



Analysis – in the light of the European Union acquis – of ILO up to date Conventions

Analysis – in the light of the European
Union *acquis* – of the ILO Conventions
that have been classified by the
International Labour Organisation as
up to date

European Commission

Directorate-General for Employment, Social Affairs and Inclusion
Unit A.4

Manuscript completed in June 2013

This report was financed by and prepared for the use of the European Commission, Directorate-General for Employment, Social Affairs and Inclusion. It does not necessarily represent the Commission's official position.

Report prepared by:

Ergon Associates Ltd: Ergon is a specialist consultancy working on labour and human rights, employment, gender and development.

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(* The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

More information on the European Union is available on the Internet (<http://europa.eu>).

Cataloguing data as well as an abstract can be found at the end of this publication

Luxembourg: Publications Office of the European Union, 2014

ISBN 978-92-79-35584-4

doi: 10.2767/60921

© European Union, 2014

Reproduction is authorised provided the source is acknowledged.

Printed in Luxembourg

PRINTED ON ELEMENTAL CHLORINE-FREE BLEACHED PAPER (ECF)

Table of contents

Foreword	2
Executive Summary	3
A. Introduction	16
B. Legal analysis	17
1. Division of competences in respect of ILO conventions	17
2. Internal competence.....	18
3. External competence	24
4. Interaction between ILO Conventions and the EU social <i>acquis</i>	39
5. Methodology	45
C. Resume of findings	47
1. Union and Member State external competence in relation to the Conventions.	47
2. Conventions that are potentially incompatible with the EU <i>acquis</i>	69
3. Chapters of the EU <i>acquis</i> engaged by ILO instruments.....	80
4. Value-added of ILO instruments in the context of the EU <i>acquis</i>	88
5. EU and ILO priorities.....	100
6. Prioritisation of ILO Conventions for EU promotion of ratification	110
Annex 1: Key sources	114
Annex 2: Status of maritime Conventions upon the coming into force of MLC	119
Annex 3: Up-to-date ILO Conventions ratified by EU-27 (as at April 2013)	122
Annex 4: ILO 'Governance' Conventions not yet ratified by EU Member States	130

Foreword



László Andor

Commissioner for Employment, Social Affairs and Inclusion

The International Labour Organisation and the European Union enjoy a long standing relationship which dates back to the beginning of the European project. All EU Member States are members of the ILO as well, and are active supporters of its role in promoting decent work and social justice.

The ratification of international labour conventions is part of the efforts on promoting the universally agreed Decent Work Agenda. In recent years the EU Member States, as well as other countries in the world, have intensified the ratification of ILO conventions. All the EU Member States have already ratified the eight fundamental ones, also called core international labour standards. These are considered as Human Rights instruments, covering the following subjects: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination at work.

This report will allow the reader to get acquainted with the interplay between the EU *acquis* and other ILO Conventions that have been classified by ILO as up-to-date, and to get a better understanding of the respective competences and roles of the EU and its Member States. These conventions cover a wide range of issues pertaining to all areas of the world of work. They reflect also the on-going efforts made by the ILO and its constituents to modernise conventions in order to take into account the evolving needs of employers, workers and governments. The European Parliament's Resolution of 26 November 2009 requesting the Commission, 'to inform in detail which of the ILO Conventions fall under the competence of the EU and which fall under the subsidiarity principle' contributed to trigger the launch of this study.

This work will be extremely useful in determining how best the EU can promote the ratification and the implementation of ILO Conventions, for the part falling under its competence. I am convinced that this is a key factor to accompany EU's objectives of quality employment and inclusive growth, and foster labour rights in the global economy.

Executive summary

1. This study seeks to support the Commission (DG EMPL) in analysing the ILO Conventions in light of the EU *acquis*. In particular, this relates to the request made to the Commission by the European Parliament (Resolution of 26 November 2009, point 3): 'to inform in detail which of the [up-to-date] ILO Conventions [and Protocols] fall under the competence of the EU and which fall under the subsidiarity principle.'
2. Accordingly, with regard to each of the up-to-date ILO Conventions and Protocols, the aim of the study is threefold, determining:
 - a. Whether each ILO instrument is consistent with the EU or whether there are concerns that it is, in whole or in part, inconsistent with the EU *acquis*. This analysis is to inform the Commission (as well as the other EU institutions and Member States) as to whether the EU is in a position to promote ratification of the Convention.
 - b. Whether Member States are in a position to decide autonomously on ratification of the Convention or whether part or all of the ILO instrument falls under Union competence. This analysis should inform the Commission as to whether it needs to propose that Member States are authorised by Council Decision to ratify the ILO instrument in the interests of the Union.
 - c. To what extent and in which areas the ILO instrument is coherent with and/or adds to the EU *acquis*. This analysis is to assist the Commission in assessing the policy relevance of promoting ratification of the ILO instrument in question.
3. These objectives have entailed:
 - a. A review of literature and legal doctrine in order to develop an adequate methodology: focusing on division of competences, compatibility of ILO provisions with Union *acquis*, and consequences for ratification of these instruments by Member States.
 - b. Detailed analysis of each of the up-to-date ILO instruments in light of the EU *acquis*, and aggregation of this analysis in an accessible summary
 - c. Drafting a résumé of key findings of the analysis, and guidance on ranking with regard to the sequencing of ratification activities of EU Member States.
4. The legal analysis starts from the recognition that, under Art 15(5)(d) of the ILO Constitution, only (ILO) Member States may ratify an ILO Convention. This means that where the Union possesses exclusive external competence in relation to an ILO Convention– or parts of a Convention – (EU) Member States must receive authorisation to ratify the Convention in the interests of the Union.

5. In the context of international agreement such as ILO Conventions, the competence in question is an *external* competence. Whilst some external competences are explicitly granted to the Union in the Treaties (such as common commercial policy), external competences in relation to the fields covered by ILO instruments are typically not expressly established in the Treaty and arise by implication from an internal competence, or are derived from general legal bases. Pursuant to Art 153(2)(b) TFEU, internal competence for social policy – the common core of many of the ILO instruments – is shared between the Union and Member States.
6. CJEU jurisprudence affirms that an external competence can arise by implication either from the existence or the exercise of an internal competence: the doctrine of parallelism.¹ In a series of cases, the Court broadly identified three circumstances in which such implied external competence could arise:
 - a. ERTA principle: where external action is *necessary* to attain the objective/s underpinning an internal competence even in the absence of prior internal legislation.²
 - b. WTO principle: where a legally binding act makes provision for external competence;³
 - c. ‘Open Skies’ principle: where the Union adopts common rules, the Member States no longer have the right to undertake obligations towards non-member countries which affect those rules or alter their scope, so that external competence to do so prospectively resides in the Union institutions.⁴
7. This case law is codified in Art 216 TFEU, which establishes that external competence may either be conferred expressly or may arise by implication (Art 216(1) TFEU). Under Art 216 TFEU, it remains necessary to delineate the scope of implied external competence by reference to a specifically identified internal competence. There is thus, for the purposes of this study, an important link between internal competence over issues covered by ILO instruments (which will typically be express) and external competence (which will typically be implied, albeit from an express internal competence).
8. The *nature* of the external competence is presumptively determined by Arts 2–6 TFEU, which connect different policy areas with different kinds of external competence. Under Art 4(1) TFEU, ‘residual’ competence – where the policy area engaged by an international agreement is not specifically mentioned in Arts 2–6 – is shared competence. The only exception to this is Art 3(2) TFEU,

¹ Opinion 2/92 [1995] ECR I-521.

² Case C-22/70 *Commission v Council (ERTA)* [1971] ECR 263; Opinion 1/76 [1977] ECR 741.

³ Opinion 1/94, WTO [1994] ECR I-5416.

⁴ Case C-467/98 *Commission v Denmark* [2002] ECR I-9519.

which codifies existing case law by providing a list of circumstances in which exclusive external competence can arise irrespective of the policy area engaged by the agreement at hand:

- a. 'when its conclusion is provided for in a legislative act of the Union'
- b. 'or is necessary to enable the Union to exercise its internal competence'
- c. 'or in so far as its conclusion may affect common rules or alter their scope'.

9. In order to develop legal tests to apply to the analysis of external competence pertaining to ILO instruments, we have also considered the implied powers case law. Opinion 2/91 is the most significant case law addressing the determination of external competence in respect of ILO Conventions. In Opinion 2/91, the CJEU held that the Union will possess exclusive external competence when the commitment is 'of such a kind as to affect [...] Community rules'. The Court further held that the commitment will 'affect [...] Community rules' when it engages an area which the Union has regulated 'to a large extent'.
10. The Directives under consideration in Opinion 2/91 were found to be regulation 'to a large extent' because they 'contain rules, which are more than minimum requirements.' The Court further drew attention to the *content* of Directive 88/379, referring to the 'very detailed rules on labelling set out in the... Directive'; and also to the *nature* and of the Directives and the *future development* of EU law in that area, noting that the Directives contain rules 'progressively adopted... with a view to achieving an ever greater degree of harmonisation' (our emphasis). The CJEU restated this analysis in Opinion 1/03, 'The Lugano Opinion', referring more generally to the importance of considering the scope, nature, content and future development of the rules.
11. It therefore follows that, where the Treaty establishes that an area of the *acquis* is to be governed by shared internal competence, there should not be any general assumptions regarding the character of EU regulation which may give rise to implied exclusive external competence, but that each and every regulation should be assessed regarding its scope as well as its nature and content in order to determine whether it constitutes 'regulation to a large extent'. This has been our approach.
12. Accordingly, this study has developed and applied legal tests based on the four principal grounds which may give rise to Union exclusive external competence:
 - a. The Convention engages an area of EU law over which the Union possesses express exclusive competence pursuant to Article 3(1) TFEU.
 - b. The Convention engages Union coordinating regulation, therefore 'affecting common rules' under Article 3(2) TFEU.

- c. The Convention engages regulation 'to a large extent', following Opinions 2/91 and 1/03, therefore also 'affecting common rules' under Article 3(2) TFEU
- d. The Convention is incompatible with the *acquis*, in which case the Union 'pre-empts' Member State competence under Articles 3(2) and 2(2) TFEU to the extent that it has already legislated in an area of Union and Member State shared competence.

13. On this basis, analysis of the up-to-date ILO instruments in the light of the *acquis* has found that the following eleven particularly detailed harmonising Regulations and Directives constitute regulation 'to a large extent' for the purposes of our analysis. This list is not closed, as further instruments may come to constitute regulation to a large extent as EU law develops.

- Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances
- Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency
- Directive 2006/42/EC of the European Parliament and Council on machinery
- Directive 2003/37/EC on type-approval of agricultural or forestry tractors
- Directive 2009/16/EC on port State control (Recast)
- Directive 2008/68/EC on the inland transport of dangerous goods
- Directive 2005/36/EC on the recognition of professional qualifications
- Directive 96/29/Euratom laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation
- Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work
- Directive 96/82/EC on the control of major-accident hazards involving dangerous substances
- Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile constructions sites

14. The study also finds that Article 157 TFEU providing for equal pay for equal work between men and women constitutes 'regulation to a large extent', due to the scope and the precise nature of the principle in EU law. The direct horizontal effect of Article 157 TFEU, following the case of *Defrenne*, means that Member States' autonomy to implement the principle of equal pay for men and women is greatly restricted.

15. Equally, analysis finds that Directive 2003/88/EC on working time does *not* constitute 'regulation to a large extent'. Directive 2003/88/EC is not wider in scope or more detailed in nature than other Directives enacted under Article

153(1)(a) TFEU, such as Directive 89/391/EEC setting minimum requirements in occupational safety and health.

16. Given the broad nature of many ILO instruments, the analysis has also sought to clarify the legal basis for implied external competence. Opinion 2/91 highlights the distinction between competence in relation to *individual* provisions of a Convention, and competence in relation to the Convention as *a whole*. In particular, in Opinion 2/91, the Court found that the Union possessed exclusive external competence with regard to specific provisions of Convention 170 relating to labelling; however, the Court's overall conclusion in Opinion 2/91 was that Convention No 170 as a whole fell under shared competence.

17. This is reflected in the wording of the Council Decisions which authorise Member States to ratify C186 and C188 'in the interests of the European Community' [now Union]. (Commission Proposals for Council Decisions regarding C170 and C189 are now in train.) For example, Council Decision 2010/321/EU refers specifically to the need for Member States to receive authorisation to 'ratify, for the parts falling under the exclusive competence of the Union, the Work in Fishing Convention, 2007'. The Decision therefore does not purport to authorise Member States to ratify the Convention as a whole (even where the effect of requiring authorisation *de facto* prevents Member States from autonomously ratifying those other parts, as the ILO instruments are not severable, with specific exceptions). The same is true of Council Decision 2007/431/EC authorising EU Member States to ratify the Maritime Labour Convention, 2006, which can be inferred by reading Article 1 of the Decision in conjunction with preamble paragraph 6.

18. Accordingly, there is external competence, and compatibility with the *acquis*, in relation to seventy-two⁵ up-to-date ILO Conventions and Protocols. The nature of external competence is categorised into four areas, reflecting the distribution of internal competence under TFEU, and differing procedural implications:

Nature of external competence	Procedural implication for ratification
Engages union exclusive external competence (express or implied)	Member States require Council authorisation in order to ratify the Convention. Member States and the Union are subject to the duty of sincere cooperation under Articles 4 and 13 TEU.

⁵ There are eighty-one up-to-date Conventions and Protocols in total. However, the report excludes analysis of the ten up-to-date maritime Conventions which are no longer open for ratification upon the entering into force of C186 (MLC). It includes analysis of C158 – Termination of Employment Convention, a conclusion on the status of which was not reached by the Cartier Working Party.

Falls under Union and Member State shared external competence	Member States may autonomously ratify the Convention, subject to the duty of sincere cooperation.
Falls under Union 'special' coordinating external competence	Member States may autonomously ratify the Convention, subject to the duty of sincere cooperation.
Falls under Member State competence	Member States may autonomously decide whether to ratify the Convention, subject to the duty of sincere cooperation.

19. The majority (40 out of 72, or 56%) of the up-to-date ILO instruments fall under Union and Member State shared competence, with a significant minority (25 out of 72, or 35%) engaging Union implied exclusive external competence.

20. The most significant grounds for Union exclusive competence is that the ILO instrument in question engages, and could therefore affect, EU common rules, characterised both by coordinating regulation and regulation 'to a large extent'. By contrast, markedly few Conventions engage fields which are expressly attributed to exclusive Union external competence – in both cases (C94 – Labour Clauses (Public Contracts) Convention and C29 – Forced Labour Convention) these pertain to public contracts.

Category	Division of specific Conventions into different external competences			
	Union and Member State shared competence	Engage Union exclusive external competence	Union 'special' coordinating competence	Member State competence
Fundamental Rights	C87, C98, C105, C111, C138, C182	C29, C100		
Governance (Priority)	C81, C129, C144		C122	
Dock Workers		C152		
Elimination of Child Labour	C77, C78, C124			
Employment Policy and Promotion	C158	C181	C159	
Equality of Opportunity & Treatment	C156			
Fishers, Maritime Labour, Seafarers		C185, C186, C188		
Freedom of Association, Collective Bargaining	C141, C151, C154			C135
Indigenous and Tribal People	C169			
Labour Administration and Inspection	P81, C160	P110		C150

Maternity Protection	C183			
Migrant Workers		C97, C143		
Occupational Safety and Health	C120, C148, P155, C161, C167, C176, C187	C115, C139, C155, C162, C170, C174, C184, C189		
Social Security	C168	C102, C118, C121, C128, C130, C157		
Specific Categories of Workers	C172, C177	C110, C149		
Vocational Guidance and Training			C140, C142	
Wages	C173	C94		C95, C131
Working Time	C14, C106, C171, C175	P89		

21. The study has identified a very limited number of up-to-date ILO instruments which are potentially incompatible with the EU *acquis*. To the extent that these Conventions contain provisions that are incompatible with the *acquis*, those provisions will trigger Union implied exclusive competence under the doctrine of pre-emption, pursuant to Arts 3(2) and 2(2) TFEU. The potentially incompatible Conventions which we have identified are:

- P 89 – Protocol to the Night Work (Women) Convention: Protocol Art. 2(1) potentially discriminates against women workers, contrary to Directive 2006/54/EC.
- C 94 – Labour Clauses (Public Contracts) Convention: Art. 2(1)(a) is potentially incompatible with Art. 3(l) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, in view of Case C-346/06 Rüffert, and; potential incompatibility with Article 56 TFEU, in view of Case C-346/06 Rüffert.
- C 97 – Migration for Employment Convention (Revised): potential incompatibility between Art 5 of Annex 1 and Art 3(6) with Art 45 TFEU establishing free movement of workers (provision of contract prior to departure for cross-border workers; restriction on immigration); potential incompatibility [resolved elsewhere in Convention] between Art 3(2) of Annex I and Art. 56 TFEU establishing free movement of services (private recruitment services).
- C110 – Plantations Convention: potential incompatibility between under Art 11(2) and Art 45 TFEU (requirement that cross-border workers undergo a medical examination prior to departure).

22. A further four up-to-date Conventions containing potential incompatibilities are the subject of a Council Decision – or a Commission Proposal for a Council Decision – authorising their ratification in the interests of the Union:

- C185 – Seafarers' Identity Documents Convention (Revised): potential incompatibility between Article 6(7) of C185 and Regulation (EC) No 539/2001. The Proposal for a Council Decision (COM/2004/0530 final) emphasises that the 'application of the Community rules on visas should be preserved' (paragraph 17). This reasoning is reflected in the preamble of Council Decision of 14 April 2005, which also contains the text of C185 in its Annex.
- C186 – Maritime Labour Convention: potential incompatibility between Standard A1.4, paragraph 2 and Art. 56 TFEU as the Standard provision does not require that the relevant collective agreements be declared universally applicable, therefore potentially contrary to Art. 56 TFEU, as interpreted by the CJEU in Rüffert (see above in relation to C94).
- C188 – Work in Fishing Convention: potential incompatibility between Art 34 of the Convention Regulations (EEC) No 1408/71 and (EC) No 883/2004 concerning social security responsibilities of flag state and state of residence.
- C189 – Domestic Workers Convention: Article 8(1) of the Convention is potentially incompatible with Art. 45 TFEU and Art. 2 of Regulation No 492/2011 on freedom of movement for workers within the Union (requirement that cross-border migrant domestic workers receive a written job offer, or contract of employment prior to departure).

23. Of these Conventions, C188 and C189 contain a safeguard clause which provides that a regional economic integration organisation, such as the EU, may derogate from the provision which gives rise to the potential incompatibility.

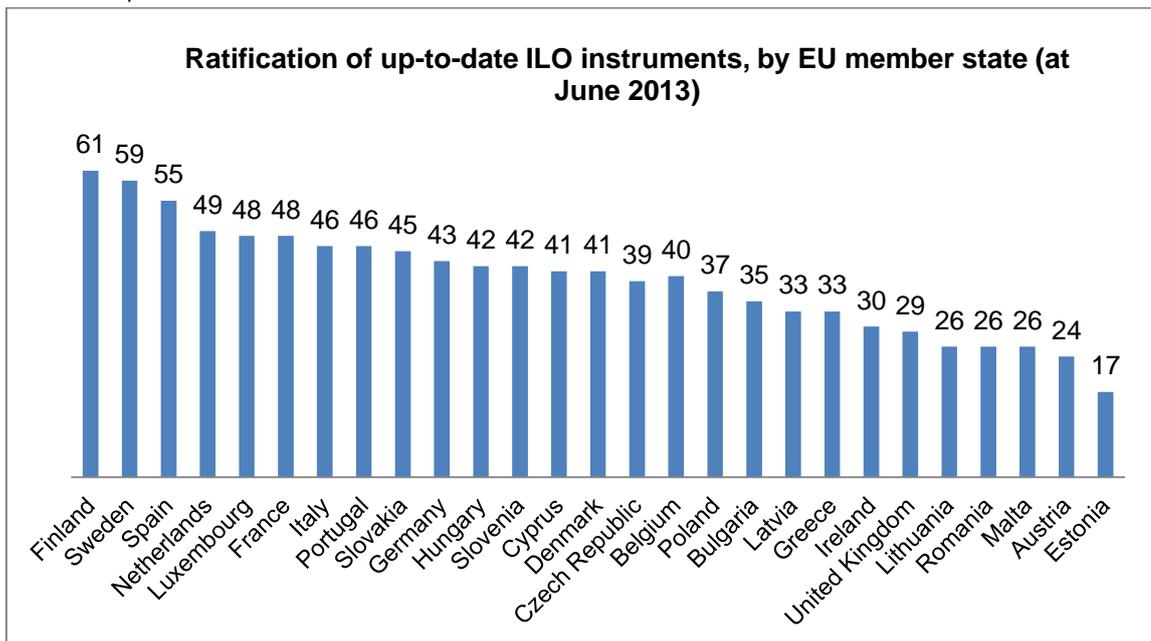
24. As broad instruments covering a range of subjects, the ILO instruments engage a number of Chapters of the EU *acquis*, beyond social and employment policy: Chapter 1: Free movement of goods; Chapter 2: Freedom of movement for workers; Chapter 3: Right of establishment and freedom to provide services; Chapter 5: Public procurement; Chapter 10: Information society and media; Chapter 13: Fisheries; Chapter 18: Statistics; Chapter 19: Social policy and employment; Chapter 23: Judiciary and fundamental rights; Chapter 24: Justice, freedom and security; Chapter 26: Education and culture. The most significant engagement with the *acquis* outside social and employment policy relates to cross-border movement: Free Movement of Workers, Free Movement of Services, and Justice, Freedom and Security.

25. A comparative perspective on EU and ILO standards suggests that the EU *acquis* provides a high level of protection to workers within the EU, whilst maintaining a flexible legal framework within which Member States are generally free to provide for greater standards of protection. In many areas, EU regulation provides for greater protection of workers than the ILO instruments.

26. However, there are a number of areas where the ratification of up-to-date ILO Conventions and Protocols could complement or add value to the existing EU *acquis* by:

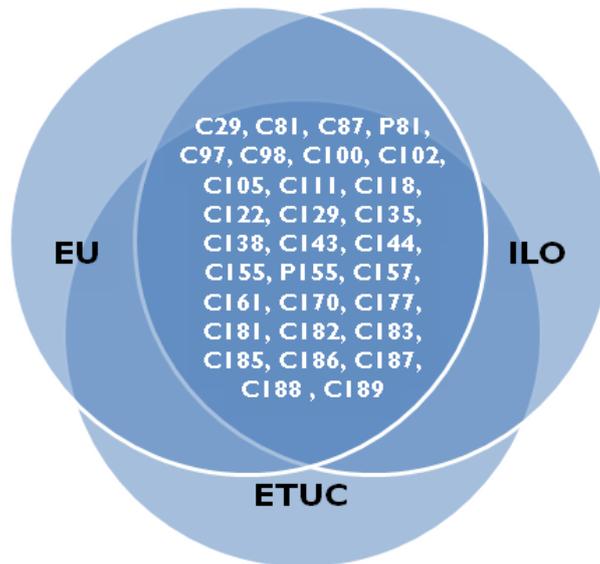
- a. Providing for greater protections for workers, by means of more stringent minimum requirements, particularly in occupational safety and health (OSH)
- b. Establishing a normative framework in areas which are not covered or only partly covered by legislation and Union policies, including those areas expressly excluded from Union competence, such as such as labour administration and inspection, trade union rights, collective bargaining and wages.
- c. Complementing measures where the current EU *acquis* establishes a procedural or coordinating framework, such as social security.
- d. Extending scope and coverage of protections, for instance to specific groups of workers, such as domestic workers or homeworkers.
- e. Responding to the particular objectives of the EU, such as gender equality, and the demands of the European labour market in current and future economic contexts.

27. Of the 83 instruments (including C158) which are the focus of this study, there is a mixed picture of ratification across the EU.



Source: ILO Brussels, ILO NORMES

28. Assessing the relative importance and priority accorded to the up-to-date ILO instruments, we find that there is considerable consensus between the EU (Commission, Parliament) ETUC and the ILO (diagram includes instruments already ratified by all 27 EU Member States, and those subject to Council Decisions or Proposals for Council Decisions authorising ratification):



29. BusinessEurope, with the IOE, notes that the Commission “calls upon all Member States to set an example by ratifying and implementing the ILO Conventions classified by ILO as up to date” in COM(2008)412. However, BusinessEurope registers concerns with regard to the following up-to-date ILO instruments: C87 (Freedom of Association and Protection of the Right to Organise), C94 (Labour Clauses (Public Contracts)), C98 (Right to Organise and Collective Bargaining), C100 (Equal Remuneration), C143 (Migrant Workers (Supplementary Provisions)), C156 (Workers with Family Responsibilities), C175 (Part-time Work Convention), and C158 (Termination of Employment).

30. The Conventions are prioritised into four categories: high; medium; low; and incompatible with the *acquis*, meaning that the EU should abstain from promoting ratification. The ranking is based on the following four criteria:

1.	Compatibility (Exclusion criterion)	<ul style="list-style-type: none"> Are there significant compatibility concerns?
2.	Value-added	<ul style="list-style-type: none"> What is the 'value-added' to EU <i>acquis</i> through ratification? Does the Convention address issues of pertinence to the EU which are not currently addressed by EU and Member State rules and policies? Is the Convention wholly relevant to the EU workplace context, including crisis recovery?
3.	Importance to EU	<ul style="list-style-type: none"> Is the Convention referenced in EU public policy commitments or communications? Is the Convention relevant to specific EU policies? Is the Convention a priority, or a significant concern, for ETUC and BusinessEurope?
4.	Importance to ILO	<ul style="list-style-type: none"> What significance does the ILO accord to the Convention?

31. These rankings exclude:

- The eight ILO Fundamental Conventions, which have all been ratified by all 27 EU member states, and the ILO Governance Convention which has already been ratified by all 27 EU member States – namely C81(Labour Inspection)
- Those ILO Conventions which are already the subject of an authorising Decision by the Council, or where a proposal for a Decision is in train, namely: C170 – Chemicals Convention, C185 – Seafarers' Identity Documents Convention, C186 – Maritime Labour Convention, C188 – Work in Fishing Convention, and C189 – Domestic Workers Convention.

32. First, it is suggested that there should be a prioritisation of those Conventions that engage Union exclusive competence, meaning that Member States require Council authorisation before ratification. This prioritisation is intended to inform the sequencing of Commission proposals for Council Decisions authorising ratification in the interests of the Union.

High priority	No. of Member State ratifications
C102 – Social Security (Minimum Standards) Convention	21
C118 – Equality of Treatment (Social Security) Convention	7
C155 – Occupational Safety and Health Convention	15
C157 – Maintenance of Social Security Rights Convention	2
C181 – Private Employment Agencies Convention	12
Total: 5	
Medium priority	
C121 – Employment Injury Benefits Convention	8
C128 – Invalidity, Old-Age and Survivors' Benefits Convention	8
C130 – Medical Care and Sickness Benefits Convention	8
C143 – Migrant Workers (Supplementary Provisions) Convention	5
C149 – Nursing Personnel Convention	14
C152 – Occupational Safety and Health (Dock Work) Convention	10
C162 – Asbestos Convention	11
C184 – Safety and Health in Agriculture Convention	4
C115 – Radiation Protection Convention	18
C139 – Occupational Cancer Convention	14
C174 – Prevention of Major Industrial Accidents Convention	6
C167 – Safety and Health in Construction Convention	9
Total: 12	
Low priority	
P110 – Protocol to the Plantations Convention	0

33. There are four Conventions which engage Union exclusive external competence that are potentially incompatible with the EU *acquis*. Where a Convention is incompatible with the EU *acquis* the Commission should abstain from promoting its ratification, and therefore these Conventions are not included in the priority ranking. However, among these Conventions there are two – C94 and C97 – which are significant priorities for social partners and the ILO, and which represent significant potential value-added for the *acquis*.

Potentially incompatible	
P 89 – Protocol to the Night Work (Women) Convention (Revised)	0
C 94 – Labour Clauses (Public Contracts) Convention	10
C 97 – Migration for Employment Convention (Revised)	10
C110 – Plantations Convention	0

34. Second, there is a suggested prioritisation for Conventions that fall under a competence other than EU exclusive competence (i.e. Union and Member State shared competence, or Union 'special' coordinating competence) meaning that Member States may autonomously ratify the Convention. This prioritisation is intended to inform promotion by the Commission of Conventions for ratification by Member States in the interests of the Union.

High priority	No. of MS ratifications
P 81 – Protocol to the Labour Inspection Convention	4
C122 – Employment Policy Convention	25
C129 – Labour Inspection (Agriculture) Convention	20
C135 – Workers' Representatives Convention	24
C144 – Tripartite Consultation (International Labour Standards) Convention	25
C151 – Labour Relations (Public Service) Convention	17
C154 – Collective Bargaining Convention	13
P155 – Protocol of 2002 to the Occupational Safety and Health Convention	5
C177 – Home Work Convention	5
C183 – Maternity Protection Convention	12
C187 – Promotional Framework for Occupational Safety and Health Convention	10
Total: 11	
Medium priority	
C 14 – Weekly Rest (Industry) Convention	23
C 77 – Medical Examination of Young Persons (Industry) Convention	13
C 78 – Medical Examination of Young Persons (Non-Industrial) Convention	12
C106 – Weekly Rest (Commerce and Offices) Convention	12
C120 – Hygiene (Commerce and Offices) Convention	16
C124 – Medical Examination of Young Persons (Underground Work) Convention	18
C140 – Paid Educational Leave Convention	13
C141 – Rural Workers' Organisations Convention	16

C142 – Human Resources Development Convention	22
C148 – Working Environment (Air Pollution, Noise and Vibration) Convention	18
C156 – Workers with Family Responsibilities Convention	11
C158 – Termination of Employment Convention*	10
C159 – Vocational Rehabilitation and Employment (Disabled Persons) Convention	20
C160 – Labour Statistics Convention	19
C161 – Occupational Health Services Convention	11
C168 – Employment Promotion and Protection against Unemployment Convention	4
C169 – Indigenous and Tribal Peoples Convention	3
C171 – Night Work Convention	7
C172 – Working Conditions (Hotels and Restaurants) Convention	6
C173 – Protection of Workers' Claims (Employer's Insolvency) Convention	8
C175 – Part-Time Work Convention	9
C176 – Safety and Health in Mines Convention	11
Total: 24	

**The Cartier Working Party reached no conclusion on the status of C158*

35. The Conventions in the table below fall under Member State exclusive competence, and therefore Member States may ratify the Conventions autonomously.

Member State competence Conventions	No. of Member State ratifications
C 95 – Protection of Wages Convention	17
C131 – Minimum Wage Fixing Convention	9
C150 – Labour Administration Convention	16

A. Introduction

Report overview

This report constitutes the **Final Report** for Study Contract no. VT/2011/056 'Analysis – in the light of the European Union *acquis* – of the ILO Conventions that have been classified by the International Labour Organisation as up to date'.

The aim of the study is to establish, with regard to each of the up-to-date ILO Conventions and Protocols:

- Whether the Convention appears to be consistent with EU *acquis* or whether there are concerns that it is, in whole or in part, inconsistent with the EU *acquis*. This analysis should inform the Commission (as well as the other EU institutions and Member States) as to whether the EU is in a position to promote ratification of the Convention.
- Whether Member States are in a position to autonomously decide on ratification of the Convention, or if part or all of the Convention falls under Union competence. This analysis should inform the Commission as to whether it needs to propose that Member States are authorised by Council Decision to ratify the Convention in the interests of the Union.
- To what extent and in which areas the Convention coheres with and/or adds to EU *acquis*. This analysis should assist the Commission in assessing the policy relevance of promoting ratification of the Convention in question.

Final report structure

This report sets out:

- **Task 1** output: a full draft of the legal analysis which underpins our methodological approach to analysing the up-to-date ILO Conventions and Protocols with regard to competences engaged and compatibility with EU *acquis*
- **Task 2** output: summary description of methodology for analysis of Conventions and Protocols
- **Task 3** outputs: Presentation of analytical fiches populated with all up-to-date Conventions and Protocols; and a synthetic grid summarising the findings of the analysis of all Conventions and Protocols examined
- **Task 4** outputs: A résumé of key findings, followed by a presentation of elements for guidance on ranking the up-to-date instruments examined, for a possible sequencing of the ratification activities of Member States.

B. Legal analysis

This analysis seeks to set out the reasoning which supports our approach to the analysis of each ILO up-to-date convention and our conclusions on issues of competence and compatibility. The analysis is arranged under two broad headings: first, dealing with issues pertaining to internal and external competence; second, dealing with the interaction between ILO standards and the EU *acquis*.

1. Division of competences in respect of ILO conventions

1.1. General

The question of the correct approach to EU Member State ratification of ILO Conventions requires an appreciation of the division of competence between the Union and the Member States. This necessitates an analysis of *internal* legislative and policy-making competence in areas covered by the up-to-date ILO Conventions, in order to identify the extent to which the Union and Member States respectively possesses competence to act *externally*, in relation to an ILO Convention.

The following analysis seeks to inform an applied analysis to determine:

- (a) whether Member States are in a position to decide autonomously on ratification of each Convention, or
- (b) if part or all of the Convention falls under Union competence and, if so, whether this Union competence is exclusive, thus necessitating that Member States are authorised by Council Decision to ratify the Convention in the interests of the Union.

1.2. The principle of conferral and dimensions of competence

Since its inception, the European Union has operated on the basis of the principle of conferral, now contained in Article 5 of the Treaty on European Union (TEU). This means that the Union institutions may only act where they can identify a provision in one of the Treaties which confers a power on them to do so. In lieu of such a provision, the Member States remain the default holders of competence in a given policy area (Art 4 TEU).

Union competence will thus arise predominantly on the basis of *express* conferral, but the Court of Justice of the European Union (CJEU) has developed a doctrine whereby the Union's powers may also to be implied. With regard to internal competence, the rule is that the Treaty must be interpreted as conferring any powers that are indispensable for carrying out the tasks it prescribes.⁶ This doctrine has now been consolidated in the Article 352 (1) TFEU, which states: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have

⁶ Alan Dashwood, 'The Limits of European Community Powers' (1996) *European Law Review*, 113-128, at 124.

not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.'

Where competence is established, it is further necessary to identify the nature of that competence. The different kinds of competence are now clearly delineated in Arts 2 to 6 TFEU. Accordingly, the EU's competence may be:

- Exclusive (Art 3 TFEU)
- Shared (Art 4 TFEU)
- Limited to the EU supporting, coordinating or supplementing Member State action (Art 6 TFEU), or
- A 'special competence' to provide guidelines for national economic and employment policies (Art 5 TFEU)

2. Internal competence

2.1. Treaty provisions on internal competence in social and employment policy

Internal competence pertaining to social policy

Union institutions may only act where they can identify a Treaty provision or legal base conferring a power on them to do so. The broadest basis related to measures which would conventionally be described as 'labour law' can be found in **Title X TFEU on Social Policy**.

Pursuant to **Art 153(2)(b) TFEU**, Directives in any of the fields listed in Art 153(1)(a)-153(1)(i) may be enacted by the European Union. These fields are:

- (a) improvement in particular of the working environment to protect workers' health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

Under TFEU Art 4(2)(b), '**social policy**' is an area of **shared competence** between the EU and Member States. What this means is that the EU can implement a range of measures – including soft law, hard law and harmonisation (referred to in Article 151 TFEU as the 'approximation of provisions laid down by law, regulation or administrative action'). A specific legislative competence is then conferred in Art 153(2)(b), which states that the European Parliament and the Council 'may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation'. Member States can act only where the EU has not exercised its competence or has explicitly ceased to do so.

Internal competence pertaining to employment policy

By contrast, '**employment policy**' is covered by the **special category of competence** in Art 5(2) TFEU – which states that the Union shall 'take measures to ensure coordination of the employment policies' of Member States, in particular 'by defining guidelines for these policies'. The details of this competence are elucidated in Title IX TFEU, where the role of the EU is limited to encouraging cooperation and by supporting and, if necessary, complementing the action of Member States. The main competences conferred by Title IX are for the Council to 'draw up guidelines which the Member States shall take into account in their employment policies' (Art 148(2) TFEU); and to adopt 'incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment', explicitly prohibiting 'harmonisation of the laws and regulations of the Member States' (Art 149 TFEU). The measures envisaged by these competences may best be described as 'soft law' measures, whose purpose is to influence policy rather than to tie Member States to binding and enforceable standards.

2.2. Treaty provisions on internal competence in related fields

There are a number of fields closely related to social and employment policy which may be engaged by ILO Conventions, and where competence is expressly conferred on the EU. These include **but are not limited to**:

- **Equal treatment and anti-discrimination** (e.g. Convention 100): As well as the competence in relation to equality between men and women at work in Art 153(1)(i), EU competence in the field of equal treatment and anti-discrimination is conferred in Arts 18, 19 and 157 TFEU.
- **Social security** (e.g. Convention 102, Convention 186): As well as the competence in relation to social security in Art 153(1)(c), exclusive competence in the field of social security coordination – specifically in relation to migrant workers – is conferred on the EU in Art 48 TFEU.
- **Internal market**: Competence is conferred on the EU in Art 114 TFEU to adopt measures 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. A number of fields relating

to internal market measures and fundamental economic freedoms may be engaged by ILO Conventions, specifically as they interact with **freedom of movement of workers** (for instance, visa exemptions under C185), **freedom to provide services** (particularly in view of secondary legislation on Posted Workers), **freedom of establishment** as well as **public procurement** (namely, as regards 'social clauses' under C94).

- **Migrant rights:** Competence is conferred on the EU to adopt measures relating to the treatment of third-country nationals in Art 79 TFEU (noting Art 79(2) pertaining to trafficking in persons)
- **Vocational training:** competence is conferred on the EU to adopt measures to implement a vocational training policy in Art 166 TFEU.
- **The judiciary**(for instance, judicial cooperation under C189): Art 81 TFEU provides that the Union shall develop judicial cooperation in civil matters having cross-border implications.
- **Fundamental rights: the EU Charter of Fundamental Rights.**

In relation to fundamental rights, it is important to mention that **Art 6(1) TEU** confers first-order legal status on the **EU Charter on Fundamental Rights**. Art 51(2) of the Charter and Art 6(1) TEU itself make clear that the instrument does not create any new competences for the Union. However, the Charter's provisions may act as an aid to the interpretation of Treaty provisions in so far as they represent a core constituent of Union 'fundamental rights', which have long been recognised as general principles of Union law.⁷ Thus uncertainties in interpretation may be resolved in favour of the protection of fundamental rights.⁸

ILO standards are relevant to the interpretation of the Charter as the Preamble states that the Charter entrenches 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States'. While the Court of Justice has been somewhat reluctant to cite ILO standards directly in its human rights jurisprudence,⁹ those standards and the work of the ILO supervisory bodies nonetheless influence and shape the work of institutions like the European Court of Human Rights and the Council of Europe's European Committee of Social Rights, which is in turn more regularly called upon by the CJEU. In particular, it is important to note that Art 52(3) of the Charter accords deference to the jurisprudence of the ECHR, such that even before the EU's accession to the European Convention on Human Rights, the Charter will function as the vessel for the application of ECHR jurisprudence in the Court of Justice.

⁷ See Case C-4/73 *Nold* [1974] ECR 491

⁸ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143

⁹ O'Higgins, 'The interaction of the ILO, the Council of Europe and European Union Labour Standards', in Hepple, *Social and Labour Rights in Context: International and Comparative Perspectives*, CUP 2002

2.3. Exercise of competence

Where competence exists in relation to potential legislative action by the Union, it is then necessary consider the various legal principles that regulate the **exercise** of competence:

- **Subsidiarity (Art 5(3) TEU):** In line with Art 5(3), the principle of subsidiarity requires that where Union competence is not exclusive, the Union should only act if the objectives of the proposed action cannot be sufficiently achieved by the Member States (either at central, regional or local level), but can by reason of the scale or effects of the proposed action, be better achieved at Union level. Article 8 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality provides that legal acts can be challenged before the CJEU on the basis that they infringe the principle of subsidiarity, but jurisprudence thus far suggests that 'the ECJ (CJEU) will not lightly overturn EU action on the ground that it does not comply with subsidiarity'.¹⁰ Whilst there have been some (ultimately unsuccessful) challenges, on the ground of subsidiarity, to the exercise of internal Union competence in the labour field,¹¹ with regard to external competence, the means by which this may be implied – from either the *existence* or the *exercise* of an internal competence – means it is highly likely the subsidiarity test will have been satisfied also in the case of external action.
- **Pre-emption (Art 2(2) TEU):** Art 2(2) encapsulates the doctrine of pre-emption in its statement that 'the Member States shall exercise their competence to the extent that the Union has not exercised its competence'. Thus where the Union acts in accordance with its competence, Member States may no longer exercise competence with respect to that matter. However, as confirmed by Protocol (No 25) on the Exercise of Shared Competence, where the Union has taken action in a certain area, 'the scope of the exercise of the competence *only covers those elements governed by the Union act in question and therefore does not cover the whole area*'. In the context of exclusive competence, pre-emption occurs even if the EU has not taken action.
- **Duty of sincere co-operation (Art 4(3) TEU) and the duty arising from the requirement of unity in the international presentation of the Community:** The CJEU has affirmed that the Art 4(3) duty 'is of general application',¹² suggesting that it applies irrespective of the nature of the competence at hand, and in particular even where the competence is exclusive in favour either of Member States or the Union.¹³ For more detail on this duty and the duty arising from the requirement of unity in the international presentation of the Community, see 'How do the duties of sincere co-operation... where the Union seeks to exercise an external competence', below.

¹⁰ Craig & de Búrca, *EU Law: Text, Cases and Materials*, 5th ed, OUP 2011, at 98

¹¹ Case C-84/94 *United Kingdom v. Council (Working Time Directive)* [1996] ECR I-5755

¹² Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805

¹³ Hillion, 'Mixity and coherence in EU external relations: the significance of the 'duty of cooperation'', CLEER Working Papers 2009/2, at 22

- **Proportionality (Art 5(4) TEU):** In line with Art 5(4), the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaty. Once again, Art 8 of Protocol (No 2) affirms that legal acts can be challenged on the basis that they infringe the principle of proportionality. Although there is greater precedent for annulling measures on the basis of proportionality,¹⁴ the Court has often reiterated that it will only strike down a measure if it is 'manifestly inappropriate' in relation to the objective pursued, or if a 'manifest error' has been made in the proportionality calculation.¹⁵ In the specific context of social policy, the Court has emphasised that the institutions must be allowed a 'wide discretion' where they are required to make 'social policy choices' which require 'complex assessments'.¹⁶

Further, various policy considerations come in to dictate how a particular competence is exercised in practice. Thus in the competences which permit regulation of the internal market, the EU has often made recourse to 'total harmonisation' – the creation of a single European standard, precluding any national legislation within the occupied field. This can be explained on the basis that supplementary national action may endanger the strict uniformity of the Union regime.¹⁷ By contrast, in the context of social policy, flexible measures allowing for supplementary national action have generally been preferred.

2.4. Limits on the EU internal competence in social policy

It is important to note, when considering EU internal competence on social policy issues, that the following provisions in Title X TFEU lay down substantive (as opposed to procedural) limits on the scope of the competence enjoyed by the Union in the realm of social policy:

Pay, freedom of association and the right to strike

Art 153(5) TFEU expressly states that the competence conferred in Art 153 TFEU does not apply to 'pay, the right of association, the right to strike or the right to impose lock-outs'. However, the position with regard to Union competence in respect of these areas of social policy is more nuanced than immediately appears.

First, there is an obvious overlap between these fields and fields in which the EU *does* enjoy legislative competence. For example, the right of association is excluded but there is express competence in relation to collective consultation and representation of workers (Arts 153(1)(e) and (f) TFEU). Further, the constitutional recognition of the position of the social partners in Art 152 TFEU and the competence to promote the role of the social partners by means of the social dialogue procedure. This procedure (Arts 154-155 TFEU) envisages that agreements concluded between the social partners at EU level shall be implemented 'in

¹⁴ See Case C-114/76 *Bela-Mühle v Grows-Farm Gmb* [1977] ECR 1211

¹⁵ See Case C-331/88 *ex p. Fedesa & Ors* [1990] ECR I-4023

¹⁶ Case C-84/94, *UK v Council (Working Time Directive)* [1996] ECR I-5755

¹⁷ Robert Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 *Common Market Law Review* 1023, at 1040

accordance with the procedures and practices specific to management and labour and the Member States'. Art 155(2) also envisages social partner agreements on 'matters covered by Article 153' – i.e. taking into account the Art 153(5) exclusion – which may be implemented by a Council decision on a proposal from the Commission, suggesting that the social partners may conclude agreements on matters *not* subject to Art 153 and its exclusions.

Whilst it is clear that the EU Charter of Fundamental Rights does not extend the competence of the Union (Article 51(2)), the Union institutions (and the Member States when they are implementing Union law) are nonetheless bound to respect rights recognised in the EU Charter, including freedom of association and the right to strike.

On pay, whilst there is express exclusion of EU competence to enact binding measures, and at present no such measures exist, nevertheless broader regulation of wages can occur by means of equal treatment regulation, agreements between the social partners and through EU-level coordination of national economic and fiscal policy.

Moreover, other legal bases may be relevant.¹⁸ Although Article 153(5) TFEU rules out the adoption of uniform minimum requirements on pay, freedom of association and the right to strike, it does not rule out the possibility of adopting measures under other provisions of the Treaty, even if these measures have an impact on pay, freedom of association and the right to strike. The result is that a number of Community instruments contain provisions on pay. This was the view of the Final Report of Working Group XI on Social Europe – one of the Convention working groups providing analysis prior to the EU Constitutional Treaty.¹⁹

Further, Article 157 TFEU on equal pay between men and women clearly confers on the Union some competence with regard to non-discrimination and pay, as manifest and utilised in significant secondary legislation pertaining to equal pay, notably equal treatment Directive, 2006/54.).

Other substantive limits on EU competence in the social sphere

A number of other provisions in Title X TFEU also lay down substantive (as opposed to procedural) limits on the scope of the competence enjoyed by the Union in the realm of social policy:

¹⁸ Several commentators have argued that the lack of Union competence *under Article 153 TFEU* to enact legally binding measures with respect to freedom of association, pay and collective bargaining, does not preclude other legal bases from being used: G Brinkman, 'Lawmaking under the Social Chapter of Maastricht' in P Craig and C Harlow (eds) *Lawmaking in the EU*, Kluwer 1998, at 244.

¹⁹ CONV 516/1/03, paras 28 and 29: 'Although Article 137(5) TEC rules out the adoption of uniform minimum requirements on pay, it does not rule out the possibility of adopting measures under other provisions of the Treaty, even if these measures have an impact on pay. The result is that a number of Community instruments contain provisions on pay.'

- **Art 151 TFEU:** This provision states that the Union and the Member States shall implement social policy measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union's economy.
- **Art 153(2)(b) TFEU:** This provision states that measures must 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of SMEs'.
- **Art 153(4) TFEU:** This provision states that measures 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof'. Where ILO conventions engage other areas of competence, it will be necessary to identify the division of competence between the Union and Member States.

3. External competence

3.1. Express and implied external competence

Just as the Treaties may confer an express internal competence, they may also confer an **express external competence**. In this case, external competence is conferred separately from internal competence and its scope is primarily determined by the terms used in the competence-conferring provision.

Whilst some external competences are explicitly granted to the Union in the Treaties (such as common commercial policy), external competences in relation to social and employment policy are typically not spelled out in the Treaty and may only arise if they can be **implied** from an internal competence, or derived from general legal bases. There is thus, for the purposes of this study, an important link between internal competence over labour issues (which will typically be express) and external competence (which will typically be implied, albeit from an express internal competence).

This is based on the long-standing principle, affirmed in CJEU jurisprudence, that an external competence can also arise **by implication** either from the existence or the exercise of an **internal competence**: the **doctrine of parallelism**.²⁰ In a series of cases, the Court broadly identified three circumstances in which such implied external competence could arise:

1. **ERTA principle:** where external action is *necessary* to attain the objective/s underpinning an internal competence even in the absence of prior internal legislation.²¹
2. **WTO principle:** where a legally binding act makes provision for external competence;²²

²⁰ Opinion 2/92 [1995] ECR I-521.

²¹ Case C-22/70 *Commission v Council (ERTA)* [1971] ECR 263; Opinion 1/76 [1977] ECR 741.

²² Opinion 1/94, WTO [1994] ECR I-5416.

3. **'Open Skies' principle:** where the Union adopts common rules, the Member States no longer have the right to undertake obligations towards non-member countries which affect those rules or alter their scope, so that external competence to do so prospectively resides in the Union institutions.²³

3.2. Existence and nature of external competence in light of the Treaty of Lisbon

TFEU seeks to codify the case law relating to both **existence** of external competence and the **nature** of this competence. The existence of competence is a prior question to the nature of competence; TFEU can be seen to reflect this distinction, in so far as there are separate Articles for determining whether an external competence to conclude an international agreement exists (Art 216 TFEU), and for determining whether any such external competence is exclusive (Art 3(2) TFEU). Where EU External competence exists, Art 218 TFEU establishes a general procedure for the exercise of treaty-making powers for the EU, stipulating the division of tasks between the institutions and the various voting procedures.

Importantly, there remains an active debate as to the relationship between allocation of external competence under Art 216(1) TFEU and exclusivity of that competence under Art 3(2) TFEU, importing into the Treaty the ambiguity in the case law.²⁴

Existence of external competence

The **existence** of external competence is determined by Art 216 TFEU, which makes express provision for the circumstances in which an external competence arises. However, this codification is not an attempt to resolve the complexities of the Court's case law on implied powers. Rather, the Treaty provision re-states in summary form the principles arising from the Court's implied powers jurisprudence.

Art 216(1) TFEU makes it clear that external competence may either be conferred expressly or may arise by implication. When applying Art 216(1), it is also worthwhile to pay attention to guidance from the relevant case-law. In accordance with *Opinion 1/03*,²⁵ it is therefore necessary to undertake a 'comprehensive and detailed analysis' of the relevant provisions taking into account relevant Community rules and provisions of the international agreement. Having regard to 'the nature and content of those rules and those provisions, this analysis should consider whether the agreement in question is capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which

²³ Case C-467/98 *Commission v Denmark* [2002] ECR I-9519.

²⁴ Geert De Baere, 'The Framework of EU External Competences For Developing the External Dimensions of EU Asylum and Migration Policy', Katholieke Universiteit Leuven, Leuven Centre for Global Governance Studies, Working Paper No. 50, May 2010, at 7.

²⁵ *Opinion 1/03 on the Lugano Convention* [2006] ECR I-1145.

they establish'.²⁶ In this light, the question is whether the conclusion of an agreement:

- *'is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties...'*. There is some uncertainty as to the meaning of the word 'necessary' in this context, and in particular, a debate has arisen as to whether necessary ought to be understood to mean 'indispensable' for the achievement of the objective at issue, or something less stringent. In this regard, looking to case-law under Art 352 TFEU is instructive, as in that context, the Court has clearly not required a demonstration of 'indispensability', but has merely required a showing of a clear connection between objective and action taken. In light of this, we follow the view that 'necessary' means 'tending to facilitate': thus implied external competence exists where concluding an agreement might plausibly 'help ensure the optimal exercise of the expressly conferred internal competence'.²⁷ It has alternatively been described as an 'assessment of whether the internal competence would be furthered by external action'.²⁸
- *'or is provided for in a legally binding act...'*. This allows external competence to be conferred by secondary legislation.
- *'or is likely to affect common rules or alter their scope'*. This provision is engaged where there is an incompatibility between the agreement and existing EU common rules. However, even in the absence of any incompatibility, it is engaged where the area covered by the agreement at hand is already 'largely covered' by common rules, even where some provisions in the international agreement do not affect or alter common rules.²⁹ Common rules are defined broadly to include 'any kind of secondary law'.³⁰

The language of Art 216 TFEU has led to the suggestion by some commentators that the relationship between internal and external competence may have been loosened. Cremona argues, specifically with regard to the first 'necessity' path to implied external competence, that it may now be sufficient that an international agreement pursues one of the general external policy objectives laid out in Art 21 TEU, rather than the specific objectives underpinning any given internal competence.³¹ More generally, Craig and de Búrca suggest that 'the breadth of

²⁶ Ibid, para [133].

²⁷ Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences', in: Dashwood & Maresceau (Eds), *The Law and Practice of EU External Relations – Salient Features of a Changing Landscape*

²⁸ Klamert, 'New conferral or old confusion? – The perils of making implied competences explicit and the example of the external competence for environmental policy', *CLEER Working Papers 2011/6*, at 19.

²⁹ *Case C-467/98 Commission v Denmark* [2002] ECR I-9519

³⁰ Klamert (2011), as above, at 10

³¹ Marise Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in Paul Craig and Gráinne de Búrca (eds.) *The Evolution of EU Law*, 2nd edition, 2011, at 226

Article 216 is readily apparent, and [...] the reality is that it will be rare, if ever, that the EU lacks power to conclude an international agreement'.³²

However, our view is that it remains **necessary to delineate the scope of implied external competence by reference to a specifically identified internal competence**. Our logic for this reasoning is as follows. First, the wording of Art 216 TFEU does not clearly break from the terms used in the jurisprudence, such that any claims that it will have this effect must be recognised as drawing inferences. Second, such inferences become harder to justify when it is acknowledged that Art 216 TFEU is carried over from the Constitutional Treaty, and that the Working Group which drafted the provision explicitly stated that its intention was to **codify, not to modify**, the jurisprudence, and that the provision was to be 'without prejudice to the delimitation of competences between the Union and the Member States'.³³ Combined with the arguments already made in favour of the view that the material scope of implied external competence is co-extensive with the material scope of internal competence, the view we have taken for the purposes of this study is that Art 216 TFEU makes no change in this regard.

There is further reason to question Cremona's view that the 'necessity' path may now allow the expansion of external competence into areas excluded from internal competence, based on the case-law on Art 352 TFEU. Art 352 TFEU makes an essentially identical provision for competence based on necessity with respect to internal and external activity. Yet in *Opinion 2/94*,³⁴ the Court refused to accept that the Union could rely on Art 352 to accede to the European Convention on Human Rights, as this would go 'beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community'. Further, the Court held that the provision 'cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose'.³⁵ It is commonly accepted that measures taken under Art 352 'may not conflict with specific Treaty provisions as they relate to internal or external competence'.³⁶ It is likely that Art 216 TFEU will be interpreted in the same way, as it essentially restates Art 352 but in the specific context of external relations.

Nature of external competence

Just as competence for internal action, the **nature** of the external competence is presumptively determined by Arts 2–6 TFEU, which connect different policy areas with different kinds of competence. It should also be noted that the 'residual' kind of

³² Craig & de Búrca, *EU Law: Text, Cases and Materials*, 4th ed, OUP 2008, at 80

³³ CONV 459/02, Final Report of Working Group VII on External Action, Brussels, 16 Dec 2002, at [18]

³⁴ [1996] ECR I-1759

³⁵ *Ibid*, paras [29] and [30].

³⁶ O'Keefe, 'Exclusive, Concurrent and Shared Competence', in Dashwood & Hillion (eds.), *The General Law of EC External Relations*, London: Sweet & Maxwell 2000, at 191.

competence – where the policy area engaged by an agreement is not specifically mentioned in Arts 2–6 – is **shared competence** (Art 4(1) TFEU).

The only exception to this is Art 3(2) TFEU, which provides a list of circumstances in which **exclusive external competence** can arise irrespective of the policy area engaged by the agreement at hand:

- “when its conclusion is provided for in a legislative act of the Union...”. This provision is similar to the second clause of Art 216(1), but it only covers legislative acts, rather than all legally binding acts.
- “or is necessary to enable the Union to exercise its internal competence...”. This evokes the decision in Opinion 1/76,³⁷ where it was held that exclusive external competence could arise where it would otherwise not be possible to exercise an internal competence. This distinguishes this form of ‘necessity’ from that provided for in the first clause of Art 216(1), and the jurisprudence makes clear that in this context, ‘necessary’ does mean ‘indispensable’.
- ‘or in so far as its conclusion may affect common rules or alter their scope’. This echoes the third clause of Art 216(1) and the effect is that wherever external competence exists on this basis, it will be exclusive. While the wording is not identical – ‘may affect’ is *prima facie* less onerous than ‘is likely to affect’ – giving weight to the difference would have the counterintuitive effect of making the conditions for shared competence more stringent than for exclusive competence. Further, as Eeckhout notes, other language versions of the Treaty do not reflect the distinction.³⁸ The better view is thus that the provisions mean the same thing.

It is not clear how Art 3(2) interacts with the case law it is designed to codify, in particular Opinion 1/03.³⁹ That Opinion suggests that where the EU had exercised its powers internally, then the Court of Justice could conclude that this gave rise to exclusive external competence, whenever such competence was needed to ‘preserve the effectiveness of Community law and the proper functioning of the systems established by its rules’.⁴⁰ This appears to be a less categorical and more purposive approach to the determination of exclusivity. By contrast, Art 3(2)’s ostensibly exhaustive list of circumstances seems to revert to the approach in *Commission v Denmark*, which was subsequently explained in *Opinion 1/03*. The latter case also post-dated the drafting of the text of the Constitutional Treaty, the first Treaty proposal to include the now-Art 216 TFEU.

It is also worth noting, however, that the Court in its *Opinion 1/03* did not suggest that it was disagreeing with its then-recent decision in *Commission v Denmark*, but merely explained the approach in the case as ‘formulated in light of the particular contexts

³⁷ Opinion 1/76 [1977] ECR 741

³⁸ Piet Eeckhout, *EU External Relations Law*, 2nd ed OUP 2011, at 113, n 136.

³⁹ Opinion 1/03 on the Lugano Convention [2006] ECR I-1145

⁴⁰ *Ibid*, paras [114] and [115]

with which the Court was concerned'.⁴¹ Further, as the Court went on to explain, previous decisions were actually consistent with the more purposive approach it was expounding,⁴² and it ought to be remembered that the Working Group's intention was to codify the principles arising from the long-running jurisprudence, rather than the specific approach taken in *Commission v Denmark*.

3.3. External competence in relation to ILO Conventions

Once it has been established that external competence exists, in accordance with the implied-powers case law read in light of Art 216 TFEU, Opinion 2/91 offers important guidance as to when such competence will be exclusive. Opinion 2/91 also casts useful light on the practical issue of ratification: the nature of the ILO Constitution means that Conventions can only be ratified by states (see below, paras 2.1 and 2.2) but where the Union possesses exclusive competence, it will be necessary for it to authorise Member States to conclude an agreement on its behalf.

In para 18 of Opinion 2/91, the CJEU held that where an ILO Convention engages a Union measure that provides for *minimum requirements*, Member States possess competence to conclude international agreements that adopt more stringent requirements than set out in those minimum requirements. The Court stated:

'18. If, on the one hand, the Community decides to adopt rules which are less stringent than those set out in an ILO convention, Member States may, in accordance with Article 118a(3), adopt more stringent measures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO convention.'

It is important to reiterate, however, that where the Union has provided for minimum requirements, it has nonetheless pre-empted Member State action, in accordance with Article 2(2) TFEU, so that Member States cannot enter into international commitments that provide for *conflicting* obligations to those minimum requirements.⁴³ The Protocol on Shared Competence⁴⁴ provides that:

'With reference to Article 2 A of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence *only covers those elements governed by the Union act in question and therefore does not cover the whole area*' (emphasis added).

So, to summarise, where a Convention falls within the category of shared competence, Member States must implement the minimum requirements set out in the EU *acquis* but may adopt any measures provided for by the Convention which are more stringent than, or not covered by, the *acquis*.

⁴¹ Opinion 1/03 on the Lugano Convention [2006] ECR I-1145

⁴² *Ibid*, paras [122] and [123]

⁴³ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials*, CUP 2nd edition, 2010, at 206; see also Craig and de Búrca, at 84-5.

⁴⁴ Protocol (No 25).

Implied exclusive external competence

With regard to the Union's exclusive competence to enter into international commitments, in Opinion 2/91, the CJEU held that the Union will possess such exclusive external competence when the commitment is 'of such a kind as to affect [...] Community rules'. The Court further held that the commitment will 'affect [...] Community rules' when it engages an area which the Union has regulated 'to a large extent'.⁴⁵ It is therefore important to understand precisely what the court means by regulation 'to a large extent'.

In Opinion 2/91, the Directives⁴⁶ under consideration are found to be regulation 'to a large extent' because they 'contain rules, which are more than minimum requirements'.⁴⁷ The Court further drew attention to the *content* of Directive 88/379, referring to the 'very detailed rules on labelling set out in the... Directive'; and also to the *nature* and of the Directives and the *future development* of EU law in that area, noting that the Directives contain rules 'progressively adopted... with a view to achieving an ever greater degree of harmonisation' (emphases added). In this respect, it does not matter that '[t]he scope of Convention No 170... is wider than that of the directives mentioned (emphasis added).' The Court also emphasised the broader policy implications of the Directives, saying they are designed 'to remove barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environment'.⁴⁸ As a consequence, the Court expresses the view that the commitments arising from the Conventions are 'of such a kind as to affect the Community rules laid down in those directives'.⁴⁹

The CJEU restated this analysis in Opinion 1/03, 'The Lugano Opinion', referring more generally to the importance of considering the scope, nature, content and future development of the rules::

'Where the test of 'an area which is already covered to a large extent by Community rules' (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the *scope* of the rules in question but also on their *nature* and *content*. It is also necessary to take into account not only the current state of Community law in the area in question but also its *future*

⁴⁵ Op 2/91, para. 26. This rule is now codified under Article 3(2) TFEU.

⁴⁶ The specific Directives referred to by the Court in paragraph 22 are Council Directive 67/548/EEC on the approximation of laws, regulations and administrative practices relating to the classification, packaging and labelling of dangerous substances, and Directive 88/379/EEC of on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations. These have now been codified in Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures.

⁴⁷ Op 2/91, para 22.

⁴⁸ *Ibid.* 25.

⁴⁹ *Ibid.* 26.

development, insofar as that is foreseeable at the time of that analysis (see, to that effect, Opinion 2/91, paragraph 25) (emphases added).⁵⁰

The intensity of the test for implied exclusive external competence

Following the above analysis it is clear that, based on a combined reading of Opinions 2/91 and 1/03, the CJEU has set a high benchmark for regulation 'to a large extent'. Such regulation must, in terms of scope, seek to achieve 'an ever greater degree of harmonisation', bearing in mind the 'nature and content' of the rules, and the potential for the future development of the rules.

The implications of the test for implied exclusive external competence in relation to Union Directives and Regulations

In light of the above, our approach is based on the understanding that, where the Treaty establishes that an area of the *acquis* is to be governed by shared competence, the CJEU has set a high threshold for that area to become an area of Union implied exclusive external competence. A single Directive that merely achieves 'minimum harmonisation' in a given area should therefore not be considered regulation 'to a large extent', unless there is clear evidence that the nature or content of the rules means that the rules should fall under Union exclusive competence. However, it is likely to require a clear legal precedent, such as an explicit judgment of the CJEU, in order to establish that rules of a certain nature or content belong to a category of competence different to the competence allocated to such rules in the Treaty.

In contrast, where there is 'total or full or global harmonisation' or standardisation in a given area, then that will be an area which is regulated 'to a large extent', triggering implied exclusive external competence.

External competence in relation to internal coordinating competence

The nature of Union internal coordination of Member State policies, in the form of *hard law*, requires that the Union possess exclusive external competence in such coordination. An illustrative example is Union implied exclusive external competence in relation to coordination of Member State social security schemes. This is pertinent because exclusive external competence for social security coordination gave rise to the need for Council authorisation for Member States to ratify both the Maritime Labour Convention (C186) (see Council Decision 2007/431/EC, preamble para 6, read in conjunction with Article 1) and the Work in Fishing Convention (C188)⁵¹.

EU coordination of social security between Member States sets a procedural standard, as opposed to minimum requirements, and in that respect it has the same

⁵⁰ Op 1/03, 126.

⁵¹ See Council Decision authorising Member States to ratify C188: 'some areas of the Convention [that] fall within the Community's exclusive competence, namely the coordination of social security schemes that flows from Regulation (EEC) No 1408/71 [now replaced by Regulation (EC) No 883/2004]... on the application of social security system schemes to employed persons and their families moving within the Community adopted pursuant to Article 42 of the EC Treaty.'

element of compulsion as substantive global harmonisation. So, in relation to social security, EU level coordination compels uniform cooperation between Member States. The effectiveness of such coordination requires that the Union possess implied exclusive external competence; otherwise there is a risk that the uniform standard set by the EU will fragment. The Treaty basis for such exclusive external competence is therefore Article 3(2) TFEU, which provides that 'The Union shall also have exclusive competence for the conclusion of an international agreement when... its conclusion may affect common rules or alter their scope.'

Note that exclusive competence is also derived from Regulation (EU) No 1231/2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality. The 2012 EC Communication on 'The External Dimension of EU Social Security Coordination' (COM (2012) 153) states: '[t]he existence of Regulation (EU) No 1231/2010 gives the EU exclusive competence as regards the social security coordination rights of nationals from third countries who are in a cross-border situation within the EU.'⁵²

This position is entirely justifiable. Regulation 1231/2010 extends the coordination of Member State social security systems under Regulations 883/2004 and 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality. It is therefore a coordinating Regulation, and so following the above analysis, the EU possesses implied exclusive external competence under Article 3(2) TFEU.

In contrast, where the Union coordinates internally within the Union in the form of *soft law*, such as guidelines, the Union does not possess exclusive competence in relation to such coordination. An illustrative example is Union coordination of Member State employment policies. The primary objective underlying Title IX TFEU on Employment Policy is for the Union and Member States to develop 'a coordinated strategy for employment' rather than common rules, to ensure Member States aim towards the attainment of certain targets (e.g. in respect of reducing in poverty or social exclusion; increasing the proportion of those in employment). Competence over employment policy explicitly excludes harmonisation of the laws and regulations of the Member States (Art 149 TFEU). There are commonly agreed *guidelines* with regard to employment policy e.g. on economic policy, with which Member States' employment policies must sit. But these are far from amounting to common rules. Member States have an obligation to report annually on their employment policies through 'National Reform Programmes', which are analysed by the Commission for compliance with the 'Europe 2020' targets (e.g. aiming for an employment rate of

⁵² Note, however, that this has been contested by some EU Member States: see, for instance, paras 3.10-3.22 of the UK House of Commons European Scrutiny Committee, Second Report of Session 2012-13: 'There is no clear evidence to support the extrapolation that the EU has, or should have, exclusive external competence in social security coordination agreements with third countries, and the Government is of the view that any proposals arising from this Communication should not extend the competence of the EU in this field.'

75%; targets as to the percentage of GDP invested in R&D; proportion of the population completing tertiary education) and flagship initiatives (e.g. mobility of young worker and students; improved skills training).

Thus, to the extent that there are 'common rules' in employment policy, they take the form of soft law. The 'hardest' form of action envisaged under the Employment Title is Art 149 TFEU: the Parliament and Council may use the ordinary legislative procedure (Art 294 TFEU, the former co-decision procedure), but even then, it can only be used to adopt 'incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences'. Finally, it is worth noting that employment policy coordination is not justiciable before the Court of Justice.

In light of the above, our view is that coordination of employment policy does not engage Art 3(2) TFEU where it provides that 'The Union shall also have exclusive competence for the conclusion of an international agreement when [...] its conclusion may affect common rules or alter their scope.'

3.4. The legal basis for allocation of external competences

Legal basis for implied external competence

Union acts affirming the negotiation or conclusion of international agreements must identify an applicable legal basis just like other internal acts, and Court practice has been to assess whether the correct legal basis has been chosen not by reference to the terms of the Union act itself, but to the terms of the international agreement sought to be concluded.⁵³ Where an express external competence is relied on, practice has been for the Union act to choose that provision as the legal basis.⁵⁴ By contrast, where an implied external competence is relied on, practice has been for the Union act to identify an applicable internal legal basis whose scope covers the international agreement at hand.⁵⁵

In our view, it follows that **implied external competence only exists in relation to agreements whose material scope is consistent with the material scope of Union internal competence**. This is consistent with the jurisprudence, as the Court has only

⁵³ See *Commission v Council*, n 3 above, paras [37] – [56].

⁵⁴ Thus Council Decisions 2002/628 EC and 2003/106 EC, concerning the conclusions of the Cartagena Protocol on Biosafety and the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade respectively, both rely on Art 175(1) EC (now Art 192 TFEU).

⁵⁵ Thus Council Decision 2010/48 EC concerning the conclusion of the United Nations Convention on the Rights of Persons with Disabilities relies on Arts 13 and 95 EC (now Arts 19 and 114 TFEU).

ever recognised implied external competence with respect to agreements which 'regulated matters clearly within Community (internal) competence'.⁵⁶

Predominant purpose and individual provisions

Within EU law, the predominant purpose of an act determines the competence issue. As noted above, Union institutions may only act where they can identify a Treaty provision or legal base conferring a power on them to do so. It is well established that the choice of legal basis 'must be based on [...] objective factors amenable to judicial review', which 'include in particular the aim and content of the measure'. Those objective factors point to the competence, if any, which allows the Union to adopt a particular instrument.

Where more than one competence area is engaged, the proper legal basis is that which matches with the 'main or predominant purpose or component' of the measure. However, exceptionally, where a measure 'simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other', it will have to be founded on the various corresponding legal bases.

For example, in Opinion 2/00 the question was whether the Protocol of Cartagena on Biosafety dealt mainly with environmental protection, or with external trade in goods, the latter being an area of exclusive competence under the common commercial policy. The Court found that the Protocol fell under the Union's environmental policy competence despite the inclusion of a trade dimension. Accordingly Article 192 TFEU (ex Article 175(1) EC) was held to be the appropriate legal basis for the conclusion of that Protocol on behalf of the Union, such that competence to conclude the Protocol was shared between the Union and the Member States rather than being exclusive to the Union.

A key lesson to draw from Opinion 2/91 is the need to be alert to the distinction between Union and Member State competence in relation to **individual provisions** of a Convention, and Union and Member State competence in relation to the Convention **as a whole**. In particular, in Opinion 2/91 the Court found that the Union possessed exclusive external competence with regard to those provisions of Convention 170 relating to labelling (para 26 of the judgment).⁵⁷ However, the Court's overall conclusion in Opinion 2/91 was that Convention No 170 fell within the joint competence of the EC and the Member States (paras 19-20, 39). Because most of provisions of the Convention fell under shared competence, the Convention as a whole also fell under shared competence. Thus, while Member States require Council authorisation to ratify those parts of Convention 170 which fall under

⁵⁶ Piet Eeckhout, *EU External Relations Law*, 1st edition, OUP 2004, at 97.

⁵⁷ 'In those circumstances, it must be considered that the commitments arising from Part III of Convention No 170, falling within the area covered by the directives cited above in paragraph 22, are of such a kind as to affect the Community rules laid down in those directives and that consequently Member States cannot undertake such commitments outside the framework of the Community institutions' Opinion 2/91, para 26.

exclusive EU competence, there is shared competence for the Convention as a whole and as to its implementation, which requires joint action by the Community and the Member States. As Eeckhout notes:

'[N]otwithstanding the fact that the international agreement covered the same subject matter as Community legislation, there was no exclusive competence, because both the agreement and the Community legislation allowed for the adoption of more stringent provisions. The tenor of the Court's reasoning is that, in the light of that state of affairs, conflicts between the provisions of the convention and those of the Community directives were excluded'.⁵⁸

Where the Union has exclusive competence in relation to the agreement at hand (or indeed **components of** the agreement), it is clear that any action by the Member State in relation to the agreement may only proceed 'by virtue of specific authorisation by the Community' (*Suzanne Criel v Procureur de la République*). As such, Member States require authorisation by means of a Council Decision in order to ratify any such agreement. (See the discussion above on the Maritime Labour Convention, 2006, the Work in Fishing Convention 2007 (C 188), and Seafarers' Identity Documents Convention (Convention 185) which all required prior authorisation by means of a Council Decision before Member States were empowered to ratify.)

Under the doctrine established above, Member States may not ratify an ILO Convention coming within the exclusive competence or substantively at variance with the EU *acquis*. However, the Member States retain capacity both under national and international law. Exclusive Union competences simply require them not to act autonomously. This is evident from the text of Article 2(1) TFEU. EU law can, therefore, authorise the Member States to act jointly on the international plane even within exclusive external Union competences.⁵⁹ This is reflected in the wording of the Council Decisions which authorise Member States to ratify Conventions 185, 186 and 188 '**in the interests of the European Community**' [now Union].

In the case of both the ILO Maritime Labour Convention, 2006⁶⁰ and the Work in Fishing Convention 2007 (C 188)⁶¹ the fact that some provisions of both Conventions fell within the Union's exclusive competence required authorisation by the Council for Member States to ratify **those parts of the Convention** which fell under EU competence. This referred to exclusive EU competence – discussed above – for social security coordination under Article 48 TFEU (ex-Art 42 TEU) which empowers

⁵⁸ Piet Eeckhout, *EU External Relations Law*, 2nd ed OUP 2011, at 85-86.

⁵⁹ de Baere above n 4, at 15.

⁶⁰ Council Decision 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 (2007/431/EC) OJ L 161/63, 22.6.2007.

⁶¹ Council Decision of 7 June 2010 authorising Member States to ratify, in the interests of the European Union, the Work in Fishing Convention, 2007, of the International Labour Organisation (Convention No 188) (2010/321/EU) OJ L 145/12, 11.6.2010.

the European Parliament and the Council to adopt measures in the field of social security as are necessary to provide freedom of movement for workers.

Similarly, although the policy on asylum, immigration and external border control is not an area of EU exclusive competence, the EU and Member States are developing a common policy⁶² such that some articles of the Seafarers' Identity Documents Convention (Convention 185) fell within the Union's competence in the area of visas, necessitating prior Council authorisation for those Member States which are bound by the Union rules on visas.⁶³

It is important to note that the requirement for authorisation **does not seek to imply** that the entirety of both Conventions fell under the Union's exclusive competence. The Council Decisions refer specifically to the need for Member States to receive authorisation to ratify those 'parts of' the Conventions which fall under exclusive Union competence, not the Conventions as a whole (even where the effect of requiring authorisation de facto prevents Member States from autonomously ratifying those other parts).

To these three ILO Conventions (relating to Maritime Labour; Seafarers' Identity Documents; and Work in Fishing) must now be added two more: the Chemicals Convention No 170 and the Domestic Workers Convention No 189. In its proposal for a Council Decision authorising Member States to ratify the Chemicals Convention,⁶⁴ the Commission notes that the rules under Part III of Convention are covered 'to a large extent by Union *acquis* on the approximation of laws, regulations and administrative practices in the area of classification, packaging and labelling' that has been developed since 1967 and further consolidated. It is because of what the Court had to say about Part III of this Convention in Opinion 2/91 that the Commission is revisiting this issue of the need to authorise Member States to ratify the Convention. Given the finding (at para 26) that parts of the Convention fall within the competence of the Union, and Member States cannot therefore enter into commitments outside the framework of the Union's institutions in relation to these parts, the Court went on to find that the Union possessed exclusive external competence as to provisions of the Convention relating to labelling.

⁶² 'The European Community is working towards the establishment of an area of freedom, security and justice based, inter alia, on a common visa policy': Council Decision 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) (2005/367/EC), OJ L 136/1, 30.5.2005.

⁶³ Council Decision 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) (2005/367/EC), OJ L 136/1, 30.5.2005.

⁶⁴ Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the International Labour Organization (Convention No 170), COM/2012/0677 final.

Similarly, the draft proposal for a Council decision authorizing the Member States to ratify ILO Domestic Workers Convention No. 189,⁶⁵ points to two key factors which make Council authorisation of Member State ratification necessary: first, because the degree of EU regulation on the subject has reached an advanced stage, such that Member States were no longer able to act sovereign in the external sphere in this regard; second, there was a potential for conflict with the Union *acquis*, given the danger that the provision in the Domestic Workers Convention to protect migrant domestic workers may interfere with the freedom of movement for workers under the Union's exclusive competence.

This would therefore seem to place Conventions 170 and 189 into the same category as Conventions dealing with Maritime Labour, Seafarers' Identity Documents, and Work in Fishing. Drawing on this past experience, our approach to the ILO Conventions is therefore that where one provision of a convention serves to trigger exclusive Union competence, the convention is **not severable** and thus necessitates Council authorisation prior to Member State ratification.

3.5. Procedural implications of external competence

Where the Union enjoys exclusive competence in relation to the agreement at hand, or in relation to a provision of that agreement, it is clear that any action by the Member States in relation to the agreement may only proceed 'by virtue of specific authorisation by the Community'.⁶⁶ Otherwise, Member States have no power under Union law to negotiate or conclude any such agreement. However, as they retain capacity both under national and international law, it remains open to the Union to delegate as much of its competence to the Member States as it chooses. This is particularly useful in the external relations context where, as in the context of the ILO, the Union is not able to ratify conventions due to constitutional requirements of the ILO.

As well as the duty of sincere co-operation (Art 4(3) TEU), Member States and the Union owe a separate obligation to cooperate arising from 'the requirement of unity in the international representation of the Community'.⁶⁷ Both duties are all the more necessary where the Union is itself unable to conclude the international agreement at hand.⁶⁸ The two duties are often recognised to apply at the same time,⁶⁹ and it has been argued that they share the same 'constitutional foundation', such that the interpretation of one ought to inform that of the other.⁷⁰ While the Court in *Opinion 2/91* suggested that the duties required close cooperation between the Community institutions and the Member States both in the negotiation and conclusion of agreements and in the fulfilment of the obligations entered into, it did not specify

⁶⁵ Draft Commission position, 10 August 2012.

⁶⁶ Case C-41/76, *Suzanne Criel v Procureur de la République* [1976] ECR 1921, now encapsulated in Art 2(1) TFEU.

⁶⁷ *Opinion 2/91* [1993] ECR I-1079, para [36].

⁶⁸ *Ibid.*

⁶⁹ *Commission of the European Communities v Ireland (MOX Plant)* [2006] ECR I-4635.

⁷⁰ Hillion, n 9 above.

how, or the legal mechanisms by which, such close cooperation was to be achieved. The requirements of the duties in the context of shared and exclusive competence will be discussed in turn:

Shared external competence

Residual uncertainty notwithstanding, it is clear that the duty to co-operate may impose onerous procedural requirements on Union institutions and the Member States. They must take 'all measures necessary so as best to ensure cooperation' in seeking to ratify an agreement.⁷¹

A more difficult question is whether the duty may go beyond obligations of conduct to encompass obligations of result, at least where the Union was unable to conclude an international agreement itself. The language in *Opinion 2/91* – 'requiring' unity – may suggest that the Member States and the Union must form a common position to allow them to make submissions to ratify the agreement. Yet as Hillion observes, the obligation to take 'all measures so as best to ensure cooperation' does not suggest that a common position is required, and recent cases like *MOX Plant* drop the language of unity.⁷² As such, the obligation may be best conceived of as an obligation of 'best efforts',⁷³ but with Member States ultimately retaining the prerogative to conclude the agreement on their own terms where, in spite of their best efforts, a common Union position is not reached.

Exclusive external competence

Where the subject matter of an international agreement engages Union exclusive competence, it is clear that Member States have no power under Union law to negotiate or conclude the agreement. Where the Union has no power under international law to conclude the agreement, stalemate will only be avoided if the Union authorises the Member States to act on its behalf. The crucial question then becomes what is required by the Member States' duties of cooperation in this scenario. Cremona suggests that Member States could be required by Art 4(3) to conclude agreements where authorised to do so, citing 'the need to protect the unity of the common market and the uniform application of Community law'.⁷⁴ There is no precedent to support the suggestion that the Union can compel Member State action in this way, and it is also clear that the unity of the common market would be equally threatened in a situation of shared competence where Member States might ultimately take their own line in respect of a given agreement.

As a result, we follow the view that Member States are not required to sign agreements where the Union authorises them to do so. However, they will be

⁷¹ *Opinion 2/91*, n 42 above, para [38].

⁷² Hillion, n 9 above.

⁷³ Marise Cremona, 'Member States as Trustees of the Community Interest: Participating in International Agreements on behalf of the European Community', EUI Working Papers Department of Law, LAW 2009/17, at 4.

⁷⁴ *Ibid*, at 7.

obliged to establish and follow a joint negotiating position,⁷⁵ and Member States would once again be required to fulfil onerous procedural obligations pertaining to consultation and cooperation, which may be heightened in light of the fact that they will not be able to ratify the agreement individually.

The decision in *Commission v Greece*⁷⁶ confirms that the Union institutions are bound by the duties of cooperation, even where they enjoy exclusive competence in relation to an international agreement. In that case, the Union was required to facilitate Greece's attempts to make submissions to an international forum on a matter of exclusive Union competence. The Court affirmed that the Commission 'could have endeavoured' to do so, and that it was not allowed to prevent Greece presenting its views 'on the sole ground that a proposal is of a national nature'.⁷⁷ The Court did not elucidate on the more general requirements of the duty in the context of external relations, but the language used by the Court leaves little doubt that the duty owed in this context is less onerous than that owed by the Union in a situation of shared competence.

Member States' retained competence

As stated above,⁷⁸ the better view of the Court's jurisprudence is that Member States still owe the duty of co-operation even when exercising retained competence in the context of external relations. This fits with the more general insight⁷⁹ that the division of competences in EU law must be separated from the scope of application of EU law. As such, pursuant to the duty of co-operation, Member States have an obligation to abstain from measures that could jeopardise the achievement of the Community's objectives.

4. Interaction between ILO Conventions and the EU social acquis

4.1. ILO Constitutional requirements

Art 15(5)(d) of the ILO Constitution makes it clear that only ILO Member States may ratify an ILO convention. This means that where the Union enjoys external competence to ratify an ILO convention – or parts of a Convention – **under EU law**, it can only do so by authorising its Member States to do so in the interests of the Union, and where the competence is exclusive, such authorisation is the only permissible means by which the Member States can ratify an ILO Convention as a matter of EU law.

In line with Article 19(5)(b) of the ILO Constitution, responsibility for placing instruments before the competent authorities lies with Members. Further, it is Members who must 'take such action as may be necessary to make effective the provisions of... (the) Convention' (Art 19(5)(d)); and Members who are obliged to

⁷⁵ Cremona, n 50 above, at 3.

⁷⁶ [2009] ECR I-701.

⁷⁷ *Ibid*, para [26].

⁷⁸ *Commission v Luxembourg*, n 8 above.

⁷⁹ See n 64 below.

report to the Director-General of the International Labour Office the position of its law and practice in regard to matters dealt with by any Convention which they have not yet ratified (Art 19(5)(e)). In fulfilling these reporting obligations, it will be necessary for the Member States, where relevant, to give an account of relevant law and practice at Union as well as at national level.

However, the requirements of Union law, and in particular the duties of cooperation discussed above, also require 'close cooperation between the Member States and the Union institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into'. This may mean sharing responsibility so that some or all of the implementing responsibilities are agreed to be carried out by the Union and its institutions. However, it is clear that in many situations, the Art 19(5)(d) duty on Member States will be satisfied where they agree for Union institutions to carry out given implementing activity. By contrast, the unequivocal wording in Arts 19(5)(b) and (e) suggest that it is only the Members themselves who can discharge their obligations. As a result, Member States must balance their obligations under EU law and the ILO Constitution.

Further, the ILO Governing Body has previously reminded Member States that they alone are responsible for failure to comply with Conventions, even if the breach is attributable to an EU measure adopted by majority (ILO GB. 215/SC/4/1, February-March 1981).

4.2. ILO conventions in light of the subsidiarity principle

The nature of the ILO Constitution means that the party responsible for the signature, ratification and implementation of an ILO Convention will always be the Member State, not the Union. What does this mean for the EU *acquis* in those areas where it has been clearly established not only that the Union has competence, but also that the principle of subsidiarity has been satisfied and it is appropriate for the Union to exercise this competence? This is the case, for example, in the area of health and safety, where the well-established Union *acquis* serves to evidence that the subsidiarity test in Art 5(3) TEU has been passed. However, some ILO Conventions, for instance Convention 187 on occupational safety and health, specifically require ratifying states to create a 'national policy' or a 'national system'. One question is therefore what action it would be appropriate for the Union to take – whether the exercise of the competence which the Union shares with the Member States meets the principle of subsidiarity in circumstances where Member States are required to act through a 'national policy'.

Our view is that the exercise of the Union's competence in this area would not be called into question. The Union would not be required to argue for the creation a supranational policy or supranational system *instead of* national-level implementation or policy measures envisaged by a Convention. But what will be required is Union coordination of the actions of the Member States; the Union may also have competence to create supranational implementing measures *alongside* national-level implementation. The key point with mixed agreements – where the

substance of the international agreement falls partly within the competence of the Union and partly within the competence of the Member States – is that they are negotiated, entered into and *implemented* by both the Union and the Member States. Chalmers et al note that the question of implementation depends on the allocation of internal competences, in other words that responsibility for the performance of mixed agreements follows the allocation of the respective competences.⁸⁰

This much was clarified by the Court in its ruling on the compatibility with the Euratom Treaty of Member State participation in the Convention on the Physical Protection of Nuclear Materials.⁸¹ Here, the Court held that the division of competence with regard to implementation of the agreement was to be resolved on the basis of the same principles that govern the division of powers relating to the negotiation and conclusion of agreements. To elaborate on this question of implementation, where a Convention requires national-level implementation or policy measures:

- **First**, the Court has underlined that the duty of cooperation applies to all stages of external action – in the negotiation, conclusion and execution of mixed agreements.
- **Second**, a mixed agreement may well necessitate implementing measures at both Union and national level. Ruling 1/78 Euratom (Nuclear Materials) seems to envisage national-level implementing provisions which sit alongside implementation by the Commission, with cooperation and coordination between the two levels:

It must be remembered that where it is apparent that the subject-matter of an agreement or Convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community ... The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard (Opinion 2/91, paragraph 38).⁸²

4.3. Fields of EU competence and the ILO up-to-date Conventions

EU bases of competence in social policy and the ILO categorisation of its up-to-date Conventions are not wholly commensurate. Some aspects of the two regimes match up neatly: for example, the competence in Art 153(1)(a) TFEU matches with the ILO category of conventions on 'occupational safety and health'. However, in other instances, pre-determined limits on EU competence laid down in the Treaties mean

⁸⁰ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials*, CUP 2nd edition, 2010, at 648.

⁸¹ Ruling 1/78 Euratom (Nuclear Materials) [1978] ECR 2151.

⁸² Case C-25/94 *Commission v Council (FAO Agreement)* [1996] ECR I-1469, para 48.

that the Union's competence is observably narrower than the fields engaged by ILO conventions. Thus the ILO category of 'wages' has no counterpart competence at EU level, due to the express exclusion of wages from Union competence in Art 153(5) TFEU. Similarly, the ILO category on 'freedom of association, collective bargaining and industrial relations' is much broader than the EU's nearest competences, in Arts 153(1)(e) and (f) TFEU – the information and consultation of workers and representation and collective defence of the interests of workers and employers, including codetermination – with the specific exclusion of the pay, the right of association, the right to strike or the right to impose lock-outs (Art 153(5)).

Other differences can be explained by the different political and social context of the two organisations. For example, in respect of ILO conventions on 'indigenous and tribal peoples', it is not surprising that the Union confers no specific competence in this regard in light of the very limited number of self-identified indigenous peoples in Europe. The priority ranking of conventions ought to reflect the relevance which particular conventions have in light of modern European conditions.

It is also notable that it is not only EU competences in social and employment policy which may be engaged by ILO conventions. As such, this study remains attentive to the possibility that various other competences might be engaged by a given instrument: see section 4.7 below, '*Compatibility of ILO Conventions with broader areas of the acquis*'.

4.4. Potential areas of conflict between ILO norms and the EU acquis

ILO standards have influenced a number of EU policies and laws, for instance, ILO conventions have been an important source of EU law on equal pay between men and women, and of the extension of the principle of equal pay to cover equal pay for work of equal value.

More broadly, the ILO's approach to labour rights as fundamental rights has had increased resonance within the EU as the EU social *acquis* has evolved to add the protection of fundamental human and labour rights as a key rationale for EU labour standards, alongside economic rationales.

Moreover, recent years have seen the growing influence of EU *acquis* on the development of ILO Conventions, including but not limited to the field of OHS (such as the Framework Convention C187).

Conflict arises only where the objectives and principles of ILO instruments are counter to the *acquis*. Where ILO Conventions provide for higher standards than the EU *acquis*, adoption by EU Member States is supported by Article 153 TFEU (ex Article 137 EC) which states that EU Member States may set stricter standards. Similarly, the ILO Constitution states that ILO Member States can go beyond the provisions of ILO conventions, so conflict does not arise when ILO norms establish lower standards.

4.5. EU *acquis* and international agreements ratified prior to accession

Art 351 TFEU [ex-Article 307(2) TEC] states that international agreements entered into prior to a Member State's accession to the EU are not affected by the provisions of the Treaty. Several Member States became bound by the ILO Constitution many years prior to accession: under Art 351 TFEU, the ILO Constitution has priority over the Treaty, as should all ILO Conventions ratified by Member States prior to its accession to the EU.

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 Court ruled that it was the duty of a Member State to ensure that the rules on equal treatment were 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'. More recently, though, when the Commission brought an action against Austria for breach of obligations under the Treaty (Case C-203/03 Commission of the European Communities v. the Republic of Austria), the Court enlarged on its interpretation of Art 307 TEC [now Art 351 TFEU], emphasising that the second part of the article requires the Member State concerned to **take all suitable measures to eliminate incompatibilities with the Treaty**.

The Commission has in previous years sought to encourage Member States to denounce ILO Convention 89 (Women's Night Work) and ILO Convention 96 (Fee-Charging Employment Agencies), on the grounds of incompatibility with the *acquis*. Neither of these Conventions is classified by the ILO as up-to-date.

4.6. EU Member State denunciation of ILO up-to-date Conventions

Many ILO conventions have been denounced by EU Member States, but the vast majority are not now classified as up-to-date, and were denounced in order to allow the ratification of a revised or in any event newer ILO convention⁸³. In some cases, Conventions – no longer considered up to date – have been denounced as a result of Member States bringing their national laws and regulations into line with Community legislation, for example the Underground Work (Women) Convention, 1935 (No. 45) and the Night Work (Women) Convention (Revised), 1948 (No. 89).

It appears that there are five examples of the denunciation of up-to-date Conventions and Protocols by EU Member States:

- **UK denounced C94** – Labour Clauses (Public Contracts) Convention – **in 1982**. Reason given: 'As a general principle the United Kingdom Government believes that terms and conditions of employment are best settled by voluntary agreement between the parties concerned, without state intervention. Convention No. 94 requires ratifying governments to impose certain terms and

⁸³ For example ratification of the Minimum Age Convention, 1973 (No. 138) automatically brings about the denunciation of Conventions 5, 7, 10, 15, 33, 58, 59, 60, 112 and 123.

conditions and ensure their effective enforcement. In the light of developments in economic conditions and in relationships between employers and employees since the United Kingdom Government ratified Convention No. 94 in 1950, the Government considers that its provisions are now inappropriate for the United Kingdom.'

- **UK denounced C95** – Protection of Wages Convention – **in 1983**. At the time of communicating its denunciation, the UK stated that it intended to repeal the Truck Acts of 1831, 1887, 1896 and 1940 and related legislation, which were the main instruments giving effect to the provisions of the Convention, in order to enable more progress in encouraging the trend towards the payment of wages by modern methods. It also notified the Office of its decision to introduce up-to-date legislation concerning wage deductions in view of the widespread feeling that statutory protections in this respect should be revised and made available to all employees. As, however, the Government was not able to anticipate at that stage how far the new legislation would affect the country's ability to satisfy the terms of the Convention, it had been decided that the right course was to formally denounce the Convention. The Government also indicated that, following the enactment of the proposed legislation, it would reconsider whether the new legislation adequately satisfied the obligations contained in the Convention, or in any revision of its provisions that might be contemplated by the International Labour Organization, so as to enable the United Kingdom to ratify it again.
- **Netherlands denounced C118** – Equality of Treatment (Social Security) Convention – **in 2004**. Reason given: 'the Netherlands can no longer meet the export obligation provided for in Article 5, paragraph 1, of Convention No. 118. Since 1 January 2000, when the Export of Benefits (Restrictions) Act entered into force, the right to social security benefits has been subject to the condition that the claimant must live in the Netherlands.'
- **Cyprus and the Czech Republic denounced P89** (Protocol of 1990 to the Night Work (Women) Convention) **in 2001**.

It is important to note that only on the last occasion has the reason for denunciation of an up-to-date Convention or Protocol been an (anticipated) conflict with EU membership. See below for detailed assessment of the incompatibility of P91 with the *acquis*.

5. Methodology

Step 1: Assess relationship to the *acquis communautaire*

- Does the scope of the ILO Convention in question engage EU law?
 - ✓ Identify all chapters of the *acquis* engaged by the Convention, and hence fields of competence engaged

No: there is no EU *acquis* involved and exclusive competence to ratify resides with the Member States

Yes

Step 2: Determine potential existence of exclusive EU external competence

With regard to each field of competence identified:

- Is there an express exclusive external EU competence?
 - ✓ Do any provisions in the Treaties explicitly confer exclusive competence on the Union for the field engaged by the Convention?
- Is there an implied exclusive external EU competence?
 - ✓ Does ratification of the Convention meet any of the tests for implied exclusive EU competence?

Yes: Member States require Council Decision authorising ratification of the Convention in the interests of the Union, where they have not already ratified the Convention

No

Step 3: Assess implication of shared external competence

With regard to each field of competence identified:

- Where external competence is shared between the EU and Member States, has the EU pre-empted through exercise of internal competence?
 - ✓ Has the EU already exercised its internal competence in the field in question by means of secondary legislation? Does this secondary legislation constitute 'common rules'?

Yes: Member States require Council Decision authorising ratification of the Convention in the interests of the Union

Step 4: Analyse compatibility with the *acquis communautaire*

- Does the ILO Convention in question contain any provisions – falling under EU external competence – which are incompatible with the *acquis communautaire*?
 - ✓ Comparative analysis of Convention's provisions against relevant Treaty provisions and secondary legislation: are any incompatible provisions material to the main objective of the instrument?
 - ✓ Have EU Member States failed to ratify – or denounced – the Convention on grounds of incompatibility?
 - ✓ Has the Convention been the subject of compatibility queries to EU or ILO bodies?

For information only: Where the ILO Convention and corresponding EU instruments set minimum requirements, are there differences in these minimum requirements? Are there differences in the scope of application?

Yes: EU and Member States must abstain, respectively, from authorisation to ratify, and ratification of, the Convention (where incompatible provisions fall under EU competence) incompatible with Union *acquis*



Step 5: Apply ranking criteria

- What is the 'value-added' to EU *acquis* through ratification? Does the Convention address issues of pertinence to the EU which are not currently addressed by EU and Member State rules and policies?
- Importance to ILO: what significance does the ILO accord to the Convention, notably as reflected in ILO Plans of Action?
- Importance to EU, notably as reflected in: Human Rights Policy plan of action 2012, other policy commitments made in Commission Communications, existence of EU Council Conclusions and policies referring to specific Conventions, relevance for specific policies (such as indigenous peoples).



Step 6: Summarise implications of analysis

- Are there concerns relating to compatibility with EU *acquis* which mean that the EU is not in a position to promote ratification of the Convention?
- Does the Convention require a Council Decision authorising Member States to ratify, or can Member States ratify autonomously?
- To what extent does the Convention meet agreed ranking criteria?

C. Résumé of findings

The purpose of this section is to summarise the findings of the comparative legal analysis in the analytical fiches of the seventy-two⁸⁴ up-to-date International Labour Organisation Conventions and Protocols ('the Conventions') which are the subject of this report. It is divided into six sections:

- Section 1 addresses the nature of Union and/or Member State external competence in relation to the Conventions
- Section 2 identifies the specific Conventions that are incompatible with the EU *acquis*
- Section 3 describes the Chapters of the EU *acquis* which are engaged by the Conventions
- Section 4 identifies those Conventions which most clearly represent potential to add value to the EU *acquis*
- Section 5 gives an overview of the relative priority accorded to the Conventions by the EU (Commission and Parliament), EU social partners, and ILO respectively
- Section 6 prioritises the Conventions⁸⁵ with a view to the EU promoting their ratification.

In addition, Annex 2 discusses the status of the maritime Conventions after the coming into force of C186 – Maritime Labour Convention, 2006.

1. Union and Member State external competence in relation to the Conventions

1.1. External competence and procedural implications

This section covers Union and Member State external competence in relation to the Conventions. The nature of external competence is categorised into four areas, reflecting the division of internal competence in the Treaty on the Functioning of the European Union (TFEU). The four areas of external competence are:

- Union exclusive external competence
- Union and Member State shared external competence
- Union 'special' coordinating external competence (pertaining to employment policy measures)
- Member State competence

⁸⁴ There are eighty-one up-to-date Conventions in total. However, the report excludes analysis of the ten up-to-date Maritime Labour Conventions which are no longer open for ratification upon the entering into force of C186 (MLC). It includes analysis of C158 – Termination of Employment Convention, a conclusion on the status of which was not reached by the Cartier Working Party.

⁸⁵ Excluding those Conventions which have been ratified by all Member States, and the Conventions that the Council has authorised Member States to ratify by a Council Decision, or which are subject to a Proposal for a Council Decision.

It should be noted that, following CJEU Opinion 2/91, a Convention that engages Union exclusive competence (therefore requiring a Council Decision authorising Member State ratification) may nonetheless, for the purposes of determining the external competence in relation to the Convention as a whole, fall under Union and Member State shared competence. This will be the case where, for example, one provision in the Convention engages Union exclusive competence, but the majority of the provisions engage shared external competence. With this in mind, the Conventions are divided to reflect those Conventions that 'engage' Union exclusive competence, and those that do not engage such competence, therefore 'falling under' shared, 'special' coordinating or Member State external competence.

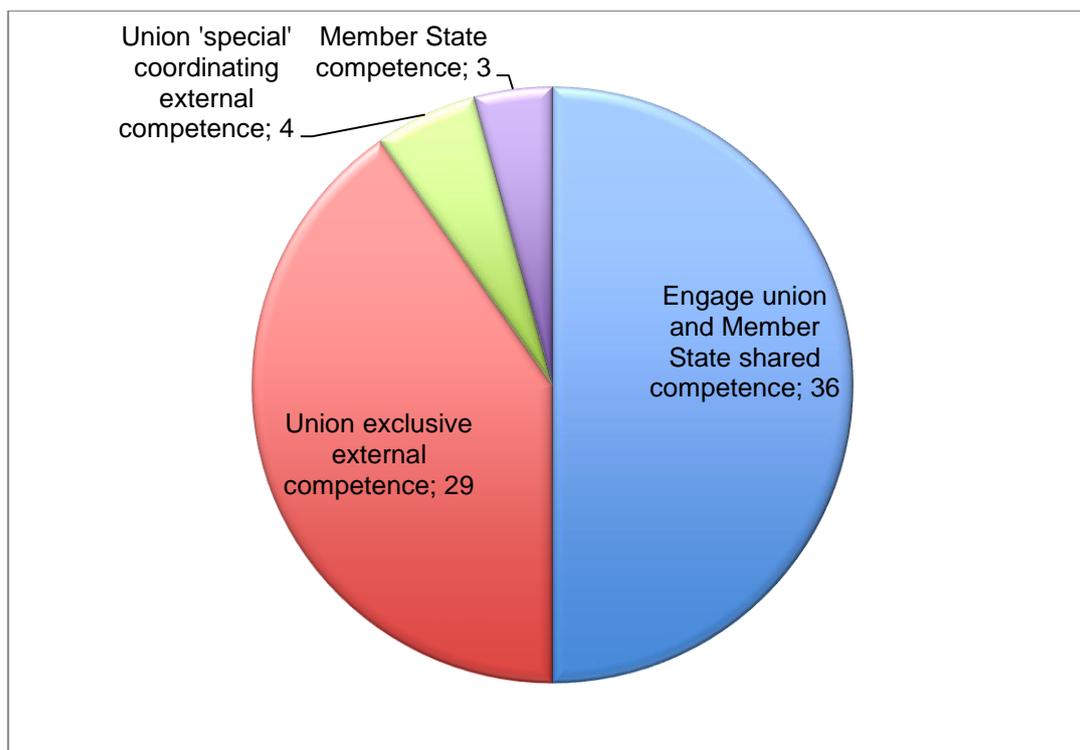
The following table sets out the procedural implications for ratification flowing from each category of external competence outlined above.

Nature of external competence	Procedural implication for ratification
Engages union exclusive external competence (express or implied)	Member States require Council authorisation in order to ratify the Convention. Member States and the Union are subject to the duty of sincere cooperation under Articles 4 and 13 TEU. ⁸⁶
Falls under Union and Member State shared external competence	Member States may autonomously ratify the Convention, subject to the duty of sincere cooperation.
Falls under Union 'special' coordinating external competence	Member States may autonomously ratify the Convention, subject to the duty of sincere cooperation.
Falls under Member State competence	Member States may autonomously decide whether to ratify the Convention, subject to the duty of sincere cooperation.

As noted, the Conventions which engage Union exclusive external competence are most significant for the Commission, as the existence of such competence, even in relation to only one Article of a Convention, means that Member States require Council authorisation in order to ratify the Convention.

The chart below shows the distribution of the Conventions analysed in relation to the four categories of external competence.

⁸⁶ The duty of sincere cooperation requires that the Union institutions and Member States fulfil their obligations under the Treaty, and may impose onerous procedural requirements on Member States. In Opinion 2/91, the Court stressed that Member States must take '*all the measures necessary so as best to ensure [...] cooperation both in the procedure of submission to the competent authority and ratification of Convention 170*'.



Therefore half (36 out of 72, or 50%) of the Conventions fall under Union and Member State shared competence, with a significant minority (29 out of 72, or 40%) engaging Union implied exclusive external competence. The following table shows how specific Conventions fall under four areas of external competence.

	Division of specific Conventions into different external competences			
	Union and Member State shared competence	Engage Union exclusive external competence	Union 'special' coordinating competence	Member State competence
Fundamental Rights	C87, C98, C105, C111, C138, C182	C29, C100		
Governance (Priority)	C81, C129, C144		C122	
Dock Workers		C152		
Elimination of Child Labour	C77, C78, C124			
Employment Policy and Promotion	C158	C181	C159	
Equality of Opportunity & Treatment	C156			
Fishers, Maritime Labour, Seafarers		C185, C186, C188		
Freedom of Association, Collective Bargaining	C141, C151, C154			C135
Indigenous and Tribal	C169			

People				
Labour Administration and Inspection	P81, C160	P110		C150
Maternity Protection	C183			
Migrant Workers		C97, C143		
Occupational Safety and Health	C120, C148, P155, C161, C167, C176, C187	C115, C139, C155, C162, C170, C174, C184, C189		
Social Security	C168	C102, C118, C121, C128, C130, C157		
Specific Categories of Workers	C172, C177	C110, C149		
Vocational Guidance and Training			C140, C142	
Wages	C173	C94		C95, C131
Working Time	C14, C106, C171, C175	P89		

1.2. Overview of Union exclusive external competence

Our analysis finds that twenty-nine out of seventy-two Conventions (40%) engage Union exclusive external competence, meaning that Member States require Council authorisation to ratify them. We have identified four principal grounds which may give rise to Union exclusive external competence, and applied legal tests based on these grounds:

1. The Convention engages an area of EU law over which the Union possesses express exclusive competence pursuant to Article 3(1) TFEU.⁸⁷
2. The Convention engages Union coordinating regulation, therefore 'affecting common rules' under Article 3(2) TFEU.⁸⁸
3. The Convention engages regulation 'to a large extent', following Opinions 2/91 and 1/03, therefore also 'affecting common rules' under Article 3(2) TFEU – see section 1.3 below
4. The Convention is incompatible with the *acquis*, in which case the Union 'pre-empts' Member State competence under Articles 3(2) and 2(2) TFEU to the extent that it has already legislated in an area of Union and Member State shared competence.⁸⁹

As reflected below, the most significant grounds for Union exclusive competence is that the ILO Convention in question engages, and could therefore affect, EU common rules, characterised both by coordinating regulation and regulation 'to a large extent'. By contrast, markedly few Conventions engage fields which are expressly attributed to exclusive Union external competence – in both cases (C94 and C29) these pertain to public contracts.

Division of Conventions by grounds for Union exclusive competence			
Union coordinating regulation, Art 3(2) TFEU	Regulation 'to a large extent', Art 3(2) TFEU	Pre-emption resulting from incompatibility, Arts 3(2) and 2(2)	Express exclusive competence, Art 3(1) TFEU

⁸⁷ Article 3(1) TFEU provides that: 3(1) The Union shall have exclusive competence in the following areas:

(a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

⁸⁸ Article 3(2) TFEU provides that: 3(2) 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** (emphasis added).

⁸⁹ Article 2(2) TFEU provides that: 2(2) When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence (emphasis added).

		TFEU	
C97, C102, C110, P110, C118, C121, C128, C130, C143, C152, C157, C181, C186, C188,	C100, C115, C139, C143, C149, C152, C155, C162, C167, C170, C174, C184, C186	C 29, P89, C 97, C110, C185, C188, C189	C 29, C 94

(Note that a Convention may fall into more than one category.)

1.3. Regulation 'to a large extent'

The existence of regulation 'to a large extent' is a key determinant giving rise to EU exclusive external competence, derived from the case law (CJEU Opinions 2/91 and 1/03). As noted in the preceding legal analysis, it follows from CJEU Opinion 1/03, paragraph 126, that where the test of '*an area which is already covered to a large extent by [Union] rules*' is to be applied, the assessment must be based not only on the scope (eg. minimum harmonisation in a certain area) of the rules in question, but also on their nature and content. Therefore, our approach has been to assess each and every regulation regarding its scope as well as its nature and content in order to determine whether it constitutes 'regulation to a large extent'.

Our analysis of the up-to-date ILO Conventions in light of the EU *acquis* finds that the following eleven particularly detailed harmonising Regulations and Directives constitute regulation 'to a large extent'. This means that when one of the Directives or Regulations is engaged by a Convention it triggers Union exclusive competence, following CJEU Opinions 2/91 and 1/03:

1. Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures
2. Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency
3. Directive 2006/42/EC of the European Parliament and Council on machinery, and amending Directive 95/16/EC (recast)
4. Directive 2003/37/EC on type-approval of agricultural or forestry tractors, their trailers and interchangeable towed machinery, together with their systems, components and separate technical units and repealing Directive 74/150/EEC (Text with EEA relevance.)
5. Directive 2009/16/EC on port State control (Recast) (Text with EEA relevance)
6. Directive 2008/68/EC on the inland transport of dangerous goods
7. Directive 2005/36/EC on the recognition of professional qualifications (Text with EEA relevance)
8. Directive 96/29/Euratom laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation
9. Directive 2004/37/EC of the European Parliament and of the Council on the

10. protection of workers from the risks related to exposure to carcinogens or mutagens at work
11. Directive 96/82/EC on the control of major-accident hazards involving dangerous substances
12. Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile constructions sites

We also find that Article 157 TFEU providing for equal pay for equal work between men and women constitutes 'regulation to a large extent'. The direct horizontal effect of Article 157 TFEU, following the case of *Defrenne*, means that Member States' autonomy to implement the principle of equal pay for men and women is greatly restricted. Therefore, following Opinions 2/91 and 1/03, Article 157 TFEU (and any secondary legislation implementing it) constitutes 'regulation to a large extent' due to the scope and the precise nature of the principle in EU law. International agreements that engage such regulation – including ILO C100 (Equal Remuneration Convention) - 'affect common rules' under Article 3(2) TFEU, meaning that there is Union implied exclusive competence in relation to such agreements.

In contrast, our analysis finds that Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time does *not* constitute 'regulation to a large extent', and therefore Union and Member State shared competence applies under Articles 153(1)(a) and 4(2)(b) TFEU when the Directive is engaged by a Convention. The test derived from CJEU Opinion 1/03 with regard to what constitutes regulation 'to a large extent' focuses on the scope, content and nature of the rules, bearing in my mind the potential for their future development. In light of this test, Directive 2003/88/EC is not wider in scope or more detailed in nature than other Directives enacted under Article 153(1)(a) TFEU, such as Directive 89/391/EEC setting minimum requirements in occupational safety and health. Further, Article 15 of the Working Time Directive permits Member States to autonomously introduce more favourable standards. In terms of the content of the rules, there is no legal precedent stating or suggesting that Working Time is a special area of occupational safety and health that uniquely falls under Union exclusive competence. Therefore we consider the Working Time Directive an area of Union and Member State shared competence under Articles 153(1)(a) and 4(2)(b) TFEU.

1.4. Key findings on EU exclusive external competence

The table which follows provides a detailed summary of each instance of EU exclusive competence, citing the relevant Convention Article(s), the relevant EU *acquis* engaged, and the grounds for Union exclusive external competence.

Conventions which engage Union exclusive external competence and therefore require Council authorisation before ratification

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
1.	C29 – Forced Labour Convention	Article 5(1) “No concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour”	Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts	Under Article 3(1)(b) TFEU the Union has exclusive competence in relation to the establishing of the competition rules necessary for the functioning of the internal market.
2.	P89 - Protocol to the Night Work (Women) Convention (Revised)	Article 1(a)-(c)(i) - provides that women may conduct night work provided that they or their representatives reach such an agreement with the employer.	Directive 2003/88/EC concerning certain aspects of the organisation of working time	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.
3.	C94 – Labour Clauses (Public Contracts) Convention	Articles 1-5 – regulate the award of public procurement contracts.	Article 3(1)(b) TFEU Directive 2004/18/EC Directive 2004/17/EC Directive 2009/81/EC amending Directives 2004/17/EC and 2004/18/EC	Under Article 3(1)(b) TFEU the Union has exclusive competence in relation to the establishing of the competition rules necessary for the functioning of the internal market.
		Article 2(1)(a) “not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on [...] by collective agreement or other recognised machinery of negotiation”;	Directive 96/71/EC concerning the posting of workers in the framework of the provision of services Article 56 TFEU Case C-346/06 Rüffert	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.
4.	C97 - Migration	Articles 6(b)-(c) require ratifying	Regulation (EC) No	The instruments are Union coordinating Regulations.

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
	for Employment Convention (Revised)	States to provide social security to, and to maintain such rights of, immigrants lawfully within its territory on equal terms to nationals. Article 7(1) requires for cooperation between employment services	883/2004 Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
		Annex I, Articles 3(2)(a)-(c), (5), 5, 7; Annex II Articles 3(2)(a)-(c), (6), 6.	Regulation (EU) No 492/2011 on freedom of movement for workers within the Union (codification)	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.
5.	C100 – Equal Remuneration Convention	Articles 1-3(2), 4 - provide for equal pay between men and women workers.	Art 157(1) and (2) TFEU: C-43/75 Defrenne v Sabena (No2) (1976) Directive 2006/54, Article 4	The direct horizontal effect of Article 157 TFEU, following Defrenne, means that Member States' autonomy to implement the principle of equal pay for men and women is greatly restricted. Therefore, following Opinions 2/91 and 1/03, Article 157 TFEU (and any secondary legislation implementing it) constitutes 'regulation to a large extent' due to the scope and the precise nature of the principle in EU law. International agreements that engage such regulation 'affect common rules' under Article 3(2) TFEU, meaning that there is Union implied exclusive competence in relation to such agreements.
6.	C102 – Social Security (Minimum Standards)	Article 68(1) - provides that non-national residents of the ratifying state shall have the same rights as national residents	Regulation (EC) No 883/2004 on coordination of social security systems Regulation (EC)	The instruments are Union coordinating Regulations. An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
	Convention		No 987/2009 implementing Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010 (nationals of third countries)	competence.
7.	C110 – Plantations Convention	Articles 11(2)-(4) - require workers in cross-border situations to have received a medical examination prior to departure. Article 52(1) – provides for equal treatment in respect of 'workmen's compensation' between nationals and non-nationals	Article 45 TFEU Regulation (EU) No 492/2011 on freedom of movement for workers (codification) Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU. The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
8.	P110 – Protocol to the Plantations Convention	Article 1(2)-(3) - provides for derogations from, <i>inter alia</i> , the above.	Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
9.	C115 – Radiation Protection Convention	The great majority of Articles providing for minimum safety standards protecting workers from the damaging effects of ionizing radiation.	Council Directive 96/29/EURATOM laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation	The Directive, while setting minimum health and safety standards, is highly detailed, and provides specific criteria in the Annexes. It therefore constitutes regulation "to a large extent" for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU,

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
				triggering Union implied exclusive external competence.
10.	C118 - Equality of Treatment (Social Security) Convention	Articles 2(1); 3-11 - establish a detailed system of reciprocal provision of social security entitlements to resident nationals of ratifying states.	Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
11.	C121 - Employment Injury Benefits Convention	Article 27 - requires that each ratifying Member shall within its territory assure to non-nationals equality of treatment with its own nationals as regards employment injury benefits.	Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
12.	C128 - Invalidity, Old-Age and Survivors' Benefits Convention	Article 30: "National legislation shall provide for the maintenance of rights in course of acquisition in respect of contributory invalidity, old-age and survivors' benefits under prescribed conditions." Article 32 provides for derogations from Article 30.	Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
13.	C130 – Medical Care and Sickness Benefits Convention	Article 32: "Each Member shall, within its territory, assure to non-nationals who normally reside or work there equality of treatment with its own nationals as regards	Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
		the right to the benefits provided for in this Convention.”		
14.	C139 – Occupational Cancer Convention	The great majority of Articles providing for minimum safety standards protecting workers from the risks of contracting occupational cancer.	Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work	<p>The Directive incorporates highly detailed annexes from Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances.</p> <p>It therefore constitutes regulation “to a large extent” for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.</p>
15.	C143 - Migrant Workers (Supplementary Provisions) Convention	<p>Article 10: “Ratifying states shall undertake to provide, <i>inter alia</i>, equal social security rights as compared with nationals for persons who as migrant workers or as members of their families are lawfully within its territory.”</p> <p>Article 14(b)-(c): “A ratifying state may [...] make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas; [...] restrict access to</p>	<p>Regulation (EC) No 883/2004</p> <p>Regulation (EC) No 883/2004</p> <p>Regulation (EC) No 1231/2010</p>	<p>The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.</p>
			Directive 2005/36/EC on the recognition of professional qualifications	<p>Directive 2005/36/EC harmonises Member State recognition of professional qualifications in significant detail, constituting regulation “to a large extent” for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external</p>

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
		limited categories of employment or functions where this is necessary in the interests of the State."		competence.
16.	C149 - Nursing Personnel Convention	Articles 2(1)-(2)-4 The Articles regulate the qualifications and training required in order to qualify as a nurse.	Directive 2005/36/EC on the recognition of professional qualifications	Directive 2005/36/EC harmonises Member State recognition of professional qualifications in significant detail, constituting regulation 'to a large extent' for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
17.	C152 - Occupational Safety and Health (Dock Work) Convention	Article 3(h) - defines the term <i>ship</i> . Article 4(2)(i) - provides for the testing, examination, inspection and certification of lifting appliances.	Directive 2009/16/EC on port State control (Recast)	The Directive provides for harmonized standards on the inspection of ships, rather than minimum requirements that Member States are free to exceed. Directive 2009/16/EC therefore constitutes regulation 'to a large extent', as found by the CJEU in Opinion 2/91. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
		Articles 21 (a), 22, 27 – regulate the design and testing of various equipments used on ships.	Directive 2006/42/EC on machinery, and amending Directive 95/16/EC (recast) (Text with EEA relevance)	The Treaty basis for the Directive is Article 114 TFEU, which provides for the 'approximation' of Member State laws for the regulation of the internal market. Directive 2006/42/EC provides for harmonized standards on the design and marketing of machinery that must be complied with and therefore constitutes regulation 'to a large extent'

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
				for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
		Article 32 – regulates transport of dangerous goods by water, specifically the handling of dangerous goods in ports.	Directive 2008/68/EC on the inland transport of dangerous goods	Directive 2008/68/EC harmonises Member State rules on the transport of dangerous goods in considerable detail, constituting regulation "to a large extent" for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
18.	C155 – Occupational Safety and Health Convention	Article 11 (b) – requires, <i>inter alia</i> , that ratifying states determine substances and agents the exposure to which is to be prohibited, limited or made subject to authorisation or control.	Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures	The Treaty basis for Regulation (EC) No 1272/2008 is Article 114 TFEU, which provides for the 'approximation' of Member State laws for the regulation of the internal market. To this end the Regulation provides for harmonized standards. The Regulation therefore constitutes regulation 'to a large extent', as found by the CJEU in Opinion 2/91. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
		Article 12 Requires ratifying states to take measures to regulate those who design, manufacture, import,	Directive 2006/42/EC on machinery, and amending Directive 95/16/EC (recast)	The Treaty basis for Directive 2006/42/EC is Article 114 TFEU, which provides for the 'approximation' of Member State laws for the regulation of the internal market. To this end the Directive provides for

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
		provide or transfer machinery, equipment or substances for occupational use in light of various requirements concerning occupational safety and health.		harmonized standards. The Directive hence constitutes regulation “to a large extent” for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
19.	C157 – Maintenance of Social Security Rights Convention	Articles 1-17 – establish a system for the reciprocal maintenance of social security rights for resident nationals of ratifying states.	Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The instruments are Union coordinating Regulations. An international agreement engaging them therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
20.	C162 – Asbestos Convention	Article 14 – requires ratifying states to hold producers and suppliers of asbestos and manufacturers and suppliers of products containing asbestos responsible for adequate labelling of the container.	Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures	The Treaty basis for the Regulation is Article 114 TFEU, which provides for the ‘approximation’ of Member State laws for the regulation of the internal market. To this end the Regulation provides for harmonized standards. Regulation (EC) No 1272/2008 hence constitutes regulation ‘to a large extent’, as found by the CJEU in Opinion 2/91. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
21.	C167 – Safety and Health in Construction Convention	The great majority of Articles providing for minimum safety standards protecting workers from the risks to health on construction sites.	Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile constructions sites	The Directive is highly detailed, and in particular the ‘prior notice’ form provided in Annex III is a standardised form. It therefore constitutes regulation “to a large

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
				extent” for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
22.	C170 – Chemicals Convention	Articles 2(a)-(c), (e); 6-9; 18(4) – require ratifying Member States to regulate the labelling of chemicals and hazardous substances.	Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures	The Treaty basis for the Regulation is Article 114 TFEU, which provides for the ‘approximation’ of Member State laws for the regulation of the internal market. To this end the Regulation provides for harmonized standards. Regulation (EC) No 1272/2008 hence constitutes regulation ‘to a large extent’, as found by the CJEU in Opinion 2/91. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
23.	C174 – Prevention of Major Industrial Accidents Convention	The great majority of Articles providing for minimum safety standards protecting workers from the risks to health posed by the possibility of major industrial accidents.	Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances	The Directive is a highly detailed harmonizing Directive and therefore constitutes regulation to a large extent for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
24.	C181 - Private Employment Agencies Convention	Articles 1(3) - defines the term <i>processing of personal data of workers</i> Article 6 – regulates the processing of personal data of workers	Directive 95/46/EC (data protection)	The EU instrument is a Union coordinating Directive. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
25.	C184 - Safety and Health in Agriculture Convention	Article 9(2) – requires ratifying states to ensure that manufacturers, importers and suppliers of, <i>inter alia</i> , agricultural machinery, ensure that the machinery complies with a series of safety and health standards.	Directive 2003/37/EC on type-approval of agricultural or forestry tractors [...] repealing Directive 74/150/EEC	Directive 2003/37/EC is based on the principle of 'total harmonisation', as stated in paragraph 4 of the preamble to the Directive. Member States must therefore comply with the harmonized standards precisely. The Directive hence constitutes regulation 'to a large extent', as found by the CJEU in Opinion 2/91. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
		Article 12(a)-(b) – requires ratifying states to ensure that those who produce, import, provide, sell, transfer, store or dispose of chemicals used in agriculture comply with national or other recognized safety and health standards.	Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures	The Treaty basis for Regulation (EC) No 1272/2008 is Article 114 TFEU, which provides for the 'approximation' of Member State laws for the regulation of the internal market. To this end the Regulation provides for harmonized standards. The Regulation hence constitutes regulation 'to a large extent', as found by the CJEU in Opinion 2/91. An international agreement engaging it therefore 'affects common rules' under Article 3(2) TFEU, triggering Union implied exclusive external competence.
26.	C185 – Seafarers' Identity Documents Convention	Article 6(3)-(9) – provides that Seafarers' Identity Documents shall enable seafarers to cross ratifying states' borders.	Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
			from that requirement	
27.	C186 – Maritime Labour Convention	Convention Articles II(I)(i); Regulation 5.2 Standard A5.2.1 (excluding Standard A5.2.1(4)(a)-(b)); Guideline B5.2; Regulation 5.2.2; Standard A5.2.2; Guideline B5.2.2 (See C186 fiche)	Directive 2009/16/EC on port State control (Recast) (Text with EEA relevance)	This is an EU instrument which harmonises legislation in detail, constituting regulation “to a large extent” for the purposes of Opinions 2/91 and 1/03. An international agreement engaging it therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
		Regulation 1.4(3); Guideline B1.4.1(2)(k); Standard A4.5(3), (8) (See C186 fiche)	Regulation (EC) No 883/2004 Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence.
		Regulation 1.4 – requires ratifying states to ensure, in defined circumstances, that seafarer recruitment and placement services in third countries conform to the requirements set out in the Code.	Article 56 TFEU	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.
		Guideline B1.4: “each Member should [... verify] that labour conditions [...] are in conformity with applicable collective bargaining agreements”	Article 56 TFEU Case C-346/06 (Rüffert) Case C-341/05 (Laval) Case C-438/05 (Viking)	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.

	Convention	Convention Article engaging EU exclusive external competence	Acquis engaged triggering Union exclusive external competence	Reason for Union exclusive external competence
28.	C188 – Work in Fishing Convention	Article 34 – equal social security treatment of nationals and non-nationals Article 36 – cooperation on social security protection and maintenance of social security rights for fishers	Regulation (EC) No 883/2004 Regulation (EC) No 883/2004 Regulation (EC) No 1231/2010	The EU instruments are Union coordinating Regulations. An international agreement engaging them therefore ‘affects common rules’ under Article 3(2) TFEU, triggering Union implied exclusive external competence. Further, there is potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.
29.	C189 – Domestic Workers Convention	Article 8(1) – requires that migrant domestic workers receive a written job offer, or contract of employment prior to crossing national borders	Article 45 TFEU	Potentially incompatible regulation. Therefore Member State competence is pre-empted to the extent that the Union has already exercised its competence under Articles 3(2) and 2(2) TFEU.
Total Conventions that engage Union exclusive external competence: 29				

1.5. Union and Member State shared external competence

A total of thirty-six Conventions (50%) are classified as falling under Union and Member State shared competence and do not also engage Union exclusive competence. Our analysis therefore suggests that Member States are free to autonomously ratify these Conventions, subject to the duty of sincere cooperation. The areas of shared competence are defined under Article 4(2) TFEU, which includes social and employment policy, the internal market, and the area of freedom, security and justice. The analytic fiches and the synthetic summary contain detailed information on the areas of the EU *acquis* engaged by the Conventions that trigger shared competence.

Conventions that fall under Union and Member State shared external competence (and do not also engage Union exclusive competence)	
C14 – Weekly Rest (Industry) Convention	C151 - Labour Relations (Public Service) Convention
C77 - Medical Examination of Young Persons (Industry) Convention	C154 - Collective Bargaining Convention
C78 - Medical Examination of Young Persons (Non-Industrial Occupations) Convention	C156 - Workers with Family Responsibilities
C81 – Labour Inspection Convention	P155 - Protocol of 2002 to the Occupational Safety and Health Convention
P81 - Protocol of 1995 to the Labour Inspection Convention	C158* - Termination of Employment Convention
C87 - Freedom of Association and Protection of the Right to Organise Convention	C160 - Labour Statistics Convention
C98 - Right to Organise and Collective Bargaining	C161 - Occupational Health Services Convention
C105 – Abolition of Forced Labour Convention	C168 – Employment Promotion and Protection against Unemployment Convention
C106 - Weekly Rest (Commerce and Offices) Convention	C169 - Indigenous and Tribal Peoples Convention
C111 – Discrimination (Employment and Occupation) Convention	C171 - Night Work Convention
C120 - Hygiene (Commerce and Offices) Convention	C172 - Working Conditions (Hotels and Restaurants) Convention
C124 - Medical Examination of Young Persons (Underground Work) Convention	C173 - Protection of Workers' Claims (Employer's Insolvency) Convention
C129 - Labour Inspection (Agriculture) Convention	C175 - Part-Time Work Convention
C135 - Workers' Representatives Convention	C176 – Safety and Health in Mines Convention
C138 - Minimum Age Convention	C177 - Home Work Convention
C141 - Rural Workers' Organisations Convention	C182 - Worst Forms of Child Labour Convention
C144 – Tripartite Consultation (International Labour Standards) Convention	C183 - Maternity Protection Convention

C148 – Working Environment (Air Pollution,
Noise and Vibration) Convention

C187 - Promotional Framework for
Occupational Safety and Health Convention

Total: 36

1.6. Union 'special' external coordinating competence

The following table shows which Conventions are categorised as falling under Union 'special' coordinating external competence. The Union possesses such external competence where the Convention primarily engages Union law falling under that competence, pursuant to Article 6 TFEU, which covers areas such as employment policy and education and vocational training. As with shared competence above, Member States are free to autonomously ratify Conventions that fall under Union 'special' coordinating external competence.

Conventions that fall under Union 'special' coordinating competence

C122 – Employment Policy Convention

C140 - Paid Educational Leave Convention

C142 - Human Resources Development Convention

C159 - Vocational Rehabilitation and Employment (Disabled Persons) Convention

Total: 4

1.7. Member State competence

Member State competence exists in relation to Conventions that do not engage any *acquis*. For example, Member State exclusive competence exists where the Convention provides for standards in an area where there is an exception within a subject matter which otherwise falls within Union competence, such as exception created by Article 153(5) TFEU in relation to pay, freedom of association and the right to strike and impose lock-outs within the area of social and employment policy. As with the shared and 'special' coordinating external competences, Member States are free to ratify Conventions that fall under Member State competence without prior authorisation.

Conventions that fall under Member State external competence

C95 - Protection of Wages Convention

C131 - Minimum Wage Fixing Convention

C150 - Labour Administration Convention

Total: 3

2. Conventions that are potentially incompatible with the EU *acquis*

This section identifies Conventions that are potentially incompatible with the EU *acquis*. If the Conventions contain provisions that are incompatible with the *acquis*, those provisions will trigger Union implied exclusive competence under the doctrine of pre-emption, pursuant to Art.s 3(2) and 2(2) TFEU.

As will be shown, some of the potentially incompatible Conventions resolve the incompatibility through the inclusion of a specific provision. However, for the purposes of determining external competence, the incompatible provision remains incompatible, therefore triggering Union implied exclusive external competence. This is because where the Union has legislated in area of shared competence it pre-empted Member State competence under Article 2(2) TFEU, meaning that Member States are no longer competent to enact provisions that are incompatible with existing EU provisions.

The potentially incompatible Conventions which we have identified are:

- P 89 – Protocol to the Night Work (Women) Convention
- C 94 – Labour Clauses (Public Contracts) Convention
- C 97 – Migration for Employment Convention (Revised)
- C110 – Plantations Convention

A further four up-to-date Conventions which contain potential incompatibilities are the subject of a Council Decision – or a Commission Proposal for a Council Decision – authorising their ratification in the interests of the Union:

- C185 – Seafarers' Identity Documents Convention (Revised)
- C186 – Maritime Labour Convention
- C188 – Work in Fishing Convention
- C189 – Domestic Workers Convention

Of these Conventions, C188 and C189 contain a so-called 'REIO'⁹⁰ or safeguard clause which provides that a regional economic integration organisation, such as the EU, may derogate from the provision which gives rise to the potential incompatibility. Because these Conventions resolve the potential conflict to which they give rise they are included for information only.

Further, C185 and C186 are already the subject of Council Decisions authorising ratification, therefore obviating the effect of any potential incompatibility in practice.

⁹⁰ REIO denoting Regional Economic Integration Organisation

2.1. P89 – Protocol to the Night Work (Women) Convention

One of the objectives of P89 is to ease the restriction on women performing night work under C89 in order to make ILO standards compatible with EU law providing for equality between men and women. However, Protocol Art. 2(1) makes the performance of night work by women subject to conditions – namely, an agreement between the organisations representative of the employers and the workers concerned. This potentially discriminates against women workers in comparison to male workers, contrary to Directive 2006/54/EC, because male workers' performance of night work is not subject to such an agreement.

However, it should be noted that under Art. 19(8) of the ILO Constitution, the provision more favourable to the worker concerned applies.

“In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.”

Nonetheless, Protocol Art. 2(1) remains potentially incompatible with the *acquis* for the purpose of determining external competence in relation to it, and therefore the Union pre-empts Member State competence under Art.s 3(2) and 2(2) TFEU.

Legal implication of potential conflict

If the Protocol is incompatible with EU law then the Commission should not promote its ratification. Notably, P89 was denounced by Cyprus and the Czech Republic in 2001, and no EU Member States have ratified P89.

2.2. C94 – Labour Clauses (Public Contracts) Convention

C94 has two principal objectives: firstly, to eliminate the use of labour cost as a competitive component among tenderers, and secondly, to ensure that public contracts are not exercised in a way so as to effect a downward pressure on wages and working conditions by placing standard clauses in the contract. While C94 mostly engages the public procurement Directives, *prima facie*, there are two areas of potential conflict between it and EU law. These tensions arise in the context of cross-border provision of services to a public authority. EU law, by ensuring transparent, non-discriminatory procedures, aims to ensure that economic operators from all EU Member States enjoy fundamental freedoms in the competition for public contracts. Before considering the various decisions on this issue, it should be noted that the potential conflicts between EU regulation to this effect and C94 were not addressed directly in the case law. Therefore without a decision of a European Court there is no explicit determination of incompatibility.

C94 Art. 2(1)(a) is potentially incompatible with Art. 3(1) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The relevant principle which requires consideration was established by the CJEU in Case C-346/06 *Rüffert*. In that case, the CJEU held that legislation in Member State A

requiring an undertaking established in Member State B that is posting its workers to Member State A to pay those workers at least the wage provided for in the collective agreement in force at the place where those services are performed in Member State A, without that collective agreement being universally applicable, does not fix a rate of pay according to the second indent of Art. 3(1) and Art. 3(8) of Directive 96/71.⁹¹ The legislation in question therefore could not be adopted by a Member State as it would be a restriction on the ability to provide cross border services enshrined in Article 56 TFEU.

Directive 96/71/EC Art. 3(l) provides that:

“3(1). Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Art. 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared **universally applicable** within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex (emphasis added).”

Art. 3(8) of the Directive provides that:

“8. Collective agreements or arbitration awards which have been declared universally applicable means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.”

In relation to the question of whether a collective agreement is of universal application, Convention 94 Art. 2(1) provides that:

“2(1) Contracts to which this Convention applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on— (a) **by collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned**” (emphasis added).

Convention 94 Art. 2(1) is therefore potentially incompatible with Article 56 TFEU and the freedom to provide services, as it requires Member State A to ensure that an undertaking established in Member State B that is posting its workers to Member State A pay those workers at least the wage provided for in the collective

⁹¹ See Ruffert, paragraphs 21-35. See also Bruun, N., Jacobs, A, Schmidt, M.; ‘ILO Convention No. 94 in the aftermath of the Ruffert case’, European Review of Labour and Research 2010 16: 473, 481-2.

agreement in force at the place where those services are performed in Member State A. The potential exception to this prima facie breach contained in with the second indent of Art. 3(1) of the Directive does not apply as the agreement need not be of universal application.

Further, following the above, Convention 94 Art. 2(1)(a) may also be an unjustified restriction on the freedom to provide services under Art. 56 TFEU.⁹² In *Rüffert*, in addition to holding that the restrictions did not fall within the protection of the Posted Workers Directive, the CJEU also held that:

“37. legal rules requiring that undertakings performing public work contracts and, indirectly, their subcontractors, apply the minimum wage laid down in a collective agreement may impose, on service providers established in another Member State where minimum rates are lower, an economic burden capable of constituting a restriction of the freedom to provide services under Art. 56 TFEU.

38. In addition... such a measure cannot be considered to be justified by the objective of ensuring the protection of workers”

Therefore, following *Rüffert*, Convention 94 Art. 2(1)(a)'s requirement to pay posted workers in accordance with the local collective agreement may constitute an unjustified restriction to provide services under Art. 56 TFEU.

Legal implications of potential conflict

Conflict between ILO Conventions and EU law is regulated by Art. 351 TFEU. According to paragraph 1 of that Art., the rights and obligations arising from agreements concluded before 1 January 1958 - or, for acceding States, before the date of their accession – between Member States and third countries, shall not be affected by the provisions of the Treaty. Art. 351(1) TFEU establishes that the application of the EU Treaty does not infringe on the obligations of the Member States to comply with the rights of third countries, based on prior treaties, and to fulfil the corresponding obligations.

C 94 was ratified by France, Austria and Finland in 1951, Belgium, the Netherlands and Italy in 1952, Bulgaria and Denmark in 1955, Cyprus in 1960 and Spain in 1971, and therefore, in all these cases, *before the EC Treaty came into force or before the Member State joined the EC (now EU)*. Therefore C 94 should be considered as a 'prior agreement' within the meaning of Art. 351(1) TFEU, with the consequence that these Member States cannot be held to be infringing EU law by fulfilling their treaty obligations arising from C 94, even where C94 conflicts with EU law.

However, to the extent that agreements which fall under Art. 351(1) TFEU are incompatible with EU law, the Member States are obliged, under paragraph 2 of Art. 351 TFEU, to take all appropriate steps to eliminate incompatibility. If this fails, or is not effective, then, according to Art. 307(2) TFEU, Member States are obliged to

⁹² Again, see Bruun, N.; Jacobs, A; Schmidt, M., 'ILO Convention No. 94 in the aftermath of the Ruffert case', 482-3

denounce, suspend or resign from the treaty. If the inconsistent treaty contains the possibility to denounce, then its denunciation on the next possible date would not encroach upon the international obligations of the Member State (see *Case I-84/98 Commission vs. Portuguese Rep. 2000*).

Art. 14 of C 94 contains the right of denunciation for the Member States. Any Member State that has ratified the Convention may denounce it after a lapse of 10 years after the date of its first coming into force, and on a ten-yearly cycle thereafter. This means that for all the EU Member States that have currently ratified C94 the most recent possible date of denunciation was 20 September 2012. None of the Member States in question availed themselves of this opportunity. Therefore the Member States remain bound to C94 for a further 10 years (until 20 September 2022 plus one year for registration and effect).

However, Member States are under an obligation to denounce a Convention only where a conflict between the Convention and EU law has become explicit, notably on the basis of a judgment of a European Court. In the *Rüffert* case the CJEU did not discuss C94, in large part because Germany is not party to the Convention. Therefore, it is not expressly established that C 94 is incompatible with EU law.

In order to avoid such a situation, the European Parliament passed a resolution on 25 October 2011 on modernisation of public procurement,⁹³ calling for an explicit statement in the public procurement Directives that they do not prevent any country from complying with ILO Convention No 94.

Further, DG EMPL is leading a process to assess potential revisions to the legislative framework for posting of workers in the context of provision of services.⁹⁴

2.3. C 97 – Migration for Employment Convention (Revised)

In attempting to provide for security of employment for migrant workers before departure, Art. 5 of Annex 1 of C97 requires that a copy of the contract of employment shall be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration, and other further provisions related to that requirement. The requirement is potentially incompatible with TFEU Art. 45 on the free movement of workers because it discriminates against EU migrant workers' freedom to move to take-up work compared to nationals of the ratifying Member State. Convention Art. 6 of Annex II is potentially incompatible with the *acquis* for the same reason. This reasoning is consistent with that applied to C189 – Domestic Workers (see below).

C97 also requires ratifying states to, *inter alia*, facilitate international migration for employment by establishing and maintaining a free assistance and information

⁹³ European Parliament resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI))

⁹⁴ Commission Staff Working Document Impact Assessment: Revision of the legislative framework on the posting of workers in the context of provision of services Brussels, 21.3.2012 SWD(2012) 63 final

service for migrant workers. In regulating such recruitment procedures, Art. 3(2) of Annex I of C097 provides that the right to engage in the operations of recruitment, introduction and placing otherwise than under government-sponsored arrangements for group transfer shall be restricted to public bodies, or bodies established in accordance with an international instrument.

This provision is potentially incompatible with Art. 56 establishing free movement of services within the EU, particularly with regards to the private provision of such services. However, exceptions to the provisions are allowed under Art. 3(3) of Annex I, which provides that:

“3(3) In so far as national laws and regulations or a bilateral arrangement permit, the operations of recruitment, introduction and placing may be undertaken by-- (a) the prospective employer or a person in his service acting on his behalf, subject, if necessary in the interest of the migrant, to the approval and supervision of the competent authority; (b) a private agency, if given prior authorisation so to do by the competent authority of the territory where the said operations are to take place, in such cases and under such conditions as may be prescribed by-- (i) the laws and regulations of that territory, or (ii) agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration.”

Art. 3(3) therefore permits private individuals to provide recruitment services involving migrant workers, provided that such recruitment conforms to the laws and regulations of that territory, or to an agreement between the territories of emigration and immigration. However, as above, despite the resolution of the incompatibility Art. 3(2) remains incompatible with the *acquis* for the purposes of determining external competence in relation to it, meaning that Member State competence is pre-empted by Art. 56 TFEU, pursuant to Arts 3(2) and 2(2) TFEU. Convention Art. 3(2) of Annex II is incompatible with the *acquis* for the same reason.

Convention Art. 3(6) of Annex II is potentially incompatible with Art. 45 TFEU and Regulation No 492/2011. The Convention Art. states that:

“3(6) Before authorising the introduction of migrants for employment the competent authority of the territory of immigration shall ascertain whether there is not a sufficient number of persons already available capable of doing the work in question.”

This is potentially incompatible with Member States' obligation to allow free movement of workers within the EU, and is unlikely to be a justified restriction of that movement.

Legal implications of potential conflict

Ten EU Member States have ratified C97: Belgium (27 Jul 1953); Cyprus (23 Sep 1960; has excluded the provisions of Annexes I to III); France (29 Mar 1954; has excluded the provisions of Annex II); Germany (22 Jun 1959); Italy (22 Oct 1952); Netherlands (20 May 1952); Portugal (12 Dec 1978); Slovenia (29 May 1992; has excluded the

provisions of Annex III); Spain (21 Mar 1967); United Kingdom (22 Jan 1951; has excluded the provisions of Annexes I and III).

As with C94, these ratifications were registered before the EC Treaty came into force or before the Member State joined the EC (now EU). Therefore C97 can also be considered as a 'prior agreement' within the meaning of Art. 351(1) TFEU, with the consequence that these Member States cannot be held to be infringing EU law by fulfilling their treaty obligations arising from C 97, even where it conflicts with EU law. However, to the extent that agreements which fall under Art 351(1) TFEU are not compatible with EU law, the Member States are obliged under para. 2 of Art. 351 TFEU to take all appropriate steps to eliminate the incompatibilities established.

Given that the context of regional economic integration has significantly developed since the drafting of C97 in 1949, there may be for a revision of the Convention, incorporating a 'safeguard clause' for regional integration organisations enabling derogation from potentially conflicting provisions, analogous to the drafting solutions reached in C188 and C189 (see below).

2.4. C110 – Plantations Convention

C110 seeks to afford protection to plantation workers in respect of employment contracts, wages, working time, medical care, maternity protection, employment accident compensation, freedom of association, labour inspection, and housing.

Art. 11 of the Convention provides that:

- “1. Every recruited worker shall be medically examined.
2. Where the worker has been recruited for employment at a distance from the place of recruiting, or has been recruited in one territory for employment in a territory under a different administration, the medical examination shall take place as near as may be convenient to the place of recruiting or, in the case of workers recruited in one territory for employment in a territory under a different administration, at latest at the place of departure from the territory of recruiting.
3. The competent authority may empower public officers before whom workers are brought in pursuance of Art. 9 to authorise the departure prior to medical examination of workers in whose case they are satisfied-- (a) that it was and is impossible for the medical examination to take place near to the place of recruiting or at the place of departure; (b) that the worker is fit for the journey and the prospective employment; and (c) that the worker will be medically examined on arrival at the place of employment or as soon as possible thereafter.
4. The competent authority may, particularly when the journey of the recruited workers is of such duration and takes place under such conditions that the health of the workers is likely to be affected, require recruited workers to be examined both before departure and after arrival at the place of employment.”

The potential incompatibility arises here from the requirement under Art 11(2) that workers undergo a medical examination “at latest at the place of departure from

the territory of recruiting". Under Art 45 TFEU, workers must be free to move from one Member State to another within the EU without a prior medical examination, unless that examination is justified under Article 45(3) TFEU on grounds of public health.

Legal implications of potential conflict

C110 has not been ratified by any EU Member States. Given its sectoral focus, future ratification is unlikely to be a priority for Member States.

2.5. C185 – Seafarers' Identity Documents Convention (Revised)

C185 replaces C108, establishing a more rigorous identity regime for seafarers with the aim of developing effective security from terrorism and ensuring that the world's seafarers will be given the freedom of movement necessary for their well-being and for their professional activities and, in general, to facilitate international commerce.

Convention Art. 6(4) on visa control of seafarers is potentially incompatible with Regulation (EC) No 539/2001 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, as amended by Regulations (EC) No 453/2003 and No 2414/2001.

Art. 6(4) of C185 provides that:

"6(4) each Member for which this Convention is in force shall, in the shortest possible time, and unless clear grounds exist for doubting the authenticity of the seafarers' identity document, permit the entry into its territory of a seafarer holding a valid seafarer's identity document, when entry is requested for temporary shore leave while the ship is in port."

This provision is potentially incompatible with Annex 1 of Regulation 539/2001, as amended by Regulations 2414/2001 and 453/2003, which lists states whose nationals require a visa to cross the external borders of Member States. Convention Art.s 6(5)-(9) are potentially incompatible with Regulation 539/2001 for the same reason.

Legal implications of conflict

C185 is the subject of a Council Decision⁹⁵ authorising Member States to ratify the Convention in the interests of the Union.

2.6. C186 – Maritime Labour Convention

The Maritime Labour Convention provides comprehensive rights and protections for seafarers, including working and living conditions, occupational safety and health, social security, wages, education and vocational training, and recruitment. It also provides for comprehensive inspection systems on ships and in ports. Moreover, C186's core normative requirements are closely mirrored in Council Directive

⁹⁵ Proposal for a Council Decision authorising Member States to ratify in the interests of the Community the Seafarers' Identity Documents Convention of the International Labour Organization (Convention 185) /* COM/2004/0530 final - CNS 2004/0180 */

1999/63/EC⁹⁶, and also Council Directive 2009/13/EC⁹⁷. There is however a potential incompatibility between C186 and the EU *acquis*, and in particular Art. 56 providing for the free movement of services within the EU and Guideline B1.4.1.2(k), which provides that:

“Guideline B1.4.1.2. In establishing the system referred to in Standard A1.4, paragraph 2, each Member should consider requiring seafarer recruitment and placement services, established in its territory, to develop and maintain verifiable operational practices. These operational practices for private seafarer recruitment and placement services and, to the extent that they are applicable, for public seafarer recruitment and placement services should address the following matters:

[...] (k) verifying that labour conditions on ships where seafarers are placed are in conformity with applicable collective bargaining agreements concluded between a shipowner and a representative seafarers' organization and, as a matter of policy, supplying seafarers only to shipowners that offer terms and conditions of employment to seafarers which comply with applicable laws or regulations or collective agreements.”

The potential incompatibility with Art. 56 TFEU arises because the provision does not require that the relevant collective agreements be declared universally applicable, contrary to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, and therefore potentially contrary to Art. 56 TFEU, as interpreted by the CJEU in *Rüffert* (see above in relation to C94).

Legal implications of potential conflict

The Council has authorised Member State ratification of C186 in the interests of the European Community.⁹⁸

2.7. C188 – Work in Fishing Convention

The objective of C188 is to ensure that fishers have decent conditions of work on board fishing vessels. To this end it provides for minimum requirements for work on board fishing vessels in relation to conditions of service, accommodation and food, occupational safety and health protection, medical care and social security.

With regard to social security for fishers, Convention Art. 34 is potentially incompatible with Regulations (EEC) No 1408/71 and (EC) No 883/2004. Convention Art. 34 provides that:

⁹⁶ Council Directive 1999/63/EC concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) - Annex: European Agreement on the organisation of working time of seafarers

⁹⁷ Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC.

⁹⁸ See Council Decision 2007/431/EC authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation.

“34 Each Member shall ensure that fishers ordinarily resident in its territory, and their dependants to the extent provided in national law, are entitled to benefit from social security protection under conditions no less favourable than those applicable to other workers, including employed and self-employed persons, ordinarily resident in its territory.”

Under the Convention, both the flag state and the state of residence have responsibilities, but for different areas of social security coverage. However, Regulations (EEC) No 1408/71 and (EC) No 883/2004 provide that the flag state is, as a rule, designated as the country whose social security legislation should apply. Therefore Art. 34 is potentially incompatible with the Regulations.

However, the incompatibility is resolved by Convention Art. 37 of C188, which provides that:

“37 Notwithstanding the attribution of responsibilities in Art.s 34, 35 and 36, Members may determine, through bilateral and multilateral agreements and through provisions adopted in the framework of regional economic integration organizations, other rules concerning the social security legislation to which fishers are subject.”

This allows for the supremacy of Union law in relation to Convention Art. 34, resolving that Art.'s incompatibility with the *acquis*. However, Art. 34 remains incompatible with the *acquis* for the purposes of determining external competence in relation to it, meaning that the Union pre-empts Member State competence under Arts 3(2) and 2(2) TFEU.

Legal implications of potential conflict

The potential incompatibility is resolved by the 'safeguard clause', providing for EU derogation from the terms of Art. 34. C188 is the subject of a Council Decision authorising Member States to ratify the Convention in the interests of the Union.⁹⁹

2.8. C189 – Domestic Workers Convention

C189 provides for the adoption of a coherent national occupational safety and health policy, as well as action to be taken by governments and within enterprises, to promote occupational safety and health and to improve working conditions for domestic workers.

Despite the Convention's focus on improving working conditions, Convention Art. 8(1) is potentially incompatible with Art. 45 TFEU guaranteeing the free movement of workers within the EU.

C189 Art. 8(1) provides that:

“8(1) National laws and regulations shall require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to

⁹⁹ Council Decision authorising Member States to ratify, in the interests of the European Union, the Work in Fishing Convention, 2007, of the International Labour Organisation (Convention No 188) (2010/321/EU)

be performed, addressing the terms and conditions of employment referred to in Art. 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies."

This is potentially incompatible with Art. 45 TFEU and Art. 2 of Regulation No 492/2011 on freedom of movement for workers within the Union, as it potentially discriminates against the recruitment of EU migrant workers compared to national workers within the ratifying Member State.

C189 Art. 8(2) however resolves the incompatibility by means of a 'REIO clause', providing that:

"8(2) The preceding paragraph shall not apply to workers who enjoy freedom of movement for the purpose of employment under bilateral, regional or multilateral agreements, or within the framework of regional economic integration areas."

It is important to note that while Art. 8(2) resolves the incompatibility between Art. 8(1) and the free movement of workers *acquis*, Art. 8(1) itself remains incompatible with the *acquis* for the purposes of determining external competence. Therefore the Union pre-empted Member State competence in relation to Art. 8(1) under Art.s 3(2) and 2(2) TFEU. Member States therefore require Council authorisation in order to ratify C189.

Legal implications of potential conflict

C189 is the subject of a Commission proposal for a Council Decision authorising Member States to ratify the Convention in the interests of the Union. The Proposal notes that the "*safeguard clause prevents any potential incompatibility between the Convention and the Union acquis on the freedom of movement for workers under Art. 45 TFEU and Regulation No 492/2011. Consequently, the provisions of the Convention in this area are not incompatible with the Union acquis.*"¹⁰⁰

¹⁰⁰ 'Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189)', COM(2013) 152 final, 2013/0085 (NLE), Brussels, 21.3.2013

3. Chapters of the EU acquis engaged by ILO instruments

Chapter of EU acquis	Fields of EU acquis engaged by up-to-date ILO instruments	ILO instruments engaging acquis Chapter
Chapter 1: Free movement of goods	<ul style="list-style-type: none"> Single market for goods: free movement of goods, technical harmonisation, product labelling and packaging, chemical products, motor vehicles, construction 	C152, C182.
Chapter 2: Freedom of movement for workers	<ul style="list-style-type: none"> Free movement of workers 	C97, C143, C149, C156, C189.
	<ul style="list-style-type: none"> Coordination of social security regimes 	C97, C110, C156, C181, C186.
Chapter 3: Right of establishment and freedom to provide services	<ul style="list-style-type: none"> Right of establishment and freedom to provide services 	C94, C97, C143, C186.
Chapter 5: Public procurement	<ul style="list-style-type: none"> Public procurement (social performance requirements) 	C29, C94, C181.
Chapter 10: Information society and media	<ul style="list-style-type: none"> Data protection 	C181.
Chapter 13: Fisheries	<ul style="list-style-type: none"> Social standards (maritime & fisheries) 	C186, C188.
Chapter 18: Statistics	<ul style="list-style-type: none"> Labour statistics 	C160, C177, P155.
Chapter 19: Social policy and employment	<ul style="list-style-type: none"> Occupational safety and health: equipment, signs and loads, protection of specific groups of workers, the workplace, chemical, physical and biological agents 	C29, C77, C78, C105, C110, C115, C120, C124, C138, C139, C144, C149, C148, C152, C155 (P155), C161, C162, C167, C169, C170, C172, C174, C176, C177, C182, C183, C184, C186, C187, C188, C189.
	<ul style="list-style-type: none"> Information, consultation and participation of employees 	
	<ul style="list-style-type: none"> Social dialogue and employee participation 	
	<ul style="list-style-type: none"> Occupational safety and health: working time 	C14, C29, C97, C106, C110, C138, C149, C171, C172, C175, C177, C181, C183, C186, C188, P089.
	<ul style="list-style-type: none"> Social protection: social security benefits 	C97, C143, C102, C110 (P110), C118, C121, C128, C130, C157, C168, C181, C186, C188.
	<ul style="list-style-type: none"> Employment policies 	C168.
	<ul style="list-style-type: none"> Social measures for target groups: disability and old age, rights and dignity of disabled persons 	C159.

Chapter 23: Judiciary and fundamental rights	• EU Charter Ch. 1 – Dignity (e.g. abolition of slavery and forced labour).	C29, C105, C169, C182, C186, C189.
	• EU Charter Ch. 2 – Freedoms (e.g. freedom of assembly and association).	C29, C87, C97, C135, C143, C151, C154, C158, C169, C181, C183, C189.
	• EU Charter Ch. 3 – Equality (e.g. non-discrimination; equality between men and women)	C29, C97, C100, C111, C140, C142, C143, C156, C158, C169, C171, C182, C183, C186, C189, P089.
	• EU Charter Ch. 4 – Solidarity (e.g. right of collective bargaining and action; fair and just working conditions)	C029, C154, C158, C169, C181, C182, C183, C186, C188, C189, P089.
	• EU Charter Ch. 5 – Justice	C169, C189.
Chapter 24: Justice, freedom and security	<ul style="list-style-type: none"> • Free movement of persons, asylum and immigration (including visas) • Judicial cooperation in criminal matters • Combating discrimination • Fight against trafficking in human beings 	C29, C97, C143, C169, C185.
Chapter 26: Education and culture	• Vocational training	C140, C142.

3.1. Chapters of the EU *acquis* engaged by ILO instruments

Chapter 1: Free movement of goods

The *acquis* regulating free movement of goods is engaged by C152 – Occupational Safety and Health (Dock Work) Convention (Article 34 TFEU and Directive 2006/42/EC on machinery), C170 – Chemicals Convention (classification, labelling and packaging of substances) and C167 – Safety and Health in Construction Convention (marketing of construction products).

Chapter 2: Freedom of movement for workers

The Conventions substantially engage the free movement of workers *acquis*, in two aspects:

- Union coordination of Member State social security schemes: the Union has competence to coordinate Member State social security schemes under Articles 5 and 48 TFEU in order to facilitate the free movement of workers. The three EU 'coordinating Regulations' are engaged by all of the up-to-date ILO social security Conventions. The EU social security coordinating Regulations are also engaged by: C97 (Migration for Employment Convention (Revised)), C156 (Workers with Family Responsibilities Convention), C181 (Private Employment Agencies Convention), C186 (Maritime Labour Convention)
- Article 45 TFEU: the following Conventions also engage Article 45 TFEU providing for free movement of workers with the EU: C97 (Migration for Employment Convention (Revised)), C143 (Migrant Workers (Supplementary Provisions) Convention), C149 (Nursing Personnel Convention), C156 (Workers with Family Responsibilities Convention), C189 (Domestic Workers Convention).

Chapter 3: Right of establishment and freedom to provide services

There is significant and potentially problematic overlap between C94 and Article 56 TFEU and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Further, C143 (Migrant Workers (Supplementary Provisions) Convention) also engages Articles 59 and 62 TFEU, and C149 (Nursing Personnel Convention) engages Articles 53 and 62 TFEU and European Parliament and Council Directive 2005/36/EC on the recognition of professional qualifications.

Chapter 5: Public procurement

EU law regulates the award of public contracts under a series of public procurement Directives: Directive 2004/17/EC ('Utilities'), Directive 2004/18/EC ('Classic'), Directive 2005/75/EC, and Directive 2009/81/EC (defence and security). C94 (Labour Clauses (Public Contracts) Convention) engages all three of those Directives, and C29 engages Directive 2004/18/EC ('Classic').

Chapter 10: Information society and media

An aspect of the EU's policy on regulating the transfer of information within Europe is the protection of individuals with regard to the processing of personal data and on the free movement of such data under European Parliament and Council Directive 95/46/EC. This Directive is engaged by C181 - Private Employment Agencies

Convention, which regulates the processing of workers' personal data by private employment agencies.

Chapter 13: Fisheries

The Common Fisheries Policy regulates Member State fishing and encourages the fishing industry. In this respect, it is not engaged by the Conventions that concern workers in fishing, such as C185, C186 and C188.

Chapter 18: Statistics

The *acquis* on statistics covers, among other areas, demographic, social and business statistics under Article 388 TFEU. To this end it is engaged by C161 - Occupational Health Services Convention which requires ratifying states to establish an occupational health service; C177 - Home Work Convention, which requires that labour statistics include, to the extent possible, home work; and C181 - Private Employment Agencies Convention which requires private employment agencies to provide statistical information to the competent authority within the ratifying Member State.

Chapter 19: Social policy and employment

Evidently, given the objectives of the ILO instruments, the overlap between the *acquis* and the Conventions is most frequent in social and employment policy. In particular, the occupational safety and health (OSH) Conventions engage the *acquis* broadly and in detail. The fifteen ILO OSH instruments engage twenty-five EU OSH Directives and Regulations.¹⁰¹ Elsewhere, the corpus of Social and Employment *acquis* is closely engaged by up-to-date ILO instruments. For instance, in the sphere of social security, a number of other ILO instruments engage Article 153(1)(c) TFEU¹⁰².

Union regulation of Member States' employment policies also operates at the level of coordination under Articles 5 and 148 TFEU. The nature of Union 'law' in this area is soft, taking the form of Council Decisions on employment policy guidance, and therefore there is little substantive legislation for the Conventions to engage. However, C168 – Employment Promotion and Protection against Unemployment Convention engages Council Decisions on employment policy.

Chapter 23: Judiciary and fundamental rights

The European Charter of Fundamental Rights ('the Charter') is significantly engaged by the ILO Conventions. Twenty-four out of seventy-two (33%) up-to-date

¹⁰¹ Directive 96/29/UNIONRATOM; Directive 89/391/EEC; Directive 92/58/EEC; Directive 90/270/EEC; Directive 98/24/EC; Directive 2002/44/EC; Directive 2003/10/EC; Directive 2004/37/EC; Directive 2002/14/EC; Regulation (EC) No 1272/2008; Directives 2000/39/EC, 2006/15/EC, 2009/161/UNION; Directive 2006/42/EC; Directive 2009/148/EC; Directive 92/57/EEC; Directive 89/656/EEC; Directive 2009/104/EC; Directive 1999/92/EC; Regulation (EC) No 1907/2006; Directive 96/82/EC; Directive 92/104/EEC; Directive 92/58/EEC; Directive 90/269/EEC.

¹⁰² C102 – Social Security (Minimum Standards) Convention; C121 – Employment Injury Benefits Convention; C128 – Invalidity, Old-Age and Survivors' Benefits Convention; C130 – Medical Care and Sickness Benefits Convention; C168 – Employment Promotion and Protection against Unemployment Convention; C156 – Workers with Family Responsibilities; C171 – Night Work Convention; C183 – Maternity Protection Convention; C169 – Indigenous and Tribal Peoples; C188 - Work in Fishing Convention; C186 – Maritime Labour Convention.

Conventions engage the Charter across six of its seven chapters. The most frequently engaged rights fall under the chapters on freedoms, equality and solidarity (see table below).

Chapter 24: Justice, freedom and security

There is very significant engagement of the justice, freedom and security *acquis* by ILO instruments. The ILO migrant workers Conventions (C97 and C143) engage the *acquis* on these issues extensively, as do a number of other ILO instruments: C182 – Worst Forms of Child Labour Convention, C181 – Private Employment Agencies Convention, C185 – Seafarers' Identify Documents Convention, C186 – Maritime Labour Convention, C189 – Domestic Workers Convention.

C97 - Migration for Employment Convention (Revised), C143 - Migrant Workers (Supplementary Provisions) Convention, and C189 – Domestic Workers Convention also engage Article 67 TFEU and European Parliament and Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, where those instruments relate to judicial cooperation in civil and criminal matters.

Chapter 26: Education and culture

The Conventions overlap to a low degree with the education and vocational training *acquis*. Union law in this area takes the form of guiding policy only, notably 'Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the priorities for enhanced European cooperation in vocational education and training for the period 2011-2020', which is engaged by C140 - Paid Educational Leave in the ILO policy field of Vocational Guidance and Training. The vocational training *acquis* is also engaged by C159 - Vocational Rehabilitation and Employment (Disabled Persons) Convention, C142 – Human Resources Development Convention, and C169 – Indigenous and Tribal Peoples Convention.

3.2. Engagement of European Charter of Fundamental Rights by up-to-date ILO instruments

ECFR Chapter	ECFR Articles engaged by ILO instruments	ILO instruments
Dignity	<i>Article 5. Prohibition of slavery</i>	C029 – Forced Labour Convention C105 – Abolition of Forced Labour Convention C186 – Maritime Labour Convention C189 – Domestic Workers Convention C182 – Worst Forms of Child Labour Convention C169 – Indigenous and Tribal Peoples
Freedom	<i>Article 12. Freedom of assembly and association</i>	C87 – Freedom of Association and Protection of the Right to Organise Convention C135 – Worker's Representatives Convention C151 – Labour Relations (Public Service) Convention C154 – Collective Bargaining Convention C158 – Termination of employment
	<i>Article 8. Protection of personal data</i>	C183 – Maternity Protection C181 – Private Employment Agencies
	<i>Article 15. Freedom to choose an occupation and engage in work</i>	C097 – Migration for Employment Convention (Revised)
	<i>Articles 7. Respect for private and family life; 14. Right to education; 15. Freedom to choose an occupation and engage in work.</i>	C143 – Migrant Workers (Supplementary Provisions) Convention
	<i>Articles 12. Freedom of assembly and association; 14. Right to education; 15. Freedom to choose an occupation and engage in work; 16. Freedom to conduct a business</i>	C169 – Indigenous and Tribal Peoples Convention
	<i>Article 15. Freedom to choose an occupation and engage in work</i>	C029 – Forced Labour Convention
	<i>Articles 6. Right to liberty and security; 7. Respect for private and family life; 12. Freedom of assembly and of association; 15. Freedom to choose an occupation and right to engage in work</i>	C189 – Domestic Workers Convention
Equality	<i>Article 20. Equality before the law</i>	C097 – Migration for Employment Convention (Revised)

	<i>Article 21. Non-discrimination</i>	C158 – Termination of employment C189 – Domestic Workers Convention
	<i>Article 22. Cultural, religious and linguistic diversity</i>	C143 – Migrant Workers (Supplementary Provisions) Convention
	<i>Article 23. Equality between men and women</i>	C29 – Forced Labour Convention P89 – Protocol to the Night Work (Women) Convention C140 – Paid Educational Leave C156 – Workers with Family Responsibilities Convention C182 – Worst Forms of Child Labour Convention C183 – Maternity Protection C142 – Human Resources Development
	<i>Articles 21. Non-discrimination; 22. Cultural, religious and linguistic diversity; 23. Equality between men and women</i>	C169 – Indigenous and Tribal Peoples Convention
	<i>Articles 21. Non-discrimination; 23. Equality between men and women</i>	C100 – Equal Remuneration Convention C111 – Discrimination (Employment and Occupation) Convention C186 – Maritime Labour Convention
Solidarity	<i>Article 28. Right of collective bargaining and action</i>	C154 – Collective Bargaining Convention C169 – Indigenous and Tribal Peoples
	<i>Article 29. Right of access to placement services</i>	C188 – Work in Fishing Convention
	<i>Article 31. Fair and just work conditions.</i>	P 89 – Protocol to the Night Work (Women) Convention
	<i>Article 28. Right of collective bargaining and action and bargaining; 31. Fair and just work conditions; Article 32. Prohibition of child labour and protection of young people at work; Article 33. Family and professional life; Article 34. Social security and social assistance.</i>	C189 – Domestic Workers Convention
	<i>Article 32. Prohibition of child labour and protection of young people at work</i>	C138 – Minimum Age Convention C182 – Worst Forms of Child Labour Convention
	<i>Article 33. Family and professional life</i>	C183 – Maternity Protection
	<i>Articles 28. Right of collective bargaining and action; 30. Protection in the event of unjustified dismissal</i>	C158 – Termination of employment
	<i>Articles 28. Right of collective</i>	C181 – Private Employment Agencies

	<i>bargaining and action; 31. Fair and just work conditions</i>	
	<i>Articles 31. Fair and just work conditions; 34. Social security and social assistance</i>	C029 – Forced Labour Convention
	<i>Articles 29. Right of access to placement services; 31. Fair and just work conditions</i>	C186 – Maritime Labour Convention
Justice	<i>Article 47. Right to an effective remedy and to a fair trial</i>	C169 – Indigenous and Tribal Peoples [C169 also engages Chapter VII on General Provisions, Article 54. Prohibition of the abuse of rights] C189 – Domestic Workers Convention

4. Value-added by ILO instruments to the EU *acquis*

4.1. EU and ILO standards

A comparative perspective on EU and ILO standards suggests that the EU *acquis* provides a high level of protection to workers and migrants within the EU, whilst maintaining a flexible legal framework within which Member States are generally free to provide for greater standards of protection. In many areas, EU regulation provides for **greater protection** of workers than the ILO instruments. However, the scope of this section of the report is limited to discussing the areas where the ratification of up-to-date ILO Conventions and Protocols could complement or add value to the existing EU *acquis* by:

- Providing for greater protections for workers, by means of more stringent minimum requirements.
- Establishing a normative framework in areas which are not covered or only partly covered by legislation and Union policies, including those areas expressly excluded from Union competence, such as such as labour administration and inspection, trade union rights, and collective bargaining.
- Providing for substantive measures where current EU *acquis* establishes only a procedural or coordinating framework, such as minimum standards for social security.
- Extending coverage of protections, for instance to specific groups of workers, such as domestic or nominally self-employed workers.
- Responding to the particular objectives of the EU and the demands of the European labour market in current and future economic contexts.

For practical purposes, our identification of ILO instruments which can add most to the *acquis* **excludes** those instruments which have already been:

- Ratified by all EU Member States (namely, C29, C81, C87, C98, C100, C105, C111, C138, C182)
- Subject to a Council Decision, or Commission Proposal for a Council Decision (namely, C170, C185, C186, C188 and C189).

4.2. Occupational safety and health

Both the up-to-date ILO instruments and the EU *acquis* on OSH comprise a comprehensive normative framework setting minimum standards for the protection of workers.¹⁰³ Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work is the cornerstone of the Union's OSH legislation, setting minimum standards for the protection of workers across the full-range of OSH concerns. It provides at least equivalent standards of protection in nearly all areas where it is engaged by the two overarching ILO OSH

¹⁰³ Including C152 - Occupational Safety and Health (Dock Work) Convention, which falls under the ILO classification of Dock Workers.

Conventions: C187 (Promotional Framework for Occupational Safety and Health Convention) and C155 (Occupational Health and Safety Convention).

The two notable areas in which C155 and C187 would add value to the Directive, and to the OSH *acquis* more generally, pertain to:

- the exclusion of 'domestic servants' [domestic workers in the ILO terminology] from the scope of the Directive,¹⁰⁴ (although this is in part addressed by the current proposal for a Council Decision on C189, whose provisions on OSH are by definition less detailed)
- the absence of provisions on inspection and enforcement in the Directive.

The 2002 Protocol to the Occupational Safety and Health Convention P155 also represents significant additional value for the EU, establishing more stringent or detailed requirements than the *acquis* in the following areas:

- Scope: Article 3(b) of the Convention is more stringent than Article 3 of Directive 89/391/EEC, which excludes 'employed domestic servants' [domestic workers]
- Record-keeping: employer's maintenance of records, and the employer's responsibility to record information relating to the classification of occupational accidents, diseases, and dangerous occurrences
- Information: the provision of information to workers
- Notification: the employers' responsibility to notify competent bodies, as well as the criteria according to which occupation accidents are notified and the time-limits for notification, and the substance of notifications to be provided by employers

Examination of technical and sectoral ILO OSH Conventions against the *acquis* suggests potential areas of value-added specific to particular working environments and risks, most markedly the more recent Conventions covering:

- Mining (see analysis below of C176 – Safety and Health in Mines Convention), and
- Agriculture (see analysis below of C184 - Safety and Health in Agriculture Convention)

Further, the introduction of OSH standards relating specifically to agriculture (through ratification of C184) would increase the coherence and accessibility of OSH standards in that sector, which at present are regulated by more general Union OSH legislation.

The following table provides a detailed summary of the provisions of ILO up-to-date instruments, the ratification of which would improve on, or complement, current EU norms relating to OSH.

¹⁰⁴ Article 3(a).

Up-to-date ILO OSH instruments which establish more stringent minimum requirements than the *acquis*

C115 - Radiation Protection Convention

- Scope of medical examinations
- Categories of workers permitted to return to work once declared unfit

C120 - Hygiene (Commerce and Offices) Convention

- Standards of hygiene inspection

C139 - Occupational Cancer Convention

- Issues relating to the periodic determination of carcinogens and exemptions from the prohibition of carcinogens
- Specification of the persons / bodies on whom compliance with the provisions of the Convention rests
- Inspection

C148 - Working Environment (Air Pollution, Noise and Vibration) Convention

- The determination of exposure limits
- The use of processes, substances, machinery and equipment which involve exposure of workers to occupational hazards
- The requirement that measures taking account of national conditions and resources shall be taken to promote research in the field of prevention and control of hazards in the working environment due to air pollution, noise and vibration
- The requirements that employer shall be required to appoint a competent person, or use a competent outside service or service common to several undertakings, to deal with matters pertaining to the prevention and control of air pollution
- Penalties and inspection

C162 – Asbestos Convention

- Monitoring of the work environment.
- The requirement that monitoring of workers' health shall take place during working hours

C167 - Safety and Health in Construction Convention

- Reporting of occupational diseases by employers to the competent authority
- Inspection

C174 – Prevention of Major Industrial Accidents Convention

- The inclusion of extractive sites and waste land-fill sites under the scope of the Convention
- Inspection

C176 – Safety and Health in Mines Convention

- The compilation and publication of statistics
- The power of the authority to restrict or suspend mining activities on grounds of health and safety
- The provision of at least two exits connected to separate means of egress to the surface
- The establishing of a system so that the names of all persons who are underground can be accurately known at any time, as well as their probable location
- The right of workers' health and safety representatives to consult with the competent authority
- Penalties and inspection

C184 - Safety and Health in Agriculture Convention

- Establishing inter-sectoral co-ordination mechanisms between relevant bodies in the agricultural sector
- Corrective measures and appropriate penalties in agriculture
- Inspection

- Ensuring that activities involving animals, livestock and stabling areas, comply with national or other recognized health and safety standards

4.3. Labour inspection and administration

It is noted above that one key area where ILO instruments could add to the OSH *acquis* is in the area of labour inspection. This is recognised by the Commission: “The standards and measures of the ILO also complement the *acquis* in areas which are not covered or only partly covered by legislation and Community policies, such as labour administration and inspection” (*Promoting decent work for all: The EU contribution to the implementation of the decent work agenda in the world*, COM (2006) 249).

In light, it is clear that value that would be added to the *acquis* by Member State ratification of the key up-to-date ILO instruments on labour inspection, both of which are priority ('Governance') instruments for the ILO:

- P81 – Protocol of 1995 to the Labour Inspection Convention 1947, which extends the Labour Inspection Convention to the non-commercial services sector
- C129 – Labour Inspection (Agriculture): C129 is more stringent than the *acquis* on all areas relating to labour inspection.

The primary ILO instrument on Labour Inspection – C81 (Labour Inspection), a 'governance' Convention – has been ratified by all 27 EU Member States.

4.4. Employment rights and work organisation

The EU *acquis* comprises a broad framework of minimum requirements in the field of employment rights and work organisation, relating to collective redundancies transfer of undertakings, the consultation and information of workers, working hours, equal treatment and pay, and posted workers. There are some specific issues on which up-to-date ILO instruments offer potential value-added in this area, as follows:

ILO instruments which establish more stringent requirements than the *acquis* on employment rights and work organisation

C14 – Weekly Rest (Industry) Convention

- Ensuring that rest days are taken simultaneously by employees

C106 – Weekly Rest (Commerce and Offices) Convention

- Ensuring that rest days are taken simultaneously by employees
- Inspection and penalties

Labour rights derived from fundamental rights – primarily freedom of association and prohibition of child labour – are addressed in 'Fundamental Rights' below.

4.5. Gender equality

There are four up-to-date ILO Conventions which offer value to the *acquis* in meeting the objective established in Art 8 TFEU: "*In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.*"

- C156 - Workers with Family Responsibilities Convention
- C175 – Part-Time Work Convention
- C177 – Home Work Convention
- C183 – Maternity Protection Convention

All four Conventions are wholly compatible with the *acquis*.

Work and family

The main purpose of C156 supplements EU law, in so far as the *acquis* does not provide specifically for the accommodation of the needs of workers who have family responsibilities. C156 is more stringent or detailed than the *acquis* in several respects:

- on community planning and community services for workers with family responsibilities (Convention Art 5);
- that family responsibility shall not constitute a valid reason for termination of an employment contract (Convention Art 8)
- on the provision of social security to workers with family responsibilities (Convention Art 4)
- on the promotion of information and education which engender broader public understanding of the principle of equality of opportunity and treatment for men and women workers and of the problems of workers with family responsibilities (Convention Art 6).

On the specific issue of working mothers, C183 (Maternity Protection Convention) establishes protections which are common with the *acquis* (such as the right to 14 weeks maternity leave). However, C183 is more stringent than the *acquis* on the breaks guaranteed to workers for breastfeeding.

Part time work

C175 is more specific than the Council Directive 97/81/EC on the measures to be taken to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers (Convention Art 4); the measures to be taken to facilitate access to productive and freely chosen part-time work (Convention Art 9). C175 is also more stringent than the Directive on the inclusion of maternity protection for part-time workers (Article 8(b)).

Homeworkers

C 177 on Home Work provides a framework for protecting homeworkers, requiring ratifying states to adopt a national policy on home work aiming at improving the situation of homeworkers and to promote, as far as possible, and equality of treatment. Whereas the EU *acquis* covers homeworkers, it does not provide for

equality between homeworkers and other workers in the areas of fundamental rights, working conditions and social security entitlements beyond a minimum level of protection. This is the added value of C177.

The aims pursued by C177 meet the objectives of the EU, including striking a balance between flexibility of the labour market and security of employees, and equality of treatment and opportunity for women workers, given that most homeworkers are women. Moreover, C177 has already been the subject of a Commission Recommendation in 1998¹⁰⁵.

4.6. Wages

Article 153(5) TFEU rules out the adoption of uniform minimum requirements on pay, freedom of association and the right to strike, although it does not rule out the possibility of adopting measures under other provisions of the Treaty, even if these measures have an impact on pay, freedom of association and the right to strike.¹⁰⁶ Further, Article 157 TFEU on equal pay between men and women clearly confers on the Union some competence with regard to pay, as manifest and utilised in significant secondary legislation pertaining to equal pay, notably equal treatment Directive, 2006/54, as well as Directive 1999/70/EC (fixed-term work), Directive 97/81/EC (fixed-term work) and Directive 2008/104/EC (Temporary Agency Work).

The resulting situation means that those ILO Conventions which would supplement EU measures through provision of substantive protections, particularly C131 on Minimum Wage Fixing, fall under exclusive Member State competence. Given the absence of EU *acquis* on minimum wage determination, C131 offers a number of areas of added-value to the EU *acquis*:

- Establishing a minimum wage applicable to “all groups of wage earners whose terms of employment are such that coverage would be appropriate” (Art 1)
- Providing that the level of a minimum wage should take into account “the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups” (Art 3), which approximates the current debate around a ‘Living Wage’¹⁰⁷
- Providing for minimum wage up-rating machinery (Art 4(1))

¹⁰⁵ Commission Recommendation of 27 May 1998 on the ratification of ILO Convention No 177 on Home Work of 20 June 1996 (notified under document number C(1998) 764) (98/370/EC)

¹⁰⁶ The result is that a number of Community instruments contain provisions on pay. This was the view of the Final Report of Working Group XI on Social Europe – one of the Convention working groups providing analysis prior to the EU Constitutional Treaty. CONV 516/1/03, paras 28 and 29: ‘Although Article 137(5) TEC rules out the adoption of uniform minimum requirements on pay, it does not rule out the possibility of adopting measures under other provisions of the Treaty, even if these measures have an impact on pay. The result is that a number of Community instruments contain provisions on pay.’

¹⁰⁷ See for instance www.pes.eu/sites/www.pes.org/files/declaration-social-dimension-emu-social-union-27-02-2013_en.pdf

- Providing for full consultation with representative organisations of employers and workers (Art 4(2))

4.7. Social security

Whereas ILO instruments establish a comprehensive and detailed framework for the implementation of social security schemes, the *acquis* does not generally provide for substantive social security measures. Member States regulate their own social security schemes in terms of the level and scope of protections and benefits. In contrast, several ILO up-to-date Conventions set minimum standards in social security, therefore engaging, and exceeding the provisions of, Article 153(1)(c) TFEU. These include:

- C102 – Social Security (Minimum Standards) Convention
- C121 – Employment Injury Benefits Convention
- C128 – Invalidity, Old-Age and Survivors' Benefits Convention
- C130 – Medical Care and Sickness Benefits Convention
- C156 – Workers with Family Responsibilities
- C168 – Employment Promotion and Protection against Unemployment Convention
- C183 – Maternity Protection Convention

Ratification of the above Conventions would add value to the *acquis*, in so far as they provide for substantive social security entitlements for workers which do not currently form part of EU social and employment policy standards.

ILO instruments can also add potential value to the coordination of social security regimes, under Articles 5 and 48 TFEU. Whereas the EU coordinates Member State's social security schemes, the ILO Conventions establish between ratifying states a system of reciprocal provision of social security to one another's resident nationals. In this light, the principal ILO instruments on social security (C102, C157 and, particularly in this context, C118) might potentially add value to the *acquis*.

The EU has now extended the principle of equal treatment to third country nationals, and only if they are legally resident in the EU. Regulation 1231/2010 extends the scope of personal coverage to third-country nationals who are in a cross-border situation. The Single Permit Directive¹⁰⁸ and the Blue Card Directive¹⁰⁹ guarantee, in principle, the equal treatment of third-country migrant workers with EU nationals with respect to social security. In particular, Article 12(4) of the Single Permit Directive provides for equality of treatment between EU nationals and third-country nationals in respect of the export of pensions to a third country (without the need to first

¹⁰⁸ Directive 2011/98/EU of 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L343/1, 23.12.2011.

¹⁰⁹ Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L155/17, 18.6.2009.

adopted bilateral agreements). EU Member States are required to export the acquired pensions of third-country nationals who had been resident in their territory and when moving to a third country, if the Member States concerned also exported such pensions in respect of their own nationals. Similarly, in respect of the Blue Card Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

The ILO Conventions afford greater protection: countries which have ratified Convention 118 are under the obligation to apply the principle of equality of treatment even where no cross-border situation within the EU is involved. Moreover, ILO standards establish more stringent requirements in the treatment of third-country nationals¹¹⁰.

4.8. Employment policy

C168 (Employment Promotion and Protection against Unemployment Convention) engages Council Decisions¹¹¹ on employment policy. The employment policy objectives outlined in both the Convention and the Decisions are compatible, though C168 makes provision for substantive social security entitlements as part of its employment policy, in contrast to the Council Decisions which do not.

4.9. Education and vocational training

The Union also possesses coordinating competence in the area of education and vocational training under Articles 6(e), 165 and 166 TFEU. Vocational training also falls under social policy coordinating objectives, defined under Article 157 TFEU. Beyond the Treaty there is little substantive Union law in this area. However, there exists important 'soft law' in the form of policy guidance, notably 'Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the priorities for enhanced European cooperation in vocational education and training for the period 2011-2020'. This is engaged by

¹¹⁰ Currently, EU nationals benefit from the principle of equal treatment within the EU regardless whether they have worked in only one Member State. In contrast, third country nationals who have only worked in one Member State currently do not benefit from the principle of equal treatment and non-discrimination, in that their rights are limited to the EU Member State in which they worked. In this specific context, application of the equal treatment principle would mean that EU Member States would be required to export the acquired pensions of third-country nationals who had been resident in their territory and when moving to a third country, if the Member States concerned also exported such pensions in respect of their own nationals. A similar principle was also accepted in the Blue Card Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment: Article 14(1)(f) of this Directive states that "*EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card ... without prejudice to existing bilateral agreements, payment of income-related acquired statutory pensions in respect of old age, at the rate applied by virtue of the law of the debtor Member State(s) when moving to a third country*".

¹¹¹ C168 – Employment Promotion and Protection against Unemployment Convention engages Decision 1672/2006/EC establishing a Community Programme for Employment and Social Solidarity, and Council Decision 2010/707/UNION on guidelines for employment policies of Member States.

C140 (Paid Educational Leave),¹¹² which provides for greater benefits to workers in the following areas:

- The requirement that a policy for paid education for workers must provide for the human, social and cultural advancement of workers;
- The requirement that the financing of arrangements for paid educational leave shall be on a regular and adequate basis and in accordance with national practice;
- The requirement that the period of paid educational leave shall be assimilated to a period of effective service for the purpose of establishing claims to social benefits and other rights deriving from the employment relation.

Further, C159 – Vocational Rehabilitation and Employment (Disabled Persons) Convention provides for much more detailed substantive requirements for the vocational rehabilitation and employment of disabled persons than the *acquis*. This is therefore another area of the *acquis* which would be complemented by ratification of ILO standards.

4.10. Migration

Whilst policy on asylum, immigration and external border control is not an area of Union exclusive competence, the Union and Member States are developing a common policy in this area (Art 67 TFEU). Competence is conferred to adopt measures relating to the treatment of third-country nationals in Art 79 TFEU, including Art 79(2) on trafficking in persons.

The regulation of migrants entering, exiting, and moving within the Union is important, *inter alia*, to the protection of migrants and to securing the integrity of EU and Member State borders. The Migrant Workers Conventions (C97 and C143) engage the *acquis* on these issues extensively, and reveal a number of areas in which ILO standards would add value to the *acquis*, noting however the issues highlighted above, relating to the potential conflict between certain provisions of C97 and the *acquis*.

Issues on which ILO C97 and C143 are more stringent than the EU *acquis*

C97 - Migration for Employment Convention (Revised):

- the requirement that Member States provide a free service to assist migrants for employment
- the requirement that Member States take all appropriate steps against misleading propaganda relating to emigration and immigration
- the requirement that Member States, within their jurisdiction, facilitate the departure, journey and reception of migrants for employment
- the requirement that Member States ascertain that migrants for employment and the

¹¹² C140 engages Articles 162, 166, TFEU; and Conclusions of the Council on the priorities for enhanced European cooperation in vocational education and training for the period 2011-2020. C142 engages articles 162, 166 TFEU, and the Conclusions of the Council on the priorities for enhanced European cooperation in vocational education and training for the period 2011-2020.

members of their families are in reasonable health and enjoy adequate medical attention during the journey and on arrival in the territory of destination

- the requirement that Member States that provide public employment services to migrants provide the services for free
- residence requirements following unemployment or injury
- the collective transport of migrants
- that the cost of return not being imposed on migrants

C143 - Migrant Workers (Supplementary Provisions) Convention:

- the requirement to systematically seek to determine whether there are illegally employed migrant workers on its territory
- the requirement to determine whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations
- the requirement to consult representative organisations of employers and workers and for information on that subject
- the requirement to consult representative organisations of employers and workers in regard to the laws and regulations and other measures provided for in the Convention, and the possibility of their taking initiatives for the purposes of it
- that an expelled migrant worker should not bear the financial costs of expulsion
- equal access to social security between nationals and migrant workers
- the requirement to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the policy of equality
- the requirement to enact such legislation and promote such educational programmes as may be calculated to secure the acceptance and observance of the policy
- the requirement to take measures, encourage educational programmes and develop other activities aimed at acquainting migrant workers as fully as possible with the policy, with their rights and obligations and with activities designed to give effective assistance to migrant workers in the exercise of their rights and for their protection
- the requirement to formulate and apply a social policy appropriate to national conditions and practice which enables migrant workers and their families to share in advantages enjoyed by its nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs as they may have until they are adapted to the society of the country of employment
- the requirement to take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue
- the requirement to guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment
- the requirement to take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory

Anti-trafficking

The *EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016* (COM(2012) 286) urges Member States to ratify all relevant international instruments, agreements and legal obligations which will make the work against trafficking in human beings more effective, coordinated and coherent: namely, C29 – Forced Labour Convention, 1930 C105 – Abolition of Forced Labour Convention, C182 – Worst Forms of Child Labour Convention and C189 – Domestic Workers Convention. All of these instruments have either been ratified by all EU Member States or, in the case of C189, are already subject to Proposal for a Council Decision authorising ratification.

4.11. Fundamental Rights

Forced labour

C29 (Forced Labour Convention) is of particular note in this regard, as it regulates potential derogations from Article 5 of the European Charter of Fundamental Rights to a greater extent than the Charter itself. C29 has been ratified by all EU Member States.

Freedom of association and collective bargaining

While core principles related to freedom of association and collective bargaining are reflected in the EU *acquis* through the Charter, and all Member States have ratified Conventions 87 and 98, there is some potential added value to the *acquis* that could arise from the ratification and implementation of:

- C135 – Workers' Representatives Convention
- C141 – Rural Workers' Organisations Convention
- C151 – Labour Relations (Public Service) Convention
- C154 – Collective Bargaining Convention

All four of these conventions provide more detail in relation to specific aspects of labour relations, freedom of association, workers organisation, the operation of workers' representatives and collective bargaining. All are compatible with the *acquis* and also the commitment of the EU to promote social dialogue.

Prohibition of child labour and protection of young people at work

The core conventions on child labour (C138 and C182) – which afford a limited number of more stringent protections to children than the *acquis* – are most applicable in this regard. Both instruments have been ratified by all 27 EU Member States. A further series of up-to-date ILO instruments offer specific additional protections to children and young people in the workplace:

ILO instruments which establish more stringent requirements than the ILO *acquis* on the prohibition of child labour and protection of young people at work

C77 - Medical Examination of Young Persons (Industry) Convention

- The frequency of medical re-examinations for young people
- The requirement that an examination must be carried out by a physician

- The provision of health documents
- Physical and vocational rehabilitation of young people
- Certificates for inspectors

C78 - Medical Examination of Young Persons (Non-Industrial Occupations) Convention:

- the frequency of medical re-examinations for young people
- that an examination must be carried out by a physician
- physical and vocational rehabilitation of young people
- certificates for inspectors

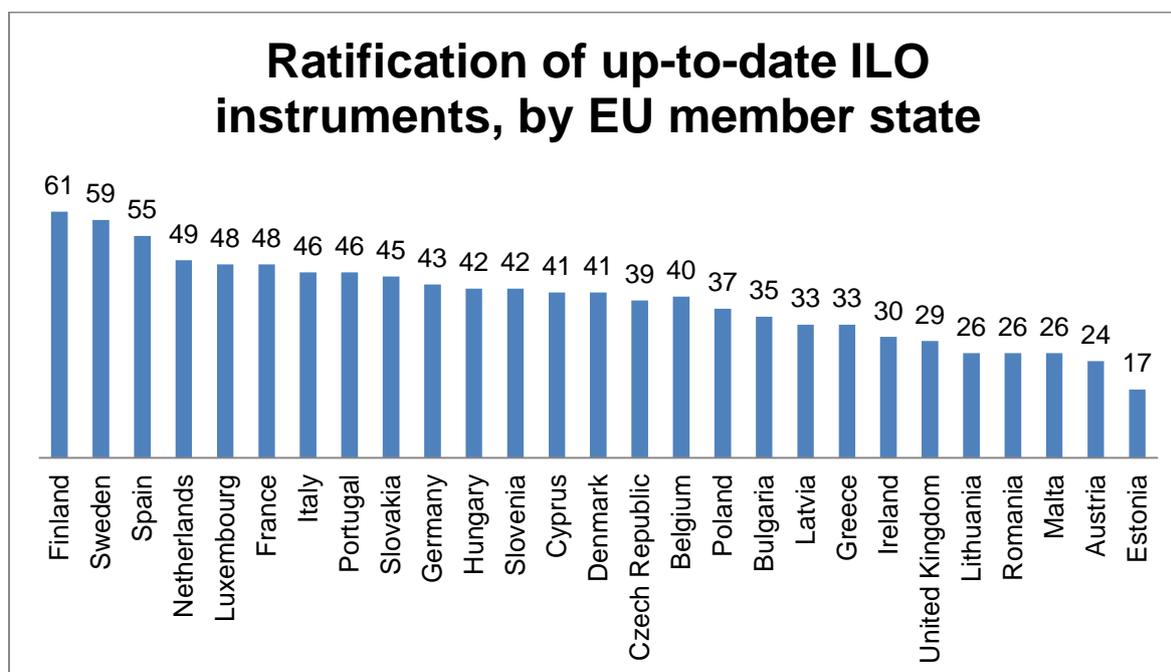
C124 - Medical Examination of Young Persons (Underground Work) Convention:

- the at least annual health re-examination of workers under the age of 21 who work in mines
- the nature and thoroughness of the examination required
- enforcement, penalties for non-compliance and records of young people at work in mines

5. EU and ILO priorities

5.1. The current picture of ratification of up-to-date instruments by EU Member States

Of the 83 instruments (including C158) which are the focus of this study, there is a mixed picture of ratification across the EU. The graphic below depicts the current situation, as at April 2013.



Source: ILO Brussels, ILO NORMES

Annex 3 provides a detailed overview of ratifications of each up-to-date instrument.

5.2. EU priorities

The Renewed Social Agenda (COM(2008) 412 final) makes clear the EU commitment to promoting ratification of all up-to-date ILO Conventions: *"The Commission [...] calls upon all Member States to set an example by ratifying and implementing the ILO Conventions classified by ILO as up to date."*

Beyond proposing to the Council that Decisions be issued to authorise ratification of ILO Conventions 170, 185, 186, 188 and 189, the Commission has also previously issued several Recommendations calling on Member States to ratify ILO Conventions, such as:

- European Commission Recommendation of 27 May on the Ratification of ILO Convention No. 177 on Home Work of 20 June 1996
- European Commission Recommendation of 18 November 1998 on Ratification of ILO Convention No. 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

- Commission Recommendation of 15 September 2000 on the ratification of ILO Convention No. 182 of 17 June 1999 on the Worst Forms of Child Labour.

Moreover, a number of Conventions are identified in key Commission texts as bringing potential value to the *acquis*, or as priorities for ratification, as follows (excluding references to instruments which have now been ratified by all 27 Member States, or which are already subject to Council Decisions authorizing ratification, or Commission Proposals for a Council Decision).

- “The standards and measures of the ILO also complement the *acquis* in areas which are not covered or only partly covered by legislation and Community policies, such as labour administration and inspection, trade union freedom, collective bargaining and minimum standards in terms of social security” (*Promoting decent work for all: The EU contribution to the implementation of the decent work agenda in the world*, COM (2006) 249)
- “The Commission calls upon all Member States to set an example by ratifying and implementing the ILO Conventions classified by ILO as up to date. These conventions include inter alia:
 - the four priority conventions, which have been reconfirmed by the new ILO Fundamental Declaration of 10 June 2008, namely the Convention on labour inspection, 1947 (No 81) and its 1995 Protocol, the Convention on labour inspection in agriculture, 1969 (No 129), the Convention on employment policy, 1964 (No 122) and the Convention on tripartite consultations, 1976 (No 144);
 - recent health and safety Conventions that have reviewed and updated, supplemented or consolidated existing Conventions: the Promotional Framework for Occupational Health and Safety Convention, 2006 (No 187) and the related general provisions Convention on Occupational Safety and Health, 1981 (No 155) and its 2002 Protocol and the Convention on Occupational Health Services, 1985, (No 161);
 - two new conventions on the Private Employment Agencies Convention, 1997 (No 181), the Maternity Protection Convention, 2000 (No 183).” (*Commission Staff Working Document: Report on the EU contribution to the promotion of decent work in the world COM(2008) 412 final*)
- “The Commission urges the Member States to ratify all relevant international instruments, agreements and legal obligations which will make the work against trafficking in human beings more effective, coordinated and coherent [ILO Forced Labour Convention, 1930 (No 29), ILO Abolition of Forced Labour Convention, 1957 (No 105), ILO Worst Forms of Child Labour Convention, 1999 (No 182) and ILO Domestic Workers Convention, 2011 (No 189)]” (*EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, COM(2012) 286)

- “The International Labour Conference in 2011 called upon ILO member states to consider the conclusion of agreements to provide equality of treatment, as well as access to and the preservation and/or portability of social security entitlements for migrant workers. Discussion on social protection and social security coordination with other regions in the world is of growing importance. The Commission will therefore promote cooperation on social security coordination with other international organisations and with other parts of the world.” (*The External Dimension of EU Social Security Coordination* COM(2012) 153)

Summary of EC priority Conventions		
C/P No.	Convention / Protocol	EU priority?
P81	Protocol of 1995 to the Labour Inspection Convention 1947	Named as priority in COM (2008) 412 p.32; Value-added for <i>acquis</i> identified in COM (2006) 249 p.4
C102	Social Security (Minimum Standards) Convention	(Basis for European Social Security Code) Referenced in 'Social Protection in European Union Development Cooperation', COM(2012) 446 final
C118	Equality of Treatment (Social Security) Convention	Value added for the <i>acquis</i> identified in COM (2006) 249, p.4.
C122	Employment Policy Convention	Named as priority in COM (2008) 412 p.32
C129	Labour Inspection (Agriculture) Convention	Named as priority in COM (2008) 412 p.32; Value-added for <i>acquis</i> in COM (2006) 249 p.4
C135	Workers' Representatives Convention	Value-added for <i>acquis</i> identified in COM (2006) 249 p.4
C141	Rural Workers' Organisations Convention	Value-added for <i>acquis</i> identified in COM (2006) 249 p.4
C144	Tripartite Consultation (International Labour Standards) Convention	Named as priority in COM (2008) 412 p.32
C150	Labour Administration Convention	Value-added for <i>acquis</i> identified in COM (2006) 249 p.4
C151	Labour Relations (Public Service) Convention	Value-added for <i>acquis</i> identified in COM (2006) 249 p.4
C152	Occupational Safety and Health (Dock Work) Convention	"Commission invites Member States to ratify ILO C152" - Explanatory Memo to Port Services Directive (<i>subsequently withdrawn</i>)
C154	Collective Bargaining Convention	Value-added for <i>acquis</i> identified in COM (2006) 249 p.4
C155	Occupational Safety and Health Convention	Named as priority in COM (2008) 412 p.33
P155	Protocol of 2002 to the Occupational Safety and Health Convention	Named as priority in COM (2008) 412 p.33
C157	Maintenance of Social Security Rights Convention	Value added for the <i>acquis</i> identified in Com (2006) 249, p.4.

C161	Occupational Health Services Convention	Named as priority in COM (2008) 412 p.33
C181	Private Employment Agencies Convention	Named as priority in COM (2008) 412 p.33
C183	Maternity Protection Convention	Named as priority in COM (2008) 412 p.33
C187	Promotional Framework for Occupational Safety and Health Convention	Named as priority in COM (2008) 412 p.33

European Parliament

The European Parliament has also made a number of commitment to promoting Member States' ratification up-to-date ILO Conventions.

Beyond reference to the Fundamental and Governance Conventions, as well as those which are subject to Council Decisions or proposal for Decisions, the Parliament's resolution of 23 May 2007 on promoting decent work for all (2006/2240(INI)) highlights the significance of the Migrant Worker Conventions: "76. *Within the framework of a consistent approach to international labour migration, welcomes the will of Member States to ratify [...] ILO Convention Nos 97 and 143*".

With regard to social security, the Parliament's 'Report on the integration of migrants, its effects on the labour market and the external dimension of social security coordination' (2012/2131 (INI)) "*calls on the Commission to provide guidance for Member States entering into any bilateral agreement, so that to ensure more uniform application across the EU, on a basis of respect for both the EU Social Security Coordination and the ILO Social Security Conventions*".

In 2011, the European Parliament called for "an explicit statement in the [public procurement] directives that they do not prevent any country from complying with ILO Convention 94." Furthermore, Parliament called on the Commission "to encourage all Member States to comply with that Convention".

5.3. EU social partner priorities

As in other sections, this identification of priorities excludes those Conventions which have been ratified by all 27 Member States. This includes the core Conventions on Freedom of Association and Collective bargaining Rights, C87 and C98, which are a central and ongoing concern for social partners.

ETUC

Engagement with ETUC legal officers indicates that the following up-to-date ILO Conventions are significant priorities for ETUC:

- C94 – Labour Clauses In Public Contracts
- C102 – Social Security
- C158 – Termination Of Employment
- C183 – Maternity Protection
- C189 – Domestic Workers

Major documented commitments and priorities include a number of additional priorities, as follows:

- ILO Priority Conventions, of which C122, 129, C144 and P81 have not yet been ratified by all EU Member States
- C135 – Workers' Representatives
- C187 – OSH Framework – and C155
- C181 – Private Employment Agencies
- C 97 and C 143 – Migrant Workers

1. ETUC Strategy and Action Plan 2011-2015¹¹³

4.4 "A genuine "European social model" [...] should also include: [...] better protection against dismissal, also promoting the ratification of ILO Convention 158"

8.21 "The ETUC will: [...]continue to support the revision of the Maternity Protection Directive and calls for a period of leave of at least 18 weeks in all Member States (in line with ILO Convention 183 and Recommendation 191), the maintenance of full income, and protection against dismissal during maternity leave, as well as stronger rights after returning to work"

9.15 "The EU should give full support to the establishment of a universal social protection floor, while rejecting leveling down, in line with ILO Convention 102."

2. ETUC position paper: The proposal for a Directive on services in the internal market (2004)

"ETUC proposes [...] that the Commission henceforth set the following priorities where the regulation of posted workers and temporary work is concerned:

- the ratification of ILO Convention 181 on the private employment agencies. This would create a general framework of protection, which could provide for an adequate basis to discuss further steps in the direction of liberalising services."

3. ETUC Resolution on EU Investment Policy (Adopted at the Executive Committee meeting of 5-6 March 2013)¹¹⁴

"The investment agreement should explicitly promote these rights. [...] there are other important ILO conventions relevant to decent work that should be encompassed in the agreement. These include those identified as "priority conventions" by the ILO Governing Body in its 1993 decision (Convention 122 on Employment Policy, Conventions 81 and 129 on Labour Inspection and Convention 144 on Tripartite Consultation), other Conventions enjoying widespread support at the ILO (including Convention 155 on Occupational Safety and Health, Convention 102 on Social Security, Convention 103 on Maternity Protection, and Convention 135 on Workers' Representatives)

4. Workplace Europe: Trade Unions Supporting Mobile and Migrant Workers¹¹⁵

¹¹³ See www.etuc.org/IMG/pdf/Rapport_Congres_2011_EN_DEF.pdf

¹¹⁴ See www.etuc.org/a/11025

¹¹⁵ See www.etuc.org/IMG/pdf/WPE_Final_Brochure_EN_final_doc.pdf

"We need to intensify actions and campaigns, calling for the ratification of ILO Conventions 97 and 143 on migrant workers, and the UN Convention 1990 on migrant workers and their families, and the relevant Council of Europe instruments."

BusinessEurope

BusinessEurope, with the IOE, notes that the Commission "*calls upon all Member States to set an example by ratifying and implementing the ILO Conventions classified by ILO as up to date*" in COM (2008) 412. However, BusinessEurope challenges the EU competence in active 'promotion' of ratification of ILO conventions by Member States, especially, but not exclusively, in the case of those which do not involve any aspects falling under EU exclusive competences.

Further, BusinessEurope registers concerns with regard to the following up-to-date ILO instruments:

- C87 (Freedom of Association and Protection of the Right to Organise): BusinessEurope notes concerns relating to the scope and mandate of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) with regard to the application of that C87 (right to strike).
- C94 (Labour Clauses (Public Contracts)): BusinessEurope regards the low number of ratifications of C94 as a result of its potential to stifle competition, its overly-bureaucratic nature, and its redundancy, because workers employed under public procurement contracts do not in fact require special protection over and above general labour and employment laws.
- BusinessEurope also notes the potential incompatibility between Article 2 of Convention and the Free Movement of Services acquis and the Posted Workers Directive.
- C98 (Right to Organise and Collective Bargaining): BusinessEurope endorses the promotion of collective bargaining mechanisms as beneficial to both employees and employers: however, BusinessEurope is concerned by the interpretation of some Convention provisions and terms by CEACR in relation to Articles 1 and 2 ('adequate protection' against anti-union discrimination), and discouragement of direct agreements with non-unionized workers (Article 4).
- C100 (Equal Remuneration): BusinessEurope endorses this Convention, but is concerned about the application of the principle of 'equal remuneration for men and women for work of equal value', where it is not clear how the 'value of work' should be assessed.
- C143 (Migrant Workers (Supplementary Provisions)): BusinessEurope believes that the definition of migrant in C143 is out of date and, in particular, fails to distinguish between permanent and temporary migrants in the context of security of employment, relief work and retraining.
- C156 (Workers with Family Responsibilities): BusinessEurope supports the objective of enabling workers to combine their family and occupational responsibilities to the greatest extent possible, and notes the beneficial effect this has on worker productivity. However, it regards the Convention as hindered by comprehensive and idealistic targets and a lack of flexibility in attaining standards.

- C175 (Part-time Work Convention): BusinessEurope is of the view that the small number of ratifications of C175 (14) indicates many states' reluctance to introduce an element of inflexibility into part-time work, the current flexibility of which increasingly serves modern labour needs. It states that excessive regulation of part-time work is perceived by businesses as something that would impede states' economic development and employment numbers.
- C158 (Termination of Employment): BusinessEurope is concerned about the 'very high and demanding requirements' of C158. In particular, it criticises Article 9 of the Convention, which provides that in labour disputes legal provisions must be interpreted in favour of the worker, and Article 12, which requires payment of a severance allowance even in cases of justified dismissal.

5.4. ILO priorities

The ILO's own measure of the modern day relevance and significance of its conventions and protocols is the list of 'up-to-date Conventions' published by the Cartier Working Party in 2002, and since updated to include every Convention passed in the subsequent sessions of the International Labour Conference. It is also worth noting the Governing Body's recent proposal to establish a Standards Review Mechanism (SRM) for the ongoing review of international labour standards, which is now part of a broader discussion within the ILO about standards.

The ILO has promoted its eight 'fundamental Conventions' since 1995,¹¹⁶ and aims to achieve their universal ratification. Furthermore, in its Declaration on Fundamental Principles and Rights at Work (1998), the ILO laid out a framework to promote the 'principles concerning the fundamental rights which are the subject of those (fundamental) Conventions'.

The ILO Governing Body has designated a further four conventions as 'priority Conventions'¹¹⁷ on the basis that they are 'significant from the viewpoint of governance'.¹¹⁸ These are the Conventions which it is thought will best enhance the general functioning of the international labour standards system.

The Governing Body has adopted further plans of action to promote particular standards, such as:

- Plan of action (2010–2016) towards widespread ratification and effective implementation of the governance Conventions
 - Of the ILO governance Conventions, C122, 129, C144 and P81 have not yet been ratified by all EU Member States

¹¹⁶ The fundamental conventions are C29 and 105 (forced labour); C87 and 98 (freedom of association); C100 and C111 (equal treatment); and C138 and 182 (child labour).

¹¹⁷ The priority conventions are C81, C122, C129 and C144.

¹¹⁸ ILO Declaration on Social Justice for a Fair Globalization, 2008, at 18.

- Plan of Action (2010-2016) on the occupational safety and health instruments (Convention No. 155, its 2002 Protocol and Convention No. 187) adopted in March 2010)
 - C155 is a particular priority for the ILO: "Together with Convention No. 187 and Recommendation No. 197, Convention No. 155, its 2002 Protocol and Recommendation No. 164 continue to have a defining role and should be promoted, and given effect to, as a matter of priority" [ILC General Survey, 2009, Report III (Part 1B)]
 - P155 is also a priority for the ILO: '[w]idespread ratification and implementation of Convention No. 155, its 2002 Protocol and Convention No. 187 is of particular strategic importance. It will trigger an important process which has the potential not only for an overall improvement in the area of OSH but also to boost the ratification of other instruments' (para. 18).
- Gender Equality Action Plan 2010-15 – which includes an objective to promote improved ratification rates, and analyse obstacles to ratification, of the Workers with Family Responsibilities Convention, 1981 (No. 156), the Maternity Protection Convention, 2000 (No. 183), the Part-Time Work Convention, 1994 (No. 175), and the Home Work Convention, 1996 (No. 177)

Two further, interrelated key instruments emphasized during engagement with ILO Geneva and Brussels are those pertaining to migrant workers and social security:

- In its submission to the EESC on the European Commission Communication on The External Dimension of EU Social Security Coordination (COM(2012) 153), the ILO called for the Commission to 'to analyse the impact of the Treaty on the Functioning of the EU on the ratification by EU Member states of the up to date ILO Conventions 118 and 157 as well as on the migrant workers conventions 97 and 143 and to consider initiatives for removing the possible obstacles to ratification as the Conventions probably affect EU exclusive competences in the field of mobility and social security coordination.'
- The International Labour Conference in 2011 called upon ILO member states to consider the conclusion of agreements to provide equality of treatment, as well as access to and the preservation and/or portability of social security entitlements for migrant workers.

The most recent statement of ILO strategic priorities is contained in the 'Strategic Framework' for the Director-General's Programme and Budget proposals for 2014–15¹¹⁹. A number of the Outcomes targeted in the Strategy are based on key up-to-date instruments, as summarised below.

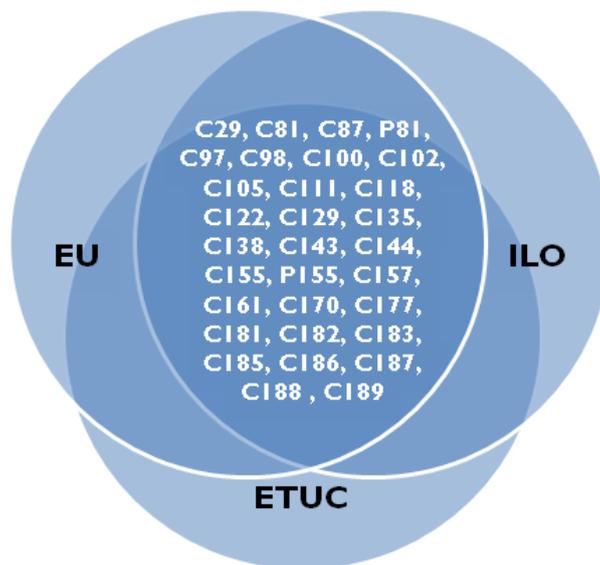
¹¹⁹ www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_203480.pdf

Key ILO instruments reference in Strategic Framework' for the ILO Director-General's Programme and Budget proposals for 2014–15

Outcome	Named up-to-date ILO Convention / Protocol
Outcome 1: More women and men have access to productive employment, decent work and income opportunities	Employment Policy Convention, 1964 (No. 122)
Outcome 4: More people have access to better managed and more gender equitable social security benefits	Social Security (Minimum Standards) Convention, 1952 (No. 102)
Outcome 5: Women and men have improved and more equitable working conditions	Minimum Wage Fixing Convention, 1970 (No. 131) Workers with Family Responsibilities Convention, 1981 (No. 156) Domestic Workers Convention, 2011 (No. 189)
Outcome 6: Workers and enterprises benefit from improved safety and health conditions at work	Conventions Nos 81, 129, 155 and 187
Outcome 11: Labour administrations apply up-to-date labour legislation and provide effective services	Labour Inspection Convention, 1947 (No. 81) Labour Inspection (Agriculture) Convention, 1969 (No. 129) Labour Administration Convention, 1978 (No. 150) Termination of Employment Convention, 1982 (No. 158)
Outcome 12: Tripartism and strengthened labour market governance contribute to effective social dialogue and sound industrial relations	Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) Collective Bargaining Convention, 1981 (No. 154)
Outcome 14: The right to freedom of association and collective bargaining is widely known and exercised	Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) General Survey on the Labour Relations (Public Service) Convention, 1978 (No. 151) Collective Bargaining Convention, 1981 (No. 154)
Outcome 15: Forced labour is eliminated	Forced Labour Convention, 1930 (No. 29) Abolition of Forced Labour Convention, 1957 (No. 105)
Outcome 16: Child labour is eliminated, with priority given to the worst forms	Minimum Age Convention, 1973 (No. 138) Worst Forms of Child Labour Convention, 1999 (No. 182)
Outcome 17: Discrimination in employment and occupation is eliminated	Equal Remuneration Convention, 1951 (No. 100) Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
Outcome 19: Member States place an integrated approach to decent work at the heart of their economic and social policies	Convention No. 160 Convention No. 144

5.5. Summary of EU, ILO and ETUC priorities

Assessing the relative importance and priority accorded to the up-to-date ILO instruments, we find that there is considerable consensus between the EU (Commission, Parliament) ETUC and the ILO (diagram includes instruments already ratified by all 27 EU Member States, and those subject to Council Decisions or Proposals for Council Decisions authorising ratification):



BusinessEurope has not registered any priorities for ratification. BusinessEurope concerns with regard to specific up-to-date instruments are noted above.

6. Prioritisation of ILO Conventions for EU promotion of ratification

This section ranks the Conventions in order of priority to the EU in terms of promoting ratification.¹²⁰ The Conventions are prioritised into four categories: high; medium; low; and incompatible with the *acquis*, meaning that the EU should abstain from promoting ratification. The ranking is based on the following four criteria:

1.	Compatibility (Exclusion criterion)	<ul style="list-style-type: none"> Are there significant compatibility concerns?
2.	Value-added	<ul style="list-style-type: none"> What is the 'value-added' to EU <i>acquis</i> through ratification? Does the Convention address issues of pertinence to the EU which are not currently addressed by EU and Member State rules and policies? Is the Convention wholly relevant to the EU workplace context, including crisis recovery?
3.	Importance to EU	<ul style="list-style-type: none"> Is the Convention referenced in EU public policy commitments or communications? Is the Convention relevant to specific EU policies? Is the Convention a priority for ETUC and BusinessEurope?
4.	Importance to ILO	<ul style="list-style-type: none"> What significance does the ILO accord to the Convention?

The Conventions are divided into two groups for prioritisation, in each case listed in numerical order within each priority category – high, medium and low / incompatible.

First, we suggest a prioritisation for those Conventions that fall under Union exclusive competence, meaning that Member States require Council authorisation before ratification. This prioritisation is intended to inform the sequencing of Commission proposals for Council Decisions authorising ratification in the interests of the Union.

Second, we suggest a prioritisation for Conventions that fall under a competence other than EU exclusive competence (i.e. Union and Member State shared competence; Union 'special' coordinating competence; or Member State competence) meaning that Member States may autonomously ratify the Convention. This prioritisation is intended to inform promotion by the Commission of Conventions for ratification by Member States in the interests of the Union.

These rankings exclude:

- The eight ILO Fundamental Conventions, which have all been ratified by all 27 EU member states
- The ILO Governance Convention which has already been ratified by all 27 EU member States – namely C81 (Labour Inspection) – see Annex 4 for more information on the ratification status of other Governance Conventions by EU Member States.

¹²⁰ A more detailed analysis of each Convention against the criteria is contained in the summary to the analytical fiche of each of Convention attached to this report.

- Those ILO Conventions which are already the subject of an authorising Decision by the European Council, or where a proposal for a Decision is in train, namely: C170 – Chemicals Convention, C185 – Seafarers' Identity Documents Convention, C186 – Maritime Labour Convention, C188 – Work in Fishing Convention, and C189 – Domestic Workers Convention.

6.1. Priority ranking of Conventions that engage Union exclusive competence

The Conventions listed in the table below engage Union exclusive competence, and therefore Member States require a Council decision in order to ratify the relevant ILO instrument in the interests of the EU. The 'high priority' Conventions are designated as such primarily because of their importance to the EU, which is established by their being mentioned in relevant EU documents (Plans of Action, Communications, Council Conclusions), and by their importance to the EU social partners. Also taken into consideration is the value added to the EU *acquis* by the Conventions, and their importance to the ILO as established by ILO Plans of Action and prioritisation.

High priority	No. of Member State ratifications
C102 – Social Security (Minimum Standards) Convention	21
C118 – Equality of Treatment (Social Security) Convention	7
C155 – Occupational Safety and Health Convention	15
C157 – Maintenance of Social Security Rights Convention	2
C181 – Private Employment Agencies Convention	12
Total: 5	
Medium priority	
C121 – Employment Injury Benefits Convention	9
C128 – Invalidity, Old-Age and Survivors' Benefits Convention	8
C130 – Medical Care and Sickness Benefits Convention	8
C143 – Migrant Workers (Supplementary Provisions) Convention	5
C149 – Nursing Personnel Convention	14
C152 – Occupational Safety and Health (Dock Work) Convention	10
C162 – Asbestos Convention	11
C184 – Safety and Health in Agriculture Convention	4
C115 – Radiation Protection Convention	18
C120 – Hygiene (Commerce and Offices) Convention	16
C167 – Safety and Health in Construction Convention	9
C174 – Prevention of Major Industrial Accidents Convention	6
Total: 11	
Low priority	
P110 – Protocol to the Plantations Convention	0

There are four Conventions falling under Union exclusive external competence that are potentially incompatible with the EU *acquis*. Where a Convention is incompatible with the EU *acquis* the Commission should abstain from promoting its ratification, and therefore these Conventions are not included in the priority ranking.

However, among these Conventions there are two – C94 and C97 – which are significant priorities for social partners and the ILO, and which represent significant potential value-added for the *acquis*. An initial assessment of potential next steps is included in the analysis of incompatibility at Section 2 above.

Potentially incompatible	
P 89 – Protocol to the Night Work (Women) Convention (Revised)	0
C 94 – Labour Clauses (Public Contracts) Convention	10
C 97 – Migration for Employment Convention (Revised)	10
C110 – Plantations Convention	0
Total: 4	

6.2. Priority ranking of ILO Conventions that fall under shared or ‘special’ coordinating external competence

The Conventions in the table below fall under Union and Member State shared or ‘special’ coordinating external competence, and therefore Member States may ratify them autonomously, subject to the duty of sincere cooperation.

High priority	No. of MS ratifications
P 81 – Protocol to the Labour Inspection Convention	4
C122 – Employment Policy Convention	25
C129 – Labour Inspection (Agriculture) Convention	19
C135 – Workers' Representatives Convention	24
C144 – Tripartite Consultation (International Labour Standards) Convention	25
C151 – Labour Relations (Public Service) Convention	17
C154 – Collective Bargaining Convention	13
P155 – Protocol of 2002 to the Occupational Safety and Health Convention	5
C177 – Home Work Convention	5
C183 – Maternity Protection Convention	12
C187 – Promotional Framework for Occupational Safety and Health Convention	10
Total: 11	
Medium priority	
C 14 – Weekly Rest (Industry) Convention	23
C 77 – Medical Examination of Young Persons (Industry) Convention	13
C 78 – Medical Examination of Young Persons (Non-Industrial) Convention	12
C106 – Weekly Rest (Commerce and Offices) Convention	12
C124 – Medical Examination of Young Persons (Underground Work) Convention	18
C139 – Occupational Cancer Convention	14
C140 – Paid Educational Leave Convention	13
C141 – Rural Workers' Organisations Convention	16
C142 – Human Resources Development Convention	22
C148 – Working Environment (Air Pollution, Noise and Vibration) Convention	18

C156 – Workers with Family Responsibilities Convention	11
C175 – Part-Time Work Convention	9
C158 – Termination of Employment Convention*	10
C159 – Vocational Rehabilitation and Employment (Disabled Persons) Convention	20
C160 – Labour Statistics Convention	19
C161 – Occupational Health Services Convention	11
C168 – Employment Promotion and Protection against Unemployment Convention	4
C169 – Indigenous and Tribal Peoples Convention	3
C171 – Night Work Convention	7
C172 – Working Conditions (Hotels and Restaurants) Convention	6
C173 – Protection of Workers' Claims (Employer's Insolvency) Convention	8
C176 – Safety and Health in Mines Convention	11
Total: 22	

*The Cartier Working Party reached no conclusion on the status of C158

6.3. Conventions which fall under Member State exclusive competence

The Conventions in the table below fall under Member State exclusive competence, and therefore Member States may ratify the Conventions autonomously.

Member State competence Conventions	No. of Member State ratifications
C 95 – Protection of Wages Convention	17
C131 – Minimum Wage Fixing Convention	9
C150 – Labour Administration Convention	16
Total: 3	

Annex 1: Key sources

Policy and doctrinal reference points

❖ Treaty provisions and secondary legislation

- Article 4(3) TEU 'principle of sincere cooperation' (replacing in substance Article 10 EC)
- Article 3(2) TFEU (new provision)
- Article 5(3) TFEU (formerly Art 5 EC)
- Article 151 TFEU (formerly Art 136 EC)
- Article 153 TFEU (formerly Art 137 EC)
- Article 216 TFEU (new provision)
- Article 218 TFEU (formerly Art 300 EC)
- Article 53 Charter Of Fundamental Rights Of The European Union
- P7_TA(2009)0101 – Ratification and implementation of updated ILO Conventions – European Parliament resolution of 26 November 2009 on the Conventions that have been classified by the ILO as up to date
- PROGRESS framework – Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity

• Case law of the Court of Justice of the European Union (CJEU)

- Case C-22/70 *Commission v Council (European Road Transport Agreement)* [1971] ECR 263
- Case C-4/73 *Nold* [1974] ECR 491
- Case C-114/76 *Bela-Mühle v Grows-Farm Gmb* [1977] ECR 1211
- Opinion 1/76 *European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741
- Case C-41/76, *Suzanne Criel v Procureur de la République* [1976] ECR 1921
- Ruling 1/78 *Euratom (Nuclear Materials)* [1978] ECR 2151
- Case C-331/88 *ex p. Fedesa & Ors* [1990] ECR I-4023
- Case C-69/89 *Nakajima All Precision Co. Ltd v Council* [1991] ECR I-2069
- Opinion 2/91 regarding ILO Convention No 170 on Chemicals at Work [1993] ECR I-1061
- Opinion 2/92 [1995] ECR I-521
- Opinion 1/94 *WTO* [1994] ECR I-5416
- Case C-84/94 *UK v Council (Working Time)* [1996] ECR I-5755
- Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143
- Case C-25/94 *Commission v Council (FAO Agreement)* [1996] ECR I-1469
- Case C-61/94 *Commission v Germany* [1996] ECR I-3989
- Case C-467/98 *Commission v Denmark ('Open Skies')* [2002] ECR I-9519
- Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR I-9713
- Opinion 1/03 regarding the Lugano Convention [2006] ECR I-1145
- Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805
- Case C-94/03 *Commission v Council* [2006] ECR I-1
- Case C-459/03 *Commission of the European Communities v Ireland (MOX Plant)* [2006] ECR I-4635
- Case C-250/03, *Mauri v Ministero della Giustizia* [2005] ECR I-1267
- Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779
- Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767
- Case C-45/07 *Commission v Greece (external competence of the Member States)*

❖ **Council Decisions for ratification of ILO Conventions**

- Council Decision 2005/367/CE of 14 April 2005 authorising Member States to ratify, in the interests of the Community, the Seafarer's Identity Document Convention of the International Labour Organisation (Convention 185) OJ L 136 of 30 May 2005
- Council Decision 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 (2007/431/EC) OJ L 161/63, 22.6.2007
- Council Decision of 7 June 2010 authorising Member States to ratify, in the interests of the European Union, the Work in Fishing Convention, 2007, of the International Labour Organisation (Convention No 188) (2010/321/EU) OJ L 145/12, 11.6.2010
- Council Decision 2002/628 concerning the conclusions of the Cartagena Protocol on Biosafety
- Council Decision 2003/106 EC concerning the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade
- Council Resolution on the balanced participation of women and men in family and working life (2000/C218/02)
- Council Decision 2010/48 EC concerning the conclusion of the United Nations Convention on the Rights of Persons with Disabilities

❖ **Council Conclusions**

- Council Conclusions on Decent work for all, 2767th Employment, Social Policy, Health and Consumer Affairs Council meeting Brussels, 30 November and 1 December 2006

❖ **Commission Proposals and Recommendations for ratification of ILO Conventions**

- Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the International Labour Organization (Convention No 170) [COM(2012) 677 final]
- European Commission Recommendation of 27 May on the Ratification of ILO Convention No. 177 on Home Work of 20 June 1996
- European Commission Recommendation of 18 November 1998 on Ratification of ILO Convention No. 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
- European Commission Recommendation of 15 September 2000 on the ratification of ILO Convention No .182 of 17 June 1999 on the Worst Forms of Child Labour

❖ **Commission Communications Proposals and other working documents**

- European Commission, *Promoting decent work for all: The EU contribution to the implementation of the decent work agenda in the world*, Brussels, 24.5.2006 COM(2006) 249 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewed social agenda: Opportunities, access and solidarity in 21st century Europe COM/2008/0412 final of 02.07.2008

- European Commission Staff Working Document, *Report on the EU contribution to the promotion of decent work in the world*, 2.7.2008 SEC (2008) 2184
- Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, *The External Dimension of EU Social Security Coordination* [COM (2012) 153 final]
- Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, *Social Protection in European Union Development Cooperation*, [COM (2012) 446 final]
- European Commission Staff Working Document, *Impact Assessment: Revision of the legislative framework on the posting of workers in the context of provision of services* [SWD (2012) 63 final]
- Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors', the 'Proposal for a Directive of the European Parliament and of the Council on public procurement', and the 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts' (2012/C 191/16)
- European Commission Staff Working Document, *Promoting Employment through EU Development Cooperation* [SEC (2007) 495]
- Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services [COM (2012) 130 final]
- European Parliament, Directorate General for Internal Policies, Policy Department A: Economic And Scientific Policy - Employment And Social Affairs, *The External Dimension of EU Social Policy*, IP/A/EMPL/ST/2009-02, July 2010
- European Parliament, Directorate General for Internal Policies, Policy Department A: Economic And Scientific Policy, *Enforcement of Fundamental Workers' Rights*, IP/A/EMPL/ST/2011-04, September 2012
- Exchange of letters between the Commission of the European Communities and the International Labour Organization, O.J. C 156, 30 May 2001) (2001/C 165/12)
- 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. COM (94) 2 final, 12 January 1994
- Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the International Labour Organization (Convention No 170), COM/2012/0677
- Exchange of letters between the European Commission and the International Labour Organisation, of 21 and 22 December 1989, O.J. C 24/8.
- ILO Declaration on Social Justice for a Fair Globalization, 2008 COM(2008) 412 final
- Final report of Working Group VII on External Action, 2002 CONV 459/02
- Final report of Working Group XI on Social Europe, 2003, CONV 516/1/03
- European Parliament resolution of 23 May 2007 on promoting decent work for all (2006/2240(INI))
- European Parliament, 'Report on the integration of migrants, its effects on the labour market and the external dimension of social security coordination' (2012/2131(INI))
- European Parliament resolution of 25 October 2011 on modernisation of public procurement ([2011/2048\(INI\)](#))

❖ Bibliography

- Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds) *The European Union after the Treaty of Lisbon*, CUP 2012
- Geert De Baere, 'The Framework of EU External Competences For Developing the External Dimensions of EU Asylum and Migration Policy', Katholieke Universiteit Leuven, Leuven Centre for Global Governance Studies, Working Paper No. 50, May 2010
- Geert de Baere, *Constitutional Principles of EU External Relations*, OUP 2008
- G Brinkman, 'Lawmaking under the Social Chapter of Maastricht' in P Craig and C Harlow (eds) *Lawmaking in the EU*, Kluwer 1998
- Bruun, Jacobs & Schmidt, 'ILO Convention 94 in the aftermath of the Rüffert case', (2010) *Transfer: European Review of Labour and Research*, 473-488
- Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials*, CUP 2nd edition, 2010
- Paul Craig and Gráinne de Búrca (eds) *The Evolution of EU Law*, 2nd ed, OUP 2011
- Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 5th ed, OUP 2011
- Marise Cremona, 'Extending the Reach of the AETR Principle: Comment on Commission v Greece (C-45/07)' (2009) *European Law Review*, 754-768
- Marise Cremona, 'Member States as Trustees of the Community Interest: Participating in International Agreements on Behalf of the European Community', *EUI Working Paper*, Law No 2009/17
- Marise Cremona, 'A Constitutional Basis for Effective External Action? An assessment of the Provisions on EU External Action in the Constitutional Treaty' *EUI Working Papers LAW* No 2006/30
- Marise Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EUI Working Paper*, Law No 2006/22
- Alan Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences', in Dashwood & Hillier (eds.)
- Alan Dashwood, 'The Limits of European Community Powers' (1996) *European Law Review*, 113-128
- Piet Eeckhout, *EU External Relations Law*, Oxford University Press, 2nd Edition, 2011
- Piet Eeckhout, *EU External Relations Law*, 1st edition, OUP 2004
- Nicholas Emiliou, 'Towards a clearer demarcation line? The division of external relations power between the Community and Member States' (1994) *European Law Review*, 76-86
- Hillion, 'Mixity and coherence in EU external relations: the significance of the 'duty of cooperation'', *CLEER Working Papers* 2009/2
- Ailish Johnson, 'EU-ILO Relations: Between Regional And Global Governance' in Jan Orbie, Lisa Tortell (eds) *The European Union and the Social Dimension of Globalization: How the EU Influences the World*, Routledge, 2009
- Robert Kissack, 'The Performance of the European Union in the International Labour Organization (2011) *Journal of European Integration*, 651-665
- Eve C. Landau and Yves Beigbeder, *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work*, Martinus Nijhoff Publishers, 2008
- Tonia Novitz, 'Promoting Core Labour Standards and Improving Global Social Governance: An Assessment of EU Competence to Implement Commission Proposals', *EUI Working Paper Series*, RSC 2002/59, 2002
- Tonia Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO' in Philip Alston (ed) *Labour Rights as Human*

Rights, OUP, 2005

- Jan Orbie and Lisa Tortell, 'The new GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) *European Foreign Affairs Review*, 663-681
- Klamert, 'New conferral or old confusion? – The perils of making implied competences explicit and the example of the external competence for environmental policy', CLEER Working Papers 2011/6
- O'Higgins, 'The interaction of the ILO, the Council of Europe and European Union Labour Standards', in Hepple, *Social and Labour Rights in Context: International and Comparative Perspectives*, CUP 2002
- O'Keefe, 'Exclusive, Concurrent and Shared Competence', in Dashwood & Hillion (eds.), *The General Law of EC External Relations*, London: Sweet & Maxwell 2000
- J. Sack, 'The European Community's Membership of International Organizations', (1995) *Common Market Law Review*, 1227-1256
- Robert Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 *Common Market Law Review* 1023
- Ronald van Ooik, 'The European Court of Justice and the Division of Competences in the European Union', in D. Obradovic and N. Lavranos (eds) *Interface between EU Law and International Law*, Europa Law Publishing, 2007
- Ryan, 'The Charter and Collective Labour Law', in Hervey & Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart Publishing 2003

Annex 2: Status of maritime Conventions upon the coming into force of MLC

Given the study's focus on up-to-date Conventions, this study focuses exclusively on two Conventions in the maritime domain – the Maritime Labour Convention (MLC / C186) and the Seafarers' Identity Documents Convention (C185) – for the following reasons:

- Following MLC Art VIII, the MLC will come into effect in August 2013, having been ratified by 30 ILO member states representing at least 33% of global tonnage by August 2012.
- Upon MLC coming into effect, 10 previously up-to-date maritime Conventions that are consolidated in the MLC will be closed for further ratification
- The study concludes in June 2013, meaning in practice that the only up-to-date maritime Conventions open to new ratification upon the study's conclusion will be the MLC and C185.

Below is a brief overview of the status of the existing maritime Conventions, and their relationship to the new MLC.

How the content of the existing Maritime Labour Conventions has been incorporated into the Maritime Labour Convention, 2006

The Regulations and the Standards (Part A) and Guidelines (Part B) in the Code are set out in five Titles, which essentially cover the same subject matter as the existing 37 maritime labour Conventions and associated Recommendations, updating them where necessary. There are a few new subjects, particularly in the area of occupational safety and health to meet contemporary concerns, such as the effects of noise and vibration on workers or other workplace risks, but in general the Convention aims at maintaining the standards in the current instruments at their present level, while leaving each country greater discretion in the formulation of their national laws establishing that level of protection.

The provisions relating to flag State inspection, including the use of recognized organizations builds upon the existing ILO Maritime Labour Inspection Convention (No. 178). The potential for inspections in foreign ports (port State control) in Title 5 is based on existing maritime Conventions, in particular Convention No. 147 – the Merchant Shipping (Minimum Standards) Convention, 1976 and the Conventions adopted by the International Maritime Organization (IMO) and the regional port State control agreements (PSC MOU).

However, the MLC, 2006 builds upon them to develop a more effective approach to these important issues, consistent with other international maritime Conventions that establish standards for quality shipping with respect to issues such as ship safety and security and protection of the marine environment. One of the most innovative aspects of the MLC, 2006, as far as ILO Conventions are concerned, is the certification of seafarers' living and working conditions on board ships.

The 36 Conventions and one Protocol that are consolidated in the MLC, 2006 are listed in its Article X. This list consists of all the previous maritime Conventions, adopted since 1920, except the Convention addressing seafarers' identity documents of 2003 (Convention No. 185) and the 1958 Convention that it revises (Convention No. 108), as well as the Seafarers' Pension Convention, 1946 (No. 71) and the (outdated) Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15):

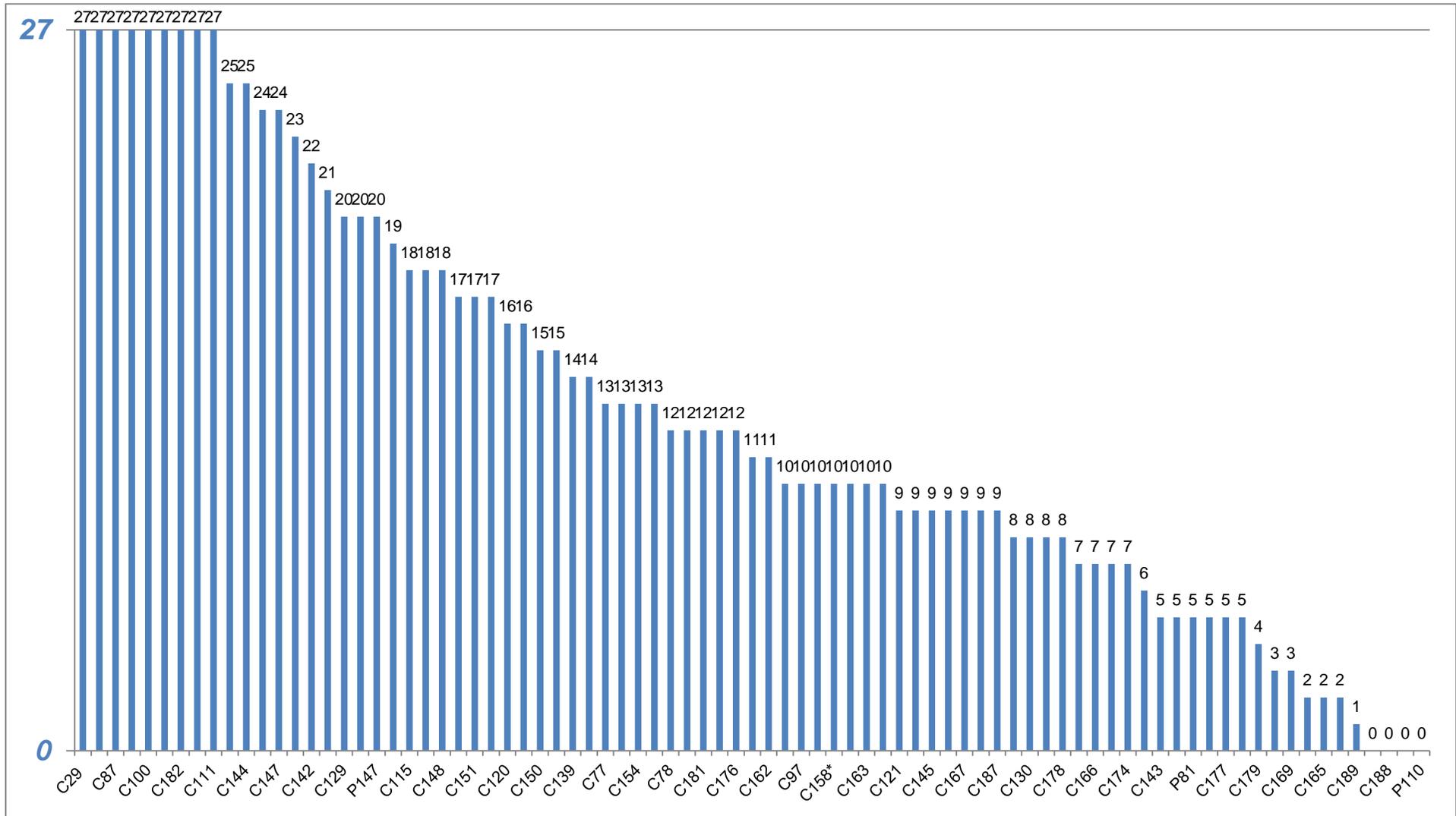
Minimum Age (Sea) Convention, 1920 (No. 7)
Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)
Placing of Seamen Convention, 1920 (No. 9)
Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)
Seamen's Articles of Agreement Convention, 1926 (No. 22)
Repatriation of Seamen Convention, 1926 (No. 23)
Officers' Competency Certificates Convention, 1936 (No. 53)
Holidays with Pay (Sea) Convention, 1936 (No. 54)
Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)
Sickness Insurance (Sea) Convention, 1936 (No. 56)
Hours of Work and Manning (Sea) Convention, 1936 (No. 57)
Minimum Age (Sea) Convention (Revised), 1936 (No. 58)
Food and Catering (Ships' Crews) Convention, 1946 (No. 68)
Certification of Ships' Cooks Convention, 1946 (No. 69)
Social Security (Seafarers) Convention, 1946 (No. 70)
Paid Vacations (Seafarers) Convention, 1946 (No. 72)
Medical Examination (Seafarers) Convention, 1946 (No. 73)
Certification of Able Seamen Convention, 1946 (No. 74)
Accommodation of Crews Convention, 1946 (No. 75)
Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76)
Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91)
Accommodation of Crews Convention (Revised), 1949 (No. 92)
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93)
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109)
Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)
Prevention of Accidents (Seafarers) Convention, 1970 (No. 134)
Continuity of Employment (Seafarers) Convention, 1976 (No. 145)
Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)
Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)
Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)
Seafarers' Welfare Convention, 1987 (No. 163)
Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)
Social Security (Seafarers) Convention (Revised), 1987 (No. 165)
Repatriation of Seafarers Convention (Revised), 1987 (No. 166)
Labour Inspection (Seafarers) Convention, 1996 (No. 178)
Recruitment and Placement of Seafarers Convention, 1996 (No. 179)
Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)

The continuing status of the Maritime Labour Conventions once the 2006 Maritime Labour Convention has entered into force in 2013

The existing ILO maritime labour Conventions will be gradually phased out as countries that have ratified those Conventions ratify the MLC, 2006, but there will be a transitional period when some Conventions will be in force in parallel with the MLC, 2006. Countries that ratify the MLC, 2006 will no longer be bound by the existing Conventions when the MLC, 2006 comes into force for them. Countries that do not ratify the MLC, 2006 will remain bound by the existing Conventions they have ratified, but those Conventions will be closed to further ratification.

Entry into force of the MLC, 2006 will not affect the four maritime Conventions that are not consolidated in the MLC, 2006 (of which only C185 on seafarers' identity documents is classified as up-to-date). They will remain binding on States that have ratified them irrespective of the MLC, 2006. The ILO maritime Conventions dealing with fishing and dock workers are also not affected by the MLC, 2006.

Annex 3: Up-to-date ILO Conventions ratified by EU-27 (as at June 2013)



Source: ILO Brussels, ILO NORMES (excludes Croatia)

Up-to-date ILO Conventions ratified by EU-27 and Croatia (as at June 2013)

		AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	HR		
C14	Weekly Rest (Industry) Convention, 1921		1	1		1	1	1	1	1		1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	24 (inc. HR)
C29	Forced Labour Convention, 1930	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C77	Medical Examination of Young Persons (Industry) Convention, 1946		1	1		1				1		1	1		1			1	1		1	1		1		1					13
C78	Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946			1		1				1		1	1		1			1	1		1	1		1		1					12
C81	Labour Inspection Convention, 1947	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C87	Freedom of Association and Protection of the Right to Organise Convention, 1948	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C94	Labour Clauses (Public Contracts) Convention, 1949	1	1	1	1		1		1	1					1					1						1					10
C95	Protection of Wages Convention, 1949	1	1	1	1	1				1		1	1		1				1	1	1	1	1	1	1	1					17
C97	Migration for Employment Convention (Revised), 1949		1		1					1	1				1					1		1			1	1		1			10
C98	Right to Organise and Collective Bargaining Convention, 1949	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C100	Equal Remuneration	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)

		AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	HR		
	Convention, 1951																														HR)
C102	Social Security (Minimum Standards) Convention, 1952	1	1	1	1	1	1			1	1	1		1	1			1		1	1	1	1	1	1	1	1	1	1	1	22 (inc. HR)
C105	Abolition of Forced Labour Convention, 1957	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C106	Weekly Rest (Commerce and Offices) Convention, 1957			1	1		1			1		1			1	1			1	1		1		1	1				1	13 (inc. HR)	
C110	Plantations Convention, 1958																													0	
C111	Discrimination (Employment and Occupation) Convention, 1958	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C115	Radiation Protection Convention, 1960		1			1	1		1	1	1	1	1		1	1		1		1	1	1		1		1	1	1		18	
C118	Equality of Treatment (Social Security) Convention, 1962						1		1	1	1			1	1												1			7	
C120	Hygiene (Commerce and Offices) Convention, 1964		1	1		1	1		1	1	1				1	1		1			1	1		1		1	1	1		16	
C121	Employment Injury Benefits Convention, 1964		1		1				1		1			1				1		1					1		1		1	10 (inc. HR)	
C122	Employment Policy Convention, 1964	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			1	1	1	1	1	1	1	1	1	1	1	26 (inc. HR)
C124	Medical Examination of Young Persons (Underground Work) Convention, 1965	1	1	1	1	1			1	1		1	1	1	1				1	1	1	1		1		1		1		18	
C128	Invalidity, Old-Age and Survivors'	1			1	1			1		1									1				1			1			8	

		AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	HR		
	Benefits Convention, 1967																														
C129	Labour Inspection (Agriculture) Convention, 1969		1			1	1	1	1	1	1		1		1	1		1	1	1	1	1	1	1	1	1	1	1	1	1	21 (inc. HR)
C130	Medical Care and Sickness Benefits Convention, 1969					1	1		1		1							1		1				1			1			8	
C131	Minimum Wage Fixing Convention, 1970									1						1	1		1	1		1	1		1	1				9	
C135	Workers' Representatives Convention, 1971	1			1	1	1	1	1	1	1	1	1		1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	25 (inc. HR)
C138	Minimum Age Convention, 1973	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C139	Occupational Cancer Convention, 1974		1			1	1		1	1	1		1	1	1			1				1		1	1		1		1	15 (inc. HR)	
C140	Paid Educational Leave Convention, 1974		1			1			1	1	1		1							1	1			1	1	1	1	1		13	
C141	Rural Workers' Organisations Convention, 1975	1	1		1		1		1	1	1	1	1		1				1	1	1					1	1	1		16	
C142	Human Resources Development Convention, 1975	1			1	1	1		1	1	1	1	1	1	1	1	1	1		1	1	1		1	1	1	1	1		22	
C143	Migrant Workers (Supplementary Provisions) Convention, 1975				1										1							1			1		1			5	
C144	Tripartite Consultation (International Labour Standards) Convention, 1976	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			1	1	1	1	1	1	1	1	1	1	1	25
C145*	Continuity of Employment (Seafarers) Convention, 1976								1	1			1		1					1	1	1				1	1			9	
C146*	Seafarers' Annual			1					1	1	1				1			1		1	1					1	1			10	

		AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	HR		
	Leave with Pay Convention, 1976																														
C147*	Merchant Shipping (Minimum Standards) Convention, 1976		1	1	1		1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		1	1	1	1			24
C148	Working Environment (Air Pollution, Noise and Vibration) Convention, 1977		1			1	1		1	1	1		1		1	1		1	1		1	1		1	1	1	1	1	1	19 (inc. HR)	
C149	Nursing Personnel Convention, 1977		1				1		1	1		1			1	1	1	1	1		1	1			1		1			14	
C150	Labour Administration Convention, 1978				1	1	1		1		1	1			1	1		1		1		1	1			1	1	1		15	
C151	Labour Relations (Public Service) Convention, 1978		1		1		1		1			1	1		1	1		1		1	1	1		1	1	1	1	1		17	
C152	Occupational Safety and Health (Dock Work) Convention, 1979				1		1		1	1	1				1					1						1	1			9	
C154	Collective Bargaining Convention, 1981		1		1				1			1	1			1	1			1			1	1	1	1	1			13	
C155	Occupational Safety and Health Convention, 1981		1		1	1	1		1				1	1		1		1		1		1		1	1	1	1		1	16 (inc. HR)	
C156	Workers with Family Responsibilities Convention, 1981			1					1	1		1					1			1		1		1	1	1	1		1	12 (inc. HR)	
C157	Maintenance of Social Security Rights Convention, 1982																									1	1			2	
C158**	Termination of Employment Convention, 1982				1				1	1						1		1				1		1	1	1	1			10	
C159	Vocational Rehabilitation and				1	1	1		1	1	1	1	1	1	1		1	1	1	1	1	1		1	1	1	1		1	21 (inc. HR)	

		AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	HR		
	Employment (Disabled Persons) Convention, 1983																														HR)
C160	Labour Statistics Convention, 1985	1			1	1	1		1		1	1	1	1	1	1				1	1	1		1		1	1	1			19
C161	Occupational Health Services Convention, 1985		1			1			1		1		1					1			1			1	1		1		1		11 (inc. HR)
C162	Asbestos Convention, 1986		1		1		1		1		1							1		1		1		1	1	1		1			12 (inc. HR)
C163*	Seafarers' Welfare Convention, 1987			1		1	1		1	1			1										1	1		1	1				10
C164*	Health Protection and Medical Care (Seafarers) Convention, 1987			1		1			1	1	1		1		1									1		1	1				10
C165*	Social Security (Seafarers) Convention (Revised), 1987												1													1					2
C166*	Repatriation of Seafarers Convention (Revised), 1987			1						1	1		1					1					1			1					7
C167	Safety and Health in Construction Convention, 1988					1	1		1		1		1		1			1						1			1				9
C168	Employment Promotion and Protection against Unemployment Convention, 1988								1														1			1					3
C169	Indigenous and Tribal Peoples Convention, 1989						1													1						1					3
C170	Chemicals Convention, 1990										1				1			1			1						1				5
C171	Night Work Convention, 1990		1		1	1											1	1				1		1							7
C172	Working Conditions (Hotels and Restaurants)	1			1						1			1				1								1					6

		AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	HR	
	Convention, 1991																													
C173	Protection of Workers' Claims (Employer's Insolvency) Convention, 1992	1		1					1							1	1							1	1	1				8
C174	Prevention of Major Industrial Accidents Convention, 1993		1					1	1									1		1					1		1			7
C175	Part-Time Work Convention, 1994				1				1				1		1			1		1		1			1		1			9
C176	Safety and Health in Mines Convention, 1995	1	1			1			1		1			1				1			1	1		1		1	1			12
C177	Home Work Convention, 1996		1	1					1					1						1										5
C178*	Labour Inspection (Seafarers) Convention, 1996			1					1	1				1				1			1						1	1		8
C179*	Recruitment and Placement of Seafarers Convention, 1996			1					1	1				1																4
C180*	Seafarers' Hours of Work and the Manning of Ships Convention, 1996		1	1			1		1	1	1	1		1		1		1	1	1			1		1	1	1	1		17
C181	Private Employment Agencies Convention, 1997		1	1		1			1				1		1		1			1	1	1		1		1				12
C182	Worst Forms of Child Labour Convention, 1999	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	28 (inc. HR)
C183	Maternity Protection Convention, 2000	1		1	1								1		1	1	1	1		1			1	1	1					12
C184	Safety and Health in Agriculture Convention, 2001								1								1					1		1			1			5
C185	Seafarers' Identity Documents									1			1															1		3 (inc.)

		AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	HR		
	Convention (Revised), 2003																														HR)
C186 (MLC)	Maritime Labour Convention, 2006			1	1		1		1	1		1				1		1	1	1	1					1	1		1		10 (inc. HR)
C187	Promotional Framework for Occupational Safety and Health Convention, 2006				1	1	1		1		1													1		1	1	1			9
C188	Work in Fishing Convention, 2007																														0
C189	Domestic Workers Convention, 2011														1																1
P81	Protocol of 1995 to the Labour Inspection Convention, 1947				1				1					1				1									1				5
P89	Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948																														0
P110	Protocol to the Plantations Convention, 1958																														0
P147*	Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976		1	1	1		1	1	1	1	1	1	1	1		1	1	1	1	1			1		1		1	1			20
P155	Protocol of 2002 to the Occupational Safety and Health Convention, 1981								1									1				1			1		1				5
	TOTAL	24	40	35	41	39	41	17	61	48	43	33	42	30	46	33	26	48	26	49	37	46	26	45	42	55	59	29	25	1061 (1086 incl. HR)	

* Status to be reviewed on entry into force of MLC, 2006

** CWP failed to come to a conclusion on status of this Convention

Annex 4: ILO 'Governance' Conventions not yet ratified by EU Member States

The following tables indicate the 'Governance' (or Priority) Conventions which have not been ratified by specific EU members.

C122: Employment Policy Convention, 1964

C122	Reasons for not ratifying	Source
Luxembourg	The Government has indicated that there are prospects for the ratification of this Convention.	ILO NORMES / Nov 2012 GB paper (GB.316/LILS/INF/2)
Malta	The Government has not provided any indication on the prospects of, or obstacles to, ratification of this Convention.	ILO NORMES / Nov 2012 GB paper (GB.316/LILS/INF/2)

C129: Labour Inspection (Agriculture) Convention, 1969

C129	Reasons for not ratifying	Source
Austria	According to the Government, there are plans to consider the possibility of ratifying Convention 129, however there are concerns that the absence of a central authority for agriculture and forestry may hinder ratification. In 2010, the Government indicated that the ratification process will begin as soon as the necessary resources are available. 2012 GB paper confirms 'prospects of ratification'.	Nov 2010 paper, Nov 2012 GB paper (GB.316/LILS/INF/2)
Bulgaria	The central labour inspection authority of Bulgaria raised the issue of the lack of resources to provide the equipment necessary for carrying out certain technical inspections. This may be one of the factors for why it has not ratified the Convention. 2012 GB paper indicates no reply received / reply contains no indication on prospects of ratification.	General Survey 2006, Nov 2012 GB paper (GB.316/LILS/INF/2)
Cyprus	According to the Government, ratification would require establishing structures and mechanisms for inter-institutional cooperation which cannot be envisaged at the moment owing to the economic situation. 2012 GB paper indicates 'ratification not considered / deferred / rejected'.	Nov 2010 GB paper, Nov 2012 GB paper (GB.316/LILS/INF/2)
Greece	2012 GB paper indicates 'prospects for ratification'.	Nov 2012 GB paper (GB.316/LILS/INF/2)
Ireland	2012 GB paper indicates no reply received / reply contains no indication on prospects of ratification.	Nov 2012 GB paper (GB.316/LILS/INF/2)
Lithuania	2012 GB paper indicates 'ratification not considered / deferred / rejected'. The Government of Lithuania stated that they have no intention of ratifying the Convention on the grounds that its application would require the establishment of a separate inspection system for agriculture.	Nov 2012 GB paper (GB.316/LILS/INF/2)
United Kingdom	The Government indicates that the question of ratification is again being examined, although no decision has yet	General Survey 2006, Nov 2012 GB

been taken on its position regarding ratification. In the past, the Government considered that ratification of C129 would require amending the legislation in force and it was felt that amendments were not necessary as current provisions provided adequate protection for workers. 2012 GB paper indicates 'prospects for ratification'.

paper
(GB.316/LILS/INF/2)

C144: Tripartite Consultation (International Labour Standards) Convention, 1976

C144	Reasons for not ratifying	Source
Luxembourg	The Government has indicated that the ratification procedure for Convention 144 has been initiated.	ILO NORMES / Nov 2012 GB paper (GB.316/LILS/INF/2)
Malta	The Government has not provided any indication on the prospects of, or obstacles to, ratification of this Convention.	ILO NORMES / Nov 2012 GB paper (GB.316/LILS/INF/2)

In addition, only five EU member states¹²¹ have ratified the Protocol of 1995 to the Labour Inspection Convention, 1947 (No. 81). Some of the obstacles to ratification include the following¹²²:

- The Government of Austria sees the fact that labour inspection in respect of local and provincial government employees is carried out separately by the nine provinces and not by the federal labour inspectorate could be an obstacle to ratification of the Protocol.
- The Government of Germany has indicated that the main obstacle lies in the absence in the Protocol of provisions for the exclusion of religious communities covered by national legislation applicable to church organisations.
- The Government of Portugal has indicated that since the Protocol does not allow the exclusion of nuclear plants and offshore enterprises, ratification is not envisaged.

¹²¹ Cyprus, Finland, Ireland, Luxembourg and Sweden.

¹²² International Labour Conference, *General Survey on Labour Inspection* (Report III: Part 1B), 2006, p111ff: www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-iii-1b.pdf

The present study aims at providing an analysis of ILO Conventions in the light of the EU acquis and at providing a ground for promoting the ratification of ILO conventions by Member States. For this purpose, the study provides a review of literature and legal doctrine in order to develop an adequate methodology: focusing on division of competences, compatibility of ILO provisions with Union acquis, and consequences for ratification of these instruments by Member States. It provides as well a detailed analysis of each of the up-to-date ILO instruments in light of the EU acquis, and an aggregation of this analysis in an accessible summary. The promotion of the ratification of international labour standards by Member States is an essential part of the Decent Work Agenda, to which all Member States have subscribed at international level.

This publication is available in electronic format in English only with a French and German summary.

Are you interested in the **publications** of the Directorate-General for Employment, Social Affairs and Inclusion? If so, you can download them or take out a free subscription at

<http://ec.europa.eu/social/publications>

You are also welcome to sign up to receive the European Commission's free *Social Europe* e-newsletter at **<http://ec.europa.eu/social/e-newsletter>**

<http://ec.europa.eu/social>