Brendan Rooney

# Restricting Member State Participation in International Organisations in Favour of the Union through the ERTA Doctrine, the Principle of Sincere Cooperation and the Procedural Legal Basis of Article 218(9) TFEU

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# Restricting Member State Participation in International Organisations in Favour of the Union through the ERTA Doctrine, the Principle of Sincere Cooperation and the Procedural Legal Basis of Article 218(9) TFEU

**by**

**Brendan Rooney***

## Abstract

*In the field of EU external relations, the ERTA doctrine, the principle of sincere cooperation and the procedural legal basis of Article 218(9) TFEU operate individually and together to restrict Member State participation in international organisations in favour of the Union. Under the ERTA doctrine, the EU gains an exclusive competence to undertake external action if internal rules may be affected. Elsewhere, the principle of sincere cooperation imposes an obligation on the Member States to abstain from taking action in international organisations and allows the EU to exercise its external competences in international organisations of which it lacks membership through the Member States. The scope of the procedural legal basis of Article 218(9) TFEU, which permits the EU to establish positions in international organisations, also enables Union participation to the detriment of the Member States. Additionally, while Article 218(9) TFEU requires the Council to act, in principle, by qualified majority, the Council and some Member States attempt to navigate the procedural requirements of the provision to allow the Council to act unanimously. These three features of EU law do not simply operate individually but they also interact with one other to further erode the ability of the Member States to participate in international organisations. It is necessary to examine how the ERTA doctrine, the principle of sincere cooperation and the procedural legal basis of Article 218(9) TFEU function, both individually and together, to understand how Union participation in international organisations is enabled and Member State action is excluded.*

**Keywords:** EU External Relations, International Organisations, ERTA Doctrine, Principle of Sincere Cooperation, Article 218(9) TFEU, EU Competences, Voting Procedure

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# Restricting Member State Participation in International Organisations in Favour of the Union through the ERTA Doctrine, the Principle of Sincere Cooperation and the Procedural Legal Basis of Article 218(9) TFEU

## Introduction

The exercise of the external competence of the European Union (the EU) has always been an area of conflict between the EU and its Member States.[1] One point of tension that has increased in recent years is the extent to which Member State participation in international organisations has been restricted in favour of the Union. The intensity of this conflict has reached new heights as the European Commission seems to seize every opportunity to exclude the Member States from the international stage while the Member States, as well as the Council of the EU, attempt to retain their competence to take external action. While the European Parliament also has its own part to play in this conflict, this paper focuses on the roles of the Commission, the Council and the Member States. The situation was summed up succinctly by Advocate General Kokott who commented that:

> "Both sides put forward their respective arguments with astonishing passion. The Council and some of its interveners make the underlying allegation that the Commission wished to do everything possible to prevent international action by the Member States, while the Commission alleges that the Council is compulsively looking for legal bases that always permit participation by the Member States alongside the Union."[2]

It is apparent from this description that the Council seeks to employ legal bases which allow the Member States to take external action. The choice of legal basis is highly relevant within the EU legal order because it determines if the Union is competent to act, and whether the competence being exercised is exclusive to the EU or shared with the Member States.[3] The choice of legal basis is thus an important consideration in terms of allowing the Member States to take external action. However, the Commission is depicted differently, as "*do*[ing]

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[1] See, for example, COSTA Oriol, *The politicization of EU external relations*, 26(5) J. Eur. Public Policy (2019), pp. 790-802; and VAN DER MEI Anne Pieter, *EU External Relations and Internal Inter-Institutional Conflicts: The Battlefield of Article 218 TFEU*, 23(6) MJECL (2016), pp. 1051-1076.

[2] Opinion of Advocate General Kokott, Joined Cases C-626/15 and C-659/16, *Commission v Council*, ECLI:EU:C:2018:362, para. 75.

[3] ECKES Christina, *EU Powers Under External Pressure: How the EU's External Actions Alter Its Internal Structures*, Oxford, Oxford University Press (2019) 1st ed., 116 p.

*everything possible to prevent international action by the Member States*". This suggests that the Commission has more tools at its disposal than the use of various legal bases. In fact, the Commission adopts a multi-pronged approach to exclude the Member States from the international arena. This paper will discuss the methods, other than the choice of legal basis, used to restrict the Member States in international organisations.

Within this context, the EU institutions, in particular the Commission, employ the *ERTA* doctrine to gain an exclusive external competence where internal rules may be affected, and the principle of sincere cooperation to participate in international organisation of which the EU lacks membership and to impose an obligation on the Member States to abstain from acting externally. Additionally, the scope and the procedural requirements of the legal basis of Article 218(9) TFEU, which allows the EU to establish positions in international organisations, further enable Union participation and restrict the Member States' ability to undertake external action. This paper analyses these features of EU law, assessing them individually and how they interact with each other, to determine how and when Member State participation in international organisations is restricted in favour of the Union.

This paper is divided into four sections. The first section outlines (i) the sensitivity of EU rules to being affected under the *ERTA* doctrine; and (ii) how the scope of the doctrine has been extended to include participation in international organisations. The second section discusses (i) the nature of the principle of sincere cooperation; and (ii) how the principle imposes an obligation on the Member States to abstain from acting in international organisations.

The third section (i) examines the scope of the procedural legal basis of Article 218(9) TFEU; and (ii) analyses how the reach of this provision is extended by its interaction with the *ERTA* doctrine and the principle of sincere cooperation. The final section (i) outlines the procedure to be followed when establishing a Union position in an international organisation; and (ii) assesses the Council's attempts to act unanimously to establish the position. Additionally, this section (iii) discusses the potential for the Council to act unanimously under Article 218(9) TFEU through the principle of sincere cooperation on the basis of the practice of the "*common accord*" of the Member States.

## I. Rendering the Member States Incompetent through the ERTA Doctrine

The point of departure in respect of limitations imposed on the Member States' ability to participate in international organisations is the division of competences between the EU and the Member States. In addition to the EU's exclusive competences which are expressly

outlined in the Treaties,[4] Article 3(2) TFEU, concerning the EU's external action, provides that:

> "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

Article 3(2) TFEU codifies the "*doctrine of implied powers*" established by the Court of Justice of the European Union (the CJEU) beginning from the landmark case of *ERTA*.[5] This doctrine extends the external powers of the EU beyond those expressly found in the Treaties and provides the EU with a basis to act externally in areas it can regulate internally.[6] It is the last component of Article 3(2) TFEU, i.e., "*in so far as its conclusion may affect common rules or alter their scope*", that codifies the initial *ERTA* doctrine.

## A. The Sensitivity of EU Rules to Being 'Affected'

In its *ERTA* judgment, the CJEU held that each time the EU adopts provisions laying down rules with a view to implementing a common policy envisaged by the Treaty, "*the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules*".[7] Once such rules come into being, the Court concluded that "*the* [Union] *alone is in a position to assume and carry out contractual obligations towards third countries*".[8] The CJEU provided further insight into the operation of the *ERTA* doctrine in Opinion 2/91,[9] and stated that it is not necessary that the area covered by EU rules and the international agreement coincide fully so long as the relevant area is covered "*to a large extent*" by EU rules.[10] This principle was reaffirmed in Opinion 1/03,[11] where the CJEU also elaborated on the test to be applied in such a situation.

If the area covered by an international agreement is already covered to a large extent by EU rules, the Court stated that a comprehensive and detailed analysis must be carried out to determine whether the EU has an exclusive competence to conclude that agreement.[12] To this effect, the assessment must be based on the scope of the rules in question, their nature and content, as well as the current state of EU law in the area in question and its future development, insofar as that is foreseeable at the time of that analysis.[13] The overall objective is "*to ensure that the agreement is not capable of undermining the uniform and consistent application*

[4] Art. 3(1) TFEU.
[5] ECJ, Case 22/70, *Commission v Council*, ECLI:EU:C:1971:32 (ERTA).
[6] GSTÖHL Sieglinde and DE BIÈVRE Dirk, *The Trade Policy of the European Union*, London, Palgrave (2018), 29 p.
[7] *ERTA,* para. 17.
[8] *ERTA,* para. 18.
[9] ECJ, Opinion 2/91, *ILO Convention*, ECLI:EU:C:1993:106.
[10] ROSAS Allan, *EU External Relations: Exclusive Competence Revisited*, 38(4), Fordham Int'l LJ (2015), pp. 1073-1096, p. 1084.
[11] ECJ, Opinion 1/03, *Lugano Convention*, EU:C:2006:81.
[12] Opinion 1/03, para. 133.
[13] Opinion 1/03, para. 126.

*of the* [Union] *rules and the proper functioning of the system which they establish*".[14] Where EU rules are so affected by an international agreement, the EU is granted the exclusive competence to conclude that agreement.[15]

Within this framework, the CJEU has adopted a broad approach to the *ERTA* doctrine. According to Rosas, there are several important features that should be considered in the Court's post-Lisbon jurisprudence in this respect, namely that:

1. A mere risk that common rules may be affected is sufficient to trigger the *ERTA* effect and grant the EU an exclusive competence to conclude international agreements;

2. The strand of case law developed in Opinion 2/91 and Opinion 1/03 to the effect that EU rules can be affected so long as the area of the international agreement is covered to a large extent by internal rules has been confirmed;

3. When assessing whether the area concerned is sufficiently covered by Union rules, it is the legal regime rather than the specific details of the relevant EU rules and international agreement which should be examined. This means that the entire agreement should be considered as one regime and, consequently, the EU rules need not cover all aspects of the agreement to trigger the *ERTA* doctrine provided that the legal regime as a whole is sufficiently covered; and,

4. Any future foreseeable common rules should be considered in assessing whether Union rules may be affected by the international agreement.[16]

These characteristics render EU rules highly sensitive to being "affected" within the meaning of the *ERTA* doctrine. The jurisprudence of the CJEU further demonstrates the ease by which the EU gains an exclusive competence to conclude international agreements to the exclusion of the Member States.[17] Additionally, there is no question that the EU can obtain an exclusive external competence in this context in areas where the competence to act is shared with the Member States. In this regard, the EU has gained an exclusive com-

[14] Opinion 1/03, para. 133.
[15] Opinion 1/03, paras. 172-173.
[16] ROSAS Allan, *Mixity and the Common Commercial Policy after Opinion 2/15*, in HAHN Michael J and VAN DER LOO Guillaume (eds), "Law and Practice of the Common Commercial Policy: The First 10 Years After the Treaty of Lisbon", Leiden, Brill (2021), pp. 27-46, p. 39.
[17] See, for example, ROSAS, *Exclusive Competence Revisited*, pp. 1087-1093 where he discusses the cases of ECJ, Case C-114/12, *Commission v Council*, EU:C:2014:2151, ECJ, Opinion 1/13, *Convention on the Civil Aspects of International Child Abduction*, ECLI:EU:C:2014:2303, and ECJ, Case C-66/13, *Green Network*, EU:C:2014:2151; and ROSAS, *Mixity and the Common Commercial Policy*, pp. 40-41 where he discusses the cases of ECJ, Opinion 2/15, *EU-Singapore Free Trade Agreement*, EU:C:2017:376 and Opinion 3/15, *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, ECLI:EU:C:2016:657.

petence to conclude international agreements in the internally shared fields of environmental protection[18] and transport.[19] Under the *ERTA* doctrine, the EU can thus gain an exclusive external competence to conclude international agreements in an area that is shared internally on the basis that EU rules in that area may be affected,[20] where those rules are highly susceptible to being affected.

## B. Extending the Scope of the ERTA Doctrine to Include Participation in International Organisations

In *ERTA*, the pre-emptive effect which prevents the Member States from concluding international agreements which affect EU rules came into being by the joint interpretation of the attainment of a Treaty objective and the principle of sincere cooperation.[21] The CJEU held that their combined reading meant that "*the Member States cannot, outside the framework of the* [Union] *institutions, assume obligations which might affect* [Union] *rules or alter their scope*".[22] Every extension of the scope of the *ERTA* doctrine since then has also been justified by reference to the principle of sincere cooperation. For example, while the original *ERTA* case concerned EU rules adopted to implement a common policy,[23] the CJEU clarified in Opinion 2/91 that the principle of sincere cooperation requires that the scope of the doctrine extends to all areas corresponding to the Treaty objectives, including areas falling outside common policies.[24]

Even with this extension of the *ERTA* doctrine, it was initially understood that its scope was confined to the conclusion of international agreements.[25] However, in case C-45/07, *Commission v Greece* (IMO case),[26] the CJEU again expanded the scope of the doctrine by ruling that the adoption of a unilateral national position in an international organisation has the potential to affect EU rules.[27] The Court held that the submission of a proposal by Greece initiated a procedure which could lead to the adoption by the International Maritime Organisation (IMO) of new rules that would "*likely*" affect EU rules.[28] As Greece had set in motion a procedure that was likely to affect EU rules, it had infringed its obligation under the principle of sincere cooperation.[29] Consequently, the CJEU concluded that a Member

[18] ROSAS, *Exclusive Competence Revisited*, p. 1092.
[19] ROSAS, *Mixity and the Common Commercial Policy*, p. 40.
[20] ENGEL Annegret, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation*, Cham, Springer (2018), 103 p.
[21] ECKES, *EU Powers Under External Pressure*, 60 p.
[22] ROSAS, *Exclusive Competence Revisited*, p. 1084.
[23] *ERTA,* para. 23.
[24] Opinion 2/91, paras. 10-11.
[25] CREMONA Marise, *Extending the Reach of the AETR Principle: Comment on Commission v Greece (C-45/07)*, 34(5) Eur. Law Rev. (2009), pp. 754-768, p. 762.
[26] ECJ, Case C-45/07, *Commission v Greece*, ECLI:EU:C:2009:81 (IMO case).
[27] ECKES, *EU Powers Under External Pressure*, 60 p.
[28] *IMO case*, paras. 21-22.
[29] *IMO case*, para. 23.

State is no longer permitted, "*acting individually in the context of its participation in an international organisation, to assume obligations likely to affect* [Union] *rules promulgated for the attainment of the objectives of the Treaty*".[30]

Moreover, the *IMO case* also extends the reach of the *ERTA* doctrine in another sense. While the initial doctrine was triggered where the Member States "*undertake obligations*" which affect EU rules,[31] the *ERTA* effect arose in the *IMO case* by Greece simply initiating a procedure that was "*likely*" to affect EU rules. Consequently, a Member State participating in an international organisation does not need to actually undertake obligations that risk affecting EU rules to trigger the *ERTA* doctrine. The doctrine will be triggered merely by a Member State undertaking external action that sets in motion a procedure which is likely, "*somewhere down the road, to affect such rules*".[32]

The extension of the *ERTA* doctrine in the *IMO case*, in tandem with the sensitivity of EU rules, constitutes a significant constraint on the ability of the Member States to participate in international organisations. However, the doctrine is also not without its limitations. The CJEU, for example, will not grant the EU an exclusive external competence under the *ERTA* doctrine where EU rules have not been adopted,[33] or where EU rules only provide for minimum harmonisation.[34] Nonetheless, even where EU rules are inexistent or unaffected, the Member States can still be prevented from taking external action in international organisations on the basis of an obligation to abstain under the principle of sincere cooperation. While the *ERTA* doctrine traces its origins to this principle and every extension of the doctrine has been justified by reference to it, the principle of sincere cooperation can, in and of itself, restrict Member State participation in international organisations.

## II. Branding the Member States Uncooperative in International Organisations

The principle of sincere cooperation is a constitutional principle developed in the context of mixed external action by the EU and its Member States, and derives from the requirement of unity in the international representation of the Union.[35] It provides for coherence and consistency in the EU's external action and ensures that the EU and the Member States do not contradict each other or jeopardise the common position in the international arena.[36] The principle is codified in Article 4(3) TEU which states that:

[30] *IMO case*, para. 29.
[31] *ERTA,* para. 17.
[32] CASTELEIRO Andrés Delgado and LARIK Joris, *The Duty to Remain Silent: Limitless Loyalty in EU External Relations?*, 36(4) Eur. Law Rev. (2011) pp. 524-541, p. 536.
[33] ECJ, Opinion 1/94, *WTO agreement*, EU:C:1994:384, para. 77.
[34] Opinion 2/91, para. 18.
[35] CREMONA Marise, *Defending the Community Interest: the Duties of Cooperation and Compliance*, in CREMONA Marise and DE WITTE Bruno (eds), "EU Foreign Relations Law: Constitutional Fundamentals", Oxford/Portland, Hart Publishing (2008), pp. 125-169, p. 157.
[36] ECKES, *EU Powers Under External Pressure*, 59 p.

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

While the *ERTA* doctrine and the principle of sincere cooperation are separate features of EU law, they are also interconnected in the context of the EU's external relations. Given their connection, it might seem like a natural development that, as the scope of the *ERTA* doctrine extends to include participation in international organisations, the principle of sincere cooperation should also evolve to impose an obligation on the Member States to abstain from taking such action. However, a specific duty to abstain from taking external action was not evident from the early jurisprudence of the CJEU.

## A. The Nature of the Principle of Sincere Cooperation

The exact nature of the obligation arising from the principle of sincere cooperation, in particular as to whether it implies a duty to exercise best endeavours or imposes a duty to obtain a specific result, has been examined in academic literature. Hillion, for example, favours the view that the principle entails only an obligation of conduct in that it requires best endeavours.[37] Cremona also agrees that so long as the principle of sincere cooperation is kept separate from the principle of pre-emption, acting "*as a restraint on but not a denial of Member State competence*", it is best viewed as requiring best efforts.[38] However, the view that the principle of sincere cooperation requires only best efforts is qualified in some circumstances and it is acknowledged that it can impose an obligation to obtain a specific outcome.[39] Other commentators are not so nuanced and put forward the view that the principle of sincere cooperation has evolved to manifest itself as a strict obligation on the part of the Member States to refrain from taking external action.[40]

In its early jurisprudence, the CJEU emphasised that the principle embodied a requirement to ensure close cooperation between the EU and the Member States in the international arena, without actually requiring any specific actions or measures to be taken.[41] In Ruling 1/78,[42] for example, the Court observed that the implementation of the international convention at issue in that case would "*entail close cooperation between the institutions of the* [Union]

[37] HILLION Christophe, *Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'*, in HILLION Christophe and KOUTRAKOS Panos (eds), "Mixed Agreements Revisited: The EU and Its Member States in the World", Oxford/Portland, Hart Publishing (2010), pp. 87-115, p. 104.
[38] CREMONA, *Defending the Community Interest*, p.168.
[39] See, for example, HILLION, *Significance of the 'Duty of Cooperation'*, pp.104-105; and CREMONA, *Defending the Community Interest*, p. 168.
[40] CASTELEIRO, *The Duty to Remain Silent*, p. 539.
[41] CASTELEIRO, *The Duty to Remain Silent*, p. 528.
[42] ECJ, Ruling 1/78, *Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports*, ECLI:EU:C:1979:224.

*and the Member States*".[43] However, the CJEU did not outline what such cooperation involved and instead held that the international agreement should be implemented jointly by the EU and its Member States according to the division of competences.[44] The principle of sincere cooperation was thus seemingly fulfilled by both the EU and its Member States implementing their respective parts of the international agreement they had concluded.[45]

This trend of referring to the principle in the field of external relations without specifying the requirements of such cooperation continued in the jurisprudence of the Court. In Opinion 2/91, the CJEU again noted, concerning areas of shared competence, that "*it is important to ensure that there is a close association between the institutions of the* [Union] *and its Member States*".[46] However, one crucial difference between Ruling 1/78 and Opinion 2/91 was that, while both the EU and its Member States concluded the agreement in Ruling 1/78, the ILO Convention in Opinion 2/91 could not be concluded by the EU because it was only open to states.[47]

In such a situation where the EU has the competence to act but cannot accede to an international agreement, the CJEU underlined that "*cooperation between the* [Union] *and the Member States is all the more necessary*" because the EU must act "*through the medium of the Member States*".[48] Under the principle of sincere cooperation, the Court thus held that, even where the EU itself cannot conclude an international agreement, "*its external competence may, if necessary, be exercised through the medium of the Member States*".[49] Nonetheless, the CJEU again refrained from outlining how to achieve such cooperation,[50] and instead charged "*the* [Union] *institutions and the Member States to take all the measures necessary so as best to ensure such cooperation*".[51]

The thread running through the initial jurisprudence of the CJEU is that the principle of sincere cooperation was employed to achieve unity on the international stage without specific obligations being imposed on the EU and its Member States regarding the form and substance that such cooperation should take.[52] However, the subsequent evolution of the principle became stricter as the CJEU has since interpreted the principle to include on the

[43] Ruling 1/78, para. 36.
[44] Ibid.
[45] CASTELEIRO, *The Duty to Remain Silent*, p. 528.
[46] Opinion 2/91, para. 36.
[47] Opinion 2/91, para. 39.
[48] Opinion 2/91, para. 37.
[49] Opinion 2/91, para. 5.
[50] CASTELEIRO, *The Duty to Remain Silent*, p. 528.
[51] Opinion 2/91, para. 38.
[52] CASTELEIRO, *The Duty to Remain Silent*, p. 529. It should be noted, however, that the principle of sincere cooperation does impose both procedural and substantive obligations on the Member States. For a discussion on these obligations, see, for example, HILLION, *Significance of the 'Duty of Cooperation'*, pp. 92-100; CREMONA, *Defending the Community Interest*, pp. 157-167; and ECKES, *EU Powers Under External Pressure*, 65-70 pp.

part of the Member States an obligation to abstain from acting in international organisations.

## B. The Obligation on Member States to Abstain in International Organisations

### 1. The Emergence of a Duty to Abstain

In the *Inland Waterways* cases,[53] the CJEU first touched upon, but did not apply, a duty to abstain under the principle of sincere cooperation.[54] In these cases, the Commission brought separate infringement proceedings against Germany and Luxembourg in the context of an international agreement being negotiated by the EU with third countries concerning transport on inland waterways. While the CJEU noted that the EU did not have an exclusive competence in the area concerned,[55] the Court still found that the two Member States had breached the principle of sincere cooperation by negotiating and concluding their own bilateral agreements with those same countries. Although the agreement being negotiated by the EU had not yet been concluded, the mandate authorising the Commission to negotiate the agreement on behalf of the EU marked the start of a "*concerted* [Union] *action*".[56]

It was thus the existence of a concerted Union action that triggered the principle of sincere cooperation, which in turn required "*if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the [Union] institutions*".[57] However, even though the CJEU could have applied a duty to abstain from acting in these cases, it held that the breach of the principle of sincere cooperation occurred instead because Luxembourg and Germany acted "*without having cooperated or consulted with the Commission*".[58] In the *Inland Waterways* cases, the Court thus only alluded to the existence of, but did not actually impose, an obligation on the Member States to abstain from taking external action in an area of shared competence. It was only in the *IMO case*, which concerned an EU exclusive competence, that the CJEU imposed a strict obligation on the Member States to abstain from adopting a unilateral position in an international organisation.[59]

The *IMO case* concerned a situation where Greece submitted a proposal for consideration within the IMO on an issue of maritime safety. The EU is not a member of the IMO but

[53] ECJ, Case C-266/03, *Commission v Luxembourg*, ECLI:EU:C:2005:341; and ECJ, Case C-433/03, *Commission v Germany*, ECLI:EU:C:2005:462.
[54] CASTELEIRO, *The Duty to Remain Silent*, p. 530.
[55] C-266/03, *Commission v Luxembourg*, para. 51; and C-433/03, *Commission v Germany*, para. 51.
[56] C-266/03, *Commission v Luxembourg*, para. 60; and C-433/03, *Commission v Germany*, para 60.
[57] Ibid.
[58] CASTELEIRO, *The Duty to Remain Silent*, p. 531.
[59] CASTELEIRO, *The Duty to Remain Silent*, p. 533.

the field of maritime safety falls within the EU's exclusive competence.[60] In these circumstances, the CJEU held that the principle of sincere cooperation imposed an obligation on the Member States to abstain from taking unilateral action in an international organisation in an area falling within the EU's exclusive competence.[61] The Court dismissed the argument that Greece was entitled to act unilaterally on the basis that the EU was not a member of the IMO as the EU can exercise its competences through the Member States.[62]

The CJEU also stated that this obligation to abstain applies even in the absence of a common Union position being adopted on the issue.[63] This was the case even where Greece had attempted to adopt a common position but was prevented from doing so by the Commission.[64] Although the CJEU recognised that the Commission might have breached its own obligation under the principle of sincere cooperation by failing to facilitate the formation of a common position, the Court emphasised that this did not entitle a Member State to act unilaterally.[65]

The adoption of a position in an international organisation which falls into an area of exclusive competence must therefore be coordinated at the Union level beforehand and cannot be adopted unilaterally.[66] Additionally, the CJEU stated that, even if Greece could adopt a unilateral position in the IMO, Member States cannot assume obligations, in the context of their participation in an international organisation, which may affect common rules.[67] The obligation to abstain in the *IMO case* thus actually comprises two separate duties.

First, where the competence exercised is exclusive, the principle of sincere cooperation obliges Member States to either establish the common position at the EU level or to abstain completely from taking unilateral action if no such position is reached. Second, even if the Member States can adopt a unilateral position, they are under a duty to refrain from doing so if their actions are likely to affect EU rules. In the latter case, the EU gains an exclusive competence to act under the *ERTA* doctrine. An absolute obligation to abstain makes sense in areas where the EU has an exclusive competence as the principle of exclusivity prevents the Members States from taking unilateral action.[68] However, this obligation to abstain also bleeds over into areas of shared competence as can be seen from case C-246/07, *Commission v Sweden* (the PFOS case).[69]

[60] Ibid.
[61] CASTELEIRO, *The Duty to Remain Silent*, p. 534.
[62] *IMO case*, para. 31.
[63] *IMO case*, paras. 27-28.
[64] CASTELEIRO, *The Duty to Remain Silent*, p. 534.
[65] CREMONA, *Extending the Reach of the AETR Principle*, p. 765.
[66] *IMO case*, para. 28.
[67] *IMO case*, para. 29.
[68] CASTELEIRO, *The Duty to Remain Silent*, p. 535.
[69] ECJ, Case C-246/07, *Commission v Sweden*, ECLI:EU:C:2010:203 (PFOS case).

## 2. A Duty to Abstain in an Area of Shared Competence

Although a duty to abstain was not applied in the *Inland Waterways* cases, the CJEU used its reasoning in those cases to impose such an obligation in the *PFOS case*, which also concerned an area of shared competence. In the latter case, Sweden adopted a unilateral proposal to include certain environmentally harmful substances in the Annex of the Stockholm Convention on Persistent Organic Pollutants. Similar to the *IMO case*, no EU position was reached on the issue.[70] However, the two cases were distinguished as the competence being exercised in the *IMO case* was exclusive.[71] Although Sweden attempted to argue that the principle of sincere cooperation was limited in scope when an area of shared competence is concerned, the CJEU noted, referencing *Inland Waterways*, that the principle "*is of general application and does not depend ... on whether the* [Union] *competence concerned is exclusive*".[72] The Court thus rejected any limitation to the principle of sincere cooperation on the basis that the competence concerned is a shared one.

Instead, the CJEU recalled, concerning the exercise of a shared competence, that the requirement of unity in the international representation of the Union obliges close cooperation between the EU and the Member States.[73] In this context, the Court held that the Member States were under a special obligation to abstain from acting in a situation where there was a concerted Union action.[74] Despite the lack of an agreement within the Council, the Court found that there was "*a common strategy not to propose*" the substances concerned.[75] By making its unilateral proposal, the CJEU thus found that Sweden had "*dissociated itself from a concerted common strategy within the Council*".[76]

Although an obligation to abstain was imposed on the Member States in both the *IMO case* and the *PFOS case*, the effect of the unilateral position adopted by Sweden in the latter case was framed differently by the CJEU. The Court did not state that Sweden's actions would affect EU rules but noted that the submission of its proposal "*ha*[d] *consequences for the Union*".[77] The Court observed that the situation could arise where Sweden would vote in favour of its proposal and the EU might vote against it.[78] Additionally, the adoption of the proposal would also be legally binding on the EU or, at the very least, if the EU exercised an opt-out, would give rise to legal uncertainty amongst the Member States, the Secretariat of the Stockholm Convention and the other non-EU member to the Convention.[79] In this

[70] CASTELEIRO, *The Duty to Remain Silent*, p. 536.
[71] *PFOS case*, para. 72.
[72] *PFOS case*, para. 71.
[73] *PFOS case*, para. 73.
[74] *PFOS case*, para. 74.
[75] *PFOS case*, para. 89.
[76] *PFOS case*, para. 91.
[77] *PFOS case*, para. 92.
[78] *PFOS case*, para. 94.
[79] *PFOS case*, paras. 96-101.

situation, the CJEU found that Sweden's actions were "*likely to compromise the principle of unity in the international representation of the Union*" and held, as a result, that Sweden had breached the principle of sincere cooperation."[80]

There is no doubt that the principle of sincere cooperation can impose an obligation on Member States to abstain from taking action in international organisations. While this obligation arose in both the *IMO case* and *PFOS case*, the manner in which it was imposed is different. Cremona notes that Greece was not permitted to act in the *IMO case* because the competence concerned was exclusive and Greece's actions would have affected EU rules in the sense of the *ERTA* doctrine.[81] While Cremona observes that "[t]*he position should be different in a case of shared competence*",[82] a duty to abstain was also imposed on Sweden in the *PFOS case* where the competence was shared and no EU rules were affected.

To this effect, Casteleiro and Larik opine that the reasoning of the CJEU in the *PFOS case* blurs the lines between the two cases and means that, irrespective of the competence involved, Member States are under a duty to remain silent.[83] However, the situation is not as blurred as it might appear. Such a duty may be imposed in an area of shared competence where it is likely that either EU rules may be affected, in which case the EU gains an exclusive competence to act under the *ERTA* doctrine, or the principle of unity in the international representation of the Union will be compromised.

In the latter situation, the competence remains shared and the EU does not gain an exclusive competence to act. In this regard, Cremona accurately describes the principle of sincere cooperation as being *"a restraint on but not a denial of Member State competence*".[84] Nonetheless, Casteleiro and Larik are also correct when they state that "*the [CJEU]'s reasoning ... makes one wonder about situations in which Member States in matters of shared competence actually would be allowed to act*".[85] In particular, one wonders when a Member State's actions will likely compromise the principle of unity in the international representation of the Union such that a duty to abstain will be imposed.

Both the *ERTA* doctrine and the principle of sincere cooperation restrict Member State participation in international organisations in favour of the Union. Article 218(9) TFEU, which provides the legal basis for the EU to adopt positions in international organisations, can also be added to this framework. This provision has been given a wide scope of application, and its interactions with the *ERTA* doctrine and the principle of sincere cooperation

[80] *PFOS case*, paras. 103-105.
[81] CREMONA, *Extending the Reach of the AETR Principle*, p. 9.
[82] Ibid.
[83] CASTELEIRO, *The Duty to Remain Silent*, pp. 538-539.
[84] CREMONA, *Defending the Community Interest*, p. 168.
[85] CASTELEIRO, *The Duty to Remain Silent*, pp. 538-539.

have extended its scope to further enable the EU to participate in international organisations to the detriment of the Member States.

## III. Enabling Union Participation in International Organisations through Article 218(9) TFEU

Article 218(9) TFEU is the provision that allows the EU to adopt decisions establishing positions to be adopted on its behalf in international organisations. The *IMO case* and the *PFOS case* both demonstrate that the Member States' freedom of action is restricted in international organisations in favour of the EU where a prior Union position or concerted common strategy is established.[86] The means by which the EU adopts such positions have thus become immensely important. For its part, Article 218(9) TFEU reads that:

> "The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement."

While Article 218(9) TFEU also permits the Council to suspend the application of international agreements, this paper assesses the component of the provision referring to the adoption of positions in international bodies. The operation of Article 218(9) TFEU, regarding the establishing of Union positions, was uncertain at first. However, the provision has been granted a wide scope by the CJEU to enable Union participation in international organisations at the expense of the Member States. In combination with the principle of sincere cooperation and the *ERTA* doctrine, Article 218(9) TFEU allows the EU to participate in international organisations of which it is not a member, and to act in areas of shared competence without the Member States.

### A. The Scope of Article 218(9) TFEU

#### 1. Participation in International Organisations of which the EU is not a Member and EU Rules are 'Affected'

The CJEU first considered Article 218(9) TFEU in case C-399/12, *Germany v Council* (the OIV case).[87] Germany challenged a Council decision adopted pursuant to Article 218(9) TFEU which established a Union position within the International Organisation of Vine and Wine (the OIV).[88] The adopted decision was challenged on the grounds that, first,

[86] GOVAERE Inge, *Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case*, in INGE Govaere, LANNON Erwan, VAN ELSUWEGE Peter, ADAM Stanislas (eds), "The European Union in the World: Essays in Honour of Marc Maresceau", Leiden, Martinus Nijhoff Publishers (2014), pp. 225-243, p. 227.
[87] ECJ, Case C-399/12, *Germany v Council*, ECLI:EU:C:2014:2258 (OIV case).
[88] *OIV case*, para. 1.

Article 218(9) TFEU can only apply where the EU itself is a member of the international organisation concerned, and, second, a Union position may only be established in relation to the adoption of acts that are legally binding on the EU.[89]

On the first ground raised by Germany, the CJEU observed that nothing in the wording of Article 218(9) TFEU specifies that the EU must be a party to the agreement which set up the international organisation in order for the EU to adopt a position within that organisation.[90] The Court also pointed out that the field concerned in the *OIV case* fell into an area of EU competence that was highly regulated by the EU legislature.[91] Consequently, the CJEU, relying on Opinion 2/91 and the *IMO case*, held that the fact that the EU is not a member of an international organisation does not prevent a position from being adopted on its behalf through the Member States which are members.[92] However, one feature of this case, which separates it from Opinion 2/91 and the *IMO case*, is that not all of the Member States are members of the OIV.[93] The *OIV case* thus elevates the level of EU participation in international organisations by allowing the EU to exercise its competences in an organisation where only some of its Member States are members of that organisation.

On the second point, in relation to the nature of the act being adopted by the OIV, the CJEU held that the recommendations under consideration within the OIV (the OIV recommendations) were "*capable of decisively influencing the content of* [Union] *legislation*".[94] Consequently, the Court held that the OIV recommendations had legal effects for the purposes of Article 218(9) TFEU.[95] The EU exercising its external competence in international organisations of which it is not a member through the Member States derives from the principle of sincere cooperation, while the phrase "*decisively influencing*" echoes the wording of the *ERTA* doctrine which refers to EU rules being "*affected*". It thus seems that the CJEU drew on its existing jurisprudence to allow the EU to participate in international organisations of which it lacks membership through Article 218(9) TFEU. Furthermore, if "*decisively influencing*" EU legislation does have a similar meaning to "*affecting*" EU rules under the *ERTA* doctrine, this would mean that the threshold of satisfying the requirement of "*having legal effects*" under Article 218(9) TFEU would not be very high. This is because, as discussed above, EU rules are highly sensitive to being affected, or, decisively influenced.

[89] *OIV case*, respectively, paras. 29 and 36.
[90] *OIV case*, para. 49.
[91] *OIV case*, para. 51.
[92] *OIV case*, para. 52.
[93] GOVAERE, *The OIV Case*, p. 234.
[94] *OIV case*, para. 63.
[95] *OIV case*, para. 64.

## 2. Participation 'in' but not 'before' International Organisations

Another case which examines the scope of Article 218(9) TFEU is C-73/14, *Council v Commission* (the ITLOS case).[96] In this case, the Council alleged that the Commission had infringed its prerogatives under Article 218(9) TFEU by submitting, without the prior approval of the Council, a written statement to the International Tribunal for the Law of the Sea (ITLOS) in the context of an advisory opinion to be issued by ITLOS. The Council, along with nine Member States, argued that Article 218(9) TFEU covers any situation in which a body, of any kind, set up by an international agreement applies that agreement by an act having legal effects, whether binding or non-binding, in the EU.[97]

The CJEU began by noting that, as the competence being exercised was exclusive to the EU and that the EU was a party to the agreement which set up ITLOS, the EU was competent to take part in the advisory opinion proceedings.[98] On the basis of Article 335 TFEU, the Court also found that the Commission was able to represent the EU before ITLOS.[99] However, the main issue revolved around whether the Commission had, *inter alia*, disregarded the Council's powers under Article 218(9) TFEU by submitting the written statement to ITLOS without the prior approval of the Council.[100]

In relation to the scope of Article 218(9) TFEU, the Court observed that this provision concerns the positions to be adopted on the EU's behalf in the context of its participation, either through its institutions or its Member States, in the adoption of acts having legal effects within the international body concerned.[101] In these circumstances, however, the CJEU noted that the EU "*was invited to express, as a party, a position 'before' an international court, and not 'in' it*". The CJEU contrasted the *ITLOS case* with the *OIV case* to emphasise the distinction between participation "*before*" and participation "*in*" such a body. The Court noted that the *OIV case* concerned the position to be adopted on the EU's behalf in the context of its participation, through the Member States, in the adoption of recommendations within the body in question.[102] In contrast, the *ITLOS case* concerned the determination of a position to be expressed on behalf of the EU before an international judicial body requested to give an advisory opinion, where that body acts wholly independently of the parties.[103]

Consequently, the CJEU concluded that Article 218(9) TFEU was not applicable to the *ITLOS case*. In doing so, the Court provided further insight regarding the scope of the

[96] ECJ, Case C-73/14, *Council v Commission*, ECLI:EU:C:2015:663 (ITLOS case).
[97] *ITLOS case*, para. 42.
[98] *ITLOS case*, para. 55.
[99] *ITLOS case*, paras. 56-59.
[100] *ITLOS case*, paras. 60-61.
[101] *ITLOS case*, para. 63.
[102] *ITLOS case*, para. 66.
[103] Ibid.

provision. According to the CJEU, Article 218(9) TFEU is only applicable in situations where the EU participates within the body concerned, either through its institutions or its Member States, in the adoption of an act having legal effects. Conversely, if the EU is only able to make submissions to or before the body that adopts such an act, where that body is entirely independent of the parties making the submissions, then this situation falls outside the scope of Article 218(9) TFEU.

Although this interpretation actually limits the scope of Article 218(9) TFEU, it enabled the Commission to represent the EU before ITLOS without the participation of the Council and, as a result, the Member States. However, this also took place in the context of an EU exclusive competence being exercised where the EU is a party to UNCLOS. The situation may be different depending on whether the competence being exercised is shared with the Member States, the status of EU membership in the international organisation concerned and if EU rules are affected within the meaning of the *ERTA* doctrine.

## B. Extending the Reach of Article 218(9) TFEU through the *ERTA* doctrine and the Principle of Sincere Cooperation

### 1. Participation in International Organisations of which the EU is a Member and EU Rules are not 'Affected'

Despite the Court's ruling in the *OIV case*, it is incorrect to say that the EU can only adopt positions in international organisations under Article 218(9) TFEU where Union rules are likely to be affected or decisively influenced. The CJEU firmly rejected this argument in case C-600/14, *Germany v Council* (the COTIF case).[104] In this case, Germany sought the annulment of a Union position adopted pursuant to Article 218(9) TFEU within the Intergovernmental Organisation for International Carriage by Rail (OTIF). This time Germany argued, *inter alia*, that a Union position could not be adopted on the basis of Article 218(9) TFEU in an area that falls within the EU's shared competence unless there are existing EU rules which might be directly impacted by the decision of the international organisation in the sense of the *ERTA* doctrine.[105] In its argumentation, Germany relied on the fact that EU rules were affected in this manner in the *OIV case*, and noted that there were no EU rules in the field concerned in this situation.[106]

However, the CJEU circumvented Germany's argument by granting the EU the power, on the basis of the second part of Article 216(1) TFEU, to take external action in the absence

[104] ECJ, Case C-600/14, *Germany v Council*, ECLI:EU:C:2017:935 (COTIF case)
[105] *COTIF case*, paras. 31-35.
[106] *COTIF case*, paras. 34-35.

of internal rules to achieve a Treaty objective.[107] Furthermore, the Court explicitly rejected the comparison to the *OIV case*. The CJEU distinguished the two cases on the basis that the EU rules in the *OIV case* were considered only because the EU was not a member of that organisation.[108] As the EU had acceded to the Convention concerning International Carriage by Rail (COTIF) in this case, the CJEU held that the same issue did not arise.[109]

It thus appears from the *COTIF case* that so long as the EU is a member of an international organisation, it can participate in that organisation in areas of shared competence without the Member States even where EU rules are not affected. In such a situation, EU participation through Article 218(9) TFEU is not reliant on the *ERTA* doctrine. Conversely, where the EU is not a member of an international organisation, it may be the case, like in the *OIV case*, that there must be a risk that EU rules will be affected or decisively influenced before the EU can act. The CJEU explicitly distinguished the *COTIF case* from the *OIV case* on the basis that the EU was a party to COTIF. As such, it does not seem likely that the Court would extend its reasoning in the *COTIF case* to enable Union participation in international organisations where the EU lacks membership and EU rules are not affected. One case which might confirm this limitation of Union participation under Article 218(9) TFEU is *Antarctica MPA*.[110]

## 2. Participation in International Organisations of which the EU is not a Member and EU Rules are not 'Affected'

In *Antarctica MPA*, the Commission asked the CJEU to annul two Council decisions adopted on the basis of Article 218(9) TFEU concerning the submission of positions on behalf of the EU and its Member States to the Commission for the Conservation of Antarctic Marine Living Resources (the CCAMLR).[111] The Commission argued that the positions should have been submitted on behalf of the EU alone either because they fell within an exclusive competence or because the EU had gained an exclusive competence through the *ERTA* doctrine.[112] However, the CJEU concluded that the area concerned fell within the shared competence of environmental protection,[113] and that EU rules in this area were

[107] *COTIF case*, paras. 48-52. For more on the use of Article 216(1) TFEU within the context of the *COTIF case*, see, for example, NEFRAMI Eleftheria, *A. Court of Justice Article 216(1) TFEU and the Union's shared external competence in the light of mixity: Germany v. Council (COTIF)*, 56(2) CMLRev (2019), pp. 489-520; and LENK Hannes and GÁSPÁR-SZILÁGYI Szilárd, *Case C-600/14, Germany v Council (OTIF). More Clarity over Facultative 'Mixity'?*, European Law Blog (2017), available at https://europeanlawblog.eu/2017/12/11/case-c-60014-germany-v-council-otif-more-clarity-over-facultative-mixity/ (consulted 5 September 2021).

[108] *COTIF case*, para. 69.

[109] Ibid.

[110] ECJ, Joined Cases C-626/15 and C-659/16, *Commission v Council*, ECLI:EU:C:2018:925 (Antarctic MPA).

[111] *Antarctic MPA*, para. 1.

[112] *Antarctic MPA*, respectively, paras. 69 and 104.

[113] *Antarctic MPA*, para. 100.

not at risk of being affected.[114] While the Court confirmed in *Antarctica MPA* that the *COTIF case* remains good law, it held that the EU's choice between undertaking EU-only action or mixed action, i.e. with the Member States,[115] in an area of shared competence must be exercised in accordance of international law.[116]

In the *COTIF case*, the EU adopted a position in an international organisation under Article 218(9) TFEU in circumstances where EU rules were not affected. Although the CJEU also found in *Antarctica MPA* that EU rules were not affected, it concluded that the exercise by the EU of the external competence at issue without the Member States would be incompatible with international law.[117] One key distinction between the two cases was that while the EU had acceded to COTIF, it did not have a fully autonomous status within the CCAMLR when compared to the Member States.[118] This constituted an essential consideration in the specific context of the organised and coherent system formed by the international agreements applicable to the Antarctic, in particular with regard to the Antarctic Treaty.[119]

The CJEU observed that, as a party to the Canberra Convention, the EU is required to acknowledge the special obligations and responsibilities of the Antarctic Treaty consultative parties, including its Member States which have that status.[120] In these circumstances, the CJEU found that to permit the EU to act in an area of shared competence without the participation of its Member States, when some of them have the status of Antarctic Treaty consultative parties, could weaken the coherence of the system of Antarctic agreements and run contrary to the Canberra Convention.[121]

At the very least, it can be concluded from *Antarctica MPA* that the EU cannot participate through Article 218(9) TFEU in an international organisation of which the EU lacks full membership in an area of shared competence without the Member States where EU rules are not affected, if such participation would be incompatible with international law. The question of whether the Union can participate without the Member States in an international organisation of which the EU is not a member in an area of shared competence where no EU rules are affected was not answered by the CJEU. However, an assessment of the approach taken by the Court in the *OIV case*, the *COTIF case* and *Antarctica MPA*

[114] *Antarctic MPA*, paras.116-124.
[115] For a full discussion on "*mixity*", see ROSAS Allan, *Mixity Past, Present and Future: Some Observations*, in CHAMON Merijn and GOVAERE Inge (eds), "EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity", Leiden/Boston, Brill Nijhoff, (2020), pp. 8-18.
[116] KÜBEK Gesa and VAN DAMME Isabelle, *Facultative Mixity and the European Union's Trade and Investment Agreements*, in CHAMON Merijn, "The Law and Practice of Facultative Mixity", pp. 137-168, p. 156.
[117] *Antarctic MPA*, para. 128.
[118] *Antarctic MPA*, para. 130.
[119] *Antarctic MPA*, para. 131.
[120] *Antarctic MPA*, para. 132.
[121] *Antarctic MPA*, para. 133.

would support the conclusion that the EU would not be able to participate in such a situation.

Nonetheless, it should be noted that the principle of sincere cooperation was not considered in *Antarctica MPA*. It is recalled from the *PFOS case* that this principle imposes an obligation on the Member States to abstain from acting in an international organisation in an area of shared competence where its actions are "*likely to compromise the principle of unity in the international representation of the Union*". Although the EU was also a member of the international organisation in the *PFOS case*, it is possible that Union participation could be enabled under the principle of sincere cooperation in circumstances similar to *Antarctica MPA*.

To this effect, in *Antarctica MPA*, the CJEU concluded that Union participation without the Member States could weaken the coherence of the system of Antarctic agreements. If the opposite scenario had emerged whereby it was found that the participation of the Member States could weaken the coherence and effectiveness of the EU's external action, it is reasonable to speculate that the Member States may have a duty to abstain from acting by reason of the principle of unity in the international representation of the Union. In this context, Union participation without the Member States could be enabled in an international organisation of which it is not a member, in an area of shared competence, without EU rules being affected. However, this situation has yet to come before the Court and it remains to be seen whether the EU could participate in international organisations in such circumstances.

Article 218(9) TFEU, in combination with the *ERTA* doctrine and the principle of sincere cooperation, provides the EU with a far-reaching tool to participate in international organisations at the expense of the Member States. However, another aspect of Article 218(9) TFEU which restricts Member State participation in international organisations is the procedure which must be followed when establishing the Union position pursuant to this provision.

## IV. The Procedural Requirements of Article 218(9) TFEU

In addition to its wide scope, Article 218(9) TFEU has strict procedural requirements under which the Council must adopt a decision by, in principle, qualified majority to establish the Union position. However, the Council, as well as some Member States, have attempted to navigate the procedural requirements of Article 218(9) TFEU to establish the Union position by unanimity. While its attempts have thus far failed, it is possible that the Council could act unanimously under the principle of sincere cooperation to establish the Union position through the practice of the "*common accord*" of the Member States.

## A. The Procedure to be Followed when Establishing a Union Position under Article 218(9) TFEU

### 1. Linking the Applicable Voting Rule to the Substantive Legal Basis of the Decision Establishing the Union Position

It may be questioned whether a decision establishing a Union position on the basis of Article 218(9) must also indicate a substantive legal basis which corresponds to the area of the adopted position. In case C-370/07, *Commission v Council* (the CITES case),[122] the CJEU considered the modalities to be complied with for the lawful adoption of a Council decision establishing a Union position within an international organisation pursuant to what is now Article 218(9) TFEU.[123] In the *CITES case*, the Council adopted such a decision without indicating the substantive legal basis of the decision and it was not possible to infer the substantive legal basis from the decision itself.[124] Due to the absence of a legal basis underlying it, the Court annulled the decision.[125] In so doing, the CJEU seemingly imposed a strict obligation to indicate the substantive legal basis of a decision establishing a Union position in an international organisation.[126]

The substantive legal basis of such a decision is important because it determines the procedure, namely the applicable voting rule, to be followed in the Council.[127] The issue of the applicable voting rule under Article 218(9) TFEU first arose in case C-81/13, *United Kingdom v Council*,[128] which concerned the decision adopted under Article 218(9) TFEU establishing the Union position to be taken within the Association Council established by the EU-Turkey Association Agreement.[129] At issue in this case was the substantive legal basis and voting rule used to adopt the decision in question. The UK contested the Council's use of Article 48 TFEU and instead argued in favour of using Article 79(2)(b) TFEU as the substantive legal basis.[130] The UK further submitted that is was not possible to rely on Article 217 TFEU, the legal basis used to conclude association agreements, as a basis to adopt the contested decision.[131] The UK stated that Article 217 TFEU can only be used to conclude the measures constituting an association agreement, while decisions adopted under the association agreement must be based on the legal bases appropriate to their subject matter.[132]

[122] ECJ, Case C-370/07, *Commission v Council*, ECLI:EU:C:2009:590 (CITES case).
[123] GOVAERE, *The OIV Case*, p. 232.
[124] *CITES case*, paras. 58-60.
[125] *CITES case*, para. 62.
[126] GOVAERE, *The OIV Case*, p. 232.
[127] *CITES case*, para. 48.
[128] ECJ, Case C-81/13, *United Kingdom v Council*, ECLI:EU:C:2014:2449.
[129] *United Kingdom v Council*, para. 1.
[130] *United Kingdom v Council*, para. 19.
[131] *United Kingdom v Council*, para. 26.
[132] Ibid.

In relation to the applicable voting rule under Article 218(9) TFEU, the UK asserted that the default rule of qualified majority provided for by Article 16(3) TEU should not apply and, instead, the voting rule under Article 218(8) TFEU should be used.[133] Article 218(8) TFEU provides that:

> "The Council shall act by a qualified majority throughout the procedure.
>
> However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements."

The procedure in Article 218(8) TFEU thus provides for a general rule of qualified majority, except for the four situations found in the second subparagraph of that provision, which includes association agreements, where the Council must act unanimously. For its part, the Council, supported by the Commission, maintained that Article 48 TFEU was the appropriate substantive legal basis.[134] Similar to the UK, the Council also put forward the view that Article 217 TFEU could not be used as the legal basis for the contested decision but also asserted that, if it were the correct legal basis, the voting rule would be unanimity.[135] While the Commission also shared the view that Article 217 TFEU was not the appropriate legal basis, it submitted that the voting rule would be, in accordance with Article 218(9) TFEU, qualified majority.[136]

### 2. The Applicable Voting Rule under Article 218(9) TFEU

Concerning the legal basis in *United Kingdom v Council*, the CJEU dismissed the possibility of using Article 79(2)(b) TFEU as the correct legal basis,[137] but concluded that the contested decision should have been based on both Article 48 TFEU and Article 217 TFEU.[138] The contested decision was thus incorrect only insofar as it omitted Article 217 TFEU as a legal basis.[139] However, despite association agreements being one of the situations requiring unanimity in Article 218(8) TFEU, it was found that the addition of Article 217 TFEU as a legal basis had no effect on the procedure by which that decision was adopted.[140] In her analysis, Advocate General Kokott found that, according to the use and purpose of Article 217 TFEU, as well as the general scheme of Article 218 TFEU, the unanimity requirement

[133] *United Kingdom v Council*, para. 27.
[134] *United Kingdom v Council*, para. 29.
[135] *United Kingdom v Council*, para. 32.
[136] *United Kingdom v Council*, para. 33.
[137] *United Kingdom v Council*, para. 46.
[138] *United Kingdom v Council*, para. 63.
[139] *United Kingdom v Council*, para. 64.
[140] *United Kingdom v Council*, para. 65.

under Article 218(8) TFEU concerning association agreements applies only to the initial conclusion of an association agreement or structural amendments to such an agreement.[141]

Following the Advocate General on this point, the CJEU also noted that the contested decision did not relate to the conclusion of an association agreement, or to supplementing or amending its institutional framework, but was solely aimed at implementing the agreement.[142] Consequently, the Court held that, in accordance with the combined measures of the first paragraph of Article 218(8) TFEU and Article 218(9) TFEU, the applicable voting rule was qualified majority.[143] The link between adopting a decision under Article 218(9) TFEU and the voting rule found in Article 218(8) TFEU was reaffirmed in case C-687/15, *Commission v Council* (the WRC-15 case).[144] In the context of establishing a Union position under Article 218(9) TFEU, the CJEU stated in the *WRC-15 case* that when:

> "... [an] act does not correspond to any of the situations mentioned in the second subparagraph of Article 218(8) TFEU, the Council must, in principle, in accordance with the provisions, read together, of the first subparagraph of Article 218(8) and Article 218(9) TFEU, act by qualified majority when adopting that act ... ."[145]

In *United Kingdom v Council*, the CJEU thus accomplished two things. First, the Court linked the voting rule under Article 218(9) TFEU to the procedure outlined in Article 218(8) TFEU, which provides for a general rule of qualified majority subject to four situations, including association agreements, in which the Council must act unanimously. Second, the Court gave a narrow scope to the unanimity requirement regarding association agreements, as unanimity is required only for the conclusion of or structural amendments to such agreements, but not to decisions which implement those agreements. Nonetheless, it should be noted that Article 218(9) TFEU does not apply to the conclusion of international agreements and the wording of the provision explicitly excludes from its scope acts supplementing or amending the institutional framework of such agreements.[146] As a result, it seems that Article 218(9) TFEU can only ever be used in relation to decisions implementing international agreements. As these decisions require a vote by qualified majority, the Court's interpretation thus likely excludes the unanimity requirement for association agreements ever arising.

Moreover, this line of reasoning is potentially applicable to the third and fourth situations listed in the second subparagraph of Article 218(8) TFEU which require unanimity, i.e. respectively, Article 212 TFEU agreements with accession countries and the EU's accession to the European Convention on Human Rights. Unlike the unanimity requirement relating to association agreements, these situations have never arisen in the context of a dispute

[141] Opinion of Advocate General Kokott, C-81/13, *United Kingdom v Council*, ECLI:EU:C:2014:2114, para. 97.
[142] *United Kingdom v Council*, para. 66.
[143] Ibid.
[144] ECJ, Case C-687/15, *Commission v Council*, ECLI:EU:C:2017:803 (WRC-15 case).
[145] *WRC-15 case*, para. 51.
[146] Opinion of Advocate General Kokott, *United Kingdom v Council*, para. 97.

regarding the voting rule of a decision to be adopted under Article 218(9) TFEU. However, the third and fourth situations are similar to the second situation regarding association agreements insofar as each one relates to a specific category of international agreement. In light of this, it is quite possible that the CJEU's interpretation of the second situation, namely that the unanimity requirement concerns only the conclusion of or structural amendments to such agreements, would also apply in the context of the third and fourth situations. This would mean that it is unlikely that any of these three situations would require unanimity in the Council in relation to the adoption of a decision under Article 218(9) TFEU.

### 3. A Strict Requirement to Establish the Union Position by Adopting a Council Decision

In the *WRC-15 case*, the CJEU also considered the question of whether the Council could deviate from the procedural requirements of Article 218(9) TFEU. In this case, the Commission brought an action against the Council which acted unanimously, without indicating a legal basis, to adopt conclusions regarding the World Radiocommunication Conference 2015 (WRC-15).[147] The CJEU noted that, by adopting conclusions and not a decision, the Council chose a form of act other than that laid down by Article 218(9) TFEU.[148] While the Council argued that the conclusions adopted amounted, in substance, to a decision adopted under Article 218(9) TFEU, the Court found that this deviation created uncertainty regarding the legal nature and scope of the contested act.[149]

In this context, the CJEU noted that France and the Czech Republic characterised the act as a common position of the EU and the Member States whereas Germany regarded it as a coordinated position of the Member States in the form of conclusions.[150] Additionally, while the Council submitted that the adopted act was binding, the Czech Republic considered only certain aspects of the act legally binding and Germany considered that the act in its entirety constituted non-binding conclusions.[151] In relation to the legal basis, the CJEU observed that it is necessary to indicate the legal basis to determine the voting procedure within the Council.[152] As the contested act did not fall within any of the situations listed in the second subparagraph of Article 218(8) TFEU, this meant that the Council had to, in principle, act by qualified majority when adopting that act.[153]

[147] *WRC-15 case*, paras. 25-26.
[148] *WRC-15 case*, para. 38.
[149] *WRC-15 case*, para. 45.
[150] Ibid.
[151] Ibid.
[152] *WRC-15 case*, para. 51.
[153] Ibid.

The Court thus concluded that the Council should have indicated both the substantive and procedural legal basis on which that act was adopted.[154] Consequently, the CJEU held that the derogation from the legal form laid down by Article 218(9) TFEU and the failure to indicate the legal basis caused confusion regarding the legal nature and scope of the contested act, as well as the procedure to be followed for its adoption, to the extent that the EU's ability to defend its position at the WRC-15 was weakened.[155]

The Council cannot therefore deviate from the form and procedure required by Article 218(9) TFEU. In line with the *WRC-15 case*, the form of the act must be in the form of a decision which is binding in nature and the procedure to be followed is the voting rule in accordance with Article 218(8) TFEU which, in principle, requires a qualified majority. The second subparagraph of Article 218(8) TFEU does provide for four situations which require the Council to act unanimously. However, as discussed above, the latter three situations may fall outside the scope of Article 218(9) TFEU. Therefore, the only situation in which the Council is required to act unanimously when adopting a decision under Article 218(9) TFEU is the first situation listed in the second subparagraph of Article 218(8) TFEU which arises "*when the agreement concerned covers a field for which unanimity is required for the adoption of a Union act*".

This situation has only been examined in the context of establishing a Union position pursuant to Article 218(9) TFEU in bodies set up by bilateral agreements concluded by the EU with third countries. However, in its case law, the CJEU provided further insight on the connection between Article 218(9) TFEU and Article 218(8) TFEU, and explained generally how the first situation in the second subparagraph of Article 218(8) TFEU applies to require the Council to act unanimously.

## B. The Council's Attempts to Act Unanimously under the First Situation requiring Unanimity in Article 218(8) TFEU

### 1. Reinforcing the Link between the Adoption of a Decision under Article 218(9) TFEU and the Voting Procedure in Article 218(8) TFEU

The first situation requiring unanimity in the second subparagraph of Article 218(8) TFEU was considered by the CJEU in case C-244/17, *Commission v Council* (the Kazakhstan Agreement case).[156] In this case, the Commission sought the annulment of a decision adopted by the Council pursuant to Article 218(9) TFEU establishing the Union position within the Cooperation Council established by the EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (EPCA). The dispute revolved around the fact that the Council adopted

[154] *WRC-15 case*, para. 54.
[155] *WRC-15 case*, para. 58.
[156] ECJ, Case C-244/17, *Commission v Council*, ECLI:EU:C:2018:662 (Kazakhstan Agreement case).

the contested decision unanimously on the legal basis of Article 31(1) TEU of the Common Foreign and Security Policy (the CFSP), which is a field that requires the Council to act unanimously.

In its argumentation, the Commission submitted that the Council should always act by qualified majority when adopting a decision under Article 218(9) TFEU, even where its substantive legal basis corresponds to a field which requires unanimity.[157] The Commission attempted to rely on the Court's judgment in *United Kingdom v Council* to argue that any decision under Article 218(9) TFEU must be adopted by qualified majority so long as the act being adopted by the body in question does not supplement or amend the institutional framework of that agreement.[158] However, the CJEU affirmed that, as Article 218(9) TFEU does not lay down any voting rule, the applicable voting rule must be determined in each individual case by reference to Article 218(8) TFEU, which provides for qualified majority except for the four situations which require the Council to act unanimously.[159]

The Court observed that the determination of the voting rule under Article 218(9) TFEU by reference to Article 218(8) TFEU ensures that the single procedure envisaged in Article 218(9) TFEU takes account of the specific features of each field of EU activity.[160] The Court emphasised that this was especially so regarding the first situation requiring unanimity in the second subparagraph of Article 218 TFEU. This is because this situation arises where the international agreement in question covers a field for which unanimity is required for the adoption of an EU act and thus establishes a connection between the substantive legal basis of a decision adopted under that article and the voting rule applicable to the decision's adoption.[161] Furthermore, the CJEU noted that the connection between Article 218(9) TFEU and Article 218(8) TFEU complies with the institutional balance established by the Treaties as it preserves the symmetry between the procedures relating to the EU's internal activity and the procedures relating to its external activity.[162]

The Court also distinguished the situations in the *Kazakhstan Agreement case* and *United Kingdom v Council* by observing that the latter case involved the second situation in the second subparagraph of Article 218(8) TFEU which concerns a specific category of international agreement, namely association agreements.[163] In contrast, in the *Kazakhstan Agreement case*, the CJEU found that "[t]*he first case in which unanimity is required … is of an entirely different nature, since it relates to the field which the act adopted covers, and therefore to the act's content.*" To this effect, the Court held that, to determine whether the decision adopted under Article 218(9) TFEU

[157] *Kazakhstan Agreement case*, paras. 10 and 31.
[158] Ibid.
[159] *Kazakhstan Agreement case*, para. 27.
[160] *Kazakhstan Agreement case*, para. 28.
[161] *Kazakhstan Agreement case*, para. 29.
[162] *Kazakhstan Agreement case*, para. 30.
[163] *Kazakhstan Agreement case*, para. 33.

covers a field, such as the CFSP, which requires unanimity, it is necessary to refer to its substantive legal basis.[164]

In its examination of the correct voting rule, the CJEU emphasised the need for a decision adopted under Article 218(9) TFEU to take into account the specific features of each field of EU activity. Additionally, the Court had regard to complying with the institutional balance established by the Treaties. Both these aims are achieved by determining the applicable voting rule by reference to Article 218(8) TFEU. Specifically, regarding the first situation requiring unanimity in the second subparagraph of that provision, it is necessary to identify whether the substantive legal basis of the decision concerned corresponds to a field of activity requiring qualified majority or unanimity.[165]

### 2. A Failure to Act Unanimously in the Field of CFSP

The first situation in the second subparagraph of Article 218(8) TFEU therefore allows the Council to act unanimously to adopt a decision under Article 218(9) TFEU when that decision concerns a field for which unanimity is required. The CJEU has examined the application of this situation in the context of Article 218(9) TFEU in two cases, namely the *Kazakhstan Agreement case* and case C-180/20, *Commission v Council* (the Armenia Agreement case).[166] As noted above, these circumstances did not concern the participation of the EU in international organisations but rather the adoption of Union positions in bodies set up by bilateral agreements concluded by the EU with third countries. In both cases, the CJEU had to determine if the Council was justified in adding a CFSP legal basis, which requires unanimity, to the contested decisions establishing the Union positions, or if the decisions should have been adopted by qualified majority on the bases of the Common Commercial Policy (the CCP) and the Development Cooperation Policy (the DCP).

In the *Kazakhstan Agreement case*, the Court found that the contested decision adopted under Article 218(9) TFEU concerned the functioning of the bodies established by EPCA and, consequently, the field within which that decision falls must be determined in light of the agreement as a whole.[167] However, the CJEU noted that the CFSP component of EPCA was only incidental to the main CCP and DCP components of the agreement.[168] Due to the wide scope attributed to the CCP and DCP, these policies can incorporate other fields

[164] *Kazakhstan Agreement case*, para. 35.
[165] For an examination of the choice of legal basis, see, for example ENGEL, *The Choice of Legal Basis for Acts of the European Union*; and ECKES, *EU Powers Under External Pressure*, 113-147 pp.
[166] ECJ, Case C-180/20, *Commission v Council*, ECLI:EU:C:2021:658 (Armenia Agreement case).
[167] *Kazakhstan Agreement case*, para. 40.
[168] *Kazakhstan Agreement case*, para. 46.

of EU activity, including the CFSP, for the purposes of concluding an international agreement.[169] Consequently, the Court held that the Council was wrong to have added a CFSP legal basis and it should not have acted unanimously to adopt the decision.[170]

The *Armenia Agreement case* concerned a nearly identical dispute in the context of the Union position to be established in the Partnership Council set up by the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA). However, instead of adopting one decision to establish the Union position, this time the Council split the Union position into two separate decisions. In this regard, the first decision was adopted by qualified majority on the legal bases of, *inter alia*, the CCP and DCP and covered all but the CFSP Title of CEPA, while the second decision was adopted unanimously on a CFSP legal basis and concerned only the CFSP Title of the agreement.[171]

In relation to the splitting of the Union position into two separate decisions, the CJEU observed that, even though they covered different titles of CEPA, the field that they cover and hence the substantive legal basis must be assessed with regard to the agreement as a whole.[172] The Court also noted that the two decisions concerned, like the decision in the *Kazakhstan Agreement case*, the single Union position to be adopted on the functioning of the bodies established by CEPA.[173] Consequently, the CJEU held that the adoption of two separate decisions based on separate legal bases, which seek to establish a single Union position, can only be justified if that agreement contains distinct components corresponding to the different legal bases used to adopt those decisions.[174] Notwithstanding the two separate decisions, the Court, in effect, considered the form of the act establishing the position to be irrelevant, and instead examined the two decisions establishing the Union position as comprising a single act.

As in the *Kazakhstan Agreement case*, the CJEU concluded that CEPA principally concerns the CCP and DCP.[175] The Court found that the CCP and DCP components of CEPA encompass the CFSP component, with the result that it must be regarded as incidental to the main components.[176] The Court thus held that the Council was once again wrong to include the CFSP as a substantive legal basis under the decisions establishing the Union

[169] For a discussion on the wide scope of the CCP post-Lisbon, see: CREMONA Marise, *Defining the Scope of the Common Commercial Policy*, in HAHN Michael J, "Law and Practice of the Common Commercial Policy", pp. 48-70; ROSAS, *Mixity and the Common Commercial Policy*, pp. 28-38; and ECKES, *EU Powers Under External Pressure*, 127-130 pp. For a discussion on the wide scope of the DCP, see: BROBERG Morten and HOLDGAARD Rass, *Demarcating the Union's Development Cooperation Policy after Lisbon: Commission V. Council (Philippines PCFA)*, 52(2) CMLRev (2015), pp. 547-567; and BROBERG Morten and HOLDGAARD Rass, *EU External Action in the Field of Development Cooperation Policy –The Impact of the Lisbon Treaty*, SIEPS Report, No. 06/2014 available at https://www.sieps.se/en/publications/2014/eu-external-action-in-the-field-of-development-cooperation-policy-20146/sieps2014_6? (consulted 25 September 2021).

[170] *Kazakhstan Agreement case*, para. 47.

[171] *Armenia Agreement case*, para. 7.

[172] *Armenia Agreement case*, para. 38.

[173] *Armenia Agreement case*, paras. 39-40.

[174] *Armenia Agreement case*, para. 40.

[175] *Armenia Agreement case*, para. 47.

[176] *Armenia Agreement case*, para. 53.

position.[177] The *Armenia Agreement case* confirms that, concerning the adoption of a decision under Article 218(9) TFEU, it is necessary to examine whether the contested decision or decisions cover a field which requires unanimity, such as the CFSP, or whether they fall within a field which requires a qualified majority, such as the CCP and DCP. Additionally, the *Armenia Agreement case* demonstrates that it is the Union position itself that will be examined by the CJEU in identifying the correct legal basis. This means that any procedural manoeuvres employed by the Council, such as splitting the Union position into two decisions, will be ineffective to establish the position unanimously through the inclusion of a CFSP legal basis, or any other legal basis corresponding to a field requiring unanimity.

While the first situation in the second subparagraph of Article 218(8) TFEU does allow the Council to adopt a decision under Article 218(9) TFEU by unanimity, the Council's attempts to act unanimously on this basis have so far been ineffective. Although this situation has only been assessed in the context of Union participation in bodies set up by bilateral agreements concluded by the EU with third countries, there is no reason why the Court's reasoning would be different with respect to Union participation in international organisations. Therefore, the CFSP component of a decision adopted under Article 218(9) TFEU establishing a Union position in an international organisation would also be able to be incorporated by legal bases such as the CCP and DCP. In this way, at least concerning the field of CFSP, the ability of the Council to act unanimously under the first situation in the second subparagraph of Article 218(8) TFEU may be limited. However, the Council could potentially establish the Union position by unanimity under the principle of sincere cooperation through the practice of the "*common accord*" of the Member States.

## C. Achieving Unanimity in the Council in the Adoption of a Decision under Article 218(9) TFEU through the Principle of Sincere Cooperation

The principle of sincere cooperation interacts with Article 218(9) TFEU in two different ways. The first is a direct link established between the two by the CJEU in C-620/16, *Commission v Germany* (the COTIF II case),[178] which obliges the Member States to comply with a decision adopted under Article 218(9) TFEU. The second is the potential application of the Council waiting for the "*common accord*" of the Member States, as allowed by the principle of sincere cooperation in Opinion 1/19,[179] in the context of adopting a decision under Article 218(9) TFEU.

[177] *Armenia Agreement case*, para. 56.
[178] ECJ, Case C-620/16, *Commission v Germany*, ECLI:EU:C:2019:256 (COTIF II case).
[179] ECJ, Opinion 1/19, *Istanbul Convention*.

## 1. A Duty to Defend Union Positions under the Principle of Sincere Cooperation

The dispute in the *COTIF II case* concerned the fact that Germany had voted against and publicly opposed the Union position adopted pursuant to Article 218(9) TFEU that was at issue in the *COTIF case*. The Commission argued that Germany had breached the principle of sincere cooperation by its actions.[180] The CJEU found that an infringement of a Council decision adopted under Article 218(9) TFEU "*manifests its effects at international level on the unity and consistency of the external action of the European Union*".[181] In this context, the CJEU recalled that, particularly in an area of shared competence, the requirement of unity in the international representation of the European Union entails close cooperation between the Member States and the EU.[182] Consequently, the Court held that "*compliance on the part of the Member States with a decision adopted by the Council under Article 218(9) TFEU is a specific expression of the requirement of unity in representation of the European Union, arising from the obligation of sincere cooperation*".[183]

This connection between Article 218(9) TFEU and the principle of sincere cooperation puts the finishing touch on the procedural requirements of Article 218(9) TFEU. The Council is not permitted to deviate from the form and procedure under Article 218(9) TFEU, which requires the adoption of a decision by, in principle, qualified majority in accordance with Article 218(8) TFEU. Once a decision has been adopted in line with these requirements, the requirement of unity in the international representation of the Union under the principle of sincere cooperation imposes an obligation on the Member States to fully comply with and support the Union position established. Arguably, such an obligation is unnecessary as Article 288 TFEU provides that a decision, such as one adopted pursuant to Article 218(9) TFEU, is binding in its entirety and requires the Member States to defend the established position in any case.[184]

However, the external dimension of Article 218(9) TFEU means that the requirement of unity under the principle of sincere cooperation applies to restrict the Member States and ensure the coherence and consistency of the EU's external action. This is also evident from the *WRC-15 case* even if the principle of sincere cooperation did not arise in that case. In the *WRC-15 case*, the CJEU held that the Council was not permitted to deviate from the procedural requirements of Article 218(9) TFEU as this caused uncertainty and confusion regarding the legal nature and scope of the decision at issue, with the result that the ability of the EU to defend its position was weakened.[185] This was a particular risk in the *WRC-15*

[180] *COTIF II case*, para. 1.
[181] *COTIF II case*, para. 45.
[182] *COTIF II case*, para. 93.
[183] *COTIF II case*, para. 94.
[184] *COTIF II case*, paras. 78-82.
[185] *WRC-15 case*, para. 58.

*case* as the Council and several Member States disagreed regarding the binding nature of the Union position established in the WRC-15.

If the above situation in the *WRC-15 case* were permitted, this could hinder the unity of the EU's external action as it would allow the Member States to ignore or even go against the Union position established by the Council. In this way, Article 218(9) TFEU promotes the coherence and consistency of the EU's external action because the procedural requirements of that provision overruled the practice of the Council to adopt conclusions,[186] which, in turn, would have allowed for such a situation. This conclusion is also reinforced by the *COTIF II case* where the binding nature of Union positions was confirmed. The coherence and consistency of the EU's external action in that case were achieved through the requirement of unity under the principle of sincere cooperation which imposed an obligation on the Member States to defend the Union position established under Article 218(9) TFEU. Although the principle of sincere cooperation imposes such an obligation on the Member States, it may also provide an avenue for the Council to act unanimously when adopting a decision under Article 218(9) TFEU.

### 2. Waiting for the 'Common Accord' of the Member States

In Opinion 1/19, the CJEU examined whether the Treaties allow the Council to wait, before concluding a mixed agreement, for the "*common accord*", i.e. the unanimous agreement, of the Member States. In this case, the Court noted that the Council was to adopt the decision concluding the international agreement by qualified majority as it did not correspond to any of the situations in the second subparagraph of Article 218(8) TFEU requiring unanimity.[187]

The CJEU acknowledged that, concerning a mixed agreement, it is essential to ensure close cooperation between the EU and the Member States.[188] However, the Court stated that this does not entitle the Council to deviate from the procedural rules and voting arrangements laid down in Article 218(8) TFEU.[189] Consequently, the practice of the "*common accord*" which makes the initiation of the conclusion procedure laid down in Article 218 TFEU contingent upon the unanimous agreement of the Member States, where that procedure envisages the adoption of a Council decision by qualified majority, is incompatible with Article 218(8) TFEU.[190]

[186] *WRC-15 case*, para. 42.
[187] Opinion 1/19, para. 239.
[188] Opinion 1/19, para. 241.
[189] Opinion 1/19, para. 242.
[190] Opinion 1/19, paras. 245-249.

Nonetheless, the CJEU also observed that the conclusion of an international agreement depends on whether the Council is able to obtain the necessary majority,[191] and that the Treaties do not lay down any period of time within which the Council is required to act.[192] Accordingly, both the decision to act on the proposal to conclude the international agreement concerned and when to adopt such a decision falls within the political discretion of the Council.[193] The CJEU thus concluded that the Council is permitted to extend its discussions to wait for the "*common accord*" of the Member States to achieve, "*in the case of mixed agreements, closer cooperation between the Member States and the EU institutions*".[194]

The practice of the "*common accord*" therefore allows the Council to act unanimously to conclude a mixed agreement, even where Article 218(8) TFEU provides for the Council to act by qualified majority, to achieve closer cooperation between the EU and the Member States. As recalled above, the aim of ensuring such close cooperation derives from the principle of sincere cooperation. Although this practice applied in the context of concluding a mixed agreement, there is no reason why it could not equally apply to the adoption of a decision under Article 218(9) TFEU, thereby allowing the Council to act unanimously when establishing Union positions in international organisations.

An examination of the CJEU's reasoning in Opinion 1/19 further supports the application of the practice of the "*common accord*" in the context of Article 218(9) TFEU. The Court observed that ensuring close cooperation between the Member States and the EU, when concluding a mixed agreement, allows account to be taken of the institutional and political considerations liable to affect the perceived legitimacy and effectiveness of the EU's external action.[195] This reasoning would favour the extension of this practice to the establishing of Union positions given the role of Article 218(9) TFEU, as discussed above, in ensuring the coherence and consistency of the EU's external action.

Due to the application of this practice to the conclusion of mixed agreements, its most likely application concerning Article 218(9) TFEU is in a situation where the Member States and the EU are undertaking mixed action in an international organisation. Additionally, there may be an even stronger case for the application of this practice in circumstances where the EU lacks membership of the international organisation concerned and must exercise its competences through the Member States. To this effect, it is recalled that the CJEU has emphasised that "*cooperation between the* [Union] *and the Member States is all the more necessary*" in such a situation.[196]

[191] Opinion 1/19, para. 250.
[192] Opinion 1/19, para. 251.
[193] Opinion 1/19, para. 252.
[194] Opinion 1/19, para. 253.
[195] Opinion 1/19, para. 254.
[196] Opinion 2/91, para. 37.

However, there are also limits regarding this practice in the context of establishing a Union position. The first is an internal qualification given by the CJEU. In Opinion 1/19, the Court noted that as the Council must act by qualified majority, in accordance with Article 218(8) TFEU, a sufficient majority in the Council may at any time require the closure of discussions and the adoption of the decision at issue.[197] The second is an external limitation whereby the Council must also adhere to the procedures governing the international organisation concerned. In this regard, extending discussions within the Council to reach a "*common accord*" among the Member States may not be feasible where the Union position must be established within the deadlines set by the international organisation in question. Much like the application of the practice of the "*common accord*" to the conclusion of mixed agreements, its application in the context of establishing Union positions under Article 218(9) TFEU would be on a case-by-case basis having regard to all the relevant factors.[198]

## Conclusions

There is no question that Member State participation in international organisations has been restricted in favour of the Union through the *ERTA* doctrine, the principle of sincere cooperation and the procedural legal basis of Article 218(9) TFEU. The ability of the Member States to act has been eroded by how they operate individually, and how they interact with one another. While the combined effect of these features of EU law is far-reaching, it is not limitless. It seems that, for now at least, the Member States will not be excluded from situations concerning the exercise of a shared competence in an international organisation where the EU lacks full membership in that organisation and EU rules are not at risk of being affected.

Notwithstanding this final frontier, Member States are obliged, to a large extent, to participate in international organisations through the establishing of Union positions within the Council pursuant to Article 218(9) TFEU. In this regard, the Council must adopt a decision by, in principle, qualified majority to establish the Union position, except where the decision corresponds to one of the four situations found in the second subparagraph of Article 218(8) TFEU, in which case the Council must act unanimously. The Council must comply with these procedural requirements and the principle of sincere cooperation imposes an obligation on the Member States to defend the Union position once it is established.

Although there are four exceptions in the second subparagraph of Article 218(8) TFEU which require the Council to act unanimously, three of these situations concern a specific category of international agreement which may be inapplicable in the context of Arti-

[197] Opinion 1/19, para. 255.
[198] Ibid.

cle 218(9) TFEU. This is because the CJEU has stated that the requirement to act unanimously in these situations concerns only the initial conclusion of or structural amendments to such agreements, both of which fall outside the scope of Article 218(9) TFEU. As such, it may be the case that only the first situation in the second subparagraph of Article 218(8) TFEU requires the Council to act unanimously when establishing a Union position under Article 218(9) TFEU. The first situation can be distinguished from the others as it concerns the field which the adopted decision covers and does not relate to a specific category of international agreement. However, it can be seen from the Court's examination of this situation that, at least concerning the field of CFSP which requires unanimity, the ability of the Council to act unanimously under it may be somewhat limited.

Nonetheless, the Council may be permitted to act unanimously under the principle of sincere cooperation, even where the envisaged voting rule is qualified majority, through the practice of waiting for the "*common accord*" of the Member States. Although the CJEU permitted this practice regarding the adoption of a decision to conclude a mixed agreement, it seems likely that it would be equally applicable to the adoption of a decision establishing a Union position under Article 218(9) TFEU. In this context, the most likely application of this practice would be in circumstances where the EU and the Member States are undertaking mixed action together in an area of shared competence, and where the EU lacks membership in an international organisation and must exercise its competences through the Member States.

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## List of abbreviations

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| EU | European Union |
| CJEU | Court of Justice of the European Union |
| IMO | International Maritime Organisation |
| OIV | International Organisation of Vine and Wine |
| ITLOS | International Tribunal for the Law of the Sea |
| OTIF | Intergovernmental Organisation for International Carriage by Rail |
| COTIF | Convention concerning International Carriage by Rail |
| CCAMLR | Commission for the Conservation of Antarctic Marine Living Resources |
| WRC-15 | World Radiocommunication Conference 2015 |
| EPCA | Enhanced Partnership and Cooperation Agreement |
| CFSP | Common Foreign and Security Policy |
| CCP | Common Commercial Policy |
| DCP | Development Cooperation Policy |
| CEPA | Comprehensive and Enhanced Partnership Agreement |

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