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The Duty of Cooperation as an Enhancer of Vertical Coherence in EU Development Policy

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I. INTRODUCTION

The Treaty of Lisbon introduced a clear reinforcement of coherence in EU foreign relations via the introduction of several institutional innovations such as the creation of the post of High Representative as a double-hatted figure, the mandate for the creation of a European External Action Service or the addition of Article 7 TFEU among the provisions having general application (which in principle could be subject to judicial review). The Lisbon Treaty also performed further innovations in different policy areas.

Regarding EU development policy, the main innovations were the application of ordinary legislative procedure and the inclusion of the general objectives of EU external action to be followed in the formulation of policies, in a clear reinforcement of horizontal coherence. In the framework of the competence catalogue developed as a result of the Treaty of Lisbon, the EU's development policy is still considered as a *sui generis* type of shared competence (Article 4(4) TFEU). This configuration as a "parallel" competence implies the inapplicability of the principle of pre-emption, which

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generally applies to shared competences. In this regard, the Court had already understood in pre-Lisbon judgments such as the one in case C-268/94 *Portugal v. Council* that Member States remain entitled to enter into agreements with third states in the sphere of development cooperation, be it individually, collectively or jointly with the Union. This remains valid in light of Article 209 TFEU.

This absence of pre-emption or de facto exclusivity as a delimitation element in the second level of coherence as identified by CREMONA implies that coherence will have to be further reinforced in the vertical dimension through the third level of coherence, namely through synergetic interactions. CREMONA and VAN VOOREN identify three dimensions or levels of coherence: rules of hierarchy, rules of delimitation and rules of complementarity or synergies.[2] Rules of hierarchy include primacy of EU law over national law and the principle of normative hierarchy. Rules of delimitation include exclusivity, respect for institutional balance and competence delimitation in the choice of legal basis and the 'mutual non affectation clause' in Article 40 TEU.[3] One of the key principles of that third level which plays a key role in the vertical dimension of coherence is the duty of cooperation. Talking about 'parallelism' of competences appears to refer to a theoretical impossibility of incompatibility or discordance among EU and Member State action, while that is clearly not the case.[4] While pre-emption is excluded, the duty of loyalty does still apply to the field of development cooperation, as made explicit via the procedural obligations of coordination and consultation in Article 210(1) TFEU and materialising initiatives such as joint programming.

In the field of development policy, various aspects should be differentiated and in which the duty of cooperation can take manifold manifestations. For the purposes of this paper, two aspects will be identified as key. On the one hand, the EU and its Member States participate in the formulation of policies as part of the global development agenda. Such is the case of the participation of the EU in global development

[2] See M Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon make?', (2008) 3 HRSS, 11; B Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Rouletdge, Abingdon 2012); M Cremona, 'Coherence in EU foreign relations law', in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar, Cheltenham 2011).
[3] See G De Baere, *Constitutional Principles of EU External Relations* (OUP, Oxford 2008) 210.

[4] See R Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis', *European Law Review*, (2008), 709–722, 717.

conferences such as the one held in Addis Ababa in July 2015 or the forthcoming September meeting in New York, with the objective of setting the post-2015 Global Development Agenda and Sustainable Development Goals.[5] On the other hand, the EU and its Member States are active in aid programming and management on a more concrete level. This involves programming country strategic documents, but also the management and disbursement of aid, where a coherent EU-Member-State action is also key.[6]

This paper aims to assess the applicability and scope of the duty of cooperation in the field of development policy as an element of coherence from a legal perspective. For this purpose, it will firstly look at the implications of the inapplicability of pre-emption, including the applicability or inapplicability of the *ERTA* doctrine. Secondly, an examination of the implementation of the duty of cooperation in the field of development policy will be presented, focusing on initiatives such as joint programming as well as the role of the EU in setting the global development agenda through its participation at international conferences. Finally, concluding remarks will be drawn.

II. DEVELOPMENT COOPERATION AS A 'PARALLEL' COMPETENCE AND ITS CONSEQUENCES

[5] Furthermore, the EU and its Member States conclude international agreements falling under the scope of development policy, such as the Cotonou Agreement, to be revised again this year for one last time before it expires in 2020. Other international agreements concluded by the EU relate partially to development cooperation and can also be interesting for this purpose. However, they fall outside the scope of this paper.

[6] The EU has adopted an extensive range of internal instruments aimed at financing its development cooperation policy, divided among thematic and geographic instruments. Thematic instruments include European Instrument for Democracy and Human Rights (EIDHR), Instrument for Stability (IfS), Instrument for Nuclear Safety Cooperation (INSC). Geographic instruments include the Instrument for Development Cooperation (DCI), the European Development Fund (EDF), Instrument for Pre-accession Assistance (IPA), European Neighbourhood and Partnership Instrument (ENPI). The DCI is the main funding instrument for the period 2014-2020. See Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 (OJ L 77, 15.3.2014, p. 44–76). On the EDF, see the INTERNAL AGREEMENT between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies (OJ L 210, 6.8.2013, p. 1-8), Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund (OJ L 58, 3.3.2015, p. 17–38). See also INSTRUCTIONS FOR THE PROGRAMMING OF THE 11TH EUROPEAN DEVELOPMENT FUND (EDF) AND THE DEVELOPMENT COOPERATION INSTRUMENT (DCI) – 2014-2020, Brussels, 15.05.2012.

1) The legal basis for development cooperation policy after the Lisbon Treaty

The Treaty of Lisbon operated a competence clarification through the introduction of a competence catalogue covering exclusive (Article 3 TFEU), shared (Article 4 TFEU) and coordination or support competences (Articles 5 and 6 TFEU). Within the group of shared competences covered in Article 4, the principle of pre-emption which is the general rule in the field of shared competences did not apply to the areas of research, technological development and space (Article 4(3) TFEU) as well as development cooperation and humanitarian aid (Article 4(4) TFEU), in what have been contestably referred to as parallel competences.[7]

Development cooperation as such was included under Chapter 1 of Title III on Cooperation with third countries and humanitarian aid. The provisions on development cooperation (Articles 208-211 TFEU) incorporated certain differences in comparison with the previous formulation of the treaty articles dedicated to development cooperation (ex Articles 177-181 EC Treaty). The main difference lies in the isolation of the EU competence in humanitarian aid (currently in Article 214 TFEU) from the development cooperation legal basis.[8]

As part of a need of a coherent external action, Article 208 TFEU states that Union policy in this field shall follow the principles and objectives of its external action (horizontal coherence) and it shall mutually complement and reinforce that of the Member States (vertical coherence). Besides these general principles and objectives of

[7] The Lisbon Treaty does not refer to parallel competences at all. R Schütze raised the question of Why can two parallels "complement" each other and why emphasise a duty of co-operation for two levels that supposedly could never come into conflict?' (R. Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis', *European Law Review*, (2008), 709–722, 717). In this sense, M Klamert added: 'This is a good example why the drafters of the Lisbon Treaty chose well in avoiding the term 'parallel' in the context of competences. It is somewhat circular to pick a certain term to denote a category of competence and then to infer from the chosen term the characteristics that such a kind of competence should have. Clearly, in geometry, parallels cannot meet. To follow, however, that 'parallel' competences cannot enter into conflict and that for this reason there is no need for cooperation is not convincing'(M. Klamert, *The Principle of Loyalty in EU Law* (OUP, Oxford 2013)165).

[8] An interesting issue is whether the same duties can or should apply to humanitarian aid. The inclusion of the requierement in Article 214 TFEU that the 'Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union' has been severely criticised by the humanitarian community, who have considered that the applications of principles such as that of consistency would undermine the fundamental principles of humanitarian aid. See M Broberg, 'EU Humanitarian Aid after the Lisbon Treaty'(2014) 22 (3) Journal of Contingencies and Crisis Management, 167-168.

EU external action, EU development policy shall be directed at the primary objective of reduction and eradication of poverty.

Regarding coherence, Article 209(2) TFEU states the capacity of the EU to conclude international agreements in this field, without prejudice to Member-States competence to negotiate. Therefore, pre-emption does not apply either to the negotiation of international agreements or in international bodies, as was the case in the pre-Lisbon formulation.[9] In this sense, Article 211 also states that the EU and Member States shall cooperate with third countries and the competent international organisations, 'within their respective spheres of competences', implying that those spheres need not be identical.[10]

Finally, Article 210 TFEU is a key provision with regards to coherence in EU development policy, insofar as it states the need to promote complementarity and efficiency in EU and Member State action, for which the EU and its Member States shall coordinate their policies, consult each other, including in international organisations and during international conferences. They may also undertake joint action. Besides, Member States shall contribute if necessary to the implementation of Union aid programmes.

Looking at Article 210 TFEU, it makes sense to consider that EU development cooperation cannot be considered a parallel competence in its geometrical sense, insofar as it would imply a theoretical impossibility of a clash. Yet, one can think of various ways in which lack of coordination of Member State and EU development policies can lead to inefficiencies and incoherence. While it is accepted that, according to the Treaty, pre-emption does not apply, the duty of cooperation can lead to various obligations, which have occasionally been materialised in instruments of secondary law.[11] In general, this provision includes active duties of coordination, such as the regular exchange of information, joint studies and evaluations, and the streamlining of programmes.[12] However, as can be seen in the case law of the Court of Justice, the

[9] M. Klamert, *The Principle of Loyalty in EU Law* (OUP, Oxford 2013)164.
[10] *Ibid.*
[11] See Regulation (EC) 1905/2006 establishing a financing instrument for development cooperation (DCI) [2006] OJ L 378/41; M. Klamert, *The Principle of Loyalty in EU Law* (OUP, Oxford 2013), 165.
[12] K. Schmalenbach, 'Art. 210 AEUV', in C. Calliess and M. Ruffert (eds), *EUV/AEUV,* 4th edn.

duty of cooperation can go way beyond mere duties of coordination and at times be almost as constraining as the principle of pre-emption.[13]

2) Is an application of the *ERTA* doctrine to areas of 'parallel' competence possible? The duty of cooperation as an alternative to the pre-emptive jurisprudence.

Vertical conflicts in the field of external action are often linked to competence distribution. While the existence of a competence allows the Union to act, the scope of the competence can limit Member State action and in that sense reinforce coherence, insofar as only one actor is entitled to act in the international sphere. Exclusivity thus serves as a tool for solving vertical conflicts of competence, which can be placed within the second level of coherence.

The Court can use exclusivity as a tool to ensure unity in the international scene while always respecting the principle of conferral.[14] The *ERTA* judgment laid down the implied power doctrine, where the Court not only found the existence of a competence but also found that it had to be exclusive insofar as Member State action would 'affect internal rules or alter their scope'.[15]

The Treaty of Lisbon, in Article 3(2) TFEU, codified the Court's doctrine on exclusive implied powers regarding international agreements.[16] This doctrine has been restated by the Court in its recent Opinion 1/13, which confirms that ERTA is still valid after Lisbon.[17]

(Munich, Beck 2011), para 4; M. Klamert, *The Principle of Loyalty in EU Law* (OUP, Oxford 2013) 165.
[13] See Case C-246/07 Commission v. Sweden (PFOS) [2010] ECR I-3317; case C-25/94, *Commission v. Council* ('FAO case') [1996] ECR I-01469.
[14] E Neframi, 'Vertical Division of Competences and the Objectives of the Union's External Action', in M Cremona and A Thies, *The European Court of Justice and External Relations Law* (Hart Publishing, Oxford 2014) 74.
[15] Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263; see P Eeckhout, *EU External Relations Law* (OUP, Oxford 2011) 71-76.
[16] Bogdandy and Bast have considered this wide concept of exclusivity found in the Treaty of Lisbon as problematic. See A Von Bogdandy and J Bast, 'The Federal Order of Competences', in A Von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd ed, Hart – CH Beck – Nomos, Oxford – Munich 2010) 306-307.
[17] Opinion 1/13 *Convention on the Civil Aspects of Child Abduction* [2014], nyr; For a brief comment on this judgment, see L Ankersmit, 'Requiring "Unity First" in Relations with Third Countries: The Court Continues ERTA-Doctrine in Opinion 1/13' (*European Law Blog* 20 October 2014), <http://europeanlawblog.eu/?p=2574> accessed 19 January 2015; see also M Klamert, 'New conferral or

Even after the codification in Article 3(2) TFEU and *Opinion 1/13* there are still interesting questions that can be raised regarding exclusivity or de facto exclusivity that are of great relevance for coherence and particularly for its vertical dimension. Firstly, it is understood that in areas of shared competence, Article 3(2) TFEU can apply following the Court's previous case law and cause a shared competence to become de facto exclusive.[18] The interesting question is whether the *ERTA* doctrine or other forms of supervening exclusivity can apply to areas of so-called 'parallel' competence.[19] To answer this question, it can be relevant to consider whether it is understood as *lex specialis* of the principle of pre-emption regarding international agreements or whether it is a separate track.[20] If it is understood as *lex specialis* of pre-emption, then it will not be applicable to concurrent competences enunciated in Article 4(3) and (4) TFEU, of which development cooperation is of particular interest regarding EU external action.

Regarding this issue, some considerations can be made. While in pre-emption, the 'supervening exclusivity' is automatic, in *ERTA* it is not automatic, but only insofar as Member State action has the potential to affect common rules or alter their scope after 'a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules' has been made.[21] However, this difference in analysis can derive from the specificities of external action and the implied-power doctrine and not from the fact that it cannot be considered as a *lex specialis* of pre-emption in the field of external action.

Although the Court has shown a broad interpretation on the potential to affect common rules or alter their scope,[22] it has also shown that it will not always be willing to declare

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old confusion? – The perils of making implied competences explicit and the example of the external competence for environmental policy', (2011) 6 CLEER Working Papers 5-6.

[18] A Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?', in I Govaere *et al* (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, (Martinus Nijhoff Publishers, Leiden 2014) 18-19.

[19] On parallel competences A Von Bogdandy and J Bast, 'The Federal Order of Competences', in A Von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd ed, Hart – CH Beck – Nomos, Oxford – Munich 2010) 294-295.

[20] A Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?', in I Govaere *et al* (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, (Martinus Nijhoff Publishers, Leiden 2014) 23.

[21] Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145, para 124.

[22] See Opinion 1/13 *Convention on the Civil Aspects of Child Abduction* [2014], nyr, and case law cited.

the exclusivity sought by the Commission.[23] It is understood that *ERTA* would not apply to the field of development policy even in the hypothetical case that some Member States act against the EU policy in breach of the obligation of coherence and of the duty of cooperation.[24] In that case, one could wonder whether such would be a case of 'affecting internal rules or altering their scope'. Certainly, an agreement concluded between a Member State to cooperate with a country to whom the EU has decided to stop granting development aid due to, for example, the imposition of sanctions could appear to 'affect internal rules or alter their scope' in the sense of *ERTA*. However, it is understood that a conflict of this kind should not be solved via the application of the *ERTA* principle, be it a concretization of pre-emption in the external sphere or be it something else.[25]

De facto exclusivity is not a principle that can solve coherence challenges in the vertical dimension when dealing with concurrent competences.[26] A conflict of this kind should rather be solved through the application of other principles in the following levels of coherence such as the duty of loyalty, which should still apply to concurrent competences and which is also found in *ERTA* regarding aspects not falling under Union exclusive competence. In fact, a combination of *ERTA* and the duty of close cooperation can lead to a duty of abstention for Member States to enter into conflicting agreements, in a reading of *ERTA* similar to that of AG Jacobs in his Opinion on the *Lomé Convention*:

> It may also be accepted, on the basis of the judgment of the Court in ERTA and its ruling in Opinion 2/91, that, once the Community enters into an international agreement, the Member States are precluded from doing anything capable of affecting that agreement or altering its scope. The exact limits of the duty

[23] See infra on C-266/03 *Commission v Luxembourg* [2005] ECR I-4805 and C-433/03 *Commission v Germany* [2005] ECR I-6985. On development cooperation, see the judgment of the Court in Case C-316/91 *Lomé Convention* [1994] ECR I-625. See also M Broberg and R Holdsgaard, *EU External Action in the Field of Development Cooperation Policy: The Impact of the Lisbon Treaty* (2014) 6 SIEPS Working Papers 16-20.

[24] The Treaty of Maastricht did include Declaration N. 10 which read 'The Conference considers that the provisions of Article 109 (5), Article 130r (4), second sub- paragraph, and Article 130y do not affect the principles resulting from the judgement handed down by the Court of Justice in the AETR case'. This declaration has been ommited in Lisbon but the wording of the Treaty provisions has not changed. This has lead some to raise the question as to whether it is still applicable regarding concurrent competences. See M Klamert, *The Principle of Loyalty in EU Law* (OUP, Oxford 2013) 166.

[25] See Case C-316/91 *Lomé Convention* [1994] ECR I-625, Opinion of AG Jacobs, para 50.

[26] On a similar note, see Case C-316/91 *Lomé Convention* [1994] ECR I-625, Opinion of AG Jacobs, para 50 and M Klamert , *The Principle of Loyalty in EU Law* (OUP, Oxford 2013) 167.

> imposed on the Member States in that context cannot be laid down in the abstract but depend on the agreement in question. As the Council pointed out at the oral hearing, in the field of development aid to third States, the risk that action undertaken by the Member States may have adverse consequences on action undertaken by the Community is much less than it is in other areas such as that of social policy.[27]

A reasoning of this kind would appear to overcome the interpretation difficulties posed by the inapplicability of the principle of pre-emption to development cooperation as laid down in Article 209(2) TFEU with the pro-Union approach resulting from the use of Declaration no. 10 to the Treaty of Maastricht as an interpretative guidance.[28] However, the fact that action taken 'may have less adverse effects' does not mean that it will not have any adverse effects at all. We can envisage a case where the Union decides to revoke development aid granted to a certain country on the basis of sanctions adopted against the ruling regime or on the basis of the breach of a human-rights clause and certain Member States continue to grant aid. That would severely undermine the objective of the measure adopted and the use of development cooperation as a foreign policy tool. For that reason, there is a need for the duty of cooperation to come into play.

As an example of the application of the duty of cooperation as an alternative to exclusivity, the Court's judgments in *Commission v. Luxembourg*[29] and *Commission v. Germany,*[30] or even the Court's approach in *ERTA* in areas where the vesting of powers on Community institutions had not fully taken effect, can be raised.[31] The two aforementioned cases were brought to the Court as a result of the negotiation by the Community of an agreement on inland waterway transport, for which the Council had adopted an authorisation. While the Commission was negotiating the text, Germany and Luxembourg concluded agreements with the same countries. The Commission claimed the exclusive Community competence, which the Court rejected in both cases. It still

[27] See Case C-316/91 *Lomé Convention* [1994] ECR I-625, Opinion of AG Jacobs, para 49.
[28] M Klamert , *The Principle of Loyalty in EU Law* (OUP, Oxford 2013) 166-167.
[29] C-266/03 *Commission v Luxembourg* [2005] ECR I-4805.
[30] C-433/03 *Commission v Germany* [2005] ECR I-6985.
[31] Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, para 81; C Hillion, 'ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations', in M Poiares Maduro and LAzoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Hart Publishing, Oxford 2010) 231-232.

found an infringement on the part of both Germany and Luxembourg due to their breach of the duty of cooperation, which had lead to compromising the attainment of the objectives of the Treaty and the achievement of the Community's task.[32]

The abandonment of the Court's competence prism through which it looked at potential conflicts by excluding all possible Member State action is to be welcomed.[33] As HILLION points out:

> This co-operation jurisprudence suggests a growing Court's acceptance of the plurality that characterises the EU system of external relations. It could also contribute to the development of a more mature legal order, less determined by the usual competence grabbing instinct than by a genuine Community reflex.[34]

In fields where exclusivity and pre-emption apply, coherence challenges would appear *prima facie* solved in the vertical dimension. However, external action is far more complex and interrelationships between different policy areas where different competences of different natures apply is a given. In fact, the cooperation approach of the Court of Justice may be conducive to grater flexibility and a stronger unity than the unity provided for through exclusivity.[35]

III. SCOPE OF THE DUTY OF LOYALTY IN DEVELOPMENT COOPERATION

1) Limitless loyalty in concurrent competences?

The duty of cooperation has been developed by the Court of Justice to an extent in which duties of abstention are derived on the face of a Union position already existing or being negotiated on the matter, in what has been referred to as limitless loyalty or the

[32] C Hillion, 'ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations', in M Poiares Maduro and LAzoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisite don the 50th Anniversary of the Rome Treaty*, (Hart Publishing, Oxford 2010) 231.
[33] See P Eeckhout, 'Bold Constitutionalism and Beyond', in M Poiares Maduro and L Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, Oxford 2010) 219.
[34] C Hillion, 'ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations', in M Poiares Maduro and LAzoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Hart Publishing, Oxford 2010) 232.
[35] M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance', in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals*, (Hart Publishing, Oxford 2011) 126.

duty to remain silent.[36] The question is to what extent does this form of duty of cooperation not render a concurrent competence de facto exclusive.

While Article 4(4) TFEU states that the principle of pre-emption does not apply to the field of development cooperation, Article 208 TFEU states a duty of cooperation and complementarity that applies to Member-State and EU development policies, which is further reinforced by Article 210(1) TFEU.

In the field of concurrent competences, it could appear that applying the duty of cooperation to such an extent may be conducive to reaching a de facto exclusivity in the form of a limitless loyalty. However, it is precisely in areas of shared competence where the duty of cooperation is particularly relevant.[37] In fact, the duty of cooperation is applicable to reserved Member State competences as the Court held in *Centro-Com.*[38] The Court held that while Member States retained their powers in the field of foreign and security policy, those had to be exercised in a manner consistent with Community law.[39] If this is the case for reserved Member State competences, it should not be less for concurrent competences

According to Maduro and Cremona, in cases of shared competences, Member States will be under a best efforts obligation to find a common position, but if agreement is not reached, they will be entitled to act alone.[40] Otherwise, the principle of conferral would be severely compromised.[41] While this is a doctrinal clarification, the Court has not

[36] See Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-3317; A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 *European Law Review* 524.
[37] See Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-3317, Opinion of AG Maduro. Mireia page 58 fn 40.
[38] See C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England (Centro-Com)* [1997] ECR 81.
[39] *Ibid*., paras- 23-27.
[40] Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-3317, Opinion of AG Maduro, point 57; M Cremona, 'Case C-246/07 Commission v. Sweden (PFOS), judgment of the Court of Justice (Grand Chamber) of 20 April 2010' (2011) 48 CMLRev, 1653-1654.
[41] P Van Elsuwege and H Merket, 'The role of the Court of Justice in ensuring the unity of the EU's external representation', in S Blockmans and R Wessel (eds), *Principles and Practices of EU External Representation*, (2012) 5 CLEER Working Papers; G De Baere, 'O, Where is Faith? O, Where is Loyalty? Some Reflections on the Duty of Loyal Cooperation and the Union's External Environmental Competences in the Light of the PFOS Case', (2011) 36 ELRev., 417-18; C Martínez Capdevila and I Blázquez Navarro, 'La incidencia del Artículo 40 TUE en la acción exterior de la UE', (2013) 28 *Revista Jurídica de la Universidad Autónoma de Madrid* 200; A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 *European Law Review* 524; B Van

distinguished between the effect that the duty of cooperation would have in the face of exclusive or shared competences, and 'does not define the different operation of the principle in the two situations'.

We understand that this differentiation makes sense insofar as the duty of cooperation cannot hamper the distribution of competences among the Union and the Member States laid down in the treaties.[42] As the principle of pre-emption is excluded from development cooperation, and so is the application of *AETR* as a *lex specialis* of pre-emption in the field of external relations, a pre-emptive application of the duty of cooperation leading to a full duty of abstention on the part of Member States in the field of development policy is dubious.

It is therefore understood that the application of the duty of cooperation in this field would lead to an obligation of best means rather than of result. Therefore, both in the context of setting the global development agenda as in programming of aid, Member States and the EU should use their best means to come to a concerted position. At the same time, Member States should take all necessary means to avoid hampering concurrent EU action. While AG Jacobs considered in his Lomé opinion that 'the risk that action undertaken by the Member States may have adverse consequences on action undertaken by the Community is much less than it is in other areas such as that of social policy',[43] Member States remain bound by this procedural duty.

Cremona and Maduro distinguished between the scope of the duty of cooperation in shared and exclusive competences.[44] In shared competences, the duty of cooperation meant that Member States should refrain from acting while a decision is being taken within the EU, while they would remain entitled to act if a decision is not taken. That is clear for purely shared competences, but in our view is also relevant for concurrent competences. Loyal cooperation in concurrent competences creates a best efforts obligation to avoid hampering the effective application or the achievement of a

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Vooren and R Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP, Cambridge 2014) 206.

[42] See e.g. Case C-28/12, *Commission v. Council (Hybrid acts)* [2015] nyr.

[43] See Case C-316/91 *Lomé Convention* [1994] ECR I-625, Opinion of AG Jacobs, para 49.

[44] M Cremona, 'Case C-246/07 Commission v. Sweden (PFOS), judgment of the Court of Justice (Grand Chamber) of 20 April 2010' (2011) 48 CMLRev, 1653-1654; Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-3317, Opinion of AG Maduro.

concerted EU position, which would be in line with the complementarity called for in Article 210(1) TFEU. This best efforts obligation can also lead to a duty of abstention while a concerted position is being agreed. This duty of abstention would serve for Member States to take account of the agreed EU position in their reserved field of competences. Should this duty of abstention not operate, then Member States could easily hamper the achievement of the desired complementarity and coherence in their and the EU's development policy. Therefore, even while concurrent competences exclude pre-emption, a duty of abstention deriving from loyal cooperation while the EU is coming up with a decision is not at all out of question.

Furthermore, going back to the example raised earlier where the Union decides to revoke development aid granted to a certain country while some Member States continue to grant aid, this duty of best efforts would imply that Member States should at the very least an active duty of coordination by which Member States should consult with each other and coordinate their positions. Following the Court's approach in Centro-Com, in the – albeit perhaps unlikely – event that a case would be brought, the Court could easily find a conflict with the duty of cooperation. If development cooperation is an important foreign policy tool for the EU, then a Member State not following the EU's position would severely undermine the unity, coherence and visibility of the EU's external action.

Admittedly, an analysis would always have to be performed on a case-by-case basis and would depend on the exact circumstances of the case. Therefore, should the case arise, the Court would have to carefully scrutinize the consultations period and analyse whether the active duty of coordination was respected.

Depending on the circumstances of the case, understanding that the Court would rule a breach of the duty of cooperation and therefore adopt a constraining understanding of this duty towards Member States, leading to a rather 'limitless loyalty' à la PFOS, does not seem completely out of question in light of the Court's case law.[45]

[45] See A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 *European Law Review* 524.

2) Concretisation of the duty of cooperation in development cooperation: a look at joint programming and the post-2015 agenda setting

To think of the duty of cooperation in development policy inevitably leads to thinking of joint programming, which is a key example of the concretisation of this duty. However, the role of the EU and its Member States in the field of development policy is not merely limited to their role in programming of ODA.

In fact, as the first worldwide donor, the EU and its Member States should play a key role in setting the global development agenda, particularly when thinking of the post-MDG agenda. For that reason, it is relevant to look at joint programming initiatives but also at the materialisation of the duty of cooperation regarding the representation of the Union at major development conferences.[46]

i. The role of the EU in the post-2015 Agenda: a glimpse at Addis Ababa

2015 will mark a key year for the development community. On 13-16 July 2015, Addis Ababa hosted the Third International Conference on Financing for Development, as a run-up to the September UN conference on the adoption of the Sustainable Development Goals, which should replace the Millenium Development Goals and the COP21 in Paris. Current times are crucial for the position of the EU and its Member States to appear as a coherent and unified actor in the international development arena, which it should, as the first donor in ODA.

[46] Evidently, there are further expressions of the EU's development policy. However, for the sake of brevity and of coherence with this panel, the role of the EU in setting the post-2015 agenda is chosen, as well as joint programming as an example of cooperation in the field. On other initiatives with great impact in EU development policy, such as preferential trade regimes (GSP+ or the Everything but Arms, etc.), it is interesting to look at the recent TRADE Study 2015 of the European Commission. See 'Assesment of economic benefits generated by the EU Trade Regimes towards developing countries', Volume I (available at https://ec.europa.eu/europeaid/sites/devco/files/trade-report-2015-volume1_en_0.pdf, last accessed 3rd August 2015) and II (available at https://ec.europa.eu/europeaid/sites/devco/files/trade-report-2015-volume2_en.pdf, last accessed 3rd August 2015).

The case of the Addis Ababa conference this July is an example of the representation of the EU at international conferences, which has generally been faced by numerous difficulties.[47] In areas of shared competences, Member States have tried to maintain their international visibility, as is the case of development cooperation policy.[48] Regarding the attribution of representation to the Commission or the EEAS, the Commission sustains in these cases that Article 17 TEU attributes external representation to the Commission in all areas apart from CFSP.

While in some cases such as the UNFCCC COP in Copenhagen, the representation was finally attributed to the rotating presidency, this has not been the case in Addis, where Commissioner Neven Mimica addressed the plenary twice. In this regard, it is interesting to note that 23 of the 28 EU Member States addressed the plenary on their behalf once, while Commissioner Mimica addressed the plenary on behalf of the European Union and its Member States during the regular turn and also during the closing statements.[49] This type of solution contributes to the much-wanted preservation of their international visibility by Member States, while fostering the coordinating role of the EU.[50]

The EU's proposals for the post-2015 global development agenda were already found their basis in a Commission communication of June 2014.[51] A proper application of the duty of cooperation in this field would imply that Member States should take the EU's position into account as much as possible in forming their policies and should aim to coordinate their actions in search of the sought complementarity. The EU has contributed to this process more recently with a discussion paper issued on the occasion

[47] See J Santos Vara, EU Representation to International Organisations: A Challenging Task for the EEAS', in L. N. González Alonso (ed.), *Between autonomy and cooperation: shaping the institutional profile of the European External Action Service*, CLEER Working Papers 2014/6, 75.
[48] Ibid; J. Wouters, J. Odermatt and T. Ramopoulos, 'The EU in the World of International Organisations: Diplomatic Aspirations, Legal Hurdles and Political Realities", 121 Levuen Centre for Global Governance Studies, Working Paper 2013, 5.
[49] Besides Commissioner Mimica, representatives of Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden delivered statements at the plenary meetings (available at http://www.un.org/esa/ffd/ffd3/statements/plenaries.html, last accessed 04.08.2015).
[50] In spite of this, at the press conference, both Commissioner Mimica and the Luxemburgish rotating presidency were present in representation of the EU.
[51] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 'A decent Life for all: from vision to collective action', Brussels, 2.6.2014 COM(2014) 335 final.

of the Addis conference.[52] Another form of cooperation can be found in the example of the Council Conclusions on Busan, which adopted a common position of the EU and its Member States. However, this form of cooperation could be found problematic, in light of the recent judgment in the *Hybrid acts case*, insofar as it would alter the balance of competences and would transform the voting rule from qualified majority voting for the exercise of the EU competence, into unanimity.[53]

It is too early to assess the outcome of the process started in Addis, further than the success in the adoption of the Addis Ababa Action Agenda.[54] What appears clear is that 2015 will be a good scenario for the EU and its Member States to test their capacity to achieve a complementary and coordinated position in external fora in fields of concurrent competences. It is submitted that in order for the duty of loyalty to be fully respected, Member States will be under a best efforts obligation to come to a concerted position. Besides, the duty of loyalty will imply the need not to hamper EU external representation of the EU as a whole by the Commission, rather than by the rotating presidency. As a field where pre-emption does not apply, Member States will not be prevented from addressing these conferences. However, they will have to coordinate their positions. In the hypothetical event that their positions would be irreconcilable, it is argued that they would still be under a best efforts obligation not to hamper the EU position, despite the inapplicability of pre-emption.

ii. Joint programming as a test case for loyal cooperation in EU development policy

In practice, the duty of cooperation has been materialised in various initiatives such as joint programming in EU delegations, which has been perceived as a way to enhance coherence and effectiveness.[55] Joint programming also responds to a concern of aid

[52] A Contribution to the Third Financing for Development Conference in Addis Ababa
[53] See Case C-28/12, *Commission v. Council (Hybrid acts)* [2015] nyr.
[54] Addis Ababa Action Agenda "major step forward" towards dignity for all – Ban, 31.07.2015 (available at http://www.un.org/sustainabledevelopment/blog/2015/07/addis-ababa-action-agenda-ban/, last accessed 11.08.2015).
[55] M Estrada-Cañamares, 'A legal approach to joint programming in development cooperation policy', in L. N. González Alonso (ed.), *Between autonomy and cooperation: shaping the institutional profile of the European External Action Service*, CLEER Working Papers 2014/6, 52-53.

fragmentation, which appears to be on the rise.[56] Aid fragmentation constitutes a problem for the development community insofar as it can lead to policy incoherence and inefficiencies. Therefore, joint programming initiatives can be conducive to a reinforcement of the sincere cooperation-coherence-effectiveness-link.[57]

While the Treaty of Lisbon has contributed to a greater emphasis on coherence in EU external action, coordination at the programming level had already been targeted way before the Lisbon reform. Already in 2007, the EU adopted a Code of Conduct on Division of Labour in Development Policy.[58] This communication not only included joint programming, but also a form of delegated cooperation, through which portions of EU aid are allocated either to the Commission or to a single Member State for its disbursement and management.[59] Besides constituting a form of cooperation, this type of initiatives reinforce coherence and effectiveness of aid and contribute to the visibility of the EU as a bloc while not undermining Member States' own visibility which continue to play a key role as part of the EU development machinery.

After Lisbon, the EU's mechanism for joint programming was laid down in the Council Conclusions for Busan. It involves a three-step exercise, consisting of joint analysis of and joint response to a partner country's national development strategy, identifying priority sectors of intervention; in-country division of labour, as well as indicative financial allocation per sector and donor.[60]

Despite even the most transfer of competence-averse countries accept the fact that the EU's global reach is greater than that of any of the Member States acting alone, joint

[56] OECD, Report on Division of Labour: Addressing Cross-Country Fragmentation of Aid, 2011 (available at www.oecd.org/dac/aid-architecture/49106391.pdf); M Furness & F Vollmer, EU Joint Programming: Lessons from South Sudan for EU Aid Coordination, DIE Briefing Paper 18/2013.
[57] M Estrada-Cañamares, 'A legal approach to joint programming in development cooperation policy', in L. N. González Alonso (ed.), *Between autonomy and cooperation: shaping the institutional profile of the European External Action Service*, CLEER Working Papers 2014/6, 60.
[58] Communication from the Commission to the Council and the European Parliament of 28 February 2007, 'EU Code of Conduct on Division of Labour in Development Policy", European Commission, 2007. COM (2007) 72 final.
[59] See Review of the Balance of Competences between the United Kingdom and the European Union: Development Cooperation and Humanitarian Aid Report, p. 39
[60] The Council Conclusions on the EU Common Position for the Fourth High Level Forum on Aid Effectiveness (Busan, 29 November – 1 December 2011), p. 12.

programming is still faced with fear by Member States, for various reasons.[61] Firstly, insofar as the *EUDels* take the lead, they could fear the visibility challenge and perceive that the leading role of the EU may hamper their independence.[62] Member States believe that while being a soft-law initiative, they could derive breaches of the principle of sincere cooperation by not complying with an arrangement 'intended to be binding', as was the case in FAO and the arrangements with the Commission.[63] One could argue that this fear makes a lot of sense. Once a Member State has agreed in the framework of joint programming, it is likely that the Court would consider it to be bound by the duty of cooperation. Joint programming involves a hard mapping task of who does what and how.[64] Therefore, if a Member State withdraws at the implementation phase, repercussions can be rather pernicious for aid effectiveness.

Joint programming is essential particularly in countries where the comprehensive approach to crisis management is being implemented. For that reason, pilot programmes have been set up in countries where the comprehensive approach has first been implemented. In these cases, an EU-led development cooperation policy is key to an effective crisis management. A divided EU in development cooperation is likely to undermine its position in other policy fields.

IV. CONCLUDING REMARKS

While initiatives like joint programming have been considered as 'tailor-made' to 'parallel' or concurrent competences such as development cooperation, whether more constraining forms of application of the duty of cooperation as an enhancer of vertical coherence can apply is an interesting question, which perhaps raises not only an issue of vertical coherence but also horizontal.

[61] See Review of the Balance of Competences between the United Kingdom and the European Union: Development Cooperation and Humanitarian Aid Report, p. 42.
[62] M Estrada-Cañamares, 'A legal approach to joint programming in development cooperation policy', in L. N. González Alonso (ed.), *Between autonomy and cooperation: shaping the institutional profile of the European External Action Service*, CLEER Working Papers 2014/6, 59.
[63] *Ibid*., 60; ECJ, case C-25/94, *Commission v. Council* ('FAO case') [1996] ECR I-01469, para. 49.
[64] M Estrada-Cañamares, 'A legal approach to joint programming in development cooperation policy', in L. N. González Alonso (ed.), *Between autonomy and cooperation: shaping the institutional profile of the European External Action Service*, CLEER Working Papers 2014/6, 52.

Since the EU's competence in development cooperation is a concurrent or 'parallel' competence, it appears clear that the pre-emption strand of the *ERTA* case law does not apply. Yet, while pre-emption does not apply, the duty of loyal cooperation still applies to development cooperation, as emphasised by Article 210(1) TFEU. This duty applies through a best efforts obligation, which can even lead to a duty of abstention while an EU position is being adopted. Such duty of abstention should be combined with a duty of consultation and coordination. The implementation of such duty is key to achieve a unified position in contexts such as the post-2015 scenario.

Besides, in the context of joint programming, the duty of cooperation can also be more constraining. Despite pre-emption not applying, and joint programming being a soft law initiative, Member States have appeared cautious when entering into joint programming commitments. In light of the Court's case law, and depending on the concrete circumstances of the case, loyal cooperation could indeed lead to a situation where if joint-programming initiatives have been agreed, Member States would be in breach of this fundamental principle by eventually withdrawing at the implementation phase without an adequate justification.