



**Governing by 'consensuses'  
– on the legal regulation of the European  
Union's development cooperation policy**

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## I. THE HIERARCHY OF SOURCES OF LAW

In a national context, the hierarchy of the sources of law is essentially the same in most European legal systems. At the top of this hierarchy there is a constitution. Below the constitution there are acts of parliament. And at the bottom we find administrative rules. This picture may be nuanced by including many other sources, such as court rulings, circulars, guidelines, white papers etc., but the basic hierarchy of a constitution, acts of parliament and administrative rules remains essentially the same.

In the European Union we find a similar hierarchical structure.<sup>1</sup> The Treaty on European Union (TEU) together with the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup> are at the top, and below the Treaties there are directives and regulations. It is possible to nuance and complement this structure,<sup>3</sup> but essentially all Union regulation should comply with the basic structure.<sup>4</sup>

<sup>1</sup> Contrast with Marek Zirk-Sadowski, 'Soft Kelsenism versus Multicentrism: Some Remarks on Theoretical Foundations of European Law', in *Multicentrism as an Emerging Paradigm in Legal Theory* (Marke Zirk-Sadowski, Mariusz Golecki and Bartosz Wociechowski, eds.), Peter Lang International Verlag der Wissenschaften, Frankfurt A.M., 2009. With regard to European Union law, at p. 63 Zirk-Sadowski states that '[t]here is also the lack of a developed hierarchy of legal acts'.

<sup>2</sup> To this should be added a number of fundamental principles, of which many have been codified in the Treaties.

<sup>3</sup> Following the entry into force of the Lisbon Treaty, the Treaty on the Functioning of the European Union has introduced a distinction between legislative acts (Article 289(3) TFEU), and non-legislative acts (Article 209(1) TFEU). Non-legislative acts may be sub-divided into: (i) delegated acts (Article 290 TFEU), (ii) implementing acts (Article 291 TFEU) and (iii) acts issued on the basis of specific Treaty provisions (such as Articles 105 and 108 TFEU).

<sup>4</sup> See André-Jean Arnaud, 'Legal Pluralism and the Building of Europe', in *Legal Polycentricity – Consequences of Pluralism in Law*, (Hanne Petersen and Henrik Zahle, eds), Dartmouth, Aldershot 1995, pp. 149-169 at p. 151.

In the classic fields of Union policy, such as competition and free movement, the above is a fair presentation of the hierarchy of sources of law. Here Treaty provisions, together with regulations and directives, form the regulatory cornerstones. However, the situation may be different in other fields of Union policy, and in practice in some of these fields other, non-binding legal measures form the regulatory cornerstones. This gives rise to two key questions, namely: (i) why is this so, and (ii) what are the consequences of this? In the present paper I consider these two questions with particular reference to the field of the European Union's development cooperation policy.

It is important to emphasise that this paper is intended as a kind of 'think piece', where the main objective is to put forward a number of ideas in the hope that readers will provide feedback which may enable me either to substantiate or reject some of these ideas in my continued work in this area.

This paper first provides an overview of the regulation in the field of European Union development cooperation (section 2). Then it goes on to identify those who, according to the Treaties, are empowered to regulate the field of Union development cooperation (section 3). Sections 2 and 3 identify factors which might explain why development cooperation is to a large extent regulated through non-binding measures. While it is possible to identify such factors, one may reasonably question to what extent these factors can really explain the extensive use of non-binding measures (section 4). Finally, I consider the consequences of the use of non-binding measures and summarise my findings (section 5).

## 2. REGULATION OF DEVELOPMENT COOPERATION IN THE EUROPEAN UNION

### 2.1 The principle of conferred powers

The principle of conferred powers refers to the requirement that any Union act must be within the limits of the competences which the Member States have conferred upon the European Union in the Treaties in order to enable the Union to attain the objectives set out therein.<sup>5</sup> In other words, the Union is only able to act where, in one way or another, it has been given the power to do so. With regard to development cooperation, Articles 208-211 TFEU, together with Article 21 TEU, confer such competence on the Union so that these provisions essentially define the scope of the Union's competence in this field. Development cooperation policy does not differ in this respect from other policy fields of the Union.

### 2.2 Financing via the European Union's budget or via the European Development Fund

As a rule the Union's expenses are financed via its budget. Such expenditure presupposes the prior adoption of a legally binding Union act forming the legal basis for the expenditure in accordance with the Union's financial regulation.<sup>6</sup> However, the Union's development cooperation policy only partially follows this scheme, since to a large extent development assistance to the ACP countries<sup>7</sup> is financed via the European Development Fund (EDF) instead of via the Union's budget. There are

historical reasons for this and on several occasions the Commission has proposed integrating all development assistance in the budget.<sup>8</sup> Such integration would lead to a different allocation of the Member States' financing of assistance to the ACP countries and would give the Commission greater power in this field. Perhaps this is part of the explanation why the EDF continues to exist.<sup>9</sup> The EDF is financed by the Member States, has its own financial rules and is governed by a special committee.<sup>10</sup>

The continuing existence of the EDF means that the European Union's development assistance flows via two main channels, namely the budget and the EDF. Different administrative rules and decision-making structures apply for these two channels. For example, the Directorate-General for Development is responsible for the funds of the European Development Fund, whereas the Directorate-General for External Relations is responsible for the development assistance coming from the Union's budget.<sup>11</sup> The funds from the Union's budget are administered in accordance with the Financial Regulation.<sup>12</sup> In contrast, the funds from the

<sup>5</sup> Article 5(1) and (2) TEU. See also Article 13(2) TEU.

<sup>6</sup> Article 310(3) TFEU.

<sup>7</sup> 'ACP countries' denotes 79 developing countries in Africa, the Caribbean and the Pacific.

<sup>8</sup> Communication from the Commission to the Council and the European Parliament - Towards the full integration of co-operation with ACP countries in the Union budget, COM(2003) 590 final.

<sup>9</sup> At present the 10<sup>th</sup> EDF applies, covering the period 2008-2013; see Regulation (EC) No 617/2007 of 14 May 2007 on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement, OJ 2007 L 152/1.

<sup>10</sup> For an explanation of the European Development Fund, see [http://europa.eu/legislation\\_summaries/development/overseas\\_countries\\_territories/r12102\\_en.htm](http://europa.eu/legislation_summaries/development/overseas_countries_territories/r12102_en.htm).

<sup>11</sup> A third directorate general – EuropeAid – is responsible for implementing the Commission's external assistance in practice, both assistance financed via the Union's budget and assistance financed by the EDF.

<sup>12</sup> Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248/1.

European Development Fund are administered in accordance with the rules laid down in the Cotonou Agreement between the European Union and its Member States on the one hand and the ACP countries on the other hand.<sup>13</sup>

Six regulations lay down the rules for administering the financing of the Union's development assistance via the budget, forming the legal basis for the period 2007-2013.<sup>14</sup> For 'classic' development assistance, the most important of these six regulations is the Development Cooperation Instrument.<sup>15</sup>

The financing of the Union's development assistance via the EDF originally reflected the fact that at the inception of the European Union in the 1950s it was primarily French colonies and former colonies that benefited from the assistance. This financing of the French interests in the South did not appeal to the other founding Member States. The EDF provided a means of sharing the development assistance costs differently from the Member States' sharing of the general budget.<sup>16</sup> Not only do these diverging interests continue to exist, but the duality of the financing system may in itself

<sup>13</sup> See in particular the Cotonou Agreement Part IV and Annexes I and II.

<sup>14</sup> See Regulation (EC) No 1905/2006 of 18 December 2006 establishing a financing instrument for development cooperation, OJ 2006 L 378/41; Regulation (EC) No 1638/2006 of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ 2006 L 310/1; Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ 2006 L 210/82; Regulation (EC) No 1717/2006 of 15 November 2006 establishing an Instrument for Stability, OJ 2006 L 327/1; Regulation (EC) No 1889/2006 of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ 2006 L 386/1; and Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid, OJ 1996 L 163/1.

<sup>15</sup> Regulation (EC) No 1905/2006, which is normally referred to as the Development Cooperation Instrument or simply the DCI.

increase the possibility of these diverging interests pursuing mutually conflicting objectives within the Union's development assistance programme. The duality of the Union's development assistance scheme also creates particular legal problems, as we shall see in section 2.3 below.

### 2.3 The substantive regulation of European Union development cooperation policy

Turning to its substantive regulation, Union development cooperation policy appears to have three characteristics:

- 1) To a considerable extent the relationships between the different Union actors are substantively regulated either through non-binding legal measures or through an obscure interaction between binding and non-binding legal measures.
- 2) The substantive provisions laid down in the Treaty on the Functioning of the European Union are generally perceived as being merely political objectives rather than legal rules.
- 3) To a very large extent the applicable regulatory scheme finds its sources outside the classic regulatory sphere of Union law.

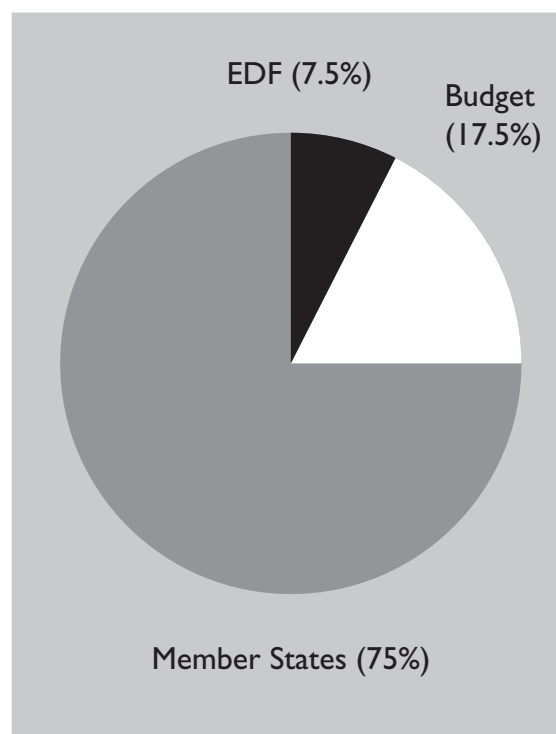
<sup>16</sup> See e.g. Paul Hoebink, 'European Development Aid in Transition', in *The European Union and the Developing Countries – The Cotonou Agreement*, Olufemi Babarinde and Gerrit Faber (eds.), Martinus Nijhoff Publishers, Leiden 2005, at pp. 127-129; and Charlotte Bretherton and John Vogler: *The European Union as a Global Actor*, Routledge, Abingdon 2008, pp. 111-113. See also Anne-Sophie Claeys, "'Sense and sensibility": the role of France and French interests in European development policy since 1957', in *EU development cooperation – From model to symbol*, Karin Arts and Anna K. Dickson (eds.), Manchester University Press, Manchester 2004; Mirjam van Reisen: *EU 'Global Player': the north-south policy of the European Union*, International Books 1999, Chapter 6; and Communication from the Commission to the Council and the European Parliament – Towards the full integration of co-operation with ACP countries in the EU budget, COM(2003) 590 final, p. 9.

The cornerstone of the European Union's development cooperation policy is 'The European Consensus on Development'.<sup>17</sup> The European Consensus is called a 'statement'. However, a 'statement' is not defined as a legal instrument in the Treaties and its legal significance is far from clear.<sup>18</sup> With regard to the measure's qualification as a 'consensus', according to the former Commissioner for Development, Poul Nielson, the term 'consensus' was merely introduced to show that the measure covers both development cooperation organised by the Member States and development cooperation organised by the European Commission.<sup>19</sup> Nevertheless, by designating the measure a 'statement' and referring to it as a consensus the drafters have based this cornerstone of the Union's development cooperation policy on what is essentially an obscure kind of measure from a legal point of view.<sup>20</sup>

As for the term 'consensus', it seems likely that the drafters chose this term to convey that all the parties involved (i.e. the Member States, the Commission, the Council of Ministers and the European Parliament) agreed on the political line set out in the document.

The objective of the European Consensus is to coordinate: (i) the development assistance provided via the Union's budget, (ii) the

Figure 1. Areas covered by 'The European Consensus on Development'



assistance provided via the European Development Fund, and (iii) the assistance provided by the individual Member States, as illustrated in figure 1.

As noted in section 2.2 above, development assistance provided via the Union's budget is regulated by six regulations, of which the most important is the Development Cooperation Instrument (DCI). To a considerable extent the DCI is based on the one-year older European Consensus on Development. As a regulation, the DCI is legally binding, whereas the Consensus is not binding. In practice, the linking of the Regulation with the non-binding Consensus means that part of the Consensus is made legally binding. However, the DCI is only a budget financing instrument, so the binding effect it vests in (parts of) the Consensus only relates to financing made via

<sup>17</sup> Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', OJ 2006 C 46/1.

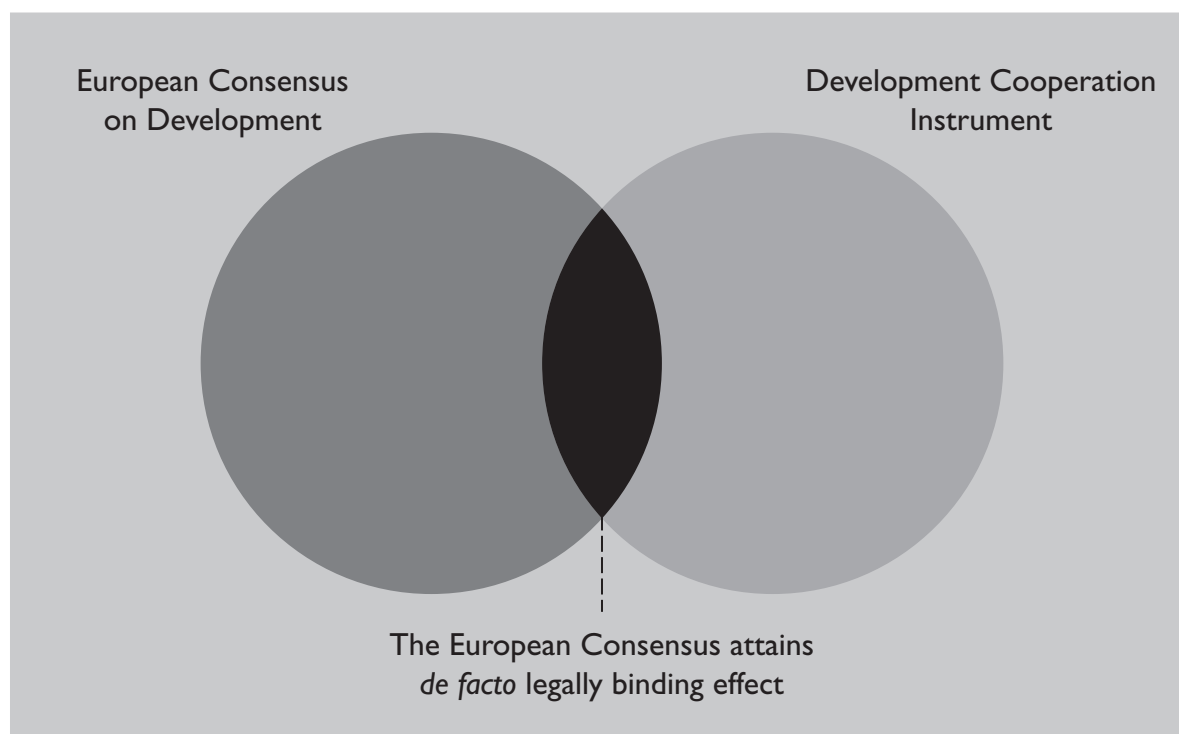
<sup>18</sup> See in particular Article 288 TFEU.

<sup>19</sup> Poul Nielson, 'Europas troværdighed afhænger af udviklingspolitikken', Udvikling No 4 2010 at p. 9. Personally I do not find it clear that the term 'consensus' necessarily covers Member State assistance. However the 'European Consensus on Development' itself makes this clear, independently of its designation.

<sup>20</sup> For instance, the drafters could have opted for a 'joint declaration' and thereby have used a less ambiguous legal measure.



Figure 2. Areas where Development Cooperation Instrument is based on the European Consensus on Development



the Union's budget. It also means that the binding effect cannot go beyond matters that fall within the DCI's scope of application. Therefore, to the extent that the DCI vests binding legal effect in the Consensus, it arguably only applies to the financing of measures and programmes via the budget. This is illustrated in figure 2.

In other words, the non-binding European Consensus on Development partly overlaps with the binding DCI. Where a matter falls within the area where the two measures intersect, the rules will have binding effect. Where a matter is merely covered by the Consensus, the rules will *not* have binding effect. Therefore, if we take a classical legal approach, when a legal issue is raised it will first be necessary to determine whether the applicable rules are *de facto* binding or merely non-binding. Such an examination may prove

difficult, so that in practice this kind of classical legal approach may prove a real challenge. However, if one takes a more flexible (i.e. less legalistic) approach, the construction may not pose such problems.

The European Consensus on Development is particularly complemented by a large number of Council conclusions, often adopted following a proposal from the Commission. Council conclusions are not legally binding, but they nevertheless constitute an important form of regulatory measure in the field of development.

The European Union's development assistance covers a very large number of developing countries, of which the 79 ACP countries are given particular attention.<sup>21</sup> Over the years, cooperation between the

<sup>21</sup> See note 7 above.

European Union and the ACP countries has been regulated through a number of successive international agreements. For the period from 2000 to 2020, this cooperation is regulated by the *Cotonou Agreement*,<sup>22</sup> which may be revised every five years.<sup>23</sup> The Cotonou Agreement forms the framework for an extensive and dynamic regulatory scheme which is made up of both binding and non-binding legal measures.

In order to fully appreciate the substantive regulation of the European Union's development cooperation policy one must also consider the chapter on development cooperation of the Treaty on the Functioning of the European Union. The Treaty provisions laid down in this chapter may be distilled into three essential elements. First, they set out the objectives of the Union's development cooperation.<sup>24</sup> Second, they lay down the decision-making procedures and competences in the area.<sup>25</sup> And third, they set out rules for the interaction between the Union's development cooperation policy and other Union policies. Together these elements express three fundamental principles, often referred to as 'the three Cs':

- *Coordination*; the Union and the Member States must coordinate their policies on development cooperation.<sup>26</sup>
- *Complementarity*; the Union's development cooperation policy and that of the Member States must complement and reinforce each other.<sup>27</sup>
- *Coherence*; the Union must take account of the objectives of development cooperation in the policies it implements that are likely to affect developing countries.<sup>28</sup>

Principles like these are fairly common in Union law and the Court of Justice has frequently shown itself willing to give these kinds of principles specific and binding legal force. However, the number of court cases in the field of development cooperation has been very limited,<sup>29</sup> which is presumably an important reason why in practice these three principles are mainly viewed as political (i.e. non-binding) objectives rather than as legally binding rules.

Finally the applicable legal regulations in the area of development cooperation originate from a variety of sources. Unsurprisingly, an important part originates from the various institutions and acts of the Union. The obvious examples of this are the Treaty on the Functioning of the European Union, together with various regulations, recommendations, consensuses, etc. Often, however, these measures must be read in conjunction with legal measures which do not originate from the European Union. Where new rules

<sup>22</sup> Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317/3.

<sup>23</sup> See Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2005 L 209/27; and Proposal for a Council Decision on the position to be adopted by the European Union within the ACP-EC Council of Ministers concerning the transitional measures applicable from the date of signing to the date of entry into force of the Agreement amending for the second time the Partnership Agreement between the African, Caribbean and Pacific States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 as first revised in Luxembourg on 25 June 2005, COM(2010) 279 final.

<sup>24</sup> Article 208(1), second subparagraph, TFEU.

<sup>25</sup> Article 209 TFEU.

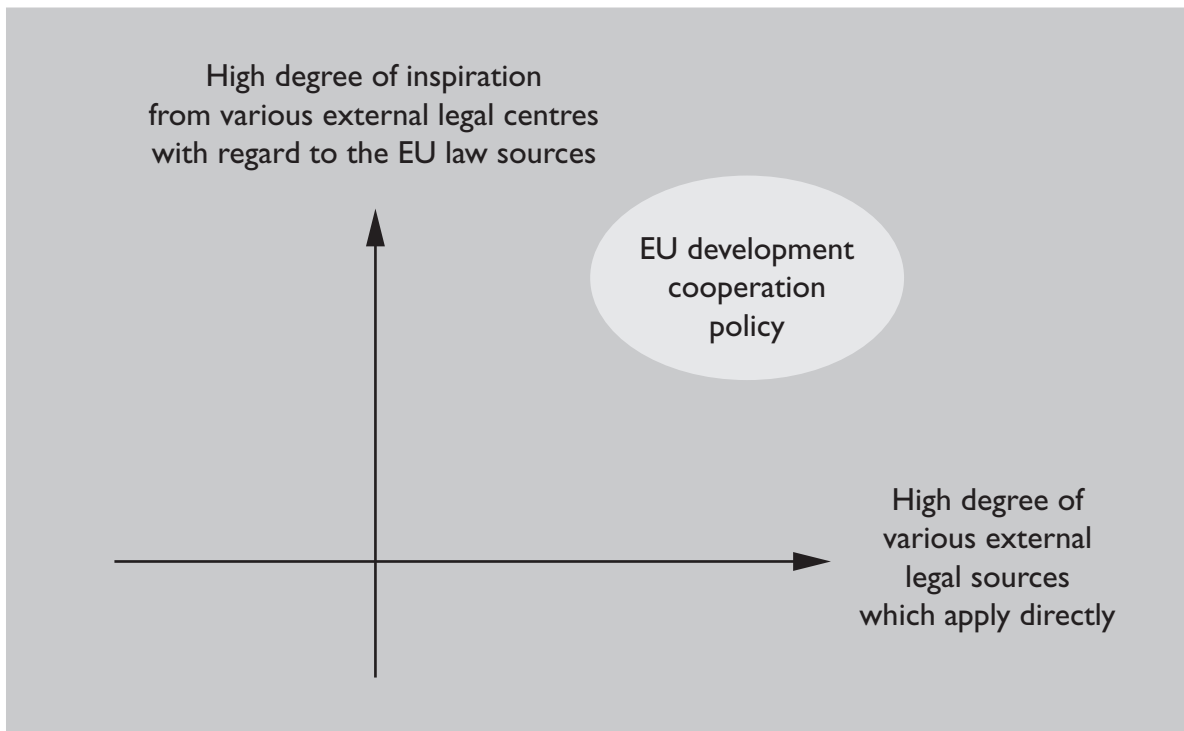
<sup>26</sup> Article 210(1) TFEU.

<sup>27</sup> Article 208(1), first subparagraph, TFEU.

<sup>28</sup> Article 208(1), second subparagraph, TFEU. See also Article 7 TFEU.

<sup>29</sup> Of the few judgments that do exist in the field Case C-268/94 *Portugal v Council* [1996] ECR I-6177 (the *India Case*) and Case C-155/07 *Parliament v Council* [2008] ECR I-8103 (the *EIB Case*) are particularly relevant.

Figure 3. European Union development cooperation policy and the direct and indirect polycentric levels



have essentially been inspired (or even copied) from Member State rules, any experience gained regarding the application of the original rules will typically – and for good reason – be considered important.

The European Union's development cooperation policy is also strongly influenced by a number of different international forums. This particularly is the case regarding the OECD's Development Assistance Committee (DAC) and it was the OECD that organised the meeting which led to the adoption of the Paris Declaration on Aid Effectiveness.<sup>30</sup> Similarly, the UN system is very important, for instance with regard to the Millennium Development Goals (MDGs).<sup>31</sup> The World

<sup>30</sup> Information about the Paris Declaration is available at [http://www.oecd.org/document/18/0,3343,en\\_2649\\_3236398\\_35401554\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_1_1_1_1,00.html).

<sup>31</sup> On the MDGs, see <http://www.un.org/millenniumgoals/>.

Bank also plays an important role. Added to this complex legal picture is the fact that, to a large extent, development cooperation operates at an inter-State level, so that classic public international law frequently comes into play, thus complicating the legal situation even further.<sup>32</sup> In order to complete this confusing picture, it must be added that the recipients of development assistance also play important roles, both where more generally they seek to influence the design of European Union development cooperation policy, and where they take part in the specific implementation of the Union's development cooperation.

From the above it can be concluded that the regulation of the European Union's development cooperation policy is polycentric

<sup>32</sup> E.g., the Cotonou Agreement is construed in accordance with public international law principles.

at two different levels. First, to a large extent the Union's regulatory structure (Treaties, regulations etc.) has drawn inspiration from sources of law that originate outside the Union system, so there are important indirect influences. Second, a number of international (binding and non-binding) rules apply directly as part of the regulation of the Union's development cooperation policy, so there is also a strong direct influence.

### 3. REGULATORY COMPETENCE IN THE FIELD OF DEVELOPMENT COOPERATION

Normally, a distinction is made between exclusive competence and shared competence. If there is an area of exclusive competence, only the Union may legislate and adopt legally binding acts for that area, and the Member States may only legislate or adopt legally binding acts for that area where they have been empowered to do so by the Union or in order to implement Union acts.<sup>33</sup> If competence in a given area is shared, both the Union and the Member States may legislate and adopt legally binding acts. However, the Member States may only exercise their competence to the extent that the Union has not exercised its competence.<sup>34</sup> With particular regard to the area of development cooperation policy, the Treaty on the Functioning of the European Union establishes that the Union has competence to carry out activities and conduct a common policy; however, the exercise of that competence must not result in Member States being prevented from exercising theirs.<sup>35</sup>

<sup>33</sup> Article 2(1) TFEU.

<sup>34</sup> Article 2(2) TFEU.

<sup>35</sup> Article 4(4) TFEU.

Union legislation in the field of development cooperation follows the ordinary legislative procedure as defined in Article 294 TFEU.<sup>36</sup> This means that the Commission must submit a proposal to the European Parliament and the Council, and the power to adopt or reject the proposal lies jointly with the Council and the European Parliament.

It follows from the above that within the Union the power to regulate in the area of development cooperation lies with the 27 Member States, the Commission, the Council of Ministers and the European Parliament. This impressive number of strong actors makes it reasonable to assume that the power to regulate in the area has a distinctively polycentric character. In this respect "Polycentric" connotes many centers of decision-making which are formally independent of each other. Whether they actually function independently, or instead constitute an interdependent system of relations, is an empirical question in particular cases.<sup>37</sup> That the European Union has multi-level, polycentric governance has often been noted in political science literature.<sup>38</sup>

As observed in section 2 above, the chapter on development cooperation of the Treaty on the Functioning of the European Union lays down that cooperation between the actors must follow the three principles referred to as the three C's; i.e. coordination, complementarity and coherence.<sup>39</sup> The three

<sup>36</sup> Article 209(1) TFEU.

<sup>37</sup> This definition is taken from V. Ostrom, C.M. Tiebout and R. Warren's, classic article on polycentric political systems: 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry', in *American Political Science Review* 1961, pp. 831-842 at p. 831.

<sup>38</sup> See e.g. L Hooghe and G Marks: *Multi-Level Governance and European Integration*, Rowman & Littlefield Publishers, 2001.

<sup>39</sup> There is an extensive literature on the (political) content of the three Cs. Perhaps the best way of gaining an overview of this is to consult the website [www.three-Cs.net](http://www.three-Cs.net).

C's are in fact supplemented by a 'fourth C', namely a requirement that the Union must ensure *consistency* between the different areas of its external actions and between these and its other policies (the principle of consistency).<sup>40</sup>

Even though the Treaties establish a division of competences between the Union and the Member States (vertical division) and between the various Union institutions (horizontal division), under the principles of the four C's each actor must exercise their competence with due respect to the other actors' exercise of their competences. It remains unclear, however, where exactly the limit must be drawn.

#### **4. IS THE REGULATION OF EU DEVELOPMENT COOPERATION POLICY SUI GENERIS?**

##### **4.1 The two essential questions**

The present paper has been written on the basis that, on the face of it, the regulation of EU development cooperation does not correspond to the regulation of other Union policy areas. Based on the above examination, two key questions must now be addressed, namely:

- 1) Does the legal situation governing the European Union's development cooperation policy differ materially from the legal situation governing other areas of Union law?
- 2) If the first question is answered in the affirmative, what factors cause this difference?

<sup>40</sup> Article 21(3), second subparagraph, TEU. See also Article 7 TFEU. In this respect it must be noted that Article 40 TEU distinguishes between the common foreign and security policy laid down in the TEU on the one hand, and the policies listed in Articles 3-6 TFEU on the other hand.

While it is not difficult to put these two questions, offering an authoritative answer to them is quite a different matter. In what follows I will discuss the two questions and indicate what, in my opinion, appears to be the most likely answers. However, my answers are characterised by considerable uncertainty, and I would therefore very much welcome comments which may support, contradict or merely put into perspective the arguments which follow.

##### **4.2 Is there a difference?**

As is apparent from the above, a dominant characteristic of the European Union's development cooperation policy is that much of its regulation is non-binding. This is particularly reflected by the following:

- First, to a very large extent the area is regulated by non-binding legal measures such as the European Consensus on Development.
- Second, even where there is substantive regulation by legal acts that are by definition binding, in practice these measures are treated as if they are non-binding. For example, some of the substantive provisions of the Treaty on the Functioning of the European Union (which are, by definition, binding) are primarily treated as non-binding policy statements.
- Third, diverse international rules of a non-binding character also play an important role in the regulation of the area. Perhaps the best example of this is the Paris Declaration on Aid Effectiveness.

The European Union's regulation of its development cooperation policy clearly differs from the classic regulation of areas such as free movement and competition, which are primarily regulated by legal measures

that are binding in both word and deed.<sup>41</sup> Moreover, within these areas the applicable regulatory measures primarily originate from within the European Union. Perhaps this difference between the classic areas and the area of development cooperation can be explained by a greater need for binding legal measures for the regulation of areas that are internal to the European Union (i.e. the majority of the Union's policy fields) than what are essentially external areas. Under the Treaties, a special regulatory scheme applies to the Union's external policy. Other than the areas covered by this scheme, it is difficult to identify areas which are so clearly concerned with the regulation of matters that are external to the Union as development cooperation policy. At first glance external trade could have been one such area. However, the European Union's activities in the area of external trade not merely have consequences outside the Union, but also have considerable impact inside the European Union, and the external trade activities are also regulated through binding legal measures and so are rather different from the regulation of the Union's development cooperation policy. It thus appears that the Union's regulation of its development cooperation policy differs from the regulation of most, if not all, other areas of the Union's policies.

In other words, a strong argument can be made that EU development cooperation policy is *sui generis*.

<sup>41</sup> Contrast this with Marek Zirk-Sadowski, note 1 above, who at p. 63 refers to 'the dominant kind of duty, in which the Community law is included, i.e. so-called soft law, meaning the norms, which are neither interdictions nor orders, but only determine goals the EU and the member states pursue.'

### 4.3 Why is EU development cooperation policy different?

In searching for an explanation for why the regulation of EU development cooperation policy is characterised by the extensive use of non-binding legal measures, three factors appear to stand out.

The *first factor* is that the 'power'<sup>42</sup> to create rules in the field of EU development cooperation policy is divided between a number of different, and relatively independent, co-existing centres which, and this number is very considerable even by EU standards. In other words, the EU development cooperation policy is characterised by having a *polycentric power structure*. Thus, the polycentric legal structure within the area of development cooperation policy is arguably a reflection or expression of this power structure.

However, before concluding too firmly that the polycentric power structure of EU development cooperation policy has been instrumental in creating a polycentric legal structure which is unique in Union law, it may reasonably be asked whether the power structure really is so different from the structures found in other fields of Union law? If the differences are negligible it would be difficult, if not impossible, to argue that the polycentric power structure is a decisive factor; in other words it would undermine the validity of the first factor. While I am not aware of similarly complex power structures in other Union policy areas, I would be surprised if there are not other areas that are characterised by having power structures that are more or less similar to those in the field of development cooperation policy, albeit without having legal structures any-

<sup>42</sup> 'Power' has been chosen to avoid using the term 'competence', since the latter entails a risk of confusion with regard to the European Union's doctrine on competence.



where like those found in the area of development cooperation policy.

The *second factor* which may be considered is the diversity of interests (and interested parties) involved. The polycentric power structure not only means that there are many actors engaged in the regulating process, it presumably also means that while some actors may have an interest in encouraging the use of binding legal measures, others will have an interest in keeping the measures 'flexible', i.e. non-binding. Introducing binding legal measures will normally mean there is a more precise definition of responsibilities (i.e. less flexibility) which in turn is likely to mean a strengthening of the roles and powers of the Commission and European Parliament, while weakening the position of the Member States. If a Member State views the Commission as a 'competitor' in the field of development cooperation policy it would seem logical for it to seek to retain the non-binding character of the regulatory measures in this field. For the same reason it would be natural for the Commission and the European Parliament to work towards strengthening the binding character of the regulatory measures. It is therefore surprising that the Commission and the European Parliament do not appear to have worked harder to strengthen their positions, for instance by bringing more cases before the European Court of Justice. Perhaps this can be clarified through a mapping of the different interests which are in play in the field. It may also be that the rather complex (chaotic) institutional structure of EU development cooperation policy has dented the ability of the Commission and the Parliament to further their own interests. In this regard the institutional streamlining introduced with the Lisbon Treaty may strengthen the Commission's position in particular and may also improve accountability within the system.

In addition to the central actors referred to, there are a number of other actors active in the field, albeit with more limited scope for influencing Union regulation in the field of development cooperation policy. These include developing countries and international organisations like the OECD and UN bodies. These other actors may equally have interests in either retaining or reforming the present regulatory situation.

The *third factor* which may explain the remarkably limited use of binding legal measures in the field of Union development cooperation policy is the professional (educational) background of those most directly engaged in the regulatory work. In the classic fields of Union policy, such as social rights, free movement and competition, many of the individual representatives have a background in law; the situation appears to be different in the field of development cooperation policy. Among the representatives of the Member States, of the Union institutions and of the other actors active in the field, the proportion of representatives with legal training seems to be very small. In contrast, many of these representatives have a background in political science or similar disciplines.<sup>43</sup> For these representatives it may seem much more natural to take a result-oriented approach based on flexible non-legally binding measures, rather than taking a traditional legal approach.<sup>44</sup>

Perhaps the last of these three factors may also partly explain the remarkable lack of court cases in the field of EU development

<sup>43</sup> See Peter Blume, 'Fragmenter af en kommunikativ teori om retssystemet', in *Liv, Arbejde og Forvaltning* (Peter Blume, Kirsten Ketscher and Steen Rønsholdt, eds.), GadJura, Copenhagen 1995, pp. 23-39 at p. 34; and the same author in 'Polycentri og monocentri', Studier No 38, Retsvidenskabeligt Institut B, Copenhagen 1990, p. 8.

<sup>44</sup> Also in the academic world, research in the field of development cooperation policy is characterised by a remarkable want of lawyers.

cooperation policy. Presumably the idea of asking a court to resolve a dispute is much more natural for lawyers than for others without a legal background.

## 5. CONCLUSION

Important parts of the regulation of the European Union's development cooperation policy are either in the form of non-binding legal measures or measures which, while formally binding, are in practice treated as political objectives or guidelines rather than as binding rules.

Above, I point to three factors which may be particularly important for explaining this situation. First, the field of development cooperation is characterised by a polycentric power structure leading to a polycentric legal source structure primarily based on non-binding legal measures. Secondly, several important actors in the field arguably have strong interests in retaining the present non-binding structure. Third, in the field of development cooperation, few of the representatives of the various actors have a background in law. They are therefore more inclined to take a pragmatic, non-legal approach, where it is less important whether a given measure is legally binding or not.

It may also be noted that, while I do not argue that the European Union's regulatory scheme in the field of development cooperation does not function, one should not overlook the fact that the extensive use of non-binding legal measures has important consequences for the power structure in the field.



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