**In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the field of External Representation**

Case C-399/12 *Germany v. Council*, Judgment of the Court of Justice of 7 October 2014, nyr.

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**Introduction**

The relationship between the EU and the Member States in the field of external representation has always been contentious. It is even more so post-Lisbon that the EU has an explicit legal personality under Article 47 TEU, something which has boosted its claim to establish a unified presence in international fora. Recent experience from CJEU jurisprudence suggests that when the Treaty falls short of providing guidance about external representation, the implied powers doctrine is often relied upon by the EU Institutions to prescribe a duty upon the Member States to be loyal to the EU when they act externally. This unwritten rule is there to ensure that Member States do not engage in conduct which may contravene the EU position. The systematisation of this positive duty has spurred the EU’s appetite for unified representation further, especially where the Treaty is silent about the position to be adopted on behalf of the EU in an international organisation to which the Member States are signatories but the EU itself is not a party.

While, however, certain omissions in the Treaty allow for flexibility and innovation, they cause certain discomfort to the Member States who are, and perhaps rightly so, worried about the preservation of the status quo with regard to the conduct of their foreign policy, an essential task for any sovereign power. With this background in mind, the O.I.V. dispute between Germany and the Council (a case involving the external dimension of the common organisation of the wine markets) that is analysed hereafter is indicative of the strife between status quo and innovation or further integration. It is a case which throws light into the question of who has competence (the national governments or the EU legislature) to prescribe the permissible course of action of Member States in a situation where the conduct of an international organisation, to which the EU is not a party, has profound legal implications for the EU legal order.

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2 Internally this area is largely regulated by the EU legislature in the exercise of its competence under Article 43 TFEU.
Factual and Legal Background

The case concerned the agreement between the EU and the Member States in the area of activity of the International Organisation of Vine and Wine (O.I.V). The O.I.V is an intergovernmental organisation with 45 countries-members (21 of which are EU Member States) and competence in the area of vine-based products. Although it was set up in 2011, its history goes back to 1924 where it was first launched as the International Vine and Wine Office. It is important for the narrative that although the majority of EU Member States are members of the organisation, the EU itself is not a party to it. This fact is crucial insofar as the O.I.V has the power to set international oenological standards viz. practices and methods of analysis. More specifically, it draws up relevant recommendations and monitors their implementation in liaison with its members. All in all, the O.I.V has competence to harmonise existing oenological standards and prepare new ones with a view to improving the production and marketing conditions of wine products, taking also into account consumer interests.

From its part, the EU has acknowledged the OIV's expertise and referred to its oenological recommendations in a number of EU Regulations. What is more, almost seven years ago, the Commission took steps to negotiate EU-O.I.V. accession pursuant to Article 8 of the relevant O.I.V agreement. Yet, due to lack of majority in the Council, the EU is yet to join the O.I.V. As such, the EU Member States parties to the O.I.V coordinated unilaterally their positions within the relevant working group on wines and alcohol.

A dispute arose when in 2012 the Council adopted a decision establishing the EU position with regard to certain resolutions to be voted in the framework of the O.I.V. The legal bases for this Decision were Article 43 TFEU on common agricultural policy and Article 218 (9) TFEU which provides the procedure with regard to the negotiation and conclusion of international agreements. The decision was adopted under qualified majority in the Council with Germany voting against it.

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3 Council Regulation No 479/2008, (6) which entered into force on 1 August 2008, introduced dynamic references to OIV resolutions into secondary law for the first time. (7) By Council Regulation No 491/2009, (8) those provisions on the common organisation of the market in wine were incorporated into Council Regulation (EC) No 1234/2007 (Single CMO Regulation). (9)

4 This provision stresses that ‘An international intergovernmental organisation may participate in or be a member of the O.I.V and may help to fund the O.I.V under conditions determined, on a case by case basis, by the General Assembly on a proposal from the Executive Committee.’

5 Council Document 11436/12, Council Decision establishing the position to be adopted on behalf of the European Union with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV) – Adoption (2012).
Therefore, Germany brought an action for annulment of the Council decision arguing that it was wrongly based on Article 218 (9) TFEU as a procedural legal basis. Two main arguments were made against the adoption of the contested decision. Broadly speaking, both arguments concerned the context in which Article 218 (9) was employed as a correct legal basis for the EU to establish its diplomatic presence in the O.I.V. and exercise its competences effectively.

The first argument brought forward by Germany concerned a strict literal interpretation of the kind of situation that the procedure laid down in Article 218 (9) TFEU applies. It was established that the provision constitutes a lex specialis in the context of the conclusion of agreements between the EU and third countries or international organisations under Article 218 (1) TFEU. It was also stressed that the provision can only be utilised by the EU legislature in order to establish the EU’s position in an international organisation that concerns the EU itself. It is, therefore, inappropriate as a legal basis to establish the EU’s position in a body that the EU is not a member. Indeed it is common practice that, outside of the EU, Member States participate in various international organisations by negotiating separate bilateral agreements. The argument was, therefore, that since the EU has not yet availed of the opportunity to become party to the O.I.V, the Council had no authority to adopt a decision based on Article 218 (9) TFEU in relation to the representation of the Member States in the O.I.V.

The second argument made by Germany was predicated on the nature of the acts that Article 218 (9) TFEU covers. Again, using a literal interpretation of Article 218 (9), it was stressed that only ‘acts having legal effects’ - i.e. acts binding under international law are covered by this provision. It is clear that O.I.V. resolutions, which the contested decision addressed by establishing a unified EU position, are not such acts. They are mere recommendations. Referring to the EU’s reliance upon the O.I.V’s recommendations in a number of Regulations, it was pointed out that even EU secondary legislation was not sufficient to confer O.I.V. resolutions effects which are binding under international law.

The main counter-argument expressed by the Council and the Commission in defence of the EU decision which, in their view, justified recourse to Article 218 (9) TFEU was that the provision must be applied where the activity of a body set up by an agreement under international law falls within the competence of the EU. They emphasised that Article 218 (9) TFEU shall provide the procedural basis for EU external action especially when the EU is exercising its exclusive competence pursuant to Article 3 (2) TFEU (i.e. in areas covered by the relevant O.I.V. oenological recommendations listed in the contested decision, since they are likely to affect common EU rules).
Accordingly, the application of Article 218 (9) TFEU ‘by analogy’ was the only way, according to the EU Institutions, of ensuring that the EU and its Member States retain the ability to act in the areas which fall strictly within their competence.\(^6\)

**Opinion of the Advocate General**

Advocate General Cruz Villalón opined that Article 218 (9) TFEU does not provide a suitable legal basis for the decision in the present case. He pointed to the fact that, contrary to other international organisations which may preclude membership to the EU for reasons of international law,\(^7\) the EU is not excluded from joining the O.I.V. Such membership would be ‘the most natural way for it to exercise its competences effectively’.\(^8\) By contrast to the EU Institutions, he opposed a teleological interpretation of Article 218 (9) TFEU. He, therefore, sided with Germany explaining that the contested Council decision must be annulled.

With reference to the first argument made by Germany, the Advocate General opined that Article 218 (9) TFEU has certain limitations which are unamenable to change. He stressed that Article 218 (9) ‘is based on the assumption that the EU must be a party to the agreement setting up the body referred to in that provision.’\(^9\) Inter alia, he argued that EU Institutions’ contention that other paragraphs of Article 218 TFEU (namely paragraph 11) apply to agreements not signed by the EU is not a sufficient ground to widen up the scope of Article 218 (9) TFEU so that it becomes applicable to all agreements concluded by the Member States without the EU’s participation.\(^10\)

With regard to the second argument expressed by Germany, the Advocate General explained that the phrase ‘having legal effects’ in Article 218 (9) TFEU covers acts which must have binding force in international law. As such, it was clearly not intended to be applied to situations such as that in the case at hand. He also raised an issue of horizontal competence with regard to the participation of the European Parliament in the conclusion of international agreements. He stated that the application by analogy of Article 218 (9) TFEU will diminish the European Parliament’s

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\(^6\) This term was used by Advocate General Cruz Villalón in his Opinion on the case (Case C-399/12 Case C-399/12 Germany v Council, nyr) delivered on 29 April 2014, para 101.


\(^8\) AG Opinion, para 107.

\(^9\) AG Opinion, para 83.

\(^10\) AG Opinion, para 75-78.
participation rights because under the provision its role is only to be informed. Clearly, this parameter was overlooked by the Council and the Commission.

**Judgment of the Court**

In its decision, delivered on 7 October 2014, the CJEU held against Germany and did not follow the Advocate General’s opinion.

With regard to the first argument made by Germany, the CJEU held that the fact that the EU is not a party to the O.I.V. Agreement does not prevent it from applying Article 218 (9) TFEU. It interpreted Article 218 (9) TFEU teleologically holding that the provision ‘intends to establish a procedural framework which allows the EU’s position in international organisations to be defined - even in the context of international agreements to which it is not a party - where the acts to be adopted are to be incorporated subsequently into EU law.’\(^{11}\) The CJEU, therefore effectively linked the first (context) and the second (content) argument made by Germany against the adoption of the contested decision.

In the mind of EU legislators, the competence to resort to Article 218 (9) TFEU in the present situation was justified by merely relying upon the legal effect that O.I.V. recommendations produced internally. The CJEU stressed that it is indeed possible for non-binding international recommendations to produce legal effects within the EU via the provisions of EU law which enforce them. This is exactly the case with the O.I.V.’s oenological recommendations - they produce legal effects within the EU by virtue of the fact that the EU legislature will turn them into EU legislation. As such, Article 218 (9) TFEU (which makes no reference to whether the EU must be a party to an ‘agreement’) was correctly utilised outside its usual context. An open interpretation of the provision assisted the EU to establish a unified position to be adopted on its behalf in the O.I.V. as well as every other organisation set up by an international agreement to which the EU is not a party.\(^{12}\)

All in all, the CJEU established that first, the positions to be adopted on the EU’s behalf does not imply that the EU has to be a party to the agreement which sets up an international body. Second,

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\(^{11}\) Judgment of the CJEU, Case C-399/12 Germany v Council, 7 October 2014, nyr, para 41.

\(^{12}\) The CJEU emphasised that it is not unusual for the EU to adopt a position on its behalf in a body set up by that agreement through, for instance, the Member States which are party to that agreement acting jointly in its interest. It cited Case C-45/07 Commission v Greece, paras 30-31; Opinion 2/91, para 5 to reinforce its argument.
the CJEU set a principle for the future. Suffice, therefore, to establish that the acts which an international body adopts have effects in the EU legal order. It is irrelevant, for the purpose of EU law, whether or not these acts produce effects in the international legal order at large.\textsuperscript{13} The EU can clearly adopt a position - It does not matter whether it is party to an agreement or has formal status to an organisation.

\textbf{Comment}

\textit{Implications of the O.I.V judgment}

The O.I.V. judgment confirms the EU’s competence to establish a unified position to be adopted on its behalf with regard to the recommendations of an international organisation, in view of the latter’s direct impact on the EU \textit{acquis} in its area of application. The CJEU addressed (albeit perhaps unsatisfactorily) a number of questions about the status in EU law of international agreements concluded by EU Member States which for some time remained subject to speculation.\textsuperscript{14} For instance, the CJEU threw some light on the degree of agency expected from Member States in the exercise of their foreign policy in international fora that the EU does not participate in any particular shape or form.

Indeed, prior to the O.I.V. case Member States were partially uncertain as to how far they can proceed to adopt positions which would affect EU law or to what extent they are required to oppose a recommendation from an organisation that they are members which is likely to alter the EU \textit{acquis}. Following the O.I.V. judgment the CJEU recalling previous practice confirmed that even in organisations that the EU is not a member, Member States still need to operate as agents of the EU and keep in line with their obligations that flow from EU membership.\textsuperscript{15} This is, of course, not the position in all cases but merely when the issue of an international agreement falls within an area of EU competence. It is only under these circumstances that the EU can legitimately exercise its

\textsuperscript{13} Judgment of the CJEU, para 44.

\textsuperscript{14} Especially following the repeal (by the Treaty of Maastricht) of former Article 116 EEC which provided a legal basis for a common action by the Member States in cases where the Community could not exercise its powers within the framework of certain international organisations. In particular, this provision prevented individual actions by Member States within the framework of international organisations of an economic character. The Community Institutions were charged with the task of coordinating common action in this situation. See for a detailed overview of the impact of agreements concluded by EU Member States which are relevant to EU law: A. Rosas, ‘The Status in EU Law of International Agreements Concluded by EU Member States’ (2011) 34 (5) \textit{Fordham International Law Journal} 1304.

\textsuperscript{15} See above, note 11.
competence under Article 218 (9) TFEU by establishing the position to be adopted on its behalf in the organisation set up by the international agreement in question.

The O.I.V. decision has already been influential. Almost a week after it delivered its O.I.V. judgment, the CJEU took a similar stance in relation to Article 218 (11) TFEU, concerning Advisory Opinions on future agreements. In Opinion 1/13, the Luxembourg judges opined that the accession of a non-EU country to the Hague Convention on child abduction fell within the EU’s exclusive competence (on international abduction of children).\(^\text{16}\) Similar to the O.I.V. case, the EU is not a party to the Hague Convention but its Member States are. The important difference, however, is that the EU is not a signatory to the Convention because, pursuant to Article 38 of the Convention, membership to the Hague Convention is only open to States. This did not stop the CJEU from claiming that EU external competence ‘may [also] be exercised through the intermediary of the Member States acting in the EU’s interest.’\(^\text{17}\)

According to the CJEU, echoing the Council, Member States should demonstrate agency by depositing declarations of acceptance in relation to the accession of eight non-EU countries to the Hague Convention. Pursuant to the Council’s proposal such declarations would be in the EU’s interest. It was the disagreement of Member States to accept such a legal obligation that led the Commission to request the advisory opinion at hand under Article 218 (11) TFEU. Not unlike O.I.V., however, the CJEU relished the chance to point to the overlap between the provisions of the Convention and those laid down by an EU Regulation on the international abduction of children.\(^\text{18}\) It claimed that the EU’s exclusive competence extends to the entirety of the Hague Convention and that its provisions affected the meaning, scope and effectiveness of the rules laid down by the EU on matters of parental responsibility. The latter observation was particularly important vis-à-vis the circumstances under which the EU can establish exclusive competence under Article 3 (2) TFEU.

**Agency as a quasi-constitutional principle in the conduct of EU external relations**

Taking the above findings into account, it shall be highlighted that what we can broadly refer to as 'agency' has become a key component in the conduct of EU external relations. Member States need to acknowledge that when the EU is competent to act on a matter they shall demonstrate a certain

\(^{16}\) Opinion 1/13 of the Court, 14 October 2014, nyr. The EU has internal competence under Article 81 (3) TFEU (family law). It has also exercised this competence by adopting Regulation 2201/2003 (see below).

\(^{17}\) Ibid, para 44.

degree of support to assist it in making its position known and its voice heard externally. The O.I.V. case has helped to ascertain that establishing its external position is all the more important for the EU in cases where it does not have a platform to make its opinion known to an international organisation. Agency has its roots in the duty of sincere cooperation or loyalty which, ever since ERTA, has become an essential component of the external dimension of EU law and the development of EU implied competences. More specifically, the CJEU has often found in the principle of loyalty an obligation to provide a particular result or, more accurately, a duty to abstain from taking action which may be in conflict with EU law.

The CJEU’s past jurisprudence suggests that agency also derives from the requirement of uniformity in the international representation of the EU – a key objective in EU external relations. A good illustration of the above point can be found in the CJEU’s judgment in Commission v Greece. There the CJEU held that Greece had acted in breach of its Treaty obligations by submitting to the International Maritime Organization (IMO) a unilateral proposal on maritime safety relating to two conventions binding on the Member States but not upon the EU which is not an IMO member. Again, it is important to mention for the purpose of this analysis that (unlike with the O.I.V.) the EU is not a member of the IMO - not by choice but because IMO membership is only open to States. Even though all EU Member States are members of the IMO, the CJEU prohibited them from submitting to the IMO positions on matters within the sphere of transport which fall squarely within EU exclusive competence. In this regard, the point of contention was that the Greek proposal would have led to the adoption of new IMO rules. Greece’s conduct would have, therefore, jeopardised EU exclusive competence on transport policy (including enhancing ship and port facility security) as it would have been disruptive to an existing EU Regulation which gave the EU sole competence to assume international obligations on the matter.

As it was expected, the CJEU was criticised for the coercive character of its decision in Commission v Greece - especially for extending the scope of its ERTA doctrine to a state’s proposal initiating a

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21 Case C-45/07 Commission v Greece (IMO) [2009] ECR I-701. The Conventions in question were International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Ship and Port Facility Security (ISPS) Code.
process which could have led to the adoption of new international rules.\textsuperscript{23} It was immaterial for the CJEU whether those rules that could have been adopted by the IMO would have been binding upon the EU. Most importantly perhaps, the IMO judgment is forceful because the CJEU shed more light on the nature of the duty of loyalty as well as the obligations of Member States springing from their membership in an international organisation to which the EU is not related. The CJEU inflated the duty of loyalty to ensure that EU competence may nonetheless be exercised by the Member States in a similar context acting as agents of the EU interest.

Subsequently, the CJEU developed further its principles on the EU’s external representation, in \textit{Commission v Sweden}. This time the dispute was in the context of an area of shared competence.\textsuperscript{24} The CJEU held that by unilaterally proposing that a chemical substance (perfluorocane sulfonate: PFOS) be listed in Annex A to the Stockholm Convention on Persistent Organic Pollutants, Sweden failed to fulfil its loyalty obligations under Article 4 (3) TEU. The CJEU established that where the subject matter of a convention falls partly within the competence of the EU and partly within that of the Member States, it is imperative to ensure close cooperation between the Member States and the EU Institutions. Such cooperation should take place both in the process of negotiation and conclusion, and in the fulfilment of the commitments entered into. Therefore, in this case loyalty was given a pre-emptive effect to block Member States from undertaking any action that could potentially undermine the objectives of the Treaties. The duty of loyalty transcended its original meaning (under Article 4 (3) TEU) and became synonymous to a duty of agency or abstention (in this particular case) even if the competence at issue was neither exclusive \textit{ab initio} nor pre-emptive through the application of \textit{ERTA}.

Indeed, the use of a best endeavours obligation or an obligation of result in the abovementioned cases was imposed upon Member States to discard any inconsistencies in the EU’s external relations approach. Yet the approach of the CJEU is not fully satisfactory because, by emphasising on an abstract duty of agency, it appears to be blurring the procedural duties of Member States under the principle of loyalty as an obligation of conduct. More often than not, Member States will be in an awkward position because even if they have the best of intentions, they will struggle to foresee when their action or inaction will upset the EU’s constitutional balance. Although the cases mentioned, the O.I.V judgment inclusive, are confined to the specific legal context set out by the individual treaty provisions in question, they are sufficient to substantiate broader conclusions about


\textsuperscript{24} Case C-246/07 Commission v Sweden (PFOS) [2010] OJ C161/3.
the CJEU vis-a-vis the imposition of a general (abstract) agency obligation upon the Member States.

Taking into account the CJEU’s preemptive approach towards Member States in exercising a competence (often in compliance with EU law), it becomes clear why Germany brought a case against the Council with reference to the O.I.V proposal. It appears that the dispute concerned more of a question of principle (rather than one on legal basis or external competence) as to whether the EU can adopt a position vis-à-vis an international organisation to which it is not a party. The discomfort that certain Member States have experienced with regard to the doctrines developed by the CJEU (and the poor reasoning that often characterises such development) is likely to generate more litigation, especially given that in the O.I.V. case Germany was supported in its claim by other Member States including the Netherlands and the UK that have recently become more reluctant towards European integration.

6. Conclusions

Not only does the dispute between Germany and the Council in the O.I.V. continues the saga on the relational impact of pie-sharing in EU external relations law and the gradual broadening of the areas belonging to EU exclusive competence. It is also noteworthy in relation to the formulation of a uniform EU position which concerns the conduct of international organisations to which Member States are parties insofar as the functioning of such organisations may impact upon the operation of the EU. In this regard, the O.I.V. case is not only controversial because of its immediate outcome but because of its progeny which confirms the CJEU’s incremental interference beyond the way Member States choose to exercise their foreign policy outside the context of their EU membership. Indeed, the CJEU’s interference with the membership of EU Member States in international organisations will also impact upon the relations between the EU and international organisations in general as well as the latter’s operation.

Following the trail of CJEU judgments on EU external competence, it becomes transparent that the EU is not encouraging Member States to adopt a double-hatted approach in the conduct of their foreign policy. Above all, they are EU Member States. As such, agency and comity (the derivatives of sincere cooperation) should be their guiding light. The question is whether the current position expressed by the CJEU in the O.I.V. decision carries unpredictable ramifications for the morphological development of the EU’s external constitution. The CJEU comes across as unprepared and rather unwilling to recognise the full implications of EU Member States’
membership in other international organisations which, similar to the EU, they also prescribe obligations and commitments for these states and their governments. Even worse for the autonomy of the Member States, the EU seems to be holding international organisations hostage to its own constitutional specificities.\textsuperscript{25} Internally, this insular approach is capable of boosting the EU’s self-confidence levels in the region as a normative power. Externally, however, the EU’s approach paints a rather negative image – one based on a single overarching objective which does not always correspond to the preferences of its Member States vis-à-vis their external representation in other international organisations.

\textsuperscript{25} See more recently the CJEU’s Opinion 2/13 (EU-ECHR accession), 18 December 2014, nyr where the CJEU stressed inter alia that ‘the agreement [2013 accession treaty to the ECHR]… fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.’