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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 7: Synthesis: Comparing the Cases

7.1 Introduction

“For too long, the expectation - at least in the Brussels bubble - was that the EU institutions would always try to do more than the treaties allowed them, while the expectation within Member States was that they would push back to make them do less. This immature behaviour has to be overcome” (Speech José Manuel Barroso, 8 May 2014)⁵⁵⁴

This chapter synthesises the findings of the influence of mixed legal competences on EU and Member State coordination in three specific sustainable development contexts: policy formulation on alternative fuels for private vehicles, negotiation of ‘Team EU’ in UNFCCC negotiations and implementation of the UN Agenda 2030 in the EU and Member States. The cases are compared systematically to build the theory on the effect of legal competences on sustainable development policies in the EU and the Member States, as well as their interaction with other issues stemming from political theoretical literature and beyond. Thereby it turns to another question, namely: *How do legal competences affect EU and Member State coordination in negotiation, implementation and formulation of sustainable development policies?* The Conclusion/Discussion (chapter 8) reflects on the answers in detail.

This chapter provides a descriptive and analytical overview of the findings in all three cases. The chapter is structured as follows. Section 7.2 describes the coordination processes (dependent variables) in the three case studies. Section 7.3 then highlights the results with regards to the effects of legal competences: the division of competences in the Treaty, the Court’s case law, regulations and directives (internally) as well as EU’s powers in a multilateral context (externally). This section contains ‘general reflections’ on legal competences (7.3.1), as well as identification of similarities and differences across the cases, which are visualised in a matrix (7.3.2). Section 7.4 analyses the political factors that were tested in the case studies as intervening variables, namely supranational versus intergovernmental dominance, the EU’s position in the international constellation of power and preference heterogeneity. In addition, other more specific explanations raised in the case studies are reviewed. Subsequently, section 7.5 analyses, assesses and visualises the interactions between these legal and political variables and refers back to the methodological challenges that were partly raised in chapter 3. This section also highlights some of the difficulties of deduction from these specific case studies, while nevertheless showing their value for future research and theory building.

7.2 EU and Member State coordination

Coordination has been defined in this dissertation as the process of contacts between diplomats and officials from EU institutions (especially the European Commission) and Member States with the purpose of discussing an issue of common interest and working towards a common position. These coordination processes can be internal (within the EU) or external (international) and include the discussion of the ‘management’ of the coordination. In

⁵⁵⁴ European Commission (2014) ‘On Europe Considerations on the present and the future of the European Union’: A speech by José Manuel Durão Barroso, President of the European Commission Humboldt University of Berlin, 8 May 2014,

all case studies the coordination processes have been described, without marking the 'quality' of the coordination. The primary objective of this dissertation is to see whether the independent variable of legal competences has an effect on these coordination processes on sustainable development policies. What is important to note, however, is that the three coordination case studies differ with regards to their 'place' in the policy cycle as well as the internal/external dimension.

In relation to the 'discussing', 'working towards a common position' and 'adjusting different positions' parts of the coordination definition, the climate change case study has been the one where the most 'coordination' aspects could be described. This is naturally the case if one takes into account the need to work towards a common position in the external context of the UNFCCC. With less 'external pressure', such as in the case of alternative fuels, there is also less coordination to be analysed and described. It is also worth noting that many interviewees for the climate change case study refer to the 'positive' encounters with coordination when compared to the other case studies.⁵⁵⁵

Coordination between EU and Member State actors includes the discussion of the 'management' of the coordination.⁵⁵⁶ It is interesting to note that these 'managing actors' differ across the case studies. In the alternative fuel case study, it appears that the ministries and societal stakeholders within the Member States are the managing force in the coordination process. In the climate change case study, one sees a specific coordination role for the Presidency of the Council of the EU, which is mostly but not only ceremonial, and a more substantive one for the European Commission (DG CLIMA). In the SDG implementation case study, the coordination lies at the EU level, and more specifically with the Secretariat-General of the European Commission. Within the Member States, the coordination 'management' differed between e.g. Ministries of Foreign Affairs, General Affairs, Development Cooperation and Environment ministries.

With regards to coordination and socialisation, one of the expectations from the literature was that preferences of Member State and EU actors, instead of being fixed, can converge over time through social interaction processes such as socialisation.⁵⁵⁷ Member States' representatives involved in deciding on or negotiating an EU position would thus adopt a European orientation due to the 'socialisation' in EU practices.⁵⁵⁸ It is no coincidence that socialisation often pops up in empirical research on climate change negotiations. Similarly, this case study shows an enormous coordination effort both before and during the UNFCCC negotiations and a rather coherent 'Team EU' socialisation. This socialisation process could enable the Commission to take on a leading role in coordination due to its experience in DG CLIMA. A similar though less demanding socialisation process seems to have taken place in the run-up to the Agenda 2030, especially by environment and development cooperation officials in the EU institutions and the ministries in the capitals of the Member States. However, with the SDG implementation, after the adoption of the Agenda 2030 in 2015, there

⁵⁵⁵ Interview MS official, 24-1-2014, Interview EU official, 9-4-2014, Interview EU official, 30-5-2017, Interview EU official, 13-6-2017, Interview MS official (1) and (2), 14-6-2017 Interview former MS official, 10-5-2017.

⁵⁵⁶ Cf. Jordan, A. and Schout, A. (2006) *The coordination of the European Union: exploring the capacities of networked governance* (Oxford University Press).

⁵⁵⁷ 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.

⁵⁵⁸ Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan), p. 75.

was a shift in coordinating actors both in the European Commission (Secretariat-General and first Vice-President) and in *some* of the Member States, where implementation coordination was transferred to interdepartmental councils or Prime Minister's offices. As a result, one can now speak of a 'transitional phase', as socialisation processes had to start once again with different actors; other stakeholders.⁵⁵⁹

7.3 The effect of legal competences

Each case study involved an operationalisation of 'legal competences' as independent variables in the same broad manner. Within the EU, these legal competences were divided into Treaty competences, legal principles and the Court's case law, as well as regulations and directives. Moreover, legal competences at the *external* (multilateral) stage also have an independent effect on EU and Member State coordination of sustainable development policies. This section summarises the findings in the three case studies in general reflections and analyses similarities and differences across such cases.

7.3.1 General reflections

Competences

The topics of interest in the case studies cover many policy areas from climate, energy and transport to security, trade and taxation. As a result, sustainable development policies are mostly topics of 'mixed competences'.⁵⁶⁰ Nevertheless, the 'centre of gravity' in these case studies were the policy areas of environment/climate change (EU in UNFCCC), development cooperation (SDGs), transport, and energy (alternative fuels). These policy areas can all be subsumed under the category of 'shared competences'.⁵⁶¹ While the 'category' of shared competence sounds cohesive, all three case studies revealed that there is a wide divergence of policy areas and coordination arrangements within the category. When compared to e.g. environment, the policy area of energy is one of the fields in which the EU has fewer powers. With regards to the energy and electricity mix, much is kept within the discretionary autonomy of the Member States.⁵⁶² Such an autonomy is equally important in financial, and taxation issues. In addition, land-use, export promotion and efforts in 'non-ETS' sectors, such as agriculture and transport, were typical 'Member State competences' and it seemed not possible for the Commission to expand its powers. The interviews' findings in the case studies seem to suggest that Member States do everything to keep these competences safe within their own hands.⁵⁶³

⁵⁵⁹ European Commission (2017) 'Commission Decision on setting up the multi-stakeholder platform on the implementation of the Sustainable Development Goals in the EU', C(2017) 2941 final, Brussels, 22.5.2017. See also 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>. for the difficulties for governments, specifically ministries of Foreign Affairs, being in partnerships with the private sector for the SDGs.

⁵⁶⁰ On mixed competences cf. Rhinard, M. and Kaeding, M. (2006) 'The international bargaining power of the European Union in 'mixed' competence negotiations: The case of the 2000 Cartagena Protocol on Biosafety'. *JCMS: Journal of Common Market Studies*, Vol. 44, No. 5, pp. 1030-1033.

⁵⁶¹ See art 4 TFEU, while acknowledging that 'development cooperation' is a specific type of shared competence, see art 4(3) TFEU and Art 208 TFEU.

⁵⁶² Cf. Kamphof, R., Bonenkamp, T., Selleslaghs, J.M.H.M.R. and Hosli, M.O. (2017) 'External competences in energy and climate change' in Leal-Arcas, R. and Wouters, J. (eds) *Research Handbook on EU Energy Law and Policy* (Edward Elgar Publishing), pp. 30-47.

⁵⁶³ Interview Other societal stakeholder 1, 27-3-2017, Interview other societal stakeholder 2, 27-3-2017, Interview other societal stakeholder, 28-7-2016 (alternative fuels case study), interview EU official, 13-6-2017, Interview MS official, 13-6-2017, Interview MS official, 8-6-2017, Interview EU official, 30-5-2017 (climate change case study) Interview EU official, 2-5-2017. Interview other societal stakeholder, 29-5-2017. Interview other societal stakeholder, 7-6-2017. Interview EU official, 7-6-2017. Interview MS official, 13-6-2017 (SDG implementation case study).

Furthermore, one of the expectations was that the discussions around the issue of competences would have a large role in the different case studies and that the European Commission would make use of these competences. However, the interviews portray an environment in which these competences are not a primary issue, and not promoted as such by EU actors.⁵⁶⁴ This latest finding is interesting, as in all three cases the European Commission *could* make the legal case that the Treaty provides them with more competences on the issue than it currently uses in practice. Examples include the peculiar negotiation mandate (unanimity) for UNFCCC negotiations, the lack of EU coordination on SDG implementation and the absence of steering policies on alternative fuels. Contrastingly, when financial/taxation, energy mix issues or land-use policies are at stake the Member States are more than willing to play the ‘competence’ autonomy card.

Court’s case law and legal principles

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 bear in mind the principle of proportionality and subsidiarity. The principle of subsidiarity proved particularly important as a guideline in EU policy formulation and implementation, within these specific case studies. This principle is often used to argue that the discretionary autonomy should stay within the hands of the Member States.

The ‘referee’ on the use of competences and the effect of legal principles in the EU is the Court of Justice of the European Union. However, the Court is only in position to reflect on the legal situation in practice when it is asked to do so by the EU institutions or its Member States. These legal opinions, infringement proceedings or annulment actions have however not (often) been started for these cases, despite the fact that the Treaty does not always provide clear answers and practice is at times seemingly contradictory of the Treaty.

Nevertheless, the Court’s case law has an important effect. ERTA case-law⁵⁶⁵ appears to have effect for both climate change negotiations as well as the UN Agenda 2030 as the EU has committed to implement the SDGs both in its *internal* and *external* policies. Moreover, quite recently the Court ruled that within a Free Trade Agreement the ‘objective of sustainable development forms an integral part of the (exclusive) common commercial policy’.⁵⁶⁶ This ‘Singapore opinion’ may prompt a more active role for the Court in the evaluation of the conduct of sustainable development.⁵⁶⁷ As social and environmental dimensions are increasingly integrated with economic policies, the Court might be asked to reflect more on the use of competences in mixed agreements. Furthermore, the ‘principle of sincere co-operation’, originating from the Court’s case law and now part of the Treaty⁵⁶⁸, obliges Member States and the EU to cooperate more loyally than they sometimes seem to do in practice as shown in the case studies. Nevertheless, although not referring directly to the Treaties and the Court’s case-law, it is seen as disrespectful to Member State and EU

⁵⁶⁴ Interview EU official, 30-5-2017, Interview MS official, 8-6-2017, Interview MS official, 14-6-2017.

⁵⁶⁵ Cf section 2.3.

⁵⁶⁶ Para 147, opinion 2/15

⁵⁶⁷ Interview EU official, 13-6-2017 (climate change case study), Interview EU official, 12-6-2017, Interview MS official, 12-6-2017 (SDG implementation case study).

⁵⁶⁸ Art 4(3) TEU.

actors to 'colour outside the lines' of the Team EU approach during climate change negotiations.

Regulations, Directives and Strategies

The EU is to be considered by certain commentators such as Damro (2012: 682) 'fundamentally a large single market with significant institutional features'.⁵⁶⁹ These single market features, especially when agreed in regulations and directives, could be analysed as legally defining powers with internal (and external⁵⁷⁰) effects. These regulations and directives affect the distribution of competences, which make them a dynamic rather than a fixed (Treaty-based) process.⁵⁷¹ As an example, one would expect the Union to have more (coordinating) powers when there is a single market for road fuel agreed in a directive. Nevertheless, when looking at the different case studies in more detail it is clear that there are many 'opt-outs' for the Member States which hinder coordination (and implementation) 'management' by the European Commission. Continuing with the example of alternative fuels, they are not part of the legally binding Emission Trading System (ETS). Moreover, there are 'substantial barriers' to the single market resulting from national taxation schemes, not only on fuels, but also on energy.⁵⁷² Overall, the case studies show that there is significant internal legislation, but that the EU seems not so strict on compliance and weak in implementation. Furthermore, all case studies demonstrated a general reluctance among Member States to accuse other Member States when they do not cooperate according to the prescribed rules of coordination.

External (multilateral) legal context

Besides the significant *internally* defined powers, there are *externally* defined legal powers. However, as the case studies have demonstrated, the international context does not often prescribe legally binding rules. The Sustainable Development Goals, for example, have a non-legal binding character and the monitoring and review mechanisms in the UN High-Level Political Forum are likewise 'soft'. The UN is 'encouraging regional frameworks such as the EU' (para 21) to facilitate implementation, but national governments 'have the primary responsibility' (para 47).⁵⁷³ The Paris Agreement is more binding, but composed of a 'binding' section as well as voluntary, non-binding commitments. The 'multilateral context' on alternative fuels is almost non-existent.

Despite these 'soft' externally assigned powers, there are nevertheless some internal effects of these UN documents and Statutes. As the EU as well as its Member States are a Party to the UNFCCC they need to cooperate to reach the objectives of the Paris Agreement, with an upcoming stocktake of climate pledges in which, most likely, the EU and its Member States will need to increase their work on mitigation, adaptation and finance. Moreover and vice

⁵⁶⁹ Damro, C. (2012) 'Market power Europe'. *Journal of European Public Policy*, Vol. 19, No. 5, pp. 682-699.

⁵⁷⁰ For external effects see ERTA case-law.

⁵⁷¹ 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> on 21-12-2014.

⁵⁷² Steenberghen, T. and Lopez, E. (2008) 'Overcoming barriers to the implementation of alternative fuels for road transport in Europe'. *Journal of Cleaner Production*, Vol. 16, No. 5, p. 584.

⁵⁷³ United Nations General Assembly (2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development', UN Resolution A/RES/70/1, adopted on 25 September 2015, available online at <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>, Accessed 12 January 2017.

versa, the Treaty and ERTA case law upgrade the external profile of the EU at e.g. the United Nations whenever EU Member States and third states are willing to accept its internal competences at an external stage. The Court's case law and, the Lisbon Treaty, combined with the Agenda 2030 and the Paris Agreement provides ample room of manoeuvre to 'parallelise' these internal and external dimensions. When, as in the case of alternative fuels, a multilateral context is missing, this seems to weaken the internally defined legal powers.

7.3.2 Similarities and differences: legal competences across the cases

The below Table (7.1) gives an overview of the relevance of legal competences for EU and Member State coordination across the cases. A 'weak' relevance indicates that the source of legal competences is not (or seldom) as such used or indicated, according to the documents and interview findings. A 'moderate' relevance indicates that there is some use of this source of legal competences; a 'strong' relevance means that this source often comes back in interview findings and/or policy and legal documents. In the alternative fuels case the 'regulations and directives' are marked as having 'strong' impact on coordination between EU and Member State actors. The 'U-turns' on biofuels in directives proved to be having an especially large effect. In contrast, with the absence of a multilateral context, the importance of UN documents and Statutes is scored as 'weak'. In the case study on 'Team EU' in UNFCCC negotiations, the UN context is 'strong' but, as indicated in many interviews, there has been almost no attention paid to 'competences' since 2010-2011. Therefore, this source of legal competences is scored as 'weak'. The case study on 'SDG implementation' has 'moderate' scores on all four sources of legal competences. With the absence of a real implementation strategy until (most likely) the next College of Commissioners from 2019, it is expected that none of the sources will be 'weak' or 'strong' until then.

	<i>Competences and Treaty provisions</i>	<i>CJEU case law and principles</i>	<i>Regulations and directives</i>	<i>Multilateral (UN) documents and Statutes</i>
Case Alternative Fuels	Moderate	Weak	Strong	Weak
Case UNFCCC Team EU	Weak	Moderate	Moderate	Strong
Case SDG implementation	Moderate	Moderate	Moderate	Moderate

Table 7. 1 The relevance of sources of legal competences across the cases

Similarities

The case studies point to some similarities. Firstly, the actual *claiming* of Treaty-based or case law-based competences by the European Commission appears to rarely occur in daily practice. Likewise, the Court of Justice is absent from the discussions as they are not asked to reflect on the division of powers in practice. This is remarkable as the daily practice sometimes contravenes the logic of the Treaty. The Commission for instance, does not question the peculiar procedure of Team EU in climate change negotiations while this would definitely be a relevant legal question for the Court of Justice. The recent Singapore opinion

was however noted in interviews across the cases, which indicate a potential revitalisation of legal questions on the conduct of powers in sustainable development policies (and trade).⁵⁷⁴ Secondly, and conversely, the Member States seem in all three cases to be selective on their 'financial' and 'energy mix autonomy' national competences such as climate finance commitments, funding for SDG implementation, taxation of fuels as well as discretionary autonomy on land-use issues and export promotion.⁵⁷⁵ Thirdly and notably, while all case studies were selected as 'mixed-competence' procedures one could see in all cases that there are strong differences between policy areas *even when* they are based on the same (shared) 'competence category'. As a result, apart from clear categories such as 'exclusive' EU competences or national competences, there is a sweeping range of policy areas where decisions are increasingly made on an ad-hoc basis. The category of 'shared' competences especially appears to be composed of different balances of power between EU and Member State actors, ranging from 50-50 to 90-10. This could be the result of the equal importance of the principle of *subsidiarity* alongside the division of competences.

Differences

There are of course also differences across the cases and the potential effect of legal competences, often largely related to the place in the chain of decision-making. While this is a small-N study and especially the climate change case seems very peculiar, one could see clear differences in the powers of the Commission in negotiation (quite strong) as compared to implementation of international agreements and powers in policy formulation (quite weak). Part of this difference could be related with the difference between external and internal competences. While the internal division of competences are delineated in the Treaty, the *external* competences are not clearly established. As a consequence, the identification of external competences is to a large extent based on decades of pre-Lisbon case law of the Court of Justice of the European Union which 'provides a fertile field for ingenious legal argument' over the interpretation of the Treaties.⁵⁷⁶

Besides the difference between internal and external dimensions, there is a difference in the actual notion of the topics within the Treaties. Climate change is not often distinguished in the Treaty, which leaves some creative room to manoeuvre for EU and Member State actors. One could even argue that there is a lack of legal competences on climate change in the Treaty. The less a topic is mentioned in the Treaty, the more legal creativity in the field of coordination seems necessary and other legal sources (such as case law, regulations, directives and UN Statutes) are used. However, this should be crosschecked with more research on this topic. Interestingly, some of the 'general' interviews on the history of competences point to an era (1980s and 1990s) in which the Treaty was more a 'framework', while in recent years it has become a 'tighter jacket' in which legal competences were more

⁵⁷⁴ Interview EU official, 13-6-2017 (climate change case study), Interview EU official, 12-6-2017, Interview MS official, 12-6-2017 (SDG implementation case study).

⁵⁷⁵ Interview Other societal stakeholder 1, 27-3-2017, Interview other societal stakeholder 2, 27-3-2017, Interview other societal stakeholder, 28-7-2016 (alternative fuels case study), interview EU official, 13-6-2017, Interview MS official, 8-6-2017, Interview EU official, 30-5-2017 (climate change case study). Interview EU official, 2-5-2017. Interview other societal stakeholder, 29-5-2017. Interview other societal stakeholder, 7-6-2017. Interview EU official, 7-6-2017. Interview MS official, 13-6-2017 (SDG implementation case study).

⁵⁷⁶ Wouters, J., Odematt, 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.

restrictive.⁵⁷⁷ The mere fact that ‘climate change’ receives less attention in the Treaty can therefore be a positive sign for more creative use of legal competences.

7.4 Intervening variables (political-theoretical issues)

The previous section pointed to some generalities across the cases. The *potential* of legal competences is often not fully used, especially by the European Commission. There can be many *political* explanations for this phenomenon. Why would the European Commission for example dare to bring a competence discussion on mercury to the Court of Justice while it keeps the status quo climate change? ⁵⁷⁸ This section points to the political issues identified from the literature that have been part of the questioning and investigation in the case studies as intervening variables. These issues are the supranational versus intergovernmental dominance, the EU’s positioning in the international constellation and preference heterogeneity. As demonstrated later, some of these ‘political’ issues do have a legal component that should not be neglected. Moreover, other explanations raised in the case studies will be briefly summarised.

Table 7.2 gives an overview of the relevance of the ‘intervening variables’ across the cases. A ‘weak’ relevance indicates that the political-theoretical issue is not (or seldom) as such used or indicated, according to the documents and interview findings. A ‘moderate’ relevance indicates that there are some references to this intervening variable; a ‘strong’ relevance means that this political explanation often comes back in interview findings and/or policy and legal documents. In the alternative fuels case study ‘preference heterogeneity’ is scored as ‘strong’ due to the differences in fuel choice between Member States. In contrast, ‘Team EU’ in UNFCCC negotiations has a ‘weak’ heterogeneity: climate change is generally considered a policy area in which Member States’ views are aligned. For ‘SDG implementation’, the EU’s position in the international constellation of power is considered as ‘strong’ as the goals can be said to correspond to ‘European’ values.

	<i>Supranational versus intergovernmental dominance</i>	<i>EU’s positioning in the international constellation of power</i>	<i>Preference heterogeneity</i>
Case Alternative Fuels	Moderate	Weak	Strong
Case UNFCCC Team EU	Weak	Strong	Weak (strong homogeneity)
Case SDG implementation	Moderate	Moderate	Moderate

Table 7. 2 The relevance of intervening variables across the cases

⁵⁷⁷ Interview ‘Former MS official (general)’ 19-4-2017 and Interview Former EU and MS official, 31-3-2017.
⁵⁷⁸ On this case, cf De Baere, G. (2012) ‘Mercury Rising: The European Union and the International Negotiations for a Globally Binding Instrument on Mercury’. *European Law Review*, Vol. 37, No. 5, pp. 640-655.

Below is an overview of the intervening variables and their potential effect on coordination of EU and Member State actors in sustainable development policies.

Supranational versus intergovernmental dominance

The main debate in the literature on European integration has for a long time been the supranational-intergovernmental 'dichotomy' which dictates that integration is either driven by supranational institutions or national governments.⁵⁷⁹ As Nugent (2017: 436) suggests intergovernmentalism refers to arrangements, 'whereby nation states, in situations and conditions they can control, cooperate with one another on matters of common interest'.⁵⁸⁰ The Member States are free to cooperate or not and are able to set the limits of this cooperation, e.g. through a veto. At the other end of the spectrum, supranationalism refers to governance arrangements where states decide to delegate responsibility for decision-making to a body that stands above (*supra*) the nation state. In this way, states lose some control, but they still have to agree to do this.

If that dichotomy also dictates EU and Member State cooperation on sustainable development issues, or lack thereof, one would expect institutional turf battles on the treacherous issues of climate change, development cooperation and fuels for private vehicles. However, this 'traditional pattern' of Member States versus European Commission, where the Member States (via the Council) ask for less EU powers fearing a 'competence creep', is only to some extent visible in the case study on alternative fuels. Interestingly, in the case of SDG implementation the Council is asking for more coordination and powers of the Commission urging for an 'implementation strategy' with 'concrete measures' in 'all relevant EU internal and external policies'.⁵⁸¹ The climate change negotiations are more peculiar. On the one hand, the Member States and the European Commission seem to work together coherently in 'Team EU' during the negotiations leaving these turf battles aside. On the other hand, the Member States keep their control over the process with a large role for the Presidency and the Council Working Group WPIEI both before and during the negotiations. The European Parliament, often not a part of the intergovernmental-supranational dichotomy literature, still seems to be a less influential player than the Council and the Commission in these three case studies. However, they sometimes demand ambitious policies especially in committees such as ENVI (environment) and DEVE (development cooperation). Nevertheless, the 'inter-committee coordination' in the European Parliament on sustainability issues is notably absent.⁵⁸²

EU's position in the international constellation of power

The position of the EU in the international constellation of power is also an explaining factor for EU and Member State cooperation as often found in the literature, especially in

⁵⁷⁹ Branch, A. P., and Ohrgaard, J. C. (1999) 'Trapped in the supranational-intergovernmental dichotomy: a response to Stone Sweet and Sandholtz', *Journal of European Public Policy*, Vol. 6, No. 1, pp. 123-143.

⁵⁸⁰ Nugent, N. (2017) *The government and politics of the European Union* (Springer), p. 436.

⁵⁸¹ Council of the European Union (2017), A sustainable European future: The EU response to the 2030 Agenda for Sustainable Development - Council conclusions, 10370/17, 20 June 2017, para 19.

⁵⁸² Yesilkagit, K. (2008) 'Review - The coordination of the European Union. Exploring the capacities of networked governance – by Andrew Jordan and Adriaan Schout'. *Public Administration*, Vol. 86, No. 2., p. 615. Yesilkagit holds that "There are almost no bureaucratic procedures that systematically support inter-committee coordination of EPI (Environmental Policy Integration). EPI, moreover, depends on informal relations and the personality of the MEPs involved as well as of the rapporteurs of the Environment and other committees."

multilateral negotiations.⁵⁸³ The case studies do not all have a clear external component and as such, they are difficult to compare on this specific explaining factor. Moreover, both SDG implementation and the introduction of alternative fuels are still in their early stages, not only in the EU but also in other parts of the world. Nevertheless, the finding that the international context indeed played a large role in 'Team EU' cooperation at UNFCCC negotiations was confirmed in many interviews. As the third largest CO₂ emitter, the EU can be considered as important, but not as the most important player to reach global CO₂ emission goals. This has a strong effect on their internal need for coordination.⁵⁸⁴ In a less clear-cut international negotiation, such as the Open Working Group leading to the Agenda 2030 and the SDGs, one could find Member States and the EU coordinating their positions effectively. However, when it comes to SDG implementation or in the absence of a multilateral negotiating context (e.g. for alternative fuels) or the absence of a strong monitoring mechanism (e.g. the HLPF for SDGs), it proved difficult for the EU and Member States to cooperate. In that sense the international context appears to facilitate EU and Member State cooperation and use of the Treaty accordingly. Indeed, even when there is large import dependence and the EU's position of the international constellation of power on fuels is decreasing in practice, it seems as if Member States can try to work on their own 'raw material/resource strategies' despite some coordination and a soft EU raw material strategy on critical raw materials.⁵⁸⁵ This could be related to the absence of international cooperation and the absence of a need to work together for (the EU and) Member States.⁵⁸⁶ This would indeed explain why energy cooperation is still in its infancy despite equal 'shared competences' like climate change, although this is largely outside the remit of this study.⁵⁸⁷

Preference heterogeneity

'Preference heterogeneity' – meaning (the absence of) aligning interests – is a primary explaining factor of EU and Member State cooperation behaviour according to the literature. The case studies sketch a mixed picture in the different policy areas. In the case of climate change there is a general preference *homogeneity*, especially on the necessity to tackle climate change internationally. On sub-issues, there are often one or two outliers, e.g. Poland⁵⁸⁸. In the multilateral negotiations there seems to be a 'Team EU' preference homogeneity on climate change mitigation and adaption and more heterogeneity on the (financial) 'means of implementation', within the EU as well as externally. The homogeneity on mitigation and adaptation can be explained by the image that the EU itself has the most ambitious climate policies as trading bloc. That makes it in the interest of all EU Member States to aim for a global ambitious climate deal. For alternative fuels there seems to be preference heterogeneity across the EU depending on the historical fuel context

⁵⁸³ Cf Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan).

⁵⁸⁴ Cf Bäckstrand, K., and Elgström, O. (2013) 'The EU's role in climate change negotiations: from leader to 'leadior'. *Journal of European Public Policy*, Vol. 20, No. 10, p. 1380 who consider the EU 'a bridge builder between the major emitters'.

⁵⁸⁵ European Commission (2013) on the implementation of the Raw Materials Initiative. COM(2013) 442 final. Brussels, Belgium, 24.6.2013. Cf Lee, B., Preston, F., Kooroshy, J., Bailey, R. and Lahn, G. (2012) 'Resources futures: A Chatham House report'. London, UK: The Royal Institute of International Affairs, accessed via <http://www.chathamhouse.org/publications/papers/view/187947> for a critical overview of international cooperation on natural resources.

⁵⁸⁶ See e.g. (in Dutch) Kamphof, R. (2013) 'Grondstoffen' (natural resources, raw materials) Nationale Commissie voor Duurzame Ontwikkeling NCDO, Amsterdam, www.kaleidosresearch.nl/download/2015/08/2013-Grondstoffen.pdf, p. 43-45.

⁵⁸⁷ Cf Kamphof, R., Bonenkamp, T., Selleslaghs, J.M.H.M.R. and Hosli, M.O. (2017) 'External competences in energy and climate change' in Leal-Arcas, R. and Wouters, J. (eds) *Research Handbook on EU Energy Law and Policy* (Edward Elgar Publishing), pp. 41-43 for differences in global climate and energy frameworks and the role of the EU.

⁵⁸⁸ Rettman, A. (2015) 'Poland vetoes CO₂ targets on the eve of Paris visit' EU Observer, 28 October 2015. Available at <<https://euobserver.com/environment/130867>>> Accessed 10 December 2015.

(diesel/gasoline), size of the automotive industry, strong domestic stakeholder lobbies and different blending and taxation policies.

For the SDGs, it is difficult to analyse the substantive divergence because of the broad scope of this agenda and the extended practical use of sustainable development. As indicated in the interviews this concept was previously especially known for the environmental dimension and to some extent poverty eradication.⁵⁸⁹ The Agenda 2030 'on sustainable development' not only encompasses the recent 'three dimensions' (environmental, social and economic) but likewise security and human rights dimensions. The 'extended' use of the concept is increasing preference heterogeneity on e.g. human rights issues in Poland and Hungary. Additionally, the idea that economic growth should stay 'within planetary boundaries' is sometimes debated beyond the classical environmentally focused DGs and ministries. This latest finding resonates in all three case studies: there seems to be more preference heterogeneity between Directorates-General and between ministries *within* the EU and *within* Member States than between the European Commission and the Member States. For example, finance ministries proved to be difficult partners in the new sustainable development pattern.⁵⁹⁰ This is an important finding that needs further testing.

Other explanations

Apart from the relevance of legal competences and intervening variables all three case studies pointed to case-specific alternative explanations for EU and Member State coordination in formulation, negotiation and implementation of sustainable development policies. The alternative fuels for private vehicles case study demonstrated the importance of the tone of the scientific and/or emotional debate for joint decision-making. In that sense, the UNFCCC negotiations were easier due to the 97 percent consensus in peer-reviewed climate science literature that humans are causing global warming.⁵⁹¹

In all the case studies, the opinions of 'other societal stakeholders' such as the private sector and CSOs were taken into consideration. In the study on alternative fuels their views were hugely significant, in the case study of SDG implementation much is *expected* from the other societal stakeholders and in the UNFCCC negotiations, besides the parallel merchandising process of the Open Tent Zone, the other societal stakeholders appeared to have only a small role in the 'real' intergovernmental negotiations.

When considering drivers for coordination of EU and Member States on sustainable development policies, some refer to a European public that values environmental protection and development cooperation highly, as has been signposted by several recent Eurobarometer surveys.⁵⁹² On the one hand, this could be an 'alternative explanation' of EU

⁵⁸⁹ Interview other societal stakeholder, 7-6-2017. Interview MS official, 12-6-2017. Interview EU official, 7-6-2017 (SDG implementation case study).

⁵⁹⁰ Interview EU official, 7-9-2016, Interview MS official, 7-9-2016, Interview other societal stakeholder, 7-9-2016, Interview EU official, 31-3-2017 (alternative fuels case study), Interview EU official, 14-10-2015, Interview MS official, 8-6-2017, Interview EU official, 13-6-2017 (climate change case study), Interview EU official, 2-5-2017. Interview other societal stakeholder, 29-5-2017. Interview other societal stakeholder, 7-6-2017. Interview EU official, 7-6-2017. Interview MS official, 13-6-2017 (SDG implementation case study).

⁵⁹¹ Cook, J., Nuccitelli, D., Green, S. A., Richardson, M., Winkler, B., Painting, R., ... & Skuce, A. (2013) 'Quantifying the consensus on anthropogenic global warming in the scientific literature'. *Environmental Research Letters*, Vol. 8, No. 2, 024024.

⁵⁹² European Commission Special Eurobarometer (2014) 'Attitudes of European citizens towards the environment', Special Eurobarometer 416, September 2014 and European Commission Special Barometer (2017) 'EU Citizen's views on development, cooperation and aid', Special Eurobarometer 455, April 2017. Cf. Falkner, R. (2007) 'The political economy of

and Member State coordination of sustainable development policies. On the other hand, consumers seem to be rather hesitant in choosing flexi-fuel vehicles and more environmentally friendly products and do not protest massively when Member States engage in practices such as reducing their aid budget.

The strong commitment to sustainable development policies seems confined to specific ministries/DGs/policy units in the EU institutions and Member States.⁵⁹³ In that way, the distinction between EU and Member States might be a bit too abstract and in practice, it is more influenced by the preferences of individual ministries, or, in the case of the European Commission, specific DGs. These differences between specific DGs and ministries might provide powerful explanation, but this finding needs however further testing to become more robust.

7.5 Interactions

This section deals with the interactions between the legal competences and the other intervening variables. It shows that there is more interaction between these approaches in the empirical practice of the case studies than the literature suggests. Moreover, certain developments could enable a larger role of legal competences in the near future. The remainder of this section is focused on some methodological limitations of the approach taken in this study.⁵⁹⁴

The effects of the procedural arrangements and legal competences are in all three case studies assessed against intervening variables suggested from the theoretical literature. The case studies however point to the situation that it is mostly not an 'either/or', but rather an interactive context. There is much interaction between these intervening variables and legal competences in practice as described and visualised below.

Firstly, it should be noted that the supranational versus intergovernmental dominance variable proved to be relatively unimportant in the case studies. Upon consideration of the 'mixed' and often 'shared' competences underpinning these policies which more on the nature of cooperation than moving competences from Member States to EU or vice versa, this does not come as a surprise. In that sense the picture of an almost 'teleological drive towards further European integration' as suggested in many academic contributions, is not necessarily the case in these mixed competence policy fields.⁵⁹⁵ After all, most EU external relations are not characterised by 'exclusivity' and the number of areas in which the EU can act without the Member States are in fact limited.⁵⁹⁶ As a result, international agreements are concluded often as 'mixed' agreements even when there is a dominant exclusive

'normative power' Europe: EU environmental leadership in international biotechnology regulation'. *Journal of European Public Policy*, Vol. 14, No. 4, p. 510.

⁵⁹³ Schout, A., & Jordan, A. (2005). 'Coordinated European Governance: Self-Organizing or Centrally Steered?'. *Public Administration*, Vol. 83, No. 1, p. 215 hold in the (related) context of 'Environmental Policy Integration' that "sectoral DGs continue to focus on their own sectoral objectives to the detriment of the environment. Most DGs are usually willing to consider environmental objectives, but not to the extent needed to deliver sustainability".

⁵⁹⁴ For a more extensive methodological overview see chapter 3: research design.

⁵⁹⁵ 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. 976.

⁵⁹⁶ Van Vooren, B. and Wessel, R. A. (2014) *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press), p. 99.

competence behind the agreement.⁵⁹⁷ Considering these legally defined shared competences, it is less odd that the Council is sometimes asking for more coordination by the Commission, in e.g. SDG implementation strategies in the EU.

Nevertheless, there are still some policy measures such as taxation and the energy mix where Member States seem less willing to coordinate, especially in cases of preference heterogeneity or supranational versus intergovernmental dominance. It is no coincidence that these policy measures in particular are often brought up in interviews, as these are based on the logic of the Treaty and specific Articles. For example, in the Treaty provisions on environment and climate change (cf Art 192 TFEU) it is already indicated that fiscal measures, land use and ‘measures significantly affecting a Member State’s choice between different energy sources’ need unanimous support from Member States by way of derogation from the normal procedure. In that way, one could see *interaction* between the variable ‘supranational versus intergovernmental dominance’ and internal EU legal competences. As such, it may be better to speak of ‘balance’ between supranationalism and intergovernmentalism in these mixed-competence arrangements than ‘dominance’.

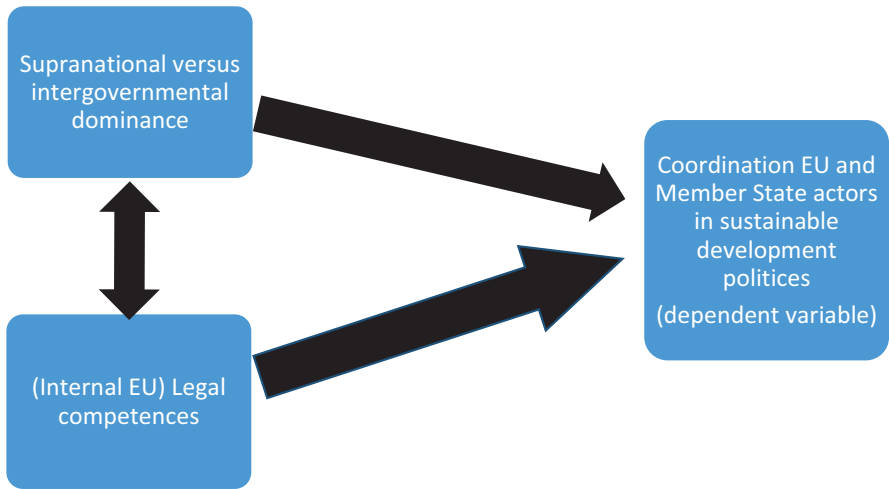


Figure 7. 1 Interactions variable supranational versus intergovernmental dominance

Secondly, the EU’s position in the international constellation of power *interacts* with UN Statutes and documents (external legal competences) as well as internal EU legal competences when there is a strong multilateral context such as the UNFCCC (see Figure 7.2). However, the case studies show that there is sometimes an absence of a multilateral context, either caused by the absence of a multilateral forum (alternative fuels) or because the implementation is an EU internal issue (SDG implementation). Both the UN Statutes and documents (EU external legal competences) and the EU’s position in the international

⁵⁹⁷ European Commission - Press release ‘European Commission proposes signature and conclusion of EU-Canada trade deal’, Strasbourg, 5 July 2016; http://europa.eu/rapid/press-release_IP-16-2371_en.htm.

constellation of power function as ‘intervening’ variables in that specific context. Figure 7.3 visualises this intervening effect.

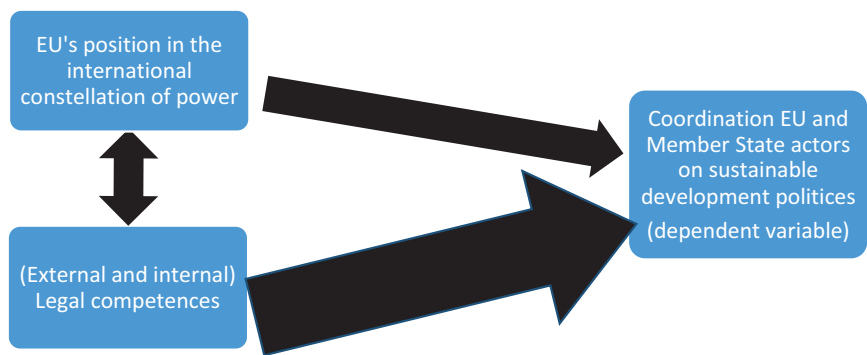


Figure 7. 2 Interactions variable EU's position in the international constellation of power in case of a strong multilateral context

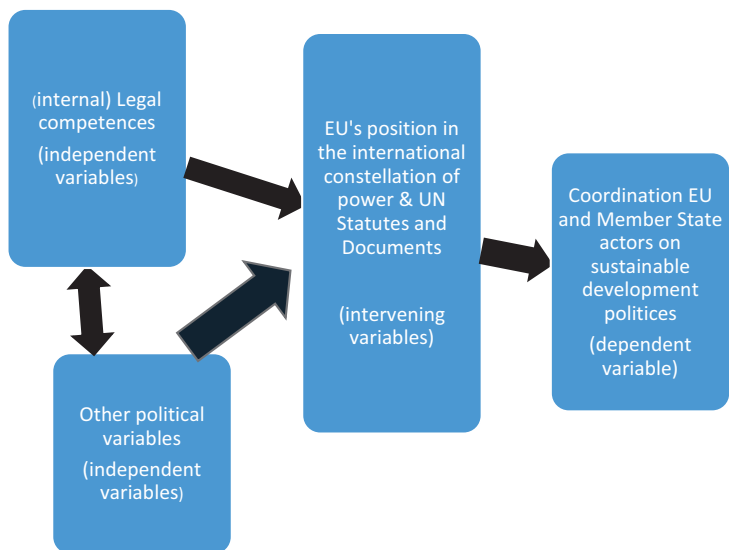


Figure 7. 3 Interactions variable EU's position in the international constellation of power in case of a weak/absent multilateral context

Thirdly, the preference heterogeneity has a clear connection with both the legal competences as well as the supranational versus intergovernmental dominance. The interaction with the legal competences has little to do with the substantive *content* of the preferences but more with the substantive (*legal*) *power* of the arguments. For instance, when the arguments are

more lenient towards environment and trade, notable EU policy areas, there seems to be much more substantive convergence than when the arguments are more lenient towards energy autonomy or financial issues and taxation, which are strong national competences. Even *within policy* areas like climate action there is much more convergence on environmental substance than financial substance issues such as the EU contribution to the Green Climate Fund. Interestingly, the *objective* of a policy could also be analysed taking into account legal competences. As such, CO2 reduction can be considered an objective where there are already many regulations, directives and a multilateral context that drives coordination between EU and Member State actors. In contrast, an objective like ‘energy security’ comes much closer to national competences such as the energy mix, which will hinder coordination between EU and Member State actors.

There is clear interaction and overlap between the variables of supranational versus intergovernmental dominance, preference heterogeneity and legal competences. They all refer to the politico-legal balance of power between EU and Member States (see Figure 7.1). This dissertation points however, to a specific sub-category of ‘preference heterogeneity’ that appears to be distinguished from the supranational versus intergovernmental dominance. This category could be named ‘preference heterogeneity between DGs/ministries’. Across the case studies there is alignment between specific DGs and ministries, e.g. DG CLIMA and environment ministries. These ‘coalitions’ could however conflict with other coalitions, such as the economic coalitions of DG ECFIN and national ministries of economic affairs. These coalitions try to make use of legal competences. Therefore, one could say that this ‘new’ category of preference heterogeneity *interacts* with legal competences but can be an independent variable in itself. The interaction of this variable is visualised in Figure 7.4.

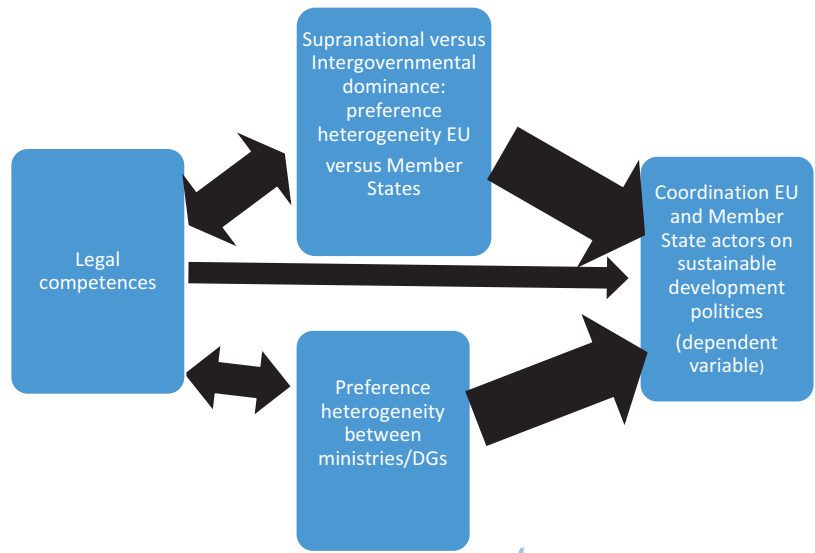


Figure 7. 4 Interactions variable preference heterogeneity

Taking these interactions and the importance of the variables into account, the mere distinction of independent legal variables and intervening political variables affecting the

dependent variable 'coordination of EU and Member State actors in sustainable development policies' proved to be difficult to hold in practice. Instead, there are many politico-legal interactions between preference heterogeneity, supranational versus intergovernmental dominance and the catalogue of competences and Treaty provisions. In that sense, the Treaty provisions themselves are the result of a political trade-off in the Treaty negotiations in the 2000s, thus making it implausible to mark the legal competences as 'independent' from political processes. Notwithstanding this fact, it is interesting to note that the logic of the Treaty is often used without political debate. Moreover, when the Treaty is deliberately not used there are frequently *political* reasons why this practice is not referred to the Court of Justice. Taking into account all these politico-legal interactions, it makes sense to combine these disciplines in analyses of EU and Member State action on sustainable development.

7.6 Methodological limitations: criticising the three case studies

As highlighted in the research design (ch 3), these selected case studies can be considered tests that can lead to valid 'analytical generalisations' or 'emergent patterns'.⁵⁹⁸ The design with only three cases has the effect that there are more rival explanations to assess than cases to observe, 'many variables, small N'.⁵⁹⁹ As a result, one should be careful in inferring general reflections from these three specific case studies.

As previously identified, the climate change case has a unique institutional arrangement of lead negotiators and issue leaders, a large role for the Presidency and a 'negotiation mandate' based on unanimous Council conclusions. EU action on climate change is a 'saviour issue' for the project of European integration itself.⁶⁰⁰ Moreover, the multilateral context with massive Conferences of the Parties of the UNFCCC gives climate change a distinct profile. Hence, besides being cautious in inferring conclusions about the legal competences this study additionally makes it clear that a sole focus on climate change negotiations does not make for valid analytical generalisations.

Aside from the uniqueness of (Team EU in) the climate change negotiations, the other cases are further unsettled. For the climate change case on the one hand, one could at least limit the timeframe from Copenhagen (2009) until Paris (2015) and after Paris (from 2015) until the new global stocktake (2018-2019) which mark distinct periods. On the other hand, SDG implementation is still an ongoing process that only started less than two years ago, when this case study was conducted. Moreover, within these two years⁶⁰¹ the Commission has waited for fourteen months since the adoption of the Agenda 2030 'implementation strategy' in November 2016. The process of formulating policies on alternative fuels is already taking longer. However, there have been such great 'U-turns' in this area that it is difficult to speak of coherent policies on alternative fuels from 2009. Notwithstanding these limitations, it the

⁵⁹⁸ Specifically, Groen L. (2016) *The Importance of Fitting Activities to Context: The EU in Multilateral Climate and Biodiversity Negotiations*. PhD Thesis, Vrije Universiteit Brussel and Toshkov, D. D. (2009) *Between politics and administration: Compliance with EU law in Central and Eastern Europe*. PhD Thesis Department of Public Administration, Faculty of Social and Behavioural Sciences, Leiden University.

⁵⁹⁹ Liphart, A. (1971) 'Comparative politics and the comparative method'. *American Political Science Review*, Vol. 65, No. 3, p. 686 and Collier, D. (1993) 'Political Science: the state of discipline II' in Finifter, A.W. (ed) *American Political Science Association*, 1993. Available at SSRN: <https://ssrn.com/abstract=1540884>. Mahoney (2007: 128) holds in this respect that there are 'criticisms pertaining to case-selection in small N-research'. Cf Mahoney, J. (2007) 'Qualitative methodology and comparative politics'. *Comparative Political Studies*, Vol. 40, No. 2, pp. 122-144.

⁶⁰⁰ Van Schaik, L. and Schunz, S. (2012) 'Explaining EU Activism and Impact in Global Climate Politics: Is the Union a Norm-or Interest-Driven Actor?'. *JCMS: Journal of Common Market Studies* Vol. 50, No. 1, p. 169.

⁶⁰¹ This case study focuses on the implementation of the Agenda 2030 and the 17 Sustainable Development Goals from the adoption of the Agenda (September 2015) until July 2017.

case studies analyse 'coordination' more than the coherence of the policies. In that sense, it is not too methodologically problematic that the policies themselves are disconcerted. However, especially for SDG implementation, it is the case that there are sometimes completely new actors on the stage when compared to the previous (negotiation) phase which makes it difficult to compare periods. Therefore, more structured and focused process tracing would add value and improve the causal analysis.⁶⁰² The results of this study analyse the 'interaction' of the legal competences with intervening variables more than the direct causal effect of these legal competences.

In addition, while also an asset, this methodological approach lacks a specific internal or external dimension and is focused on EU and Member State action in a multilateral context (EU in UNFCCC negotiations), decision-making in an EU context (alternative fuels) and implementation in an internal and external context (SDG implementation). Therefore, the results cannot be valued as specifically applicable to (one of) these domains. However, previously demonstrated, the internal and external dimensions are increasingly linked (cf SDGs). A sole focus on internal or external dimensions would be superficial. As Delreux stated the "key to understand the negotiation behaviour of the EU on the international (environmental) scene is the domestic (EU) decision-making process".⁶⁰³

It could have been a better option to keep either the policy field constant or to keep the stage in the policy-making process constant. Such a choice would have negated that the differences between the cases can were a result of the to characteristics of the policy field or to the stage of the policy-making process. While this dissertation is comprehensive in the analysis of the coordination process, it could still be criticized as being too distinct in the comparison of case studies.

Due to the limitations and small-N comparison the results in these case studies, synthesised or not, cannot be more than plausibility probes, comparable to pilot studies in experimental or survey research.⁶⁰⁴ As such, this study 'explores the suitability' of these cases as vehicle for testing a theory before starting a larger research effort.⁶⁰⁵ They need further testing in other cases to become more robust. Researchers could additionally conduct more semi-structured interviews or use other forms such as surveys or participant observation. While this is acknowledged, the pioneering theory-building exercise of the effect of legal competences on the coordination of sustainable development policies and negotiations within the EU needs closer scrutiny with a limited number of cases to start with. In that way, the three cases are relevant, as they are based on the same kind of sources and the methodology includes both legal and political theory approaches. Moreover, interactions with many of the 'already existing' issues are tested like the supranational versus intergovernmental dominance and preference heterogeneity. It is shown that these explanations are in some way inaccurate without taking into account the legal competences in greater detail.

⁶⁰² Cf Beach, D. and Pedersen, R. B. (2013) *Process-tracing Methods: Foundations and Guidelines* (University of Michigan Press) for possibilities of more systematic process-tracing. The process tracing approach in this dissertation has been largely based on earlier seminal work on process tracing by e.g. George, A. L. and Bennett, A. (2005) *Case studies and theory development in the social sciences* (Cambridge, Massachusetts: MIT Press).

⁶⁰³ 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, p. 232.

⁶⁰⁴ Levy, J. S. (2008) 'Case studies: Types, designs, and logics of inference'. *Conflict Management and Peace Science*, Vol. 25, No. 1, p. 6.

⁶⁰⁵ Ibid.

SUMMARY CHAPTER 7

The chapter synthesised the findings of three case studies on the influence of mixed legal competences on EU and Member State coordination of sustainable development policies. The cross-case comparison of 'Team EU' in UNFCCC negotiations, implementation of the UN Agenda 2030 in the EU and Member States and formulation of alternative fuel policies reveals that the actual claiming of competences and involvement of the Court of rarely occurs daily practice, at least for the European Commission. Moreover, the category of shared competences proves to be especially broad and many issues are arranged on an ad-hoc basis. Nevertheless, the legal competences prove to have many interactions with issues from the literature: supranational versus intergovernmental dominance, the EU's position in the international constellation of power and preference heterogeneity. These findings can be valued as minimal plausibility probes, due to the small N and peculiarities of the cases. Regardless, this study contributes to a new methodological approach of analysing the EU's and Member State's coordination on sustainable development issues, both within the EU as well as in the multilateral context.