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## **Play by the rules? : coordination of EU sustainable development policies and the importance of the politico-legal context**

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## Chapter 2: Theoretical Framework and Literature Review

### 2.1 Introduction

*“Only when legal and political insights are combined, will we be able to know what to do to attain one of the main EU objectives in accordance with Article 3(5) TEU: In its relations with the wider world, the Union shall (...) contribute to the sustainable development of the Earth(...).”(Jørgensen and Wessel, 2011: 286)<sup>103</sup>*

The Lisbon Treaty provides a set of legal provisions outlining the different types of EU competences in Article 2-6 TFEU. These competences mark are exclusive, shared or supporting competences, whilst linking it to specific policy areas and identifying the consequences for coordination between EU and Member States. This ‘catalogue of competences’ has been spelled out ‘for the first time ever’ in the Lisbon Treaty.<sup>104</sup> Table 2.1 provides an overview of EU competences. As is shown, many of the sustainable development-related policy areas fall under the notion of ‘shared competence’ (e.g. environment, energy, social policy and development cooperation), but there are likewise some that are included in the lists of supporting competences or exclusive competences. Besides these Treaty provisions, there are also specific Treaty chapters, provisions and legal principles that should be used. The Court’s case law and internal market regulation outline the broader notion of legal competences.

Main Competence type	Article in Treaty	Examples policy areas
<i>Exclusive competence</i>	Article 3 TFEU	Monetary policy (Eurozone), fisheries, commercial policy, competition rules internal market,
<i>Shared competence</i>	Article 4 TFEU	Internal market, social policy, cohesion policy, agriculture, environment, consumer protection, transport, energy, Freedom, Security, Justice,
<i>Supporting competence</i>	Article 6 TFEU	Industry, culture, civil protection, tourism, education, youth, sport, civil protection, administrative cooperation
Other types of competence		
<i>Parallel competences (specific type)</i>	Article 4(3) & 4(4) TFEU	Research, technological development, space, development cooperation, humanitarian aid

<sup>103</sup> Jørgensen, K. E. and Wessel, R. A. (2011) ‘The position of the European Union in (other) international organizations: confronting legal and political approaches’. In Koutrakos, P. (ed) *European Foreign Policy: Legal and Political Perspectives*. (Cheltenham: Edward Elgar), p. 286.

<sup>104</sup> Govaere, I. (2015) “Setting the international scene”: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13’. *Common Market Law Review*, Vol. 52, No. 5, p. 1278. Cf The European Convention (2002), Final Report of Working Group V “Complementary Competencies”, CONV 275/1/02 REV 1, 4 November 2002, for an overview of the reasons why a catalogue of competences was needed according to the negotiators of the Convention. An example of this reasoning can be found at p. 2: “To meet the requirements of transparency and clarity a future Treaty should contain a short, crisp and easily understood delimitation of the competence granted to the Union in each sphere of action”.

<i>shared)</i>			
<i>CFSP-type competence</i>	<i>of</i>	Article 24 TEU	Common Foreign and Security Policy (no competence Court of Justice of the EU to give judgment).
<i>Coordination EU</i>		Article 5 TFEU	Employment, social policies, economic policies

Table 2. 1 Typology of competences in EU Treaties<sup>105</sup>

This chapter reviews the existing literature theorising EU and Member State coordination is theorised and links it with the legal perspectives on EU legal competences. While this dissertation applauds the wide diversity of theoretical approaches on EU and Member State coordination, it cannot but highlight the paucity of a more pragmatic connection with the legal competences as outlined above. Relatively few empirical studies directly address the mixed EU competences in work on sustainable development.<sup>106</sup> Empirical studies that are built on a systematic analysis of the effect of competences on EU and Member State coordination are even rarer and the operationalisation is unconvincing. For example, Da Conceição-Heldt and Meunier chose to use the formal rules of decision-making to operationalise the concept of internal cohesiveness, however implying that internal cohesiveness is highest in the case of 'exclusive competences' and 'medium' in the case of shared competences, without questioning this line of reasoning.<sup>107</sup> The real effect of competences on EU and Member State coordination is therefore not operationalised yet. To fill this gap, this chapter comes to a theoretical framework in which the interaction between the legal competences and variables from the 'grand theories' can be tested in the case studies on sustainable development policies.

The chapter is structured as follows. Section 2.2 highlights the different theories and concepts on EU and Member State coordination and their (often scant) attention for the use of legal competences. After starting with some general remarks on the literature on coordination and socialisation in the EU (2.2.1) and then the traditional neofunctionalism-intergovernmentalism dichotomy (2.2.2) the section continues with social constructivism (2.2.3) and institutionalist approaches (2.2.4). Thereafter, the concepts of actorness, effectiveness and cohesiveness, as used in empirical (sustainability) studies are covered in 2.2.5. In section 2.3 the legal perspective on competences is outlined with specific attention for the Treaty, legal principles and the Court's case law. Subsequently, section 2.4 builds on the earlier section by proposing a theoretical framework and operationalisation of the theories and concepts to analyse and assess the interactions between these issues (2.4.1-2.4.3). This section likewise raises some of the limitations of this integrative approach (2.4.4).

## 2.2 Theories on EU and Member State cooperation (and legal competences)

Many political theories and concepts deal with the sharing of powers and relationships between the EU institutional actors and the Member State actors. These theories often fail to fully consider the legal competences and ponder other variables to have more and

<sup>105</sup> The table only summarises the competences as prescribed in the Treaties (Art. 2-6 TFEU) and does not include e.g. exclusive Member State competences such as direct taxation.

<sup>106</sup> Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan) uses EU competence in the theoretical framework.

<sup>107</sup> da Conceição-Heldt, E. and Meunier, S. (2014) 'Speaking with a single voice: internal cohesiveness and external effectiveness of the EU in global governance'. *Journal of European Public Policy*, Vol. 21, No. 7, p. 969.

independent effect on EU and Member State coordination. This dissertation has chosen to operationalise these grand theories of neofunctionalism, intergovernmentalism, social constructivism and institutionalism and concepts such as actorness, cohesiveness and effectiveness into functional but basic 'intervening variables' in the case studies. This section extracts some of the main elements of these theories and concepts without aiming to provide a full overview.<sup>108</sup> As demonstrated later in the paper, the legal competences derived from the Treaties often only indirectly play a role and the theories seem 'inadequate to account for the differential impact of Europe on the Member States'.<sup>109</sup> Part of the literature could be nuanced or qualified based on insights derived from this dissertation.

### 2.2.1 Coordination and socialisation in the EU (general)

There has been significant amounts of literature written on coordination in the EU, although this is often not linked with the legal division of competences, but instead focused on multi-actor networks and multi-level governance. The seminal work of Jordan and Schout (2006)<sup>110</sup> can be seen as a child of its time when coordination capacities, networks and governance of the EU were in the limelight of the academic discussions following the 'European Governance' White Paper of the European Commission (2001)<sup>111</sup>. Networked governance, link between the literature on "multi-level governance"<sup>112</sup> and the 'open method of co-ordination'<sup>113</sup> were a major driver of academic discussions on EU coordination in the late 1990s and 2000s. This academic debate shifted the attention from the interdependence between the European Commission and the Member States to the coordination capacities, networks and multiple actors.<sup>114</sup> It also included a focus on the more 'softer' measures of coordination.

The concept of coordination in the EU is 'ill-defined' and 'essentially contested', but it essentially comes down to the idea 'to bring different parts together to create an interrelated whole'.<sup>115</sup> Although inclusion of the legally binding Treaty provisions is seen as 'hugely important' in the literature because it 'completes the legal codification' of concepts like sustainable development, these works fail to include references to the division of competences and its effects on EU-Member State coordination.<sup>116</sup> Notwithstanding the positive connotation and definition of the concept, coordination is often identified as a problem. European Commission in particular seems from the outset disproportionately negatively evaluated in terms of coordination capacities, although this is not always backed

<sup>108</sup> Please see many of the quoted references for a more extensive overview of the specific theories and concepts.

<sup>109</sup> Börzel, T. (2003) 'How the European Union interacts with its member states'. Institut für Höhere Studien (IHS), Wien (Ed.)  
URN: <http://nbn-resolving.de/urn:nbn:de:0168-ssaar-246018>, p. 3.

<sup>110</sup> Jordan, A. and Schout, A. (2006) *The coordination of the European Union: exploring the capacities of networked governance* (Oxford University Press).

<sup>111</sup> European Commission (2001) 'European Governance: a White Paper', COM(2001) 428 final, Brussels, 25.7.2001.

<sup>112</sup> Hooghe, L. and Marks, G. (2001) *Multi-level governance and European integration* (Rowman & Littlefield).

<sup>113</sup> Borrás, S., & Jacobsson, K. (2004). 'The open method of co-ordination and new governance patterns in the EU'. *Journal of European Public Policy*, vol. 11. No. 2, pp. 185-208.

<sup>114</sup> Although Radaelli (2003: 11) acknowledges that "a Constitutional article may help in demarcating the territory of the OMC. It should (then...) respect the flexible and experimental nature of the relation between open coordination and legislative competence". Cf Radaelli, C. M. (2003) *The Open Method of Coordination: A new governance architecture for the European Union?* (Swedish Institute for European Policy Studies).

<sup>115</sup> Jordan, A. and Schout, A. (2006) *The coordination of the European Union: exploring the capacities of networked governance* (Oxford University Press), p. 40.

<sup>116</sup> Jordan, A. and Schout, A. (2006) *The coordination of the European Union: exploring the capacities of networked governance* (Oxford University Press), p. 69, specifically on 'Environmental Policy Integration' (EPI).

by strong empirical evidence.<sup>117</sup> Definitions that are more neutral choose to apply the concept in a way to refer only very loosely to 'meetings'.<sup>118</sup>

There is also a strand of the 'coordination' literature that is more positive on EU coordination. This is then often referred to as 'socialisation' instead of 'coordination' where the domestic actors are 'Europeanized'.<sup>119</sup> Preferences of Member State and EU actors, instead of being fixed, can converge over time through social interaction processes.<sup>120</sup> In that way Member States' representatives involved in deciding on or negotiating an EU position adapt a European orientation attributed to the 'socialisation' in EU practices.<sup>121</sup> With regard to sustainable development policies, literature on climate change negotiations takes this 'socialisation' as a given, as a phenomenon affecting EU and Member State coordination in UNFCCC settings.<sup>122</sup> However, as has been stated earlier, the socialisation is more a 'result' of specific coordination processes rather than a variable affecting coordination. In that sense, socialisation will not be operationalised as an intervening variable in this research, but more as a process that could be part of the dependent variable in this dissertation whenever it is visible. As in the related coordination literature there is minimal attention for legal competences, often replaced by a focus on 'social' norms that would drive the coordination between EU and Member State actors.

### 2.2.2 Dichotomy neofunctionalism – intergovernmentalism

The tensions between the supranational and intergovernmental characteristics are visible in the two most prominent political theories on EU and Member State cooperation. According to the *neofunctionalist* theory, EU institutions acquire more powers over time within and even across (spillover) policy areas, leading to more supranational policy-making.<sup>123</sup> Conversely, according to the theory of *intergovernmentalism*, the progress in European integration follows the convergence of important domestic groups and governments in European Member States.<sup>124</sup> The two competing paradigms leave ample room for groups of scholars who reject this 'zero-sum' game conception of the coordination between EU and Member State actors.<sup>125</sup> The approach to see whether one of the two is 'dominant' is e.g. visible in the

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<sup>117</sup> Ibid, p. 209 where the section on EU coordination capacities starts with the sentence 'The Commission has a poor reputation for internal and external management' without mentioning any further reference.

<sup>118</sup> Cf Kissack, R. (2007) 'European Union Member State coordination in the United Nations system: towards a methodology for analysis'. European Foreign Policy Unit Working Paper 2007, Vol. 1, p. 3 states: Coordination is the meeting of diplomats and officials from the governments of the European Union Member States (most likely with staff from the Council Secretariat and/or Commission present but this is not essential) in any location (national capitals, Brussels, New York or Geneva) with the purpose of discussing an issue on a UN agenda.

<sup>119</sup> Cf 2.2.3 social constructivism and sociological institutionalism.

<sup>120</sup> Groenleer, M. L. and Van Schaik, L. G. (2007) 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'. *JCMS: Journal of Common Market Studies*, Vol. 45, No. 5, p. 975.

<sup>121</sup> Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan), p. 75.

<sup>122</sup> E.g. Groenleer, M. L. and Van Schaik, L. G. (2007) 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'. *JCMS: Journal of Common Market Studies*, Vol. 45, No. 5, pp. 969-998, although this study was conducted before the entry into force of the Lisbon Treaty.

<sup>123</sup> Haas, E. B. (1958) *The uniting of Europe: Political, social, and economic forces, 1950-1957* (No. 42). (Stanford University Press). Lindberg, L.N. (1963) *The Political Dynamics of European Economic Integration*, (Stanford: Stanford University Press).

<sup>124</sup> Moravcsik, A. (1998) *The choice for Europe: social purpose and state power from Messina to Maastricht* (Ithaca, NY: Cornell University Press), chapter 1. Cf Taylor, P. (1982) 'Intergovernmentalism in the European Communities in the 1970s: Patterns and Perspectives'. *International Organization*, Vol. 36, No. 4, pp. 741-766.

<sup>125</sup> Börzel, T. (2003) 'How the European Union interacts with its member states'. Institut für Höhere Studien (IHS), Wien (Ed.) URN: <http://nbn-resolving.de/urn:nbn:de:0168-ssao-246018>, p. 3.

literature on EU-Member State implementation in which non-implementation of directives is framed as either 'inability of states to comply' or 'state reluctance to conform'.<sup>126</sup>

Indeed, already the adapted theory of liberal *intergovernmentalism* provides for a 'two-stage' process of preference formation and intergovernmental bargaining in which the first stage is more a domestic process where state executives are influenced by the preferences from society interest groups. In the second stage the state executive, who negotiates on the differences in an international (EU) arena, aggregates these preferences.<sup>127</sup>

This dissertation adheres to the conclusion as held earlier by a.o. Billiet (2009: 435) and Pollack (1997) who state that it is neither the strictly intergovernmental, nor the strictly supranational position that holds the truth, and that instead the autonomy of the Commission varies over time and from one function to another, depending on the mix of 'control mechanisms'.<sup>128</sup> However, as this study shows later, this does not mean that the institutionalist principal-agent model fully covers the legal competence lacunae in the supranationalism and intergovernmentalism literature.

### 2.2.3 Social constructivism and sociological (neo-)institutionalism

The theory of social constructivism and the development of common norms is an equally popular theory, although the International Relations literature 'finds it hard to focus on the relationship as key unit of analysis'.<sup>129</sup> Originated in the broader category of international relations constructivism as a heterogeneous category, it sees international relations as dominated by cultural and ideological forces but mostly social interaction by actors.<sup>130</sup> In EU-Member State relations, it is especially common to use 'social' constructivism. Groenleer and Van Schaik (2007) for example find with regard to negotiations on climate change that Member State representatives appear to have been 'socialised' by the interaction during the frequent meetings taking place in Brussels and the EU coordination meetings of international conferences.<sup>131</sup> In comparison to some other theories the interesting contribution of these 'social' theories is that actors are not only viewed as rational/instrumental but psychological and even bound by group processes<sup>132</sup> and the logic of 'social' appropriateness.<sup>133</sup> These social norms, however, are mostly unrelated to the legal competences while these competences appear to influence the cooperation, especially in a situation of mixed or shared competences. In that sense the theories which combine sociological and institutional aspects by arguing that the institutions in Europe have a socialising role could align better

<sup>126</sup> Mbaye, H. A. (2001) 'Why national states comply with supranational law: Explaining implementation infringements in the European Union, 1972-1993'. *European Union Politics*, Vol. 2, No. 3, p. 259.

<sup>127</sup> Moravcsik, A. (1993) 'Preferences and power in the European Community: a liberal intergovernmentalist approach'. *JCMS: Journal of Common Market Studies*, Vol. 31, No.4, pp. 473-524. Cf Caporaso, J. (1998) 'Regional integration theory: understanding our past and anticipating our future'. *Journal of European Public Policy*, Vol. 5, No.1, p.9.

<sup>128</sup> Billiet, S. (2009) 'Principal-agent analysis and the study of the EU: What about the EC's external relations?'. *Comparative European Politics*, Vol. 7, No. 4, p. 439. Cf Pollack, M. A. (1997) 'Delegation, agency, and agenda setting in the European Community'. *International Organization*, Vol. 51, No. 1, pp. 99-134.

<sup>129</sup> Kamphof, R. and Melissen, J. (2018) 'SDGs, Foreign Ministries and the Art of Partnering with the Private Sector', *Global Policy* (online, early view) <https://doi.org/10.1111/1758-5899.12563>.

<sup>130</sup> Ruggie, J. G. (1998) 'What makes the world hang together? Neo-utilitarianism and the social constructivist challenge'. *International Organization*, Vol. 52, No. 4, pp. 855-885.

<sup>131</sup> Groenleer, M. L. and Van Schaik, L. G. (2007) 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'. *JCMS: Journal of Common Market Studies*, Vol. 45, No. 5, pp. 969-998.

<sup>132</sup> Hix, S. and Høyland, B. (2011) *The political system of the European Union* (Palgrave Macmillan).

<sup>133</sup> March, J. G. and Olsen, J. P. (2004) *The logic of appropriateness*. *Oxford Handbook of Political Science* online, accessed <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-024?print=pdf> at August 15, 2017.



with the concept of legal competences than the 'pure' social constructivists.<sup>134</sup> Nevertheless, these theories seem still of the opinion that the domestic actors are in the end 'socialised' into European norms and rules of appropriateness.<sup>135</sup>

#### 2.2.4 Institutionalism

The attention given to institutions and institutionalisation in theory-building on international relations has increased at such pace that one could speak of a 'institutionalist turn' in IR, as states are not only viewed as 'units with largely static preferences', but the origin, evaluation and variation in state preferences is also explored.<sup>136</sup> Institutionalism is a common way of reflecting on European integration and takes many forms. A more historical analysis of European integration is offered by historical institutionalists.<sup>137</sup> This kind of historical institutional analysis sees reform in the EU as 'incremental' rather than the result of 'fundamental transformations'.<sup>138</sup> In the theory of 'rational institutionalism', the EU is viewed as a constraint on the behaviour of (Member State) actors with given identities and preferences. In this way, the EU is largely a 'political opportunity structure', which offers some actors political (and legal) resources to exert influence, while, it constrains the ability of others to pursue the goals.<sup>139</sup> Primarily, this is concretised in a 'principal-agent' relationship in which a group of principals (Member States) delegates power to the supranational agent (the European Commission).<sup>140</sup> Traditionally, principal-agent theory accentuates the control behaviour and mechanisms.<sup>141</sup> The 'sociological institutionalism' is explicated above.

The institutionalists could form a bridge between legal and political studies. The notion that 'institutions matter' is fundamental to this approach, as it is in many legal approaches.<sup>142</sup> An interesting example is offered by the institutionalist explanation of EU external powers, which is built upon the idea that the "modes and effects of external governance are shaped by internal EU modes of governance".<sup>143</sup> This resonates with the legal perspective (see section 2.3) in which EU external relations law is largely the result of the division of competences *within* the EU. However, institutionalists also tend to see legal competences as 'control mechanisms' and 'constraints' and the theory can be regarded as state-centric. In contrast, legal competences may 'enable' Member State *and* EU actors. Despite this shortcoming, institutionalists can be seen as innovative because of the methods they use and the way they

<sup>134</sup> Checkel, J. T. (2005) 'International institutions and socialization in Europe: Introduction and framework'. *International Organization*, Vol. 59, No. 4, pp. 801-826. See also the other contributions in this special issue.

<sup>135</sup> Checkel, J. T. (1999) 'Social construction and integration'. *Journal of European Public Policy*, Vol. 6, No.4, pp. 545-560.

<sup>136</sup> Fioretos, O. (2011) 'Historical institutionalism in international relations'. *International Organization*, Vol. 65, No. 2, p. 384.

<sup>137</sup> Pierson, P. (1996) 'The path to European integration: a historical institutionalist analysis'. *Comparative Political Studies*, Vol. 29, No. 2, pp. 123-163. Cf Meunier, S., and McNamara, K. R. (2007) *Making history: European integration and institutional change at fifty* (Vol. 8) (Oxford University Press).

<sup>138</sup> Fioretos, O. (2011) 'Historical institutionalism in international relations'. *International Organization*, Vol. 65, No. 2, p. 369.

<sup>139</sup> Börzel, T. and Risse, T. (2000) 'When Europe hits home: Europeanization and domestic change'. *European Integration online Papers (EIoP)*, Vol. 4, No. 15, p. 8.

<sup>140</sup> Pollack, M. A. (2001) 'International relations theory and European integration'. *JCMS: Journal of Common Market Studies*, Vol. 39, No. 2, pp. 228-231.

<sup>141</sup> Delreux, T. (2009) 'Cooperation and Control in the European Union The Case of the European Union as International Environmental Negotiator'. *Cooperation and Conflict*, Vol. 44, No. 2, p. 191.

<sup>142</sup> Jørgensen, K. E. and Wessel, R. A. (2011) 'The position of the European Union in (other) international organizations: confronting legal and political approaches'. In Koutrakos, P. (ed) *European Foreign Policy: Legal and Political Perspectives*. (Cheltenham: Edward Elgar), p. 275.

<sup>143</sup> Lavenex, S., and Schimmelfennig, F. (2009) 'EU rules beyond EU borders: theorizing external governance in European politics'. *Journal of European Public Policy*, Vol. 16, No. 6, pp. 791-812.



apply them (liberally).<sup>144</sup> As a result, institutionalism could indeed prove to be one of the 'nodal points' where legal and political approaches come together.<sup>145</sup>

### 2.2.5 EU external concepts: actorness, cohesiveness and effectiveness

Alongside the theoretical approaches, there are more and more *concepts* that concretise (and operationalise) the cooperation between EU and Member State actors. In the analysis of EU and Member State cooperation, particularly when in relation to the multilateral context, the following concepts are used abundantly: actorness, cohesiveness and effectiveness. As previously stated, these concepts are mostly operationalised by observing the EU and Member States as a unitary 'actor' in relation to (other) nation states.

The 'actorness' concept originates from Sjöstedt's 1977 actor capability study, which analyses the European Community's ability to function 'actively and deliberately in relation to other actors in the international system'.<sup>146</sup> This early conceptualisation already covered the capacity for 'autonomous' action, although in relation to external actors. Moreover, it focused on 'state-like' characteristics. Other authors thus point to a 'capability-expectations gap', meaning that the EC could deliver less than it promised due to a lack of capability.<sup>147</sup> When applying this concept to the cooperation between EU and Member State actors, some say that increasing supranationalism leads to 'more actorness' while more intergovernmentalism leads to less actorness.<sup>148</sup> Jupille and Caporaso identify four dimensions of actorness: authority, autonomy, external recognition and internal cohesiveness.<sup>149</sup> Interestingly, authority refers to the extent of delegated competences from the Member States to the EU, which 'can take many different shapes and varies greatly by policy area'.<sup>150</sup> The delegation of authority can be formal, resulting from Treaty articles, or it can be informal, resulting from practice. This way of examining authority operating 'beyond competences' is echoed in further studies. Vanhoonacker and Pomorska argue that important sources of authority are 'not only the legal competences of an actor but also the expertise in a particular issue'.<sup>151</sup>

The concept of internal/external 'cohesiveness' is sometimes a sub-notion of actor capacity, but can also be an autonomous concept. The concept of cohesiveness is related to the

<sup>144</sup> Maher, I., Billiet, S., and Hodson, D. (2009) 'The principal-agent approach to EU studies: Apply liberally but handle with care'. *Comparative European Politics*, Vol. 7, No. 4, pp. 409-413. Cf Fioretos, O. (2011) 'Historical institutionalism in international relations'. *International Organization*, Vol. 65, No. 2, p. 371.

<sup>145</sup> Kamphof, R., and Wessel, R.A. (2018) 'Analysing shared competences in EU external action: the case for a politico-legal framework'. *Europe and the World: A law review*, Vol. 2, No. 2, pp. 38-64. DOI: <https://doi.org/10.14324/111.444.ewlj.2018.02>.

<sup>146</sup> Sjöstedt, G. (1977) *The external role of the European Community* (Farnborough, Saxon House).

<sup>147</sup> Hill, C. (1993) 'The capability-expectations gap, or conceptualizing Europe's international role'. *JCMS: Journal of Common Market Studies*, Vol. 31, No. 3, pp. 305-328.

<sup>148</sup> Groenleer, M. L. and Van Schaik, L. G. (2007) 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'. *JCMS: Journal of Common Market Studies*, Vol. 45, No. 5, p. 969.

<sup>149</sup> Jupille, J. and Caporaso, J.A. (1998) 'States, Agency and Rules: The European Union in Global Environment Politics' in Rhodes, C. (ed.) *The European Union in the World Community* (Lynne Rienner), pp. 213-230. Vogler and Bretherton (2006) see the EU's ability to act on the world stage to depend on the notions of presence, opportunity and capability (internal context of EU action). Vogler, J. and Bretherton, C. (2006) 'The European Union as a protagonist to the United States on climate change'. *International Studies Perspectives*, Vol. 7, No. 1, pp. 1-22. However, these broad concepts are 'rather vague' and operationalisation is difficult according to da Conceição-Heldt, E. and Meunier, S. (2014) 'Speaking with a single voice: internal cohesiveness and external effectiveness of the EU in global governance'. *Journal of European Public Policy*, Vol. 21, No. 7, p. 964.

<sup>150</sup> da Conceição-Heldt, E. and Meunier, S. (2014) 'Speaking with a single voice: internal cohesiveness and external effectiveness of the EU in global governance'. *Journal of European Public Policy*, Vol. 21, No. 7, pp. 961-979 and Jupille, J. and Caporaso, J.A. (1998) 'States, Agency and Rules: The European Union in Global Environment Politics' in Rhodes, C. (ed.) *The European Union in the World Community* (Lynne Rienner), pp. 213-230.

<sup>151</sup> Vanhoonacker, S. and Pomorska, K. (2013) 'The European External Action Service and agenda-setting in European foreign policy'. *Journal of European Public Policy*, Vol. 20, No. 9, p. 1319.

infamous debate on the 'single voice' of the EU and Member States, but goes further by requiring authority of such voice, external recognition and autonomy from Member States.<sup>152</sup> The operationalisation of this concept is sometimes driven by formal competences. However, these competences are then often taken at face value and define by themselves the cohesiveness of the EU and Member States. A more thorough analysis of legal competences and its effects on cohesiveness is rarely conducted.<sup>153</sup>

There is growing literature on effectiveness where the EU is seen as a collective actor. The concept of effectiveness has traditionally been equated to the achievement of certain goals. This effectiveness literature traditionally focuses on either purely EU-led (such as trade) or Member State-led (such as CFSP) international processes.<sup>154</sup> Recent contributions focus more closely on mixed competence policy areas such as climate action. Moreover, the effectiveness literature is including input and process taken along instead of 'only' paralleling effectiveness with outcomes. Oberthür and Groen (2015) have made a strong recent contribution by proposing an assessment framework of effectiveness.<sup>155</sup>

The three concepts are still not fixed in their definition and operationalisation, as systematic research on the representation behaviour of EU Member States at the United Nations since the Lisbon Treaty 'is still developing'.<sup>156</sup> The concepts are therefore often mixed. As an example, the concept of effectiveness traditionally presumes a positive and direct correlation between the degree of internal cohesiveness and EU's external effectiveness.<sup>157</sup> These 'causal links' have however recently been questioned, with the text of the Lisbon Treaty used to support this line of critique.<sup>158</sup> In that sense, the inclusion of the political effects of competences and legal competences as operationalisation could help to bring these concepts to fruition. Oberthür and Groen (2015) for instance, already see scope for further investigation into their effectiveness 'assessment framework' by including additional internal factors including 'mixity of competences and coordination arrangements under the Lisbon Treaty'.<sup>159</sup> This dissertation could contribute to qualify and nuance the rich literature on EU

<sup>152</sup> Macaj, G. and Nicolaïdis, K. (2014) 'Beyond 'one voice'? Global Europe's engagement with its own diversity'. *Journal of European Public Policy*, Vol. 21, No.7, p. 1069.

<sup>153</sup> Cf da Conceição-Heldt, E. and Meunier, S. (2014) 'Speaking with a single voice: internal cohesiveness and external effectiveness of the EU in global governance'. *Journal of European Public Policy*, Vol. 21, No. 7, p. 969.

<sup>154</sup> Dür, A. and Zimmermann, H. (2007) 'Introduction: The EU in international trade negotiations'. *JCMS: Journal of Common Market Studies*, Vol. 45, No.4, pp. 771-787. Meunier, S. (2005) *Trading voices: the European Union in international commercial negotiations* (Princeton University Press). Young, A. R. (2011) 'The rise (and fall?) of the EU's performance in the multilateral trading system'. *Journal of European Integration*, Vol. 33, No. 6, pp. 715-729. Smith, K. E. (2013) *European Union foreign policy in a changing world* (2<sup>nd</sup> Edition, Polity Press).

<sup>155</sup> Oberthür, S. and Groen, L. (2015) 'The Effectiveness Dimension of the EU's Performance in International Institutions: Toward a More Comprehensive Assessment Framework'. *JCMS: Journal of Common Market Studies*, Vol. 53, No. 6, pp. 1319-1335. See also Kleistra, Y. and van Willigen, N. (2014). 'Evaluating the Impact of EU Diplomacy: Pitfalls and Challenges.' In Koops, J.A. and Macaj, G. (eds) *The European Union as a Diplomatic Actor* (Basingstoke: Palgrave Macmillan), p. 52 for the suggestion of a necessary change in evaluating EU diplomacy from (formal) input and process to (formal/informal) outcome and (informal) impact.

<sup>156</sup> Jin, X., and Hosli, M. O. (2013) 'Pre-and Post-Lisbon: European Union Voting in the United Nations General Assembly'. *West European Politics*, Vol. 36, No. 6, p. 1288. Cf Hosli, M.O., Van Kampen, E., Meijerink, F. and Tennis, K. (2010) 'Voting Cohesion in the United Nations General Assembly: The Case of the European Union'. Porto, Portugal. Accessed 9 October 2017 via the following website: <http://www.jhucb.it/ecpr-porto/virtualpaperroom/082.pdf>.

<sup>157</sup> Laatikainen, K. and Smith, K. (eds) (2006) *The European Union at the United Nations: Intersecting Multilateralisms* (Basingstoke: Palgrave). Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan).

<sup>158</sup> Thomas, D. C. (2012) 'Still punching below its weight? Coherence and effectiveness in European Union foreign policy'. *JCMS: Journal of Common Market Studies*, Vol. 50, No.3, pp. 457-474. Niemann, A. and Bretherton, C. (2013) 'EU external policy at the crossroads: the challenge of actorness and effectiveness'. *International Relations*, Vol. 27, No. 3, pp. 261-275. Delreux, T. (2014) 'EU actorness, cohesiveness and effectiveness in environmental affairs'. *Journal of European Public Policy*, Vol. 21, No. 7, pp. 1017-1032.

<sup>159</sup> Oberthür, S. and Groen, L. (2015) 'The Effectiveness Dimension of the EU's Performance in International Institutions: Toward a More Comprehensive Assessment Framework'. *JCMS: Journal of Common Market Studies*, Vol. 53, No. 6, p. 1319.

and Member State coordination by focusing on the independent and interacting effect of legal competences.

## 2.3 Legal perspective on legal competences and EU - Member State cooperation

The above analysis already demonstrates that 'the' political theoretical perspective does not exist. A legal perspective is in that sense more concentrated on some specific sources. For legal scholars, it is clear that the sources of power come originally (and primarily) from the Treaty provisions, the case law of the Court of Justice (both internally) and (when externally) the Statute of the international organisation. As a general principle, EU actors only have the competences conferred upon them by the Treaties.<sup>160</sup> However, the provisions in the Treaty are sometimes unclear and leaving the Court of Justice with the job of clarification under one important condition: whenever asked for its opinion or judgment by the institutions or Member States. Moreover, the external multilateral context does occasionally make it more difficult for EU actors, especially for the European Commission, to play a significant role because the Statute of the international organisation sometimes fails to allow a regional integration organisation such as the EU to become a full member. This section focuses briefly on these three sources of legal competences and points to the relevant literature on EU and Member State cooperation and the effects of these sources.

### 2.3.1 Treaty provisions

The Treaties on the European Union (TEU) and on the Functioning of the European Union (TFEU) are the 'alpha and omega' from a legal perspective: they started the process of European integration and define its limits in terms of legal competences.<sup>161</sup> As the result of an 'ever closer union'<sup>162</sup> the EU and Member States nowadays divide competences on 'nearly every issue of political life'<sup>163</sup> summarised in the catalogue of competences (Art 2-6 TFEU). The legal principle of the conferral of powers (Art 5 TEU) entails that the Union can only act once a competence has been created. In parallel, one should keep in mind the principles of proportionality and subsidiarity. These principles mean that the Union shall act only in so far as 'the objectives of the proposed action cannot be sufficiently achieved by the Member State (...) but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Art 5(3) TEU) for all policy areas besides exclusive EU competences.<sup>164</sup>

Overall, however, the EU and Member States need each other in cooperation and this is legally prescribed by the principle of sincere cooperation (Art 4(3) TEU): the Union and Member States shall 'in full mutual respect, assist each other in carrying out tasks which flow

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<sup>160</sup> Craig, P. and De Búrca, G. (2011) *EU law: text, cases, and materials* (Oxford University Press), p. 73.

<sup>161</sup> Jørgensen, K. E. and Wessel, R. A. (2011) 'The position of the European Union in (other) international organizations: confronting legal and political approaches'. In Koutrakos, P. (ed) *European Foreign Policy: Legal and Political Perspectives*. (Cheltenham: Edward Elgar), p. 264.

<sup>162</sup> Article 1 TEU.

<sup>163</sup> Pollack, M. A. (2000) 'The end of creeping competence? EU policy-making since Maastricht'. *JCMS: Journal of Common Market Studies*, Vol. 38, No. 3, pp. 519-538.

<sup>164</sup> Art 5(3) TEU.

from the Treaties'.<sup>165</sup> This principle interestingly continues with the following sentences thereby leaving out the role of EU actors:

*"The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

The Lisbon Treaty has strengthened the EU's actorness by confirming its separate legal status according to Art 47 TEU. Therefore, from a legal perspective the EU is a different entity than a collection of 28 Member States. Several Treaty articles provide a solid basis for the Union to establish a formal, substantive presence at international organisations.<sup>166</sup> Since the Lisbon Treaty this physical presence is often taken care of by 'Union Delegations in third countries and at international organisations (that) shall represent the Union' instead of earlier Commission Delegations or diplomats from the Member State holding the rotating Presidency.<sup>167</sup>

While the EU internal division of competences is quite straightforward, some parts of the Treaties have however been rather difficult to decode in the sense of delimitation of competences. The EU's external competences in particular suffer from this shortcoming. Legal scholars have marked the external relations arrangement of the Lisbon Treaty as 'rather unsatisfactorily'<sup>168</sup>, 'fuzzy'<sup>169</sup> or even a 'failure'<sup>170</sup>. The case law of the Court of Justice can thus be viewed as another source of competence (and power).

### 2.3.2 Case law Court of Justice and general principles

The final adjudicator of the use of competences in the EU is the Court of Justice of the European Union. As previously stated it is important that the Court is 'asked' for their legal opinion. There are most notably three ways in which the Court is asked to reflect on coordination between EU and Member State actors: in preliminary rulings, infringement proceedings and annulment actions. In *preliminary rulings* the Court is asked to interpret and ensure whether EU law is properly applied by national courts.<sup>171</sup> *Infringement proceedings* are mostly taken against national governments that fail to comply with EU law. Only the European Commission or another EU Member State can start them.<sup>172</sup> With *annulment actions* the Court can be asked to annul EU acts that are believed to violate the EU treaties or fundamental rights on grounds like 'lack of competence', 'infringement of the Treaties' or

<sup>165</sup> Art 4(3) TEU continues with the following sentences: "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

<sup>166</sup> Articles 220 and 221 TFEU. Articles 3(5) and 21(1) TEU.

<sup>167</sup> But see the EEAS document Council of the European Union (2012) 'EU Diplomatic Representation in third countries – First half of 2012', Doc. 18975/1/11, REV 1, 11 January 2012 which reveals that in some countries the EU is still represented by a Member State.

<sup>168</sup> Van Vooren, B. and Wessel, R. A. (2014) *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press), p. 110.

<sup>169</sup> Hillion, C. and Wessel, R. A. (2009) 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?', *Common Market Law Review*, Vol. 46, No. 2, p. 586.

<sup>170</sup> Klamert, M. (2011) 'New conferral or old confusion? The perils of making implied competences explicit and the example of the external competence for environmental policy'. CLEER Working Paper, No. 6, p. 3.

<sup>171</sup> Art 267 TFEU.

<sup>172</sup> Art 258-260 TFEU.

'misuse of powers'.<sup>173</sup> The questions for annulment can come from EU Member States or EU institutions such as the Council, the European Commission and (in some cases) the European Parliament. An institution can also be brought to Court for the 'failure to act' contrary to the Treaties.<sup>174</sup>

The Court is often perceived as 'helpful' in the participation of EU actors at international institutions as a means to exercise (internal) competences.<sup>175</sup> Some even state that the Court 'accelerates' the process of the EU actorness at e.g. international institutions.<sup>176</sup> The Court uses the logic of the Treaty but comes up with its own principles when interpreting the law. As an example, on more than one occasion the Court has referred to the 'principle of sincere cooperation' to underline how Member States were no longer completely free to engage in international activities as they see fit even *before* that principle was codified in the Treaty.<sup>177</sup> The Court of Justice seems to consider this principle as very important, not only in terms of the final results, but also in relation to the conduct of international negotiations.<sup>178</sup> Moreover, it has been suggested that this principle manifests itself more as a strict duty to 'refrain from acting' for Member State actors.<sup>179</sup>

An even stronger principle stemming from the Court's case law, and which could affect the conduct of sustainable development policies, is the principle of implied powers. This 'ERTA effect' means that EU external competences exist because there are internal rules. These internal rules, such as regulations and directives, form the basis for the external competences for EU actors.<sup>180</sup> As a result, Member States and EU actors need to cooperate when entering international agreements or international negotiations by themselves, as some elements of such negotiations may fall within the competences of the Union. These implied powers find their sources both in the general competences, as prescribed by the Treaty, as well as in (secondary) legislation. It would then appear that the Dutch Foreign Service is right in expressing the opinion that the EU external competence framework is a dynamic process rather than a static one.<sup>181</sup> The combined reading of this principle and that of sincere cooperation creates some (practical) difficulties and the 'fluidity' of competences results in a

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<sup>173</sup> Art 263-264 TFEU.

<sup>174</sup> Art 266 TFEU.

<sup>175</sup> Wouters, J., Odermatt, J. and Ramopoulos, T. (2013) 'The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities.' *Legal Hurdles and Political Realities*. Leuven Centre for Global Governance Studies Working Paper, No. 121, p. 4. And see cases Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977], ECR 741, para 5 & opinion 1/94 *Agreement establishing the World Trade Organization* [1994] ECR I-5267.

<sup>176</sup> Hoffmeister, F. (2007) 'Outsider or frontrunner? Recent developments under international and European law on the status of the European Union in international organizations and treaty bodies'. *Common Market Law Review*, Vol. 44, No. 1, p. 68.

<sup>177</sup> See Van Vooren, B. and Wessel, R. A. (2014) *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press), chapter 6. Particularly illustrative is Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR 3317. See also Cremona, M. (2011). 'Case C-246/07, *Commission v. Sweden (PFOS)*', Judgment of the Court of Justice (Grand Chamber) of 20 April 2010'. *Common Market Law Review*, Vol. 48, No. 5, pp. 1639-1665.

<sup>178</sup> Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR 3317. Cf Cremona, M. (2011). 'Case C-246/07, *Commission v. Sweden (PFOS)*', Judgment of the Court of Justice (Grand Chamber) of 20 April 2010'. *Common Market Law Review*, Vol. 48, No. 5, pp. 1639-1665.

<sup>179</sup> Casteleiro, A. D. and Larik, J. (2011) 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?'. *European Law Review*, Vol. 36, p. 522.

<sup>180</sup> See Case 22/70, *Commission v. Council*, [1971] ECR 263 (ERTA) and more extensively Van Vooren, B. and Wessel, R. A. (2014) *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press), p. 105.

<sup>181</sup> Original text: "de bevoegdheidsverdeling op het terrein van de externe betrekkingen is niet statisch, maar dynamisch". See < <http://www.minbuza.nl/ecer/dossiers/externe-betrekkingen/exclusieve-en-gedeelde-externe-bevoegdheden-van-de-eu.html> > . Accessed 3 April 2016.

field of 'ingenious legal arguments' and extensive case law, especially on EU external relations.<sup>182</sup>

### 2.3.3 Statutes from (other) international organisations

The Court of Justice has been keen on preventing other international courts and tribunals from affecting its autonomy on the interpretation and application of EU law.<sup>183</sup> The EU now possesses its own legal personality<sup>184</sup> and the Treaty requires consistency and coherence in the EU's external relations<sup>185</sup>. Despite this, the different legal roles of the EU in international organisations have legal effects with possible consequences on cooperation. The EU is, for example, a full member of the World Trade Organisation and many fisheries organisations, which coincidentally or not corresponds to its exclusive competences on these policy areas.

<sup>186</sup> In the case of shared competences, the picture is more blurred. The EU is for instance a full member of the Food and Agriculture Organization (FAO), but it is not a member of the International Maritime Organization (IMO).

The EU's position at the United Nations should receive some specific attention. While the EU actively engages with numerous UN specialised agencies and aims for 'effective multilateralism',<sup>187</sup> it is not a full member of the UN. In order for the EU to achieve full membership, an amendment of one of the key articles of the UN Charter (art 4(1)) would be required. However, this is not on the UN (state-led) political agenda. After a first failed attempt in 2010, the Union received an extended status of participation in the General Assembly from 2011.<sup>188</sup> Nevertheless, this 'membership saga' at the United Nations General Assembly makes it clear that the EU and Member States are not only dependent on their own cooperation agreements, but also (and crucially) on the recognition of other states and international organisations. This means that the role of EU actors, alongside Member State actors, depends on the policy area (and internal competences), as well as its position within international organisations.

## 2.4 A 'politico-legal' theoretical framework in practice

### 2.4.1 Confronting legal and political perspectives

The above analysis demonstrates that both legal and political theoretical perspectives on cooperation of EU and Member State actors contain helpful insights. Nevertheless, these insights are rarely challenged or pooled together.<sup>189</sup> There is of course a 'bridging'

<sup>182</sup> Vogler, J. (1999). The European Union 1 as an actor in international environmental politics. *Environmental Politics*, 8(3), p. 30. For an overview of these cases cf Van Vooren, B. and Wessel, R. A. (2014) *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press).

<sup>183</sup> Cremona, M., Thies A. and Wessel, R.A. (2017) *The European Union and International Dispute Settlement* (Oxford: Hart Publishing).

<sup>184</sup> Art 47 TEU.

<sup>185</sup> Art 21(3) TEU.

<sup>186</sup> See Wessel, R. A. (2011) 'The legal framework for the participation of the European Union in international institutions', *Journal of European Integration*, Vol. 33, No. 6, pp. 621-635.

<sup>187</sup> Cf Council of the European Union (2003), 'A Secure Europe in a Better World – European Security Strategy', 12 December 2003. Interestingly, effective multilateralism does not feature in the EU Global Strategy 2016, Cf European External Action Service (2016) 'Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign And Security Policy', June 2016, accessed [http://www.eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](http://www.eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf).

<sup>188</sup> Sixty-fifth session, Agenda item 120, Strengthening of the United Nations system, Resolution A/65/276.

<sup>189</sup> Delreux, T. (2006) 'The European Union in international environmental negotiations: a legal perspective on the internal decision-making process'. *International Environmental Agreements: Politics, Law and Economics*, Vol. 6, No. 3, pp. 231-248. Jørgensen, K. E. and Wessel, R. A. (2011) 'The position of the European Union in (other) international organizations:



community working on e.g. the 'political role' of the Court<sup>190</sup> or legal approaches such as critical legal theory and constitutionalism linking back to concerns in political science and sociology<sup>191</sup>. However, in general, legal scholars do have a tendency to focus on 'formal' Treaty provisions and case law while the political theories are tested empirically, mostly in an 'informal' context. Certain scholars claim that the formal rules play an 'inferior role' in actor capability<sup>192</sup> and that the 'legal division of labour is seldom strictly followed in practice'<sup>193</sup>. Others state that legal scholarship is 'fatally flawed' because the influences of non-legal factors are not seriously explored.<sup>194</sup> The difference in focus becomes clear when examining the attention for the Court of Justice of the EU. As the final adjudicator of the use of competences, the Court is the central institution for legal scholars while it is often overlooked by political scientists.

At the same time, the literature review on theoretical and conceptual debates (concerning for instance the role of institutions, actorness, cohesiveness and effectiveness) reveals that there are some underlying invisible links between these approaches.<sup>195</sup> In analyses of actorness and cohesiveness, the division of competences is sometimes included as an empirical factor. This inclusion was proposed in an assessment framework on effectiveness and these competence empiric studies could become one of innovative method institutionalism is famous for. The notion according to which 'institutions matter' is fundamental to the approach in both (institutionalist) political theory and legal approaches. Moreover, from a legal perspective, the 'in-between' category of shared competences in particular is often disregarded while factual legal answers fall short of what happens in practice. As the sustainable development policies mostly fall in these (mixed) shared competence categories, it is problematic that the debate is now often concentrated on academic silos. Because they both consider specific factors, it is imperative that the disciplines are bridged and not merged.<sup>196</sup>

#### 2.4.2 Legal competences: political analysis and operationalisation

Political science has been influential in its empirical quest to know 'which explanatory factors matter most (and which not at all)'.<sup>197</sup> It is in that sense that a 'political' analysis of legal competences could deliver significant empirical results. The current study contributes to the accumulation of interpreting the legal, political and policy implications of the EU treaties. This

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confronting legal and political approaches'. In Koutrakos, P. (ed) *European Foreign Policy: Legal and Political Perspectives*. (Cheltenham: Edward Elgar), pp. 261-286.

<sup>190</sup> There are of course notable examples of political analysis that do focus on the Court of Justice. Cf Burley, A. M. and Mattli, W. (1993) 'Europe before the Court: a political theory of legal integration'. *International Organization*, Vol. 47, No. 1, pp 41-76. Alter, K. J. (1998) 'Who are the "masters of the treaty"? European governments and the European Court of Justice'. *International Organization*, Vol. 52, No.1, pp. 121-147. Stone Sweet, A. (2010) 'The European Court of Justice and the Judicialization of EU Governance'. *Living Reviews in EU Governance*, Available at SSRN: <https://ssrn.com/abstract=1583345>.

and Wasserfallen, F. (2010) 'The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union?'. *Journal of European Public Policy*, Vol. 17, No. 8, pp. 1128-1146.

<sup>191</sup> Della Porta, D. and Keating, M. (2008) *Approaches and methodologies in the social sciences: A pluralist perspective* (Cambridge University Press), p. 36.

<sup>192</sup> Gehring, T., Oberthür, S. and Mühleck, M. (2013) 'European Union Actorness in International Institutions: Why the EU is Recognized as an Actor in Some International Institutions, but Not in Others'. *JCMS: Journal of Common Market Studies*, Vol. 51, No. 5, pp. 849-865.

<sup>193</sup> Delreux, T. (2009) 'Cooperation and Control in the European Union The Case of the European Union as International Environmental Negotiator'. *Cooperation and Conflict*, Vol. 44, No. 2, p. 190.

<sup>194</sup> Alter, K. J., Dehousse, R. and Vanberg, G. (2002) 'Law, Political Science and EU Legal Studies: An Interdisciplinary Project?'. *European Union Politics*, Vol. 3, No. 1, p. 114.

<sup>195</sup> Cf Kamphof, R., and Wessel, R.A. (2018) 'Analysing shared competences in EU external action: the case for a politico-legal framework'. *Europe and the World: A law review*, Vol. 2, No. 2, pp. 38-64. DOI: <https://doi.org/10.14324/111.444.ewj.2018.02>.

<sup>196</sup> Alter, K. J., Dehousse, R. and Vanberg, G. (2002) 'Law, Political Science and EU Legal Studies: An Interdisciplinary Project?'. *European Union Politics*, Vol. 3, No. 1, p. 120.

<sup>197</sup> Ibid, p. 116.



is done by means of a step-by-step empirical test of the effect of 'legal competences on the formulation, negotiation and implementation of sustainable development policies and essentially on the EU and Member State *cooperation* in the conduct of these policies. In this sense, and following, among others, Jin (2014), this dissertation 'steers the discussions surrounding the Treaty of Lisbon away from theoretical and legal perspectives to real-world-evidence'.<sup>198</sup>

For the operationalisation of the concept of 'legal competences' this dissertation adopts a broad approach. In every case study, this study examines the following legal sources: the catalogue of competences set down in art 2-6 TFEU, and the legal basis in other parts of the Treaties. In addition to the 'fixed' competences in the Treaty, this study also considers the Court of Justice case law, regulations and directives. To complete the picture, this dissertation finally evaluates the status of the EU in international organisations as a legally defined power; this evaluation is based on the statute of the specific international institution.<sup>199</sup> This analysis in fact bridges with political approaches by using semi-structured interviews to focus on the (perceived) effect of legal competences in practice. Part of this empirical quest is to answer questions such as why is the logic of the Treaty not being used or for instance why is the Court not (asked to be) involved. Therefore, other (intervening) variables may play a role.

#### *2.4.3 Interactions with intervening variables: an operationalisation*

This dissertation focuses on the effect of legal competences on political practice. Therefore, the effects that work the other way around, i.e. political effects on legal decisions, are not part of this analysis, even though the allocation of competences could indeed be the result of a 'specific constitutional and political bargain'.<sup>200</sup> Nevertheless, this dissertation also assesses the effects of other variables operationalised from political theories to examine their effect on formulation, negotiation and implementation of sustainable development policies, as well as to explore their interactions with legal competences in practice.

The following 'variables' derive from theoretical debates within the discipline: supranational versus intergovernmental dominance, the EU's position in the international constellation of power and preference heterogeneity (see Table 2.2). The 'variable' socialization is deliberately chosen as part of the dependent 'coordination' variable, rather than as a separate 'intervening' variable. The variable 'supranational versus intergovernmental dominance' stems from the main debate in the literature on European integration between neofunctionalism and intergovernmentalism. This concept is operationalised in the specific case studies on the direction of policies, in order to see whether there are 'institutional turf battles' between EU actors and Member State actors. Is it more EU- or Member State focused? The variable 'EU's position in the international constellation of power' is heavily influenced by conceptual debates on EU's external relations and by the concepts actorness, cohesiveness and effectiveness. While these concepts certainly have an internal dimension,

<sup>198</sup> Jin, X. (2014) *European Union representation at the United Nations: towards more coherence after the Treaty of Lisbon*, PhD Thesis, Leiden University, accessed <https://openaccess.leidenuniv.nl/handle/1887/22977>. Cf Hosli, M.O., Van Kampen, E., Meijerink, F. and Tennis, K. (2010) 'Voting Cohesion in the United Nations General Assembly: The Case of the European Union'. Porto, Portugal. Accessed 9 October 2017 via the following website: <http://www.jhubc.it/ecrporto/virtualpaperroom/082.pdf>.

<sup>199</sup> Jørgensen, K. E. and Wessel, R. A. (2011) 'The position of the European Union in (other) international organizations: confronting legal and political approaches'. In Koutrakos, P. (ed) *European Foreign Policy: Legal and Political Perspectives*. (Cheltenham: Edward Elgar), pp. 261-286.

<sup>200</sup> Hix, S. and Høyland, B. (2011) *The political system of the European Union* (Palgrave Macmillan), p. 19.

the latter is mostly covered by the other variables, as well as by legal competences. This variable is therefore operationalised through in-case variables such as CO2 emissions in the climate change case study and the amount of biofuels in the alternative fuels case study. Thus, both the external political context and the external 'legal' context are covered (see 2.4.2).

As is clear from the theories of social constructivism and sociological institutionalism preferences of Member State and EU actors are not fixed, and can converge over time through social interaction processes.<sup>201</sup> Member States' representatives involved in deciding or negotiating an EU position thus adopt a European orientation, due to the 'socialisation' in EU practices.<sup>202</sup> This concept is part of the operationalisation of the dependent variable 'coordination' by means of questions on the frequency of contacts as well as the question whether EU and Member State officials feel being part of a 'team' or a shared context. Preference heterogeneity means that there are no aligning interests. Whether there is substantive convergence or divergence, i.e. preference homogeneity or heterogeneity is the way in which this concept is operationalised. This variable is used to account for a 'rational' institutionalist perspective. Moreover, even though there is no specific 'historical institutionalist' variable, this perspective is still operationalised through a historical institutional overview of all the case studies, which indeed also coincide with the overview of legal competences. These three 'variables' will be analysed in their interaction with legal competences within the case studies and, above all, in the synthesis (chapter 7).

Theory	Operationalisation in intervening variable
<i>Neofunctionalism</i>	Supranational versus intergovernmental dominance
<i>Intergovernmentalism</i>	Supranational versus intergovernmental dominance
<i>Social constructivism and sociological institutionalism</i>	Socialisation (part of coordination/dependent variable. No autonomous intervening variable)
<i>Institutionalism</i>	Preference heterogeneity
Concepts	
<i>Actorness, cohesiveness, effectiveness</i>	EU's position in the international constellation of power

Table 2. 2 Operationalisation of intervening variables

#### 2.4.4 Limitations of this integrative approach

While this approach certainly brings some new empirical insights on the political effect of legal competences, there are of course other sources of authority, such as expertise or the link with other policy dossiers, which are not covered in detail in this combination.<sup>203</sup> More importantly, there are some methodological limitations to this integrative approach which

<sup>201</sup> Groenleer, M. L. and Van Schaik, L. G. (2007) 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'. *JCMS: Journal of Common Market Studies*, Vol. 45, No. 5, p. 975.

<sup>202</sup> Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan), p. 75.

<sup>203</sup> Vanhoonaeker, S. and Pomorska, K. (2013) 'The European External Action Service and agenda-setting in European foreign policy'. *Journal of European Public Policy*, Vol. 20, No. 9, p. 1322.

need to be addressed. First, the methodologies used in political and legal approaches may well be complementary, but they are also difficult to combine and weighed against each other in practice. Empirical evidence, backed by secondary literature and document analysis<sup>204</sup> is combined with a focus on legal texts and case law of the Court of Justice. The combination of these methods has great potential, but prioritising the information is a challenge that cannot be covered in this exploratory exercise.

Secondly, while aiming for an integrative approach, this examination does only cover parts of the scholarship of both disciplines. Legal approaches, despite their variety, share a focus on interpretation of Treaties and case law. Political theoretical approaches are however more diverse. It is therefore necessary to select specific theories and concepts and in its operationalisation choices are made to make these theories and concepts more detailed to allow for a workable construction.

Thirdly, by focusing on 'competences', one should be aware that this question might be 'fundamentally also one of national constitutional norms'.<sup>205</sup> As a result, some Member State actors, entities, or even specific *fonctionnaires* in EU institutions might lean more on the division of competences purely because of their national background.<sup>206</sup> For example, for federal states like Germany, Austria or Belgium, a clear-cut division of competences is part of their national constitution, while the more unitary United Kingdom does not even have a single constitutional document. Moreover, and logically, people with a legal background might respond differently to the importance of legal competences in interviews than persons without a legal background.

Fourthly, another methodological challenge is related to the fact that the work of the preferred study objects in the empirical part of this study (EU and Member State diplomats and officials) is surrounded with 'secrecy' and anonymity.<sup>207</sup> Therefore, it becomes necessary to hear different sides, to keep the interviews confidential and to combine multiple sources. At least in relation to using multiple sources, one could without a doubt say that such an integrative approach provides for triangulation of the findings. The next part of this dissertation focuses more in detail on the research design.

## SUMMARY CHAPTER 2

*This chapter reviewed the wide diversity of theoretical approaches and empirical concepts on EU and Member State coordination, both internally as well in a multilateral context. It found that there is only scant and often indirect attention paid to the division of legal competences in empirical studies. When there is empirical notion, the operationalisation is often uncritical or incomplete. This is problematic, especially when analysing sustainable development policies, as these policies are often about (mixed) shared competences and both empirical and legal sources could assist in painting a fuller picture. Therefore, this dissertation chooses a 'politico-legal' theoretical framework in which the division of competences is broadly operationalised to include Treaty provisions, the Court's case law, principles and secondary legislation. The political effect of this 'variable' on the coordination (and socialisation) of*

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<sup>204</sup> Ibid, p. 1329.

<sup>205</sup> Weiler, J. H. (2002) 'A constitution for Europe? Some hard choices'. *JCMS: Journal of Common Market Studies*, Vol. 40, No. 4, pp. 563-580.

<sup>206</sup> For an overview of the effect of national background on EU officials cf Hooghe, L. (2012) 'Images of Europe: How Commission officials conceive their institution's role'. *JCMS: Journal of Common Market Studies*, Vol. 50, No. 1, pp 87-111 and Bes, B. J. (2016) 'Europe's executive in stormy weather: How does politicization affect commission officials' attitudes?' *Comparative European Politics*, Vol. 15, No. 4, pp. 533-556.

<sup>207</sup> Duquet, S. and Wouters, J. (2015) 'Diplomacy, Secrecy and the Law'. Leuven Working Paper no 151.

*sustainable development policies is tested alongside three variables operationalised from the theoretical approaches and empirical concepts: the supranational versus intergovernmental dominance, the EU's position in the international constellation of power and preference heterogeneity. Thus, the dissertation tests the political effects of the division of competences as well as the interaction with the other foremost explanations from the literature.*