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CURRENT DEVELOPMENTS

International organizations soon blocked by EU's external powers?

CÉCILE TOURNAYE — 21 October, 2014

A comment on ECJ Grand chamber judgment of 7 October 2014, C-399/12, Germany v. Council

On October 7th, in a Grand Chamber judgment, the European Court of Justice has dramatically broadened the external powers of the European Union, to the point that it could jeopardize the efficiency of other international organizations which count EU Member States among their members. In this case, Germany contested the validity of a decision of the Council of the European Union establishing the position to be adopted with regard to certain resolutions

to be agreed upon by the International Organization of Vine and Wine (OIV).

The OIV is a technical organization which adopts non-binding recommendations on technical standards for producing and marketing vine and wine products. 21 out of its 46 Member States are EU Member States. The European Union itself is not a member, but it has chosen to refer to some OIV recommendations in its so-called "Single CMO Regulation". Until June 2010, the EU Member States, in accordance with the principle of sincere cooperation (Article 4(3) TEU), coordinated their position, in conjunction with the Commission, prior to the OIV's general assembly but in a rather informal setting. No formal common position was required and the risk of blocking the decision-making process within the OIV was very limited. In 2010, the Commission decided to ask for more, and requested, on the basis of Article 218 para. 9 TFEU, that the Council adopt a common position upon a proposal of the Commission, prior to the adoption of the standards within the OIV.

Germany, supported by 7 other Member States, contested the Commission's request and claimed that the Council could not dictate to those EU Member States who are also members of the OIV the position that they had to defend during the negotiations at the OIV.

EU Member States must represent the EU's formal position

The Court, departing entirely from the conclusions of the Advocate General, ruled against Germany and in favor of the Council of the European Union, supported by the European Commission. The Court first considered that article 218 para. 9, unlike all other provisions of Title V, is applicable to

international agreements to which the EU is *not* a party. It further found that the OIV recommendations, despite their non-binding nature, are "acts having legal effect" by virtue of their incorporations into the EU legislation. Finally, the Court notes that the OIV recommendations under discussion touch upon a domain that is "regulated for the most part by the EU legislature". It concludes that EU Member States who are members of the OIV cannot act and negotiate in their own individual name anymore, but must represent the common position of the EU, adopted through a formal decision of the Council.

This legal reasoning is debatable. To find that article 218 para. 9 applies to other types of international agreements than those considered in the rest of the article is a rather unusual interpretation and the mere fact that the Advocate General defended the opposite view proves that the reverse conclusion would have been legally just as defendable. The Court, once again, opts for the legal interpretation which is most favorable to an extension of the external powers of the European Union.

Efficiency of other international organizations jeopardized

By doing so, it is likely to hamper the work efficiency of other international organizations, to the point where the EU itself may suffer from it. It is not uncommon for EU regulations to voluntarily refer to acts adopted within third international organizations. This is particularly so with respect to acts of technical or scientific organizations. These specialized organizations have developed an expertise through well-defined structures and procedures, which are usually laid down in their constitutive charters. The whole economy of their decision-making process is however likely

to be thoroughly disrupted by this latest development of EU law.

First, the agenda of their decision-making body will have to be transmitted to the European Commission several months in advance, to allow the services of the Commission to assess which topics listed therein touch upon the "acquis communautaire", and require a prior decision by the Council. Depending on the size of the organization and proportion of EU Member States therein, third-party international organizations may thereby lose control over their agenda, both in terms of timing and subject-matter.

A "mini", EU-wide technical organization, acting prior to, and outside the respective international organization officially specialized in the field, would then have to gather at the level of the Council and adopt a common position, on the basis of a proposal of the Commission. EU Member States may have different views and there is no guarantee that the Council will reach a qualified majority to adopt a common position. The case at hand actually illustrates this situation: the Council reached a qualified majority and adopted a decision more than a year after the Commission submitted its proposal. Such a situation would inevitably delay the decision-making process within the third organization, or even block it if no decision is reached at the Council.

Requiring Member States to formally adopt a common position prior to the debates within the organization further prevents them from participating in any genuine debate at the plenary. Genuine debates would then have to take place through informal, non-public, meetings, which would fall outside the procedure laid down in the constitutive charter.

The decision-making process is thereby likely to become more opaque.

Is all this really necessary? One could argue that the unity of the EU regime would not necessarily suffer if EU Member States did not systematically defend common views within other international organizations. If Germany truly shares the views of South Africa, while France takes sides of Chile, the compromise resulting therefrom may not necessarily be worse from a technical point of view than if all EU Member States who are members of the organization strive to speak with one voice. Imposing a common view prior to the official debates may actually weaken the position of the EU Member States, as one cannot expect Germany to heartedly defend a position imposed by the Council which it does not genuinely share. While prior informal meetings with peer states surely enhances the sense of being part of a community, being forced to speak against what one really thinks may actually weaken it.

The EU has chosen on many occasions to refer in its regulations to technical standards developed by other organizations because these institutions have a well-established expertise and know-how that the Commission could not possibly develop itself. By doing so, the EU has recognized that it has an interest in being supported by effective and competent international organizations, whose decision-making process is perceived as fair and reliable. By requiring a prior formal position of EU Member States, the EU actually weakens the efficiency of those international organizations and may well undermine the very reason why it referred to their standards in the first place.

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