2014 of 12 May 2014 amending Regulation (EC) no 147/2003 concerning certain restrictive measures in respect of Somalia

Council implementing Decision 2014/729/CFSP of 20 October 2014 implementing Decision 2010/231/CFSP concerning restrictive measures against Somalia

Council implementing Regulation (EU) no 1104/2014 of 20 October 2014 implementing Article 12(1) of Regulation (EU) no 356/2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia

3.2 EUSR for the Horn of Africa

Council Decision 2011/819/CFSP of 8 December 2011 appointing the European Union Special Representative for the Horn of Africa

Council Decision 2012/329/CFSP of 25 June 2012 extending the mandate of the European Union Special Representative or the Horn of Africa

Council Decision 2013/365/CFSP of 9 July 2013 amending Decision 2012/329/CFSP extending the mandate of the European Union Special Representative for the Horn of Africa

Council Decision 2013/527/CFSP of 24 October 2013 amending and extending the mandate of the European Union Special Representative for the Horn of Africa

Council Decision 2014/673/CFSP of 25 September 2014 amending Decision 2013/527/CFSP amending and extending the mandate of the European Union Special Representative for the Horn of Africa

Commission Decision of 2.10.2014 implementing Council Decision 2014/673/CFSP amending Council Decision 2013/527/CFSP amending and extending the mandate of the European Union Special Representative for the Horn of Africa (C(2014)7223)

3.3 EUSR for the African Union

Council Decision 2011/697/CFSP of 20 October 2011 amending Decision 2011/621/CFSP extending the mandate of the European Union Special Representative to the African Union

Council Decision 2013/383/CFSP of 15 July 2013 amending and extending the mandate of the European Union Special Representative to the African Union

Commission Decision of 17.7.2013 implementing Council Decision 2013/383/CFSP extending the mandate of the European Union Special Representative to the African Union (C(2013)4746)

4 CSDP

4.1 NAVCO

Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO)

4.2 EUNAVFOR Atalanta

Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast

Council Decision 2009/907/CFSP of 8 December 2009 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast

Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta)

Political and Security Committee Decision Atalanta/1/2008 of 18 November 2008 on the appointment of an EU Force Commander for the European Union military operation

to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2008/888/CFSP)

Council Decision 2009/29/CFSP of 22 December 2008 concerning the conclusion of the Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta

Council Decision 2009/88/CFSP of 22 December 2008 concerning the conclusion of the Agreement between the European Union and the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta

Council Decision 2009/293/CFSP of 26 February 2009 concerning the Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to Kenya and for their treatment after such transfer

Political and Security Committee Decision Atalanta/1/2009 of 17 March 2009 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2009/288/CFSP)

Political and Security Committee Decision Atalanta/2/2009 of 21 April 2009 on the acceptance of third States' contributions to the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2009/356/CFSP)

Political and Security Committee Decision Atalanta/3/2009 of 21 April 2009 on the setting up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2009/369/CFSP)

Political and Security Committee Decision Atalanta/4/2009 of 27 May 2009 on the appointment of an EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2009/413/CFSP)

Political and Security Committee Decision Atalanta/5/2009 of 10 June 2009 amending Political and Security Committee Decision Atalanta/2/2009 on the acceptance of third States' contributions to the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) and Political and Security Committee Decision Atalanta/3/2009 on the setting-up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2009/446/CFSP)

Political and Security Committee Decision Atalanta/6/2009 of 22 July 2009 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somalia coast (Atalanta) (2009/559/CFSP)

Political and Security Committee Decision Atalanta 7/2009 of 2 October 2009 amending Political and Security Committee Decision Atalanta/2/2009 on the acceptance of third States' contributions to the European Union military mission to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) and Political and Security Committee Decision Atalanta/3/2009 on the setting-up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2009/758/CFSP)

Council Decision 2009/877/CFSP of 23 October 2009 on the signing and provisional application of the Exchange of Letters between the European Union and the Republic of Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to the Republic of Seychelles and for their treatment after such transfer

Council Decision 2009/916/CFSP of 23 October 2009 concerning the signing and conclusion of the Agreement between the European Union and the Republic of Seychelles on the status of the European Union-led force in the Republic of Seychelles in the framework of the EU military operation Atalanta

Political and Security Committee Atalanta/8/2009 of 4 December 2009 on the appointment of an EU Force Commander for the European Union military operation to

contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somalia coast (Atalanta) (2009/946/CFSP)

Political and Security Committee Decision Atalanta/1/2010 of 5 March 2010 amending Political and Security Committee Decision Atalanta/2/2009 on the acceptance of third States' contributions to the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) and Political and Security Committee Decision Atalanta/3/2009 on the setting up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2010/184/CFSP)

Political and Security Committee Decision Atalanta/2/2010 of 23 March 2010 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somalia coast (Atalanta) (2010/185/CFSP)

Political and Security Committee Decision Atalanta/3/2010 of 28 May 2010 on the appointment of an EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2010/317/CFSP)

Political and Security Committee Decision Atalanta/4/2010 of 19 July 2010 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2010/423/CFSP)

Council Decision 2010/437/CFSP of 30 July 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast

Political and Security Committee Decision Atalanta/5/2010 of 26 November 2010 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2010/753/CFSP)

Council Decision 2010/766/CFSP of 7 December 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast

Political and Security Committee Decision Atalanta/1/2011 of 13 April 2011 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2011/237/CFSP)

Political and Security Committee Decision Atalanta/2/2011 of 15 June 2011 on the appointment of an EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2011/341/CFSP)

Political and Security Committee Decision Atalanta/3/2011 of 5 July 2011 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2011/399/CFSP)

Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer

Political and Security Committee Decision Atalanta/4/2011 of 2 December 2011 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2011/792/CFSP)

Political and Security Committee Decision Atalanta/5/2011 of 16 December 2011 amending Political and Security Committee Decision Atalanta/2/2009 on the acceptance of third States' contributions to the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) and Political and Security Committee Decision Atalanta/3/2009 on the setting up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2011/846/CFSP)

Council Decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast

Political and Security Committee Decision Atalanta/1/2012 of 25 May 2012 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2012/284/CFSP)

Political and Security Committee Decision Atalanta/2/2012 of 3 July 2012 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2012/361/CFSP)

Political and Security Committee Decision Atalanta/3/2012 of 27 November 2012 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2012/743/CFSP)

Political and Security Committee Decision Atalanta/4/2012 of 18 December 2012 on the appointment of an EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2012/808/CFSP)

Political and Security Committee Decision Atalanta/1/2013 of 22 March 2013 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2013/159/CFSP)

Political and Security Committee Decision Atalanta/2/2013 of 2 July 2013 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2013/356/CFSP)

Political and Security Committee Decision Atalanta/3/2013 of 2 December 2013 on the appointment of an EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2013/712/CFSP)

Council Decision 2014/198/CFSP of 10 March 2014 on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania

Political and Security Committee Decision Atalanta/1/2014 of 18 March 2014 on the appointment of the EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) and repealing Decision Atalanta/3/2013 (2014/152/CFSP)

Political and Security Committee Decision Atalanta/2/2014 of 29 April 2014 on the acceptance of a third State's contribution to the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) and amending Decision Atalanta/3/2009 (2014/244/CFSP)

Political and Security Committee Decision Atalanta/3/2014 of 3 July 2014 on the appointment of the EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) (2014/433/CFSP)

Political and Security Committee Decision Atalanta/4/2014 of 24 July 2014 on the appointment of the EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) and repealing Decision Atalanta/1/2014 (2014/500/CFSP)

Council Decision 2014/827/CFSP of 21 November 2014 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast

4.3 EUTM Somalia

Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military mission to contribute to the training of Somali security forces

Council Decision 2010/197/CFSP of 31 March 2010 on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia)

Council Decision 2011/483/CFSP of 28 July 2011 amending and extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia)

Political and Security Committee Decision EUTM Somalia/2/2011 of 6 December 2011 on the establishment of the Committee of Contributors for the European Union military mission to contribute to the training of Somali security forces (EUTM Somalia) (2011/814/CFSP)

Political and Security Committee Decision EUTM Somalia/1/2011 of 6 December 2011 on the acceptance of third States' contributions to the European Union military mission to contribute to the training of Somali security forces (EUTM Somalia) (2011/815/CFSP)

Council Decision 2012/835/CFSP of 21 December 2012 extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces

Council Decision 2013/44/CFSP of 22 January 2013 amending and extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces Decision 2015/441/CFSP of 16 March 2015

Political and Security Committee Decision EUTM Somalia/1/2013 of 17 December 2013 on the appointment of an EU Mission Commander for the European Union military mission to contribute to the training of Somali security forces (EUTM Somalia) (2013/777/CFSP)

4.4 Operations Centre

Council Decision 2012/173/CFSP of 23 March 2012 on the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa

Council Decision 2013/725/CFSP of 9 December 2013 amending and extending Decision 2012/173/CFSP on the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa

Political and Security Committee Decision EU Operations Centre/1/2014 of 27 February 2014 on the appointment of the Head of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa (2014/126/CFSP)

Council Decision 2014/860/CFSP of 1 December 2014 amending and extending Decision 2012/173/CFSP on the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa

4.5 EUCAP Nestor

Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor)

Political and Security Committee Decision EUCAP Nestor/1/2012 of 17 July 2012 concerning the appointment of the Head of the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor) (2012/426/CFSP)

Political and Security Committee Decision EUCAP Nestor/1/2013 of 11 January 2013 on the establishment of the Committee of Contributors for the European Union Mission on Regional Maritime Capacity-Building in the Horn of Africa (EUCAP Nestor) (2013/41/CFSP)

Political and Security Committee Decision EUCAP Nestor/2/2013 of 11 January 2013 on the acceptance of third States' contributions to the European Union Mission on Regional Maritime Capacity-Building in the Horn of Africa (EUCAP Nestor) (2013/42/CFSP)

Council Decision 2013/367/CFSP of 9 July 2013 amending Decision 2012/389/CFSP on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor)

Political and Security Committee Decision EUCAP Nestor/3/2013 of 23 July 2013 on the appointment of the Head of the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor) (2013/400/CFSP)

Council Decision 2013/660/CFSP of 15 November 2013 amending Decision 2012/389/CFSP on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor)

Commission Decision of 21.11.2013 implementing Council Decision 2013/660/CFSP amending Decision 2012/389/CFSP on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor)

Council Decision 2014/485/CFSP of 22 July 2014 amending Decision 2012/389/CFSP on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor)

Political and Security Committee Decision EUCAP Nestor/1/2014 of 24 July 2014 extending the mandate of the Head of Mission of the European Union Mission on

Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor) (2014/642/CFSP)

Political and Security Committee Decision EUCAP Nestor/2/2014 of 24 July 2014 on the acceptance of third States' contributions to the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor) (2014/645/CFSP)

Council Decision 2014/726/CFSP of 20 October 2014 amending Decision 2012/389/CFSP on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor)

Commission Decision of 27.10.2014 implementing Council Decision 2014/726/CFSP amending Decision 2014/485/CFSP on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor) (C(2014)8194)