The impact of European Community Law on the Work within the ILO

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Basis for the discussion
at the Nordic Tripartite Seminar:
Conflicts of Norms between the ILO and EU – how can they be solved?

April 18, 2008 – Rosenbad, Stockholm

Swedish chairmanship of the Nordic Council of Ministers 2008

ILO COMMITTEE

REGERINGSKANSLIET

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December 2007

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1 Introduction

1.1 Background

The International Labour Organization (ILO) is the UN specialised agency for issues of employment and working life. The ILO's mission is to promote social justice by improving conditions of labour.[1] Several of the fields forming the subject of ILO Conventions and Recommendations also come within the competence of the European Union (EU) in the social sphere. The EU cannot be a member of the ILO[2], but has on several occasions, in connection with conflicts of norms between Community law and ILO Conventions, made declarations recommending Member States to ratify or not ratify the Conventions concerned. The European Commission particularly has worked actively to influence the ILO activity of the Member States, with the result that EU-ILO relations and the scope of the EU's external competence have become topics of discussion.

1.2 Purpose and structure

This memorandum sets out to clarify the division of competence between the EU and its Member States in matters relating to the work within the ILO, and also to describe the relationship between the EU and the ILO. The memorandum derives from work experience placement with the Swedish Ministry of Employment in connection with work on a Ll.M. (Juris Kandidat) degree thesis, and is to serve as independent documentation for a Nordic tripartite seminar on EU-ILO relations which will be taking place in the spring of 2008.

The presentation begins with a description of the ILO's mandate and the Member States' commitments to the organisation. Understanding of the problems attending the division of competence between the EU and the ILO requires a basic insight into the institutions of the EU and their several competencies, and the presentation will therefore continue with a description of how the EU is organised and of the Members States' obligations to the EU. An account will then be given of relations between the two organisations. This in turn will be followed by an account of the external competence of the EU, i.e. its authority to enter into international agreements with third countries, and an analysis of the fields in which conflicts of norms have arisen between the EU and the ILO. The aim in this connection is to give as exhaustive a description as possible, with the reservation that there might be conflicts of norms occurring between Community law and ILO Conventions that has not been taken into account. Appended to the present memorandum, finally, is a "crib" which, in very simple terms, sets forth criteria to be borne in mind for the ratification of an ILO Convention touching on Community law.

2 The EU and ILO as organisations

2.1 The ILO's mandate and the Member States' commitments

The ILO is the oldest of the UN's specialised agencies and existed already as a part of the League of Nations. Its mandate is defined mainly by its foundation documents, namely the Constitution, dating from 1919, and the 1944 Philadelphia Declaration. Through Conventions and Recommendations the ILO defines international norms concerning fundamental rights and workers' protection. More than 180 ILO Conventions have been adopted. To a great extent they govern rights in hiring relationships, such as the right to paid holiday, equal pay for equivalent work, the setting of minimum wages, job security, part-time work and job supervision etc. Certain ILO Conventions deal with labour law in specific fields of activity, e.g. agriculture and shipping. Some 50 Conventions and Recommendations have been adopted on occupational safety and health, one of the ILO's most important fields. Among

[1] See Preamble to the ILO Constitution.
[2] Under the ILO Constitution, membership is reserved for states, but the EU does have observer status in the Organisation.

other things, these Conventions have dealt with the use of chemical products in the workplace, the handling of asbestos, worker protection in mines, the prevention of major industrial accidents, occupational safety and health and industrial inspection. The ILO has also adopted a number of Conventions in the field of social security, e.g. concerning social insurance. The ILO has a mandate for promoting equality between women and men in the workplace. In 1998 the ILO Labour Conference adopted a Declaration of Fundamental Principles and Rights at Work, centring on four main principles: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. These principles are embodied in eight "fundamental conventions".

The ILO acts through the Labour Conference, the Governing Body and the International Labour Office.[3] The Labour Conference is the supreme policy-making body and elects the Governing Body, which drafts Conventions etc. The Governing Body is elected for a term of three years and among other things decides the agenda for the Labour Conference. The International Labour Office serves as the organisation's secretariat. The ILO is a tripartite organisation, meaning that representatives of employers' and workers' organisations, as well as representatives of the governments of the Member States, take part in its activities.[4]

A state belonging to the ILO is not automatically bound by an ILO Convention. Each state decides for itself whether or not to accede to a Convention. Sweden today is bound by 76 ILO Conventions.[5] Before a state can be bound by a Convention, the ILO Constitution requires the Convention to be brought before "the authority or authorities within whose competence the matter lies",[6] usually the national parliamentary assembly, "for the enactment of legislation or other action." Following the decision by the legislative assembly, the state can ratify the Convention, in which case the Convention becomes binding one year later.[7] A ratifying state is duty bound to report on the measures it has taken to give effect to the Convention.[8]

In the event of a country breaching a Convention, Article 33 of the ILO Constitution empowers the ILO Labour Conference to "take such action as it may deem wise and expedient". The ILO has no sanctions at its disposal against non-compliance with a Convention. Instead its working methods comprise dialogue, counselling, expert assistance and technical support to its members. A complain from one Member State against another can, however, be referred to the International Court of Justice in The Hague.

2.2 The EU organisation and its Member States' commitments

2.2.1 EC and EU

The Treaty of Rome establishing the European Community (the EC Treaty) was signed by the then Member States in Rome in 1957. In 1992 came the signing in Maastricht of the Treaty on European Union (the EU Treaty). The EU Treaty established a form of European co-operation, the European Union (EU), comprising three pillars.

The first pillar consists of the EC Treaty, which is still in force. Under the first pillar one finds most of the fields associated with European co-operation, such as trade affairs, customs and border issues and

[3] See Art. 3 of the ILO Constitution.
[4] See Arts. 3 and 7 of the ILO Constitution.
[5] Sweden has ratified more than 90 ILO Conventions, but some of those originally ratified have been denounced, partly due to their having been superseded by new ones.
[6] Art. 19.5 (b) of the ILO Constitution.
[7] Art. 19 of the ILO Constitution.
[8] Art. 22 of the ILO Constitution.

civil law co-operation. The first pillar is by far the biggest and most important part of the EU. The legal framework within the EU first pillar is still termed EC law. The EU concept comprehends the whole of European legal co-operation, EC co-operation included, whereas the EC is a narrower concept and refers solely to the first pillar of the EU. This distinction will be maintained throughout the present account. Since conflicts of norms between the EU and its Member States in the ILO context almost invariably arise within the first pillar, EC, reference will not be made here to the European Union as a whole, other than in exceptional case.

Under the EC Treaty, the Community has "legal personality"[9], and to that personality the EU Member States, through their membership, have ceded part of their national sovereignty. Thus co-operation within the first pillar differs from traditional international co-operation in that certain decision-making powers have been assigned to the Community itself. This co-operation is partly supranational, whereas co-operation within the second and third pillars is of the traditional interstate kind, just like co-operation within other international organisations – the ILO, for instance. The other two pillars are concerned with foreign and security policy and police and judicial co-operation in criminal matters, e.g. Europol. EU, then, is a collective concept comprising both earlier EC co-operation and the wider co-operation within pillars two and three.

The EU is also to have legal personality under the reform treaty agreed by the EU heads of state and government on 19th October 2007. Subject to the treaty being ratified by all Member States, the hope is that it will enter into force well before the European Parliament elections in June 2009.[10] Now that the EU is also to have legal personality, the terms EU and EC will not be used concurrently. Instead EU alone will be used, comprising all of today's three pillars. The reform treaty provides for the existing pillar structure to be abolished and for police and criminal justice issues to be made supranational. The portion of Community law touching on the work of the ILO, however, comes mainly within the first pillar, which is supranational already.[11] Insofar as the work of the ILO touches on foreign policy matters, which at present come under the second pillar, the reform treaty is unlikely to entail any great changes, because under the reform treaty, foreign policy decisions still require unanimity among the Member States.[12]

2.2.2 General remarks concerning the EU and its Member States' commitments

The institutions of the EU comprise the Council, the Commission, the European Parliament, the European Court of Justice and the European Court of Auditors. The EU also includes certain other bodies, such as the European Social Committee (ESC), an advisory body whose members include representatives of employers' and workers' organisations. The main political decision-making power in the EU is vested in the Council, which issues Regulations and Directives and has an important legislative function. The Commission is an administrative body which has a prerogative of proposal and monitors compliance with the treaties. The Commission is not competent to conclude international agreements, but the Council is. The European Court of Justice (ECJ) exercises judicial power and in some respects resembles a constitutional court. Article 220 of the EC Treaty defines its task as being to "ensure that in the interpretation and application of this Treaty the law is observed." The ECJ examines the actions both of the Member States and of the EU. Very simply, the relationship between the Commission, the Council and the ECJ can be summed up by saying that the Commission is the initiating institution, the Council the decision-making institution and the ECJ superior to both in that it can examine the legality of the other two institutions' actions.

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[9] Art. 281 of the EC Treaty.

[10] See the Berlin Declaration, *Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome*, 25th March 2007. The Presidency Conclusions from the European Council meeting in Brussels on 14th December 2007 envisages "a swift completion of national ratification processes with a view to allowing entry into force of the Treaty on 1 January 2009"; see p.1.

[11] Further on this point, see 3.4, below.

[12] For further particulars of the *content of the Lisbon Treaty*, see http://www.eu-upplysningen.se.

The various institutions issue legal acts of various kinds. A Regulation is binding and directly applicable in the Member States (Art. 249 of the EC Treaty). A Directive is binding with respect to the results to be achieved but leaves national authorities free to decide matters of form and procedure. Decisions are binding on the parties they are addressed to. Recommendations and Statements, on the other hand, under Art. 249 of the EC Treaty, are *not* binding on the Member States, but this is not to say that they are of no legal importance. The ECJ has ruled that Recommendations can shed light on the interpretation of Community law and on the way in which the Member States should act.[13]

The EC can conclude international agreements to the extent permitted by the EC Treaty,[14] but cannot arrogate further competence than the Treaty provides ("competence-competence"). In those fields where the EC has external competence to conclude international agreements, they are concluded in accordance with the procedure indicated by Article 300 of the EC Treaty.

Under Article 10 of the EC Treaty, the Member States incur a duty of loyalty requiring them to "take all appropriate measures … to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." A lump sum or penalty payment may, in the ultimate resort, be imposed on a Member State failing to fulfil an obligation under the EC Treaty.[15] It is important to note that the ECJ has ruled that, in the event of conflicts with national law, EC law takes precedence.[16]

2.3 The relation between the EU and the ILO

The legal framework for the role of the EU within the ILO is indicated by Article 12 of the ILO Constitution, laying down that international organisations may attend meetings but are not entitled to vote. Co-operation between the EU and the ILO has been worked out through letters of understanding between the two organisations from the 1950s onwards. These letters of understanding affirm the importance of co-operation between the two organisations.[17] A letter of intent from 1989 states that the organisations are to develop their co-operation further, with due respect for each organisation's institutional character.[18]

The EU is an important agent on the ILO's behalf. Several EU Member States have permanent seats on the ILO Governing Body, and the EU Member States between the account for one-third of the ILO's budget.[19] Through the EU, 27 countries have a common frontier and trade policy vis-à-vis third countries, and together the Member States make up an important economic unit with extensive possibilities of influencing other countries.

The EU has evolved a Generalised System of Preferences (GSP) whereby developing countries are offered more favourable tariffs on their exports to the EU. Within the GSP system the ILO's Conventions have a practical bearing on EU co-operation with third countries. Developing countries applying the ILO's eight central rights Conventions on forced labour, freedom of association, the right of organisation and collective bargaining, non-discrimination and abolition of child labour are entitled to further tariff reductions compared to developing countries not applying the Conventions. The EU leaves it to the ILO to monitor compliance with the Conventions and, on the basis of the ILO's reports, decides which countries are to be granted tariff concessions. On the strength of the ILO's reports, the EU resolved that the GSP would cease to apply to Belarus. This example shows how the EU can serve as an important means of bringing pressure to bear on other countries to live up to ILO standards. The ILO has no sanctions of its own to resort to against breaches of the Conventions but is instead

[13] Case C-322/88, *Grimaldi* para. 18-19.
[14] Art. 5, EC Treaty.
[15] Arts. 226-228, EC Treaty.
[16] Case 6/64 Costa v. E.N.E.L.
[17] See OJ C 24/8, 1 February 1990. See also Frid, pp. 281 ff.
[18] OJ C 24/8, 1 February 1990. See also Frid, pp. 282 ff.
[19] See GB 294/PFA/1 (from 2005).

dependent on its members deploying the sanctions at their disposal. In addition to the power of the EU to exert influence by means of restrictions through the GSP system, the EU Member States are also in a position to influence other ILO members through joint statements at meetings within the Organisation. At the same time as the ILO benefits from the EU as a means of putting pressure on states to comply with its Conventions, the ILO is an important agent for the EU. In order to have good trading partners, it is in the interests of the EU to have an international system of labour law standards affording fundamental rights to workers the world over.

The above mentioned letters of understanding between the ILO and EU have focused on employment, labour law, the social dialogue and social security policy.[20] In addition to these co-operation agreements with the ILO, the EU has adopted a succession and variety of documents and conclusions in support of the work of the ILO.[21] Co-operation between the EU and the ILO has been steadily intensified since 2001. Together they have declared that their aims and values coincide and they have underlined the importance of co-operating in pursued of their common objectives, including that of sustaining strong social safeguards in an increasingly globalised world.[22]

The role to be played, in purely practical terms, by the EU within the ILO is a topic of recurrent debate between the EU and its Member States.[23] As things now stand, the Commission is represented at the Member States' co-ordination prior to ILO meetings but the Commission does not speak for the Member States at ILO meetings. The EU has an important role within the ILO, but the problem has been to agree on a procedure for participation which does not threaten the ILO's tripartite structure or diminish the role of the social partners. There is a Council resolution from 1986 concerning participation by the Community in ILO negotiations when the Community has exclusive competence. Under that resolution the Commission, after negotiating with the social partners and with the Council's approval, is to be involved in written communication with the Labour Office. The Commission, acting in close collaboration with the Member States, is also to represent them at the Labour Conference.[24] The resolution is considered in the doctrine to be compatible with the ILO rules on the tripartite structure but it came in for criticism and is not complied with in practice.[25]

[20] OJ C 24/8, 1 February 1990. See also the memorandum *En sammanhållen svensk ILO-strategi 2007-2009*, pp. 61 ff.
[21] For an exhaustive account, see the memorandum *En sammanhållen svensk ILO-strategi 2007-2009*, pp. 61 ff.
[22] OJ C 165/23, 8 June 2001. See also Delarue, p. 111.
[23] Cf. Frid, pp. 281 ff.
[24] The doctrine lays down that the resolution must agree with the rules of the ILO. A Labour Office document from 1981, GB.215/SC/4/1, declares that there is nothing in the ILO Constitution to prevent several Member States expressing their opinion through a regional representative. See Frid, p. 295.
[25] Frid, p. 295, and COM (94) 2 final, p. 3.

3 The external competence of the EC

3.1 Explicit and implicit external competence

The EC Treaty lays down that the EC has external competence to conclude international agreements in certain areas. The areas in which the EC has an *explicit external competence* include trade policy, economic, financial and technical co-operation with third countries, environmental policy, research and technical development and development co-operation.[26] Arts. 149-152, concerning education, training, culture and health, empower the Community to co—operate with third countries and international organisations. Art. 111, on exchange-rate policy in relation to third countries, also gives the EC external competence, and Arts. 302-304 require it to co-operate with international organisations such as the UN and OECD.

The EC can also have external competence in situations where a clear, express foundation is lacking in the Treaty of Rome – in other words, *implicit external competence*. The ECJ established this in the so-called ERTA case (also known as the AETR case), which concerned an agreement on working conditions of crews of vehicles engaged in international road transport.[27] In the ERTA case the ECJ ruled that the EC can establish relations with a third country in fields where the EC Treaty prescribes a *common policy* and concerning all *objectives* indicated by that treaty.[28] Competence to enter into international agreements need not emanate from an express provision of the treaty but may also follow from other provisions of the treaty and of legal acts adopted by Community institutions within the frame work of these provisions.[29] In the ERTA case, the Community had used its internal competence under the articles of the treaty concerning transport policy. The ECJ ruled that it was not possible to separate the treaty's system for internal Community measures from its system for external relations.[30] Thus there exists a parallelity between the EU's internal and external competencies: if, then, the Community has acted internally in pursuit of the aims of the treaty, it also has an external competence in the corresponding field. This has come to be commonly termed *the doctrine of parallelism*, and the doctrine has been further elaborated in the Kramer case, where the ECJ ruled that the EC can have an external competence even *without* first having exercised its internal competence.[31]

Thus the external competence of the EC can be said to be explicit, i.e. to stem directly from the treaty, or else implicit, i.e. understood/implied in accordance with the doctrine of parallelism.

3.2 Exclusive external competence

The external competence of the EU can be exclusive or shared between the Member States and the Community. The provisions of the Treaty of Rome granting the EU explicit external competence make clear whether that competence is meant to be shared between the EC and the Member States or to be exclusively vested in the EC. Article 133, concerning trade policy, is one instance of the EC Treaty explicitly prescribing exclusive competence for the Community. If competence is exclusive in the Community's favour, then the Member States themselves are debarred from concluding agreements in the same area, and this, be it noted, applies *regardless* of whether or not the agreement is at variance with the rules of Community law.[32]

Implicit external competence can also be exclusive. In the ERTA case in the 1970s, exclusive implicit competence was touched on in point 31, where the Court ruled that "These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the

[26] See Arts. 133, 310, 181, 174, 170.
[27] Case 22/70 *ERTA* REG 1971, p. 263.
[28] *ERTA*, para 16 ff.
[29] *ERTA*, para 16.
[30] *ERTA*, para 19.
[31] Case 6/76 *Kramer* REG 1976, p. 1279.
[32] Opinion 2/91 Part II, para 8 (1991).

common market and the uniform application of Community law." In the ERTA case the ECJ found that "to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope." One conclusion which can thus be drawn from the ERTA case is that if the Member States wish to act externally in a field, for example by ratifying an ILO Convention which affects a field subject to binding Community rules promulgated for the attainment of objectives of the Treaty, e.g. through Regulations or Directives, they may not accede to the Convention. Ratification of an ILO Convention in a field impinging on rules of Community law must, consequently, be preceded by an analysis of whether the ILO Convention may come to impact on Community law.[33] The Member State has lost the right to enter into international agreements which can affect rules of Community law promulgated for the attainment of the objectives of the Treaty. This also follows from the duty of loyalty. Thus the Member States, being duty bound to pursue fulfilment of the obligations created by the Treaty and the measures taken by the Community's institutions, cannot enter into international agreements which are at variance with Community law.

This implicit exclusive competence was subsequently elucidated at greater length by the ECJ in its Opinion 2/91 concerning the ILO Chemicals Convention (No. 170), when it declared the external competence of the EC to be exclusive where the Treaty explicitly states that it is or "by virtue of the scope of the measures adopted by the Community institutions for the application of those provisions and which may be of such kind as to deprive the Member States of an area of competence which they were previously able to exercise on a transitional basis". The ECJ further maintained that external competence became exclusive when the subject of an international agreement came within a field which "is already covered to a large extent by Community rules progressively adopted … with a view of achieving an ever greater degree of harmonization". *The scope* of the internal rules of Community law, then. can have the effete of depriving the Member States of their external competence and making the Community's competence exclusive. It seems unclear, however, exactly to what extent a field must be regulated in order to make the Community's competence exclusive, beyond its having to be regulated "to a large extent". If, then, a field is to a great extent harmonised internally within the Community, the Member States lose their external competence in that field, *regardless* of whether or not a potential international agreement which a Member State wishes to enter into would encroach on Community law. The fact of the field coming within the Community's exclusive competence prevents the Member States from taking any independent action whatsoever in that field. One such field where the Court found implicit exclusive external competence is the portion of the above mentioned ILO Convention (No. 170) dealing with classification, packaging and marking of hazardous substances.

Summing up, we may note that the Member States of the EU are not permitted to enter into international agreements at variance with Community law. If a field comes within the Community's exclusive external competence, which it does if the Treaty expressly so provides or if the field has been harmonised to a large extent, the Member States have lost all external competence in this field.

3.3 Shared external competence

As has already been shown, the Community can have exclusive external competence to enter into international agreements. This, however, is not the commonest form of external competence. In the great majority of fields where the EU has external competence, it is shared with the Member States. There are various forms of shared competence, one form being sometimes referred to as vertically shared competence, as for example in Article 181 of the EC Treaty, concerning international

[33] See Maier, p. 166. At present there is no fully-fledged procedure indicating how it should be checked whether a Convention impacts on Community law, but the Commission is represented when ILO Conventions are being drafted and is thus able to draw attention to any conflicts of norms. The Council has also put forward resolutions empowering Member States to ratify Conventions in the Community's stead (more about this under 4, below), but one cannot argue that it is up to EU institutions to examine the potential impact of ILO Conventions on Community law. In the absence of a complete analytical procedure on this point, it must at present be deemed incumbent on every Member State to verify its ability to ratify a new ILO Convention without prejudice to the obligations following from Community law.

development assistance, which lays down that the Community's competence "shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

Certain international agreements cover both fields coming within the competence of the Community and those coming within the sphere of competence of the Member States, in which case it is common for the EC to enter into the agreement in those respects regulated by the EC, while the Member States enter into the agreement in those respects where no Community rules apply.

The fact of a field being regulated by the Community does not necessarily mean the Member States having to refrain completely from entering into agreements touching on that field. As described earlier, Opinion 2/91 lays down that a field must be regulated "to a large extent" in order for the Community's competence to be exclusive. If the competence is not exclusive there is often scope for the Member States to act internationally without prejudice to Community regulations. There may, for example, be fields for which the Community has promulgated rules, but minimum rules only. In such cases the Member States can regulate the field themselves and introduce stricter rules than the Community's.[34] It should therefore be emphasised that parallel regulation by the EU and ILO of the same legal areas commonly occurs without necessarily occasioning conflicts of any kind.

In certain cases competence can also *compete* with the Community's. In the Kramer case, mentioned earlier, the EC had not exercised its internal competence and the ECJ found that, this being so, the Member States had external competence until such time as the Community did so.[35]

Summing up, there are different types of competence sharing between the EU and its Member States and shared competence is a widespread phenomenon.

3.4 External competence in fields affected by the work within the ILO

Several ILO fields of activity, such as labour law and occupational safety and health, have their counterparts in the EU's "social dimension". The latter consists of the areas of law covering free movement of labour, employment, equal opportunities, occupational safety and health, labour law, working hours, social security for migrant workers and social insurance. The free movement of workers is dealt with in Articles 39-42. Articles 136-145 deal with matters concerning occupational safety and health, social security and equal pay for women and men doing equal or equivalent work. These articles of the EC Treaty do not explicitly grant any external competence to the Community, e.g. unlike Article 133 on the subject of trade policy, but the EC probably has implied external competence in large areas of labour law, in keeping with the doctrine of parallelism described earlier.[36] If the Community has acted internally for the attainment of the objectives of the Treaty by promulgating binding rules in the field of labour law and social policy, it also has external competence in the corresponding field.

The areas covered by ILO Conventions probably come mainly within the individual spheres of competence of the Member States or within the spheres of competence which they share with the Community.[37] In those fields where the EU has no external competence at all, the Member States, needless to say, retain their national sovereignty and can enter into all international agreements themselves, uninfluenced by the EC. Article 137.5, for example, lays down that the Community has not competence regarding conditions of pay, right of association, the right to strike or the right of lockout. This part, accordingly, comes within the Member States' own spheres of competence.[38] Nor

[34] Cf. Opinion 2/91.
[35] Case 6/76 *Kramer*, para. 39-40.
[36] Maier, p. 162.
[37] Maier, p. 165.
[38] It should be noted, however, that these areas may nevertheless come to be regulated indirectly by the Community. The ECJ, for example, maintains that certain issues connected with conditions of pay may need to be regulated so as to prevent other parts of Article 137 from losing their substance. On this point, see case C-

has the EC taken any action concerning forced labour, which would therefore seem to come within the Member States' own spheres of competence.[39]

The account which has now been given of the EU's external competence serves to show that Member States may not ratify an ILO Convention coming within the exclusive competence or substantively at variance with the Community legislation enacted for the attainment of the objectives of the Treaty. Thus the Member States' freedom of manoeuvre within the ILO is correspondingly restricted by the existing Community legislation. Even in fields covered by Community law, assuming it is not exclusive, the Member States can ratify a Convention amplifying the Community rules or referring to a field in which Community law has minimum rules only. In Opinion 2/91, described above, the ECJ refers to Article 118a (now Article 137) laying down that Member States shall not be impeded from introducing more far-reaching rules. Article 137 is the basis for most of the Community's opportunities of legislation in the social dimension, and consequently the Member States have scope for action even where binding rules have been promulgated internally.

In fields where the EU does not yet have any internal legislation, the Member States may act within the ILO and ratify Conventions as long as the EU does not have any binding rules in the field concerned: concurrent competence exists between the Member States and the EU.[40]

In certain areas, however, the Member States have more limited scope for action. It is arguable, for example, that rules concerning gender discrimination come within the EC's exclusive competence by virtue of the harmonisation which has taken place between the laws of the Member States.[41] This would mean the Member States being impeded from independently concluding international agreements in this field. Trade policy, as mentioned earlier, belongs to the EU's exclusive competence. Commercial law, however, is a complicated field, because trade agreements can often include social clauses. In cases where trade agreements also embrace issues in other fields than trade policy, the Member States should also be able to have a hand in concluding them.[42]

It should be noted that when external competence is shared between the Member States and the EU, the ECJ has ruled that the Member States must co-operate with the Community in negotiating and implementing the international agreement.[43] The Court, however, has not offered any more detailed proposals concerning the nature of this procedure where competence is shared between the EU and the Member States.

The Member States have more limited scope for action in the ILO context when the EC's external competence is exclusive. Clearly, the Member States may not ratify a Convention partly or wholly coming within the Community's exclusive sphere of competence, but the implications of exclusiveness for other stages of ILO work, such as negotiations and voting, are less clear. As regards the ability of the Member States to act individually at these stages of the ILO process, there is, as mentioned earlier, a Council Decision from 1986 indicating that it is for the Commission, acting in close co-operation with Member States and social partners, to negotiate concerning ILO Conventions where there is exclusive Community competence.[44] In the doctrine this decision is deemed compatible with the ILO Constitution,[45] but it has come in for criticism from the social partners and is not applied in practice today.[46] An expression of opinion by a Member State during negotiations for the

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307/05 *Yolanda Del Cerro Alonso and Osajudetza Servicio Vasco de Salud.* Concerning regulation of the right to strike, see case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line*.

[39] Novitz, p. 25.

[40] Cf. case 6/76 *Kramer*.

[41] Novitz, p. 17.

[42] Maier, p. 356.

[43] Opinion 2/91, para. 12 and 36-38.

[44] See Council Decision of 22nd December 1986 and Frid, pp. 294 ff.

[45] Frid, p. 295.

[46] Frid, pp. 299 ff.

Convention does not necessarily imply the assumption by that Member State of an international obligation affecting Community law or impeding its implementation.[47] Nor would the Member States appear to be impeded from acting individually when the adoption of a Convention is put to the vote, so long as the Convention is not liable to prejudice the attainment of the objectives of the EC Treaty (the duty of loyalty).

Summing up, the above account shows that conflicts of norms between the EU and the ILO can occur in a number of fields, due to the two organisations having overlapping spheres of activity. When the EC has external competence to act in a field which is the subject of an ILO Convention, that competence is most often shared with the Member States. Different demands can be made concerning action by the Member States, depending on whether the competence is shared with the Member States or exclusively vested in the EU.

3.5 Consequences of competence infringements

One interesting question arising in this connection concerns the consequences of a Member State encroaching on Community rules by ratifying an ILO Convention even though it comes within the Community's exclusive sphere of competence. Article 211 of the EC Treaty tasks the Commission with monitoring compliance with the provisions of the Treaty and with the provisions adopted by the institutions by virtue of the Treaty. As part of this monitoring the Commission can file proceedings with the ECJ, alleging that a Member State has failed to fulfil an obligation under the Treaty.[48] The Commission frequently employs this recourse to safeguard compliance with the Treaty's provisions. Thus 193 actions alleging breaches of obligations under the Treaty were filed with the ECJ in 2006.[49] Typically, a breach of this kind is due to a Member State having encountered difficulty in amending its national legislation so as to bring it into line with Community law. It is hazardous to speculate as to what the practical consequences might be for a Member State ignoring the Community's exclusive competence by ratifying a Convention which really required Council authorisation. If this were to happen consistently in fields where the Community quite clearly has exclusive competence, it is not unlikely that the Commission would act by filing an action for breach of obligations under the Treaty. When handing down judgement in a case of this kind, the Court can also award damages against the offending state.

It is less likely, however, that the Commission would take action against Member States acting independently at other stages of ILO work, e.g. negotiations, because the Member States are unlikely at this stage of things to enter into any legal obligations which could justify an action for breach of obligations under the Treaty. It is also hard to see how an action for breach of Treaty obligations could come into question for infringements of the division of competence between the Member States and the Community, in cases where competence is shared between them. The ECJ has declared that a duty of co-operation exists at all stages of work on ILO Conventions if competence is shared between the Member States and the Community, but there is no document indicating in any way how such co-operation is to proceed, and so an action for breach of Treaty obligations referring to infringement of the shared competence seems a rather vague and farfetched proposition. It is just conceivable that the Commission would take action if Member States consistently failed to co-operate with the Community on ILO work despite having been clearly placed under such an obligation.

[47] Cf. Macleod, pp. 61 f, concerning the consequences of the exclusiveness of Community law.
[48] See Art. 226, An action for alleged infringement of an obligation under the Treaty can also be filed by another Member State; see Art. 227.
[49] Bernitz, p. 131.

4 Conflicts of norms between the EU and the ILO

4.1 The relation between Community law and earlier international agreements

Article 307 of the EC Treaty lays down that international agreements entered into prior to a Member State's accession to the EU are not affected by the provisions of the EC Treaty. Sweden became bound by the ILO Constitution already in 1920, and so, under Article 307 of the Treaty, the Constitution should have priority over the Treaty, as should all ILO Conventions ratified by Sweden prior to its accession to the EU. But the situation is not quite that simple, as ECJ case law shows. In case C-158/91, where the point at issue was whether the ILO Night Work (Women) Convention (Revised), No. 89, conflicted with the Equal Treatment Directive, the ECJ ruled that it was the duty of a Member State to ensure that the rules on equal treatment of women and men would be fully implemented, "unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty." Recently, though, when the Commission brought an action against Austria for breach of obligations under the Treaty, the Court enlarged on its interpretation of Article 307 of the EC Treaty.[50] Before acceding to the EU, Austria had ratified ILO Convention No. 45 concerning the employment of women on underground work in mines of all kinds. The Court found that the ILO Convention conflicted with the EC rules on equal treatment of men and women and that, although it was true that Austria could in principle plead the first paragraph of Article 307 in support of retaining national provisions based on ILO Convention No. 45, the second part of the article requires the Member State concerned to take all suitable measures to eliminate incompatibilities with the Treaty. The rules of ILO Convention No. 45 allow denouncement only every tenth year, and one such ten-year period had elapsed in Austria's case. The Court found that at the time of the tenth year it had not been established that the Convention was at variance with Community law, and it therefore found that Austria had not failed in its duty of loyalty. It can thus be inferred from the judgement that a country not denouncing an ILO Convention (in accordance with the rules of the Convention concerned) if the Convention is at variance with Community law, thereby fails in its duty of loyalty. It is worth adding in this connection that the Commission has endeavoured to persuade Member States to denounce Convention 89 and also ILO Convention 96 concerning Fee-Charging Employment Agencies, which the Commission maintained was incompatible with Community law.[51] The above account leads to the conclusion that agreements entered into *before* accession to the EU also have to be compatible with Community law.

4.2 ILO Conventions where the Community has been deemed to have exclusive competence

4.2.1 Convention 170

Several fields which have been a subject of ILO Conventions have given rise to conflicts of norms with Community law where the Community has been deemed to have exclusive external competence. One such instance, mentioned earlier, is ILO Convention No. 170 on Safety in the Use of Chemicals at Work, which became the subject of an Opinion from the ECJ.[52] Opinions, as has already been made clear, are not binding on the Member States, but great importance should nonetheless be attached to them, since it is the Court's duty to interpret the Treaty and the Member States have a duty of loyalty

[50] Case C-203/03 Commission of the European Communities v. the Republic of Austria.
[51] See Own-initiative opinion of the Economic and Social Committee on Relations between the EU and the International Labour Organization, para. 11 (from 1995). We may note here that Sweden has not ratified Convention No. 89 (nor have the other Nordic countries). Sweden has, however, ratified Conventions Nos. 45 and 96, but has since denounced them.
[52] Opinion 2/91. We may note here that Convention No. 170 has been ratified by Sweden.

concerning the obligations which the Treaty entails. The Court maintained that a small portion of ILO Convention 170 impinged on the Community's exclusive competence. The basis of the Community's competence here was Article 95, concerning the single market, and the Community had issued several directives in this field, dealing with classification, packaging and marking of hazardous substances. In this way the Member States' legislation in the field had been harmonised and the rules did not amount to minimum regulation. This field, accordingly, was deemed exclusive to the Community and the Court therefore maintained that the Member States could not enter into any international obligations in it.

4.2.2 Convention 185

A further conflict of norms was occasioned by ILO Convention No. 185 on Seafarers' Identity Documents.[53] The Council maintained that certain articles of the Convention came within the Community's competence in the sphere of visaing, with Articles 62.2 b and 300 constituting the Community's external competence. The Council argued that the Community was working to create an area of freedom, security and justice founded among other things on a common visaing policy. The Convention came within an area where the Community had exercised its competence by adopting a visa Regulation in 2001. Since, under the ILO Constitution, the Community cannot ratify the Convention, the Council, on 14th April 2005, authorised the Member States to do so. The authorisation, however, does not indicate whether the competence is exclusive to the Community or shared with the Member States. Eeckhout takes the view that "… there is clearly no exclusive competence as regards visas, asylum, and immigration."[54] Eeckhout argues that the Community's competence regarding visas, asylum and migration applies to certain areas only, and indicates certain minimum rules, so that competence in this area is shared between the Community and its Member States.[55] A common border policy, however, is an important part of the EU, and so there are probably areas which are harmonised to such a degree that they could be deemed exclusive in favour of the Community. In its "explanatory memorandum" accompanying the proposal, the Commission refers to the Community's harmonisation of this area through Regulation (C) No. 539/2001. It also makes reference to the ERTA case, arguing that ratification of Convention 185 would affect the Community's competence in this area and that the Member State, accordingly, cannot ratify the Convention individually on their own initiative. One cannot say for sure how mindful the Council was of the Commission's argument in its decision, but the background to the decision was probably the Commission's argument and the conclusion that the area was harmonised to such a degree as to be exclusive in the Community's favour. An authorisation of this kind also serves as a political manifestation, indicating that the Community has competence in the area and conveying to the Member States the Community's opinion in the matter. It also needs to be pointed out that authorisation by the Council cannot be construed as "peremptory", only as authorisation, i.e. permission for the Member States to ratify the Convention, and so generally speaking, it is compatible with the duty of loyalty for the Member States to ratify a Convention which they have been authorised to accede to, the Council having clearly indicated that the Convention is compatible with the Community's policy objectives.

4.2.3 The Maritime Labour Convention

Another instance where the Community was deemed to have exclusive external competence within the ILO sphere concerned the Maritime Labour Convention adopted by the ILO on 7th February 2006.[56] The reason was that parts of the Convention came within the Community's exclusive sphere of competence regarding the co-ordination of social insurance systems. Internal measures for the co-ordination of social insurance systems are taken by authority of Article 42 of the EC Treaty, under the section on free movement of workers, one of the Treaty's foundation stones. That area has long been

[53] See Council Decision 2005/367/EC of 14 April 2005 authorising Member States to ratify, in the interests of the European Community, the Seafarers' Identity Documents Convention of the International Labour Organisation (Convention 185). Sweden has not yet ratified the Convention.
[54] Eeckhout, p. 134.
[55] Eeckhout, p. 134.
[56] This Convention has not yet been ratified by Sweden.

governed by Regulation 1408/71, which has now been superseded by Regulation 883/2004. The Council maintained that this was an area in which the Community had exclusive competence and in which, accordingly, the Member States could not act on their own. Note that this applies regardless of whether or not the rules of the Convention were incompatible with Community law: it is sufficient that they touch on an area in which the Community has exclusive competence. Nor is the EC able to act, because under the ILO Constitution the EC cannot ratify ILO Conventions. This led the Council to decide, on 7th June 2007, to authorise the Member States to ratify the ILO Maritime Labour Convention in its stead, the point being that the exclusiveness of Community law regarding part of the Convention impeded the Member States from ratifying it themselves, and without Council authorisation the Member States would not be able to ratify it either.

The authorisation to ratify the ILO Maritime Labour Convention is somewhat ambiguously worded. "Authorisation" does not have a coercive ring to it but seems more like permission or an appeal to the Member States to ratify the Convention. But Article 2 of the authorisation, indicating that the Council is to evaluate the progress made by the Member States in ratifying the Convention not later than 2010, makes it possible for the authorisation to be construed as a duty on the part of the Member States to ratify the ILO Convention. One possible objection to this might be that such an obligation is contrary to the ILO Constitution, which lays down that ratification or non-ratification of conventions is a matter for the individual states to decide. But the International Labour Office had already drawn up two documents at the end of the 70s indicating that the authority referred to in Article 19 of the ILO Constitution, which provides that the Member States "will bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action…" can be the Council.[57] Thus the fact of the Council authorising the Member States to ratify a Convention does not appear contrary to the ILO Constitution, whether the authorisation be perceived as "coercion" of the Member States to ratify the Convention or not.

In a strict level of Community law, it is questionable whether the scope of the Community's external competence really extends so far that it is entitled to "coerce" Member States into acting in a particular way. Arguably, the Community's exclusive external competence only means that the Member States have renounced national competence in the corresponding field, not that they have pledged themselves to act on the Community's behalf, which could be taken to imply excessive encroachment on the Member States' national sovereignty.

Following the Council of EU Transport Ministers meeting of 11th September 2006 prior to the Council decision concerning the Maritime Labour Convention, however, the current state of the law would seem to be that ratification of the Convention is not to be perceived as any kind of coercion. The Council's Legal Affairs Committee declared that the Council decision could never make ratification obligatory and that ratification was instead a matter for each Member State to decide. Thus the document would not seem to imply that ratification is obligatory for the Member States, but merely that the Member States have undertaken to give an account of the steps taken to reach a possible ratification.

4.2.4 Convention 188

The Commission will shortly be putting forward a draft Council resolution authorising the Member States to ratify the ILO Work in Fishing Convention adopted by the Labour Conference in the summer of 2007. Sources within the Commission state that this is because the Convention, like the ILO's Maritime Convention, touches on the co-ordination of social insurance systems and possibly also the

[57] See GB.215/SC/4/1 (from 1981), where the Labour Office lays down that "The competent authority is the one which has power to legislate or to take other action to implement the convention or Recommendation concerned. Where in virtue of the arrangements made by Member States belonging to a regional grouping an organ of that grouping has the power to legislate on the subject-matter of a particular Convention or Recommendation, there would seem to be nothing to prevent submission of the text to that organ in pursuance of the constitutional obligation." See also Frid, p. 293.

fisheries sector, where the EC has long had exclusive competence.[58] Probably, therefore, the Council will be adopting the Commission's proposal for a Council decision authorising the Member States to ratify Convention 188.

4.3 ILO Conventions where competence is shared between the EC and its Member States

The first conflict of norms between the ILO and the EU came in the late 70s and concerned ILO Convention 153, Hours of Work and Rest Periods (Road Transport), an area for which an EC Regulation had existed since 1969. The problem of conflicts of norms between the organisations' legal spheres recurred with reference to Convention No. 162, concerning Safety in the Use of Asbestos, the Community having issued four Directives in the corresponding field. The Commission took the view that the scope of Convention 162 came within the Community's exclusive sphere of competence and that, accordingly, the Member States could not ratify the Convention themselves, but the Council disagreed.[59] Several of the Member States therefore ratified the Convention themselves.[60]

As has already been mentioned, the ECJ became involved concerning Convention No. 170 on Safety in the Use of Chemicals at Work. The Court found that the greater part of that Convention came within the sphere of competence shared between the Member States and the EU. The Community's competence was mainly founded on Art. 118 a (now Art. 137). The EU had promulgated directives in this field, but those directives contained only minimum regulations.[61] Under Article 118 a the Member States had scope for introducing stricter rules, and so the Convention was not at variance with existing Community law. Article 19.8 of the ILO Constitution also empowers members to introduce stricter rules than those of the Convention. Thus there was no conflict with either the ILO or Community law where the Member States were concerned, and accordingly they were able to ratify the Convention without any conflicts with international or Community law.

The Commission has also issued several Recommendations calling on the Member States to ratify Conventions. One Recommendation in 1998 called upon them to ratify ILO Convention No. 177 on Home Work.[62] The objectives of the Convention coincided with those of Community law, and the then Article 118, second indent, tasked the Commission with encouraging co-operation between the Member States, especially on issues relating to labour law and working conditions (cf. the present Arts. 137 and 140). Due to the scope of the Convention coinciding with the Community's and to the Community having competence to act internally, the Community can act externally too. Here again it should be recalled that Recommendations are not binding on the Member States. Nor is this area exclusive to the Community. Instead the Commission's Recommendation ought to be seen as a proposal for action by the Member States in line with EU policy.

The Commission also recommended the Member States to ratify ILO Convention No. 180 concerning Seafarers' Hours of Work and the Manning of Ships.[63] The reason for this Recommendation was that the purpose of the Convention, namely that of promoting workers' health and safety and improving maritime safety and protection of the marine environment, coincided with the Community's objectives. Article 136 of the EC Treaty lays down that the Community's objectives shall among other things be the improvement of living and working conditions, and Art. 137 grants the Community

[58] E-mail correspondence with Rudi Delarue, 22nd November 2007.
[59] COM (94) 2 final, p. 3. It can be noted here that Sweden has ratified Convention No. 162 but not No. 153.
[60] Frid, pp. 294 ff.
[61] Cf. Art. 337 (then Art. 118a), laying down that "The provisions adopted pursuant to this Article … shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty."
[62] European Commission Recommendation of 27 May on the Ratification of ILO Convention No. 177 on Home Work of 20 June 1996. Sweden has not ratified the Convention.
[63] Commission Recommendation of 18 November 1998 on ratification of International Labour Organisation (ILO) Convention 180 concerning seafarers' hours of work and the manning of ships, and ratification of the 1996 Protocol to the 1976 Merchant Shipping (minimum standards) Convention. Sweden ratified this Convention on 15th December 2000.

internal competence to act in this field. Thus the scope of Convention No. 180 coincided with the external competence of the EC, and accordingly the Commission recommended the Member States to ratify it. This document, again, should if anything be viewed as a proposal for action by the Member States in keeping with EU objectives.

In 2000 the Commission issued a Recommendation for ratification of ILO Convention No. 182 on the Worst Forms of Child Labour. The Commission's action here can be viewed against the background of a Community Directive existing for the protection of young workers.[64]

At the time of writing the Commission is about to promulgate a Recommendation to the Member States to ratify the Conventions classified by the ILO as up to date.[65] Here again, it will be recalled that a Recommendation is not binding on the Member States. The Recommendation can, however, be viewed as an expression of the EU's support for the work of the ILO and of compatibility between the EU's objectives and those of the ILO. It can also be taken to express the Commission's standpoint on the co-operation procedure enjoined by the ECJ between the Member States and the Community.[66] A Recommendation of this kind from the EU also signals that if there is a low level of ratification of ILO Conventions by the EU Member States, this will not be due to Community law putting spokes in the wheel. The Recommendation conveys the EU's support for the Conventions concerned and their compatibility with Community law.[67]

5 Conclusion and reflections

5.1 Factors crucial to assessment of the EC's external competence

It is clear from the account which has now been given that one crucial factor governing the scope of the Community's external competence is the article of the EC Treaty on which that competence is founded. As has already been shown, the Community's competence is more likely to be deemed exclusive if it is based on articles concerning the single market or free movement rather than Article 137. Thus the ability of the Member States to act hinges on the article forming the basis of the EC's external competence and also on the extent to which the Community has promulgated legislation in the field concerned. The more harmonised the field, the likelier it becomes that the Member States will be unable to act in the matter without encroaching on Community law. If the field in question is harmonised to a great extent, the competence, as has now been made clear, will be exclusive, in which case the Member States are actually impeded from acting in the field, regardless of whether or not to do so would be to encroach on Community law. The institution issuing a document commenting on an ILO Convention and the type of legal act promulgated also serve to indicate how the Member States should/may act.

One common denominator of several of the above mentioned Conventions where the Community has been deemed to have exclusive competence is that the Conventions have often addressed maritime issues and included provisions coming within the purview of Community law. This, of course, is not to say that shipping is the only field in which the Community has exclusive competence, but should rather be seen as a consequence of shipping having been a common subject of ILO regulation.

5.2 EU and ILO standpoints concerning the conflicts and the future

It is difficult to arrive at a coherent appraisal of the view taken by the EU itself concerning its competence and its role in the work of the ILO. In certain cases the Commission has considered its

[64] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work. Sweden ratified the Convention on 13th June 2001.

[65] See *Joint Conclusions of the 5th High-Level meeting between the European Commission and the International Labour Office*, Geneva, 13 October 2006, which states: "The Commission will also envisage presenting a recommendation to EU Member States on the ratification of ILO conventions that have been classified by ILO as up to date and that are relevant for the promotion of decent work such as on OHS and working conditions" (p. 7).

[66] Opinion 2/91, part II para 12.

[67] Delarue, p. 113.

competence to extend further than the Council and the ECJ have done,[68] and the Commission has also put forward proposals for increasing its influence within the ILO, proposals which have been resisted by other institutions.[69] One such instance was in 1994, when the Commission put forward a "Proposal for a Council decision on the exercise of the Community's external competence at International Labour Conferences in case falling within the joint competence of the Community and its Member States".[70] That proposal meant that the Member States would be able to ratify an ILO Convention coming within the shared sphere of competence only after first obtaining Council approval. This, then, would have severely circumscribed the Member States' scope for independent action within the ILO. The Proposal was heavily criticised by the Economic and Social Committee and the Commission was eventually forced to retract it for lack of Council approval.[71] In connection with this Proposal, the Economic and Social Committee expressed criticism of the Commission's actions in general, claiming that by so strongly advocating a uniform representation of EU Member States, the Commission having gone so far as to say that the employer and employee sides should act, not on their own behalf but as representatives of their countries, threatened to jeopardise the tripartite structure of the ILO. [72] The Economic and Social Committee and the European Parliament also maintained that the Commission ought preferably to conduct the work of legislation within the social dimension on the basis of ILO Conventions, so as to avoid conflicts between Community law and ILO Conventions.[73] Thus the EU's own institutions are not altogether clear as to how conflicts of norms between ILO Conventions and Community law should be dealt with. The progressive development which the Commission has sought to bring about has not always been accepted by the other institutions.

In a document from its legal subcommittee, the Governing Body of the ILO has noted that there appears to be uncertainty regarding the limits of the external competence of the Member States and that of the EU, which can mean fewer and fewer ratifications of ILO Conventions by the EU countries.[74] The document states that, despite the problems of competence sharing, the Member States must consider the importance of working in pursuit of ILO objectives and ratify Conventions as soon as possible.[75] The document also refers to the inevitability of the spheres of competence of the Community and ILO coinciding, but goes on to say that this should not mean the ILO rules should be based on the EU's. A situation of that kind would be liable to entail excessively detailed regulation, which many ILO countries outside the EU would have difficulty in living up to. The Convention would then risk achieving fewer ratifications.[76] Both the ILO and the Economic and Social Committee take the view that the problem of competence sharing between the organisations should be solved by means of discussions rather than ECJ case law.[77]

[68] Cf. 4.3 and Opinion 2/91, in which the Court, unlike the Commission, found the greater part of the Convention to come within the shared sphere of competence. See also Maier, pp. 163, 171.
[69] Frid, p. 281.
[70] See COM (94) 2 final.
[71] See Own-initiative opinion of the Economic and Social Committee on Relations between the EU and the International Labour Organization.
[72] See Own-initiative opinion of the Economic and Social Committee on Relations between the EU and the International Labour Organization, para. 5.
[73] See Own-initiative opinion of the Economic and Social Committee on Relations between the EU and the International Labour Organization, para. 9.1.
[74] GB.262/LILS/2/2 para. 7 (from 1995).
[75] GB.262/LILS/2/2 para. 8.
[76] GB.262/LILS/2/2 para. 9.
[77] GB.262/LILS/2/2 para. 8, Own-initiative opinion of the Economic and Social Committee on Relations between the EU and the International Labour Organization (ILO), para. 9.1.

6 Concluding remarks

EU membership has entailed the transfer to the EC of part of the Member States' national sovereignty. As a result, the EC's external competence to enter into international agreements is crucial to the ability of the Member States to act within the ILO. External competence is either explicitly granted in the Treaty or else implied in accordance with the doctrine of parallelism. Whether or not external competence is exclusive is either expressly indicated by the Treaty or else can be inferred from the extent of Community harmonisation in the field concerned. As a consequence of the EC having external competence, the Member States may not encroach on Community law provisions or, if the sphere of competence is exclusive, the Member States must refrain entirely from regulating this field on their own, unless the Community has authorised them to do so. Where competence is shared between the Community and its Member States, the latter have a duty to co-operate with the Community.

Community law is dynamic by nature and always developing. This being so, it is in the nature of things that the exact sphere of the EC's external competence should be hard to define.[78] Perhaps for the very reason of Community law developing progressively, conflicts of norms between Community law and ILO Conventions are likely to be a frequent occurrence in future as well. As the ILO points out, it is of the utmost importance in this situation for the transfer of competence to the Community not to result in the Member States neglecting to pursue the ILO's objectives. It is also important that co-operation between the organisations should proceed with respect for the unique tripartite structure of the ILO. The aims of the two organisations coincide to a great extent, and increasingly advanced co-operation between them will entail many positive benefits. The interdependence of the EU and the ILO means that both have much to gain from close co-operation in pursuit of their common objectives.

[78] Maier, p. 36, and Macleod, p. 160.

7 Sources

Legislation

EU

The Treaty establishing the European Community, 25th March 1957

The Treaty of the European Union, 7th February 1992

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work

ILO

The ILO Constitution
Convention 45 Underground Work (Women)
Convention 89 Night Work (Women)
Convention 96 Fee-Charging Employment Agencies
Convention 153 Hours of Work and Rest Periods (Road Transport)
Convention 162 Safety in the Use of Asbestos
Convention 170 Safety in the Use of Chemicals at Work
Convention 177 Home Work
Convention 180 Seafarers' Hours of Work and the Manning of Ships
Convention 182 Worst Forms of Child Labour
Convention 185 Seafarers' Identity Documents
Convention 188 Work in Fishing
Maritime Labour Convention

Official publications

Sweden

En sammanhållen svensk ILO-strategi 2007-2009, Regeringskansliet, Arbetsmarknadsdepartementet

EU

Berlin Declaration, *Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome*, 25th March 2007

COM (94) 2 final. Proposal for a Council decision on the exercise of the Community's external competence at International Labour Conferences in cases falling within the joint competence of the Community and its Member States

Council of the European Union, Presidency Conclusions, 16616/07, 14 December 2007

Joint Conclusions of the 5th High-Level meeting between the European Commission and the International Labour Office, Geneva, 13 October 2006

Commission Recommendation of 27 May 1998 on the Ratification of ILO Convention No. 177 on Home Work of 20 June 1996, 1998/370/EC

Commission Recommendation of 18 November 1998 on ratification of International Labour Organisation (ILO) Convention 180 concerning seafarers' hours of work and the manning of ships, and ratification of the 1996 Protocol to the 1976 Merchant Shipping (minimum standards) Convention, 1999/130/EC

Commission Recommendation of 15 September 2000 on the ratification of International Labour Organisation (ILO) Convention No 182 of 17 June 1999 on the Worst Forms of Child Labour

Commission Proposal for Council Decision authorising Member States to ratify, in the interests of the European Community, the Seafarers' Identity Documents Convention of the International Labour Organisation (Convention 185), COM (2004) 530 final

Commission Proposal for a Council Decision to authorising Member States to ratify the ILO consolidated Maritime Labour Convention, COM (2006) 288 final

Own-initiative opinion of the Economic and Social Committee on Relations between the EU and the International Labour Organization (ILO), Brussels 25 January 1995

OJ C 24/8, 1 February 1990, *Exchange of letters between the European Communities and the International Labour Organization*

OJ C 165/23, 8 June 2001, *Skriftväxling mellan Europeiska gemenskapernas kommission och Internationella arbetsorganisationen*

Council Decision 2005/367/EC of 14 April 2005 authorising Member States to ratify, in the interests of the European Community, the Seafarers' Identity Documents Convention of the International Labour Organisation (Convention 185)

Council Decision 2007/431/EC of 7 June 2007 authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation

Opinion 2/91 REG 1991, pp. 1-1061

ILO

International Labour Office, GB.262/LILS/2/2, 262nd Session, *The external competence of the European Communities and the ILO's standard-setting activities*, March 1995.

GB.215/SC/4/1, *The relationship of rights and obligations under the constitution of the ILO to rights and obligations under treaties establishing regional groupings*, March 1981.

GB 294/PFA/1, *Programme and Budget for 2004-05: Regular budget account and Working Capital Fund*, November 2005.

Secondary works

Bernitz, U, Kjellgren, A, *Europarättens grunder*, 3rd ed., Norstedts Juridik 2007.

Delarue, R, *ILO-EU cooperation on employment and social affairs*, The United Nations and the European Union: An Ever Stronger Partnership, Wouters, J, et al., pp. 93-114, T.M.C. ASSER PRESS 2006.

Eeckhout, P, *External Relations of the European Union – Legal and Constitutional Foundations*, Oxford University Press 2004.

Frid, R, *The Relations Between the EC and International Organizatio*ns, Kluwer Law International 1995.

Macleod, I, Hendry, I.D., Hyett, S, *The External Relations of the European Communities*, Oxford University Press 1996.

Maier, L, *EU, arbetsrätten och normgivningsmakten*, Stockholm University 2000.

Novitz, T, *Promoting Core Labour Standards and Improving Global Social Governance, An Assessment of EU Competence to Implement Commission Proposals*, European University Institute 2002.

Case law

Case 6/64 *Costa v. E.N.E.L.*, REG 1964 p. 585.

Case 22/70 *ERTA,* REG 1971 p. 263.

Case 6/76 *Kramer,* REG 1976 p. 1279.

Case C-322/88 *Grimaldi,* REG 1988 p. 4407.

Case C-158/91 *Ministère public och Direction du travail et de l'emploi v. Jean-Claude Levy*

Case C-203/03 *Commission of the European Communities v. the Republic of Austria*.

Case C-307/05 *Yolanda Del Cerro Alonso v. Osajudetza Servicio Vasco de Salud.*

Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line.*

Internet sources

Lissabonfördragets innehåll, EU-upplysningen, 7/12 2007 (10/12 2007), http://www.eu-upplysningen.se

Appendix

POINTS TO BEAR IN MIND
when considering ratification of an ILO Convention touching on Community law

1
Question: Does the scope of the ILO Convention concerned impinge on Community law?

Action: Check treaties and secondary legislation

YES – go on to **2**

NO – The Convention comes within the exclusive sphere of competence of the Member States and the Member States can therefore decide for themselves whether or not to ratify.

2
Question: Does the field, or parts of it, come within the exclusive sphere of competence of the EC?

Action: Check whether the Treaty includes any article explicitly granting exclusive competence to the Community (e.g. on trade policy), or alternatively, whether the sphere is implicitly exclusive, i.e. whether the field is extensively regulated and harmonised internally.

YES – Member States may not ratify the Convention/parts of the Convention which come within the Community's exclusive sphere of competence, they may only do so in the Community's stead, following Council authorisation.

NO – go on to **3**

3
Question: Is competence shared between the Member States and the EU?

The answer here ought reasonably to be YES, because competence is not exclusively vested in the Member States (see 1) or in the Community (see 2). Member States may ratify the Convention insofar as it does not impinge on Community rules and the Member States have a duty of co-operation towards the Community.

REGERINGSKANSLIET

Ministry of Employment
Sweden

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