Opinion of the Court of 19 March 1993. - Opinion delivered pursuant to [Article 218(11)] of the [FEU] Treaty. - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work. - Opinion 2/91.

Keywords

1. International agreements - Conclusion - Prior opinion of the Court - Purpose - Compatibility with the [FEU] Treaty - Competence of the [Union]

([FEU] Treaty, [Article 218(11)])

2. International agreements - Conditions of participation excluding conclusion by the [Union] - Competence of the [Union] - Exercise through joint action by the Member States

3. International agreements - Conclusion - Competence of the [Union] - Express or implied attribution - Exclusive nature - Appraisal criteria

(E[U] Treaty, [the second and third paragraphs of Article 4(3)])

4. International agreements - Convention No 170 of the International Labour Organization (ILO) concerning safety in the use of chemicals at work - Conclusion - Competence enjoyed jointly by the Member States and the [Union]

([FEU] Treaty, [Articles 115 and 153], Title [X])

5. International agreements - Agreement applying to overseas countries and territories but lying outside the scope of the association scheme - Conclusion by the Member State responsible for the international representation of those countries and territories

6. International agreements - Agreement falling partially within the competence of the [Union] and partially within that of the Member States - Need for close cooperation in the negotiation, conclusion and fulfilment thereof

Summary

1. It is possible under the procedure set out in [Articles 218(1) to (9), (11) and 216(2) TFEU], as under that set out in Article 103 of the EAEC Treaty, to consider all questions concerning the compatibility with the provisions of the Treaty of an agreement envisaged, and in particular the question whether the [Union] has the power to enter into that agreement.

That procedure, however, does not lend itself to examination of the [Union]'s capacity, on an international plane, to enter into a convention drawn up under the auspices of the International Labour Organization, or of any obstacles which the [Union] may encounter in the exercise of its competence in the light of constitutional rules of that organization.

2. If the conditions of participation in an international convention exclude conclusion by the [Union] itself but the area covered by that convention comes within the external competence of the [Union], that external competence may be exercised through the medium of the Member States acting jointly in the [Union]'s interest.

3. The [Union]'s competence to enter into international commitments may arise from an express attribution by the Treaty or flow implicitly from its provisions. Whenever [Union] law has created for the institutions of the [Union] powers within its internal system for the purpose of attaining a specific objective, the [Union] has competence to enter into the international commitments necessary for the attainment of that objective, even in the absence of an express provision to that effect.

That competence may be exclusive in nature, excluding any concurrent competence on the part of the Member States, whether under the provisions of the Treaty or by virtue of the scope of the measures adopted by the [Union] institutions for the application of those provisions and which may be of such a kind as to deprive the Member States of an area of competence which they were previously able to exercise on a transitional basis. It is of little significance whether

those measures do or do not come under a common policy. In all of the areas corresponding to the Treaty objectives, [the second and third paragraphs of Article 4(3) TEU] thereof requires Member States to facilitate the achievement of the [Union]'s tasks and to refrain from any measure which could jeopardize the attainment of those objectives, which could precisely be the case if Member States were to enter into international commitments containing rules that interfered with those adopted by the [Union].

4. The conclusion of Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work is a matter which falls within the joint competence of the Member States and the [Union].

The field which it covers falls within the social provisions of the Treaty, which constitute Title [X] on social policy. The fact that the Convention sets out rules in an area in which the [Union] enjoys an internal legislative competence does not, however, confer exclusive competence on the [Union], since [Article 153 TFEU] envisages the introduction of directives only in order to lay down minimum requirements, with the result that Member States may apply the rules of the Convention, assuming that they are more stringent, on the basis of the freedom which they have to go beyond the requirements of the directives, the opposite being equally possible, since the rules of the Convention are also only minimum rules. The same applies with regard to the directives adopted on the basis of [Article 115 TFEU], since they also lay down minimum requirements.

In contrast, certain requirements of the Convention, although not contradictory to existing directives, relate to an area, that of classification, packaging and labelling of dangerous substances, in which, given the development of the [Union]'s legislative activity, which has not been limited to fixing minimum requirements, it must be considered that the Member States are no longer competent to undertake international commitments outside the framework of the [Union] institutions.

Finally, with regard to the general principles which the Convention contains for its implementation, in particular the consultation of the most representative organizations of employers and workers, it must be considered that, in so far as the substantive provisions of the Convention come within the [Union]'s sphere of competence, the [Union] is also competent to undertake commitments with regard

to the implementation of those provisions despite the fact that social policy is a matter which at present falls predominantly within the competence of the Member States.

5. If the substantive scope of an international convention lies outside the scope assigned by the Treaty to the association scheme for overseas countries and territories, it is for the Member States which are responsible for the international relations of those territories and which represent them in that regard to conclude the convention in question.

6. When it appears that the subject-matter of an international convention falls partly within the competence of the [Union] and partly within that of the Member States, the requirement of unity in the international representation of the [Union] makes it necessary to ensure close cooperation between the [Union] institutions and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into.

Grounds

On 21 August 1991 the Court of Justice received a request for an opinion submitted by the Commission of the European [Union] pursuant to the second subparagraph of [ex-]Article 228(1) of the Treaty establishing the European Economic Community This subparagraph provides that:

The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with [ex-]Article 236.'

I - Purpose of the request for an opinion

In its request, the Commission has sought the Court's opinion on the compatibility with the [FEU] Treaty of Convention No 170 of the International Labour Organization ('the ILO') concerning safety in the use of chemicals at work

('Convention No 170') and, in particular, has sought its opinion on the [Union]'s competence to conclude that Convention and the consequences which this would have for the Member States.

Convention No 170 was adopted on 25 June 1990 at the 77th session of the International Labour Conference.

II - Procedure

The request for an opinion was served on the Council and the Member States pursuant to Article 107(1) of the Rules of Procedure of the Court of Justice. Written observations were submitted by the Commission and the Council and by the Governments of the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Kingdom of the Netherlands and the United Kingdom.

By a letter received at the Court Registry on 30 April 1992, the Commission replied to a written question put by the Court. The Commission, the Council, the above-mentioned Governments and the Belgian Government submitted oral observations at the public hearing held at the Court on 30 June 1992.

On 23 October 1992 the Advocates General were heard by the Court in closed session, in accordance with Article 108(2) of the Rules of Procedure.

III - The ILO

The ILO was founded in 1919 with the aim of improving the conditions of labour and promoting social justice. States which are Members of the United Nations (of which it is a special body) may join the ILO, as well as other States admitted under the conditions set out in the ILO Constitution. The organs of the ILO are the General Conference of Representatives of the Members ('the Conference'), the Governing Body and the International Labour Office. The principal task of the Conference, which is the supreme body of the ILO, is to adopt proposals in the form of international conventions or recommendations. Its operation is based on a tripartite composition: each Member has four representatives - two Government delegates and two others representing the employers and workers of the State in question. Each delegate is entitled to vote individually on all matters which are

taken into consideration by the Conference (Article 4(1) of the ILO Constitution).

The adoption of conventions and recommendations follows a procedure, the individual stages of which are essentially as follows: when the Governing Body of the ILO has decided to include in the Conference agenda the definition of standards in a specific area, the International Labour Office drafts a report on the basis of replies provided by Members to the questionnaire previously sent to them. This report is discussed at a first reading during the annual session of the Conference and if a decision is taken to adopt a convention or recommendation the International Labour Office prepares to that end a text which is submitted to the governments for their observations. For a convention or recommendation to be adopted, a majority of two-thirds of the votes cast by the delegates present is necessary (Article 19(2) of the ILO Constitution) and Members alone may ratify a convention (Article 19(5)(d)).

Members are required to communicate the measure adopted (convention or recommendation) to the competent national authority for the purposes of its implementation and to inform the Director-General of the International Labour Office of the authority or authorities regarded as competent and of the action taken by them (Article 19(5)(b) and (c) and Article 19(6)(b) and (c) of the ILO Constitution).

It should be noted that according to the provisions of the Standing Orders of the Conference and ILO Convention No 144 concerning Tripartite Consultations to Promote the Implementation of International Labour Standards, which was adopted by the Conference on 2 June 1976, both sides of industry must be consulted for the purpose, in particular, of expressing their views on the replies of governments to the questionnaires addressed to them (Article 39(1) of the Standing Orders of the Conference and Article 5(1)(a) of Convention No 144), on the comments of the governments in respect of the draft texts for discussion in the Conference (Article 39(6) of the Standing Orders of the Conference), and on the proposals made to the competent authorities pursuant to Article 19 above (Article 5(1)(b) of Convention No 144).

It should also be borne in mind that the ILO Convention provides a procedure for supervising the manner in which Member States implement the conventions to

which they have acceded; this procedure involves consultation with workers' and employers' representatives (Articles 22 to 34 of the ILO Constitution).

Finally, it should be noted that according to Article 19(8) of the ILO Constitution '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'.

IV - [Union] participation in negotiations leading to ILO conventions

The issue of participation by the [Union] - which is not a Member of the ILO but has observer status - in negotiations leading to conventions concluded by the ILO first arose in connection with Convention No 153 on working hours and rest periods in road transport (1977 to 1979), an area which at that time was covered by Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport (OJ, English Special Edition 1969 (I), p. 170). In order to facilitate the [Union]'s participation in the various negotiations, the International Labour Office had drafted a working document for the Conference. However, the solutions outlined in that document were not endorsed by a number of Member States on account of the reactions of employers and workers, who feared that their own influence in the Conference would thereby be reduced.

This document, drawn up by the Governing Body of the International Labour Office on 12 February 1981, was supplemented by another document dated 31 May 1989. In essence, those two documents provided, with regard to negotiations, that [Union] Member States could authorize the Commission to propose amendments on their behalf, that the authority referred to in Article 19 of the ILO Constitution might be the Council and finally, with regard to ratification, that this could be done through an appropriate statement by the [Union], provided that prior notification from all the Member States confirmed that this measure constituted ratification by the Twelve.

Those documents also refer to the commitments undertaken by Member States

which have ratified a convention. They point out in this connection that Member States alone can be held liable for failure to comply with those undertakings, even if the breach of the provisions of such a convention is attributable to a [Union] measure adopted by majority decision.

The problem of the [Union]'s competence in the context of the ILO arose once again during the preparation of Convention No 162 concerning safety in the use of asbestos (1983 to 1986), an area which has been covered by four [Union] directives. In view of the fact that, while not disputing the [Union]'s competence, a number of States took the view that the ILO Constitution did not allow the [Union] to take part in the Conference, the Council decided that the [Union] and its Member States would put forward the [Union]'s position on the basis of the relevant [Union] directives. The Commission brought an action for annulment against this Council decision on the grounds that it breached [Articles 218(1) to (9), (11) and 216(2) TFEU]. However, it withdrew its action following the Council's adoption on 22 December 1986 of a decision which, in the Commission's view, provided a generally satisfactory solution to the problem of [Union] participation in ILO negotiations.

This decision, taken in agreement with the Commission, is confined to cases coming within the exclusive competence of the [Union]. It imposes full compliance with the tripartite consultation procedure provided for in Convention No 144 and the autonomy of both sides of industry. It also stipulates that the [Union] replies to the ILO questionnaire must be adopted by the Council following a proposal from the Commission and that they must take account of consultations with employers' and trade union organizations. For the preparation of the first reading of a draft convention, the Commission must propose that the Council adopt a decision authorizing it to negotiate and giving it a negotiating brief. In the Conference, the Commission speaks on behalf of the [Union] and acts in close consultation with the Member States. The delegates of the Member States retain their right to speak during the plenary session of the Conference.

In July 1988, when the Commission, pursuant to the above Council decision of 22 December 1986, requested the Member States to reply to the ILO questionnaire relating to Convention No 170, several Member States contested the [Union]'s

exclusive competence to act in the matter. As a result, the Member States sent their replies directly to the ILO, thereby preventing transmission of replies at [Union] level. The Commission took the view that the exclusive competence of the [Union] was not a matter on which there was any doubt and it wrote to the Council on 12 May 1989 requesting that it be given powers of negotiation in respect of Convention No 170.

On 30 November 1989 the Council adopted a decision which enabled the Commission to present the [Union] point of view during the negotiations in question, subject to close consultation with the Member States. The latter retained their right to express views on aspects which fell within the areas of national competence. The decision set out a procedure by which differences which might arise in this regard could be resolved. The Council also agreed in that decision to re-examine its decision of 22 December 1986 and, if necessary, with the agreement of the Commission, to supplement that decision with provisions covering cases of joint competence of the [Union] and the Member States, as well as with provisions designed to avoid difficulties arising from the Constitution of the ILO or its practices as an institution.

Following the adoption of Convention No 170, the Commission wrote to the Council stating its view that the Member States were under an obligation to inform the Director-General of the International Labour Office that the competent authorities, within the meaning of Article 19(5)(c) of the ILO Constitution, were in this case the [Union] institutions. On this occasion, several national delegations to the Council indicated their refusal to accept that the [Union] had exclusive competence to conclude the Convention.

V - The contents of the Convention

Convention No 170 is designed to protect workers against the harmful effects of using chemicals in the workplace.

The Convention is divided into seven parts.

Part I is intended to define the scope of the Convention, which applies to all branches of economic activity in which chemicals are used (Article 1(1)). States which have ratified the Convention may, however, exclude particular branches of

economic activity, undertakings or products from the application of the Convention, or certain provisions thereof. Such an exclusion must be preceded by consultation with the most representative organizations of employers and workers concerned (Article 1(2)).

Part II sets out general principles. Articles 3 and 4 thus impose obligations on Members to consult with the above organizations on the measures to be taken to give effect to the provisions of the Convention (Article 3) and on the measures taken to formulate, implement and periodically review a coherent policy on safety in the use of chemicals at work. Under Article 5, 'the competent authority shall have the power, if justified on safety and health grounds, to prohibit or restrict the use of certain hazardous chemicals, or to require advance notification and authorization before such chemicals are used'.

Part III deals with the classification of chemical products and lays down rules governing their transport, labelling and marketing, the preparation of chemical safety data sheets and the responsibilities of suppliers in these areas (Articles 6, 7, 8 and 9).

Part IV defines the responsibilities of employers with regard to the identification of chemical products (labelling, marking and use of chemical safety data sheets for these products), their transfer into other containers or equipment and the exposure of workers to hazardous chemicals (Articles 10 to 12). Employers are required to adopt appropriate measures to protect workers against the risks arising from the use of hazardous chemicals and to minimize those resulting from the disposal of chemicals which are no longer required (Articles 13 and 14). Finally, employers are required to inform their workers and to instruct and train them in the use of chemicals at work (Articles 15 and 16).

Part V defines the duties of workers to cooperate with their employers in the discharge by the employers of their responsibilities and to comply with all procedures and practices relating to safety in the use of chemicals at work. Workers are also required to take all reasonable steps to eliminate or minimize risk to themselves and to others from such use (Article 17).

Part VI deals with the rights of workers and their representatives. The Convention

provides in this regard that workers are to have the right to remove themselves from danger resulting from the use of chemicals when they have reasonable justification to believe there is an imminent and serious risk to their safety or health, and that they are to inform their superior immediately. Workers who exercise such a right or any other right under the Convention must be protected against undue consequences. They must also have the right to information on the identity of chemicals used at work, the hazardous properties of such chemicals, precautionary measures, education and training, the information contained on labels and markings and, finally, chemical safety data sheets, along with any other information required to be kept by the Convention (Article 18).

Part VII defines the responsibilities of exporting States. When in an exporting Member State all or some uses of hazardous chemicals are prohibited for reasons of safety and health at work, this fact and the reasons for it must be communicated by the exporting Member State to any importing country (Article 19).

Article 20 et seq. of the Convention are procedural in nature and deal, in particular, with ratification, denunciation and amendment procedures.

VI - Summary of the written observations submitted by the institutions and by the Governments of the Member States

A - Admissibility

The German Government takes the view that the request for an opinion is inadmissible in so far as [Article 218(11) TFEU] concerns only agreements the conclusion of which is envisaged by the [Union]. That, it argues, is not the position in the present case since the [Union] is not a Member of the ILO and Article 19(5)(d) of the ILO Constitution restricts the ratification of conventions to States which are Members of the Organization.

The German Government also takes the view that the ILO's structure, which is based on a tripartite system, precludes the [Union] from concluding Convention No 170. It points out in this connection that, in accordance with the spirit of the ILO Constitution and Convention No 144, the consultations with employers' and workers' representatives must be effective inasmuch as the purpose of such consultations is to allow those representatives to exert an influence on the various

national Governments. That influence would be reduced if their position had to be communicated to the [Union] institutions via the respective Governments. It also refers to a number of practical problems, in particular the fact that the replies to the questionnaires must be submitted within very short periods and that the representatives of the Governments of the Member States would no longer be able to take account of proposals made by employers' and workers' representatives. Finally, the influence of employers' and workers' representatives would be weakened by the fact that during negotiations in the Conference the Commission representative would lack a political sensitivity comparable to that of the representatives of Governments of the Member States who are in regular contact with both sides of industry.

The Netherlands Government also takes the view that the request for an opinion is inadmissible on the ground that Convention No 170 is not an agreement between the [Union] and one or more States or an international organization. It adds that the [Union] cannot be a party to Convention No 170 because it is not a Member of the ILO. However, it acknowledges that a broad interpretation of [Articles 218(1) to (9), (11) and 216(2) TFEU] could lead the Court to treat the request for an opinion as admissible.

B - The substance

1. The Commission and the Greek Government take the view that the [Union] alone is competent to conclude Convention No 170.

The Commission refers in this connection to paragraphs 17 and 22 of the Court's judgment in Case 22/70 Commission v Council [1971] ECR 263 (the AETR judgment), under which

'... each time the [Union], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right ... to undertake obligations with third countries which affect those rules.

...

If these two provisions [Articles 3 and the second and third paragraphs of 4(3)

TEU] are read in conjunction, it follows that to the extent to which [Union] rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the [Union] institutions, assume obligations which might affect those rules or alter their scope.'

According to the Commission, the common rules adopted on the basis of [Article 153 TFEU] may be affected, within the meaning of that case-law, by obligations undertaken by Member States pursuant to ILO conventions. The Commission adds that the nature of the minimum requirements laid down by [Union] rules in this area, like those arising under ILO conventions, does not exclude this risk.

In its reply to the question put to it by the Court in this regard, the Commission pointed out that the harmonious and gradual improvement in the working environment of all workers in the [Union], as referred to in [Article 153 TFEU], was difficult to reconcile with international obligations assumed by the Member States. This would result in the coexistence of duly enacted [Union] law and partial agreements, a situation which would certainly jeopardize the autonomy of the [Union] legislature.

The Commission notes in this connection that it would not always be possible to bring some of the measures taken under [Article 153 TFEU] into line with rules of ILO conventions, in particular in the case where, under [Article 153(2)(b) TFEU], there is a need to avoid imposing on small and medium-sized undertakings the excessive constraints which the implementation of such conventions might entail.

The Commission also notes that under obligations assumed within the ILO Member States might be seriously hampered in adopting provisions better fitted to the [Union]'s social and technical development. The Commission points out in this connection that it is possible to denounce ILO conventions only once every ten years.

According to the Commission, the [Union] has exclusive competence to conclude an international agreement only if the [Union] rules substantially cover the area which is the subject-matter of such an agreement. This is so in the present case, since the area governed by Convention No 170 is already covered by several directives adopted not only on the basis of [Article 153 TFEU], but also on the

basis of [Articles 115 and 114 TFEU].

In the Commission's opinion, the duty to consult employers' and workers' representatives, which follows from Article 3 of Convention No 170, amounts to a procedural rule, compliance with which may be ensured by the [Union]. A tripartite body, the Advisory Committee on Safety, Hygiene and Health Protection at Work (established by Council Decision 74/325/EEC of 27 June 1974, OJ 1974 L 185, p. 15), is in any event always consulted when [Union] measures are being prepared in the area covered by the Convention. The Commission takes the view that the provisions of Convention No 170 which are not the subject of [Union] rules deal with ancillary aspects of safety at work.

The Commission concludes by pointing out that if the [Union] experiences difficulty in exercising its exclusive competence within the ILO, the Member States have a duty to act jointly in the interest and on behalf of the [Union].

The Greek Government also takes the view that the [Union] enjoys exclusive competence to conclude Convention No 170. It notes in this regard that all the provisions of the Convention deal with the protection of workers, an objective which comes within the scope of [Article 153 TFEU] and which has already led to the adoption of twelve directives. The Greek Government, however, also believes that the Court should examine the general system for concluding and ratifying ILO conventions and, in particular, the question whether the [Union] may draft, sign, approve and ratify such conventions on behalf of the Member States.

The Council and the German, Spanish, Danish, French, Irish, Netherlands and Belgian Governments take the view that the competence to conclude Convention No 170 belongs jointly to the [Union] and the Member States.

For the purpose of demonstrating that the [Union] does not have exclusive competence in the area, the German, Spanish and Irish Governments point out that the paragraphs in the AETR judgment referred to by the Commission above relate only to the case where the [Union] acts within the framework of a common policy. That is not the case with regard to rules adopted on the basis of [Article 153 TFEU]. Social policy continues primarily to be a matter for the Member States.

The Spanish Government, for its part, takes the view that the directives adopted

pursuant to [Articles 115 and 114 TFEU] cannot be relied on in the present context in view of the fact that they relate to objectives and areas other than those of social policy.

For the Council and the Danish, French, Netherlands and Belgian Governments, the rules adopted on the basis of [Article 153 TFEU] cannot be affected, within the meaning of the AETR judgment, by an ILO convention concluded by Member States in the area covered by those rules. They note in this regard that those rules constitute minimum requirements ([the second indent of Article 153(4) TFEU]) in the same way as the provisions of ILO conventions (Article 19(8) of the ILO Constitution). Consequently, common rules could be affected only if the [Union] decided to introduce less stringent conditions than the international conditions, without giving Member States the opportunity to adopt provisions affording greater protection. This cannot be the case in the area under consideration precisely in view of [the second indent of Article 153(4) TFEU].

The Council and the German and Danish Governments take the view that in any case the [Union] lacks competence to assume obligations in areas which come under the tripartite consultation procedure provided for under Articles 3 and 4 of Convention No 170. Member States alone, they argue, are competent in this respect.

The Council considers that the same holds true with regard to the obligation to have a coherent policy on safety in the use of chemicals at work, provided for under Article 4 of the Convention, and the implementation of Article 5, that is to say, the attribution of the powers referred to in that provision to the competent national authorities.

The United Kingdom points out that the [Union]'s competence in the area of social policy differs from that which it exercises in the area of transport policy dealt with in the AETR judgment and that the nature of the rules adopted on the basis of [Article 153 TFEU] (minimum rules) cannot justify any external competence on the part of the [Union]. [The first sentence of Article 352 TFEU] alone can justify such a competence in that area.

Finally, the French Government expresses the view that, in any event, Member

States alone are competent to conclude Convention No 170 for the purpose of defending the interests of overseas departments or territories in view of the fact that the area covered by the Convention falls completely outside that assigned to the association scheme established under the [FEU] Treaty.

The Danish, Spanish, French, Irish and Netherlands Governments draw the Court's attention to the difficulties which the organization and operation of the ILO represent for the exercise by the [Union] of the competence to conclude a convention within the framework of that organization. Their position may be summarized as follows.

The [Union] has simple observer status. Although it may participate in deliberations, the ILO Constitution does not confer on it a right to vote (Article 12(2)). In addition, Article 15(5)(d) of the Constitution makes it clear that Member States alone may ratify an ILO convention. Ireland points out in this connection that the question whether Member States may validly delegate to the [Union] the power to ratify an ILO convention on their behalf raises a number of problems of public international law and, in particular, that of where responsibility would lie in the event that Member States fail to honour their commitments.

The operation of the ILO, based as it is on tripartitism, also constitutes an obstacle to the exercise of exclusive competence by the [Union]. The arguments relied on in this connection coincide substantially with those set out by the German Government regarding the admissibility of the request.

Finally, a number of Governments point out that the procedure to be followed by the [Union] for the purpose of concluding an ILO convention, as defined by the above Council decisions of 22 December 1986 and 30 November 1989, presupposes, for it to be applicable, prior approval by the ILO authorities. That approval has not been given hitherto.

The reasoning of the Court

I -The admissibility of the request for an opinion

1 The German Government contests the admissibility of the request for an opinion submitted by the Commission pursuant to [Article 218 (1) to (8), (11) TFEU]. The Netherlands Government also expresses doubt as to the admissibility of that request. According to those Governments, the procedure set out in that article is intended only for the examination of the compatibility with the Treaty of an agreement the conclusion of which is envisaged between the [Union] and one or more States or an international organization. The present request, they submit, relates to the [Union]'s competence to conclude a convention which is capable of being ratified only by Member States of the ILO and not by the [Union], which is not a Member of that international organization.

2 Those arguments cannot be accepted.

3 The Court has consistently held (Opinion 1/75 [1975] ECR 1355; Opinion 1/76 [1977] ECR 741; Ruling 1/78 delivered pursuant to Article 103 of the EAEC Treaty [1978] ECR 2151; and Opinion 1/78 [1979] ECR 2871) that it is possible under the procedure set out in [Articles 218(1) to (9), (11) and 216(2) TFEU], as under that set out in Article 103 of the EAEC Treaty, to consider all questions concerning the compatibility with the provisions of the Treaty of an agreement envisaged, and in particular the question whether the [Union] has the power to enter into that agreement. That interpretation is confirmed by Article 107(2) of the Rules of Procedure of the Court.

4 It follows that the request for an opinion does not concern the [Union]'s capacity, on the international plane, to enter into a convention drawn up under the auspices of the ILO but relates to the scope, judged solely by reference to the rules of [Union] law, of the competence of the [Union] and the Member States within the area covered by Convention No 170. It is not for the Court to assess any obstacles which the [Union] may encounter in the exercise of its competence because of constitutional rules of the ILO.

5 In any event, although, under the ILO Constitution, the [Union] cannot itself

conclude Convention No 170, its external competence may, if necessary, be exercised through the medium of the Member States acting jointly in the [Union]'s interest.

6 The conditions laid down in [Article 218 (11) TFEU] have therefore been satisfied and the request is consequently admissible.

II - The substance

7 Before examining whether Convention No 170 falls within the scope of the Community's competence and whether the [Union]'s competence is exclusive, the Court must point out that, as it stated in particular in paragraph 3 of Opinion 1/76, cited above, authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions. The Court concluded, in particular, that whenever [Union] law created for the institutions of the [Union] powers within its internal system for the purpose of attaining a specific objective, the [Union] had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection. At paragraph 20 in its judgment in Joined Cases 3, 4 and 6/76 *Kramer and Others* [1976] ECR 1279, the Court had already pointed out that such authority could flow by implication from other measures adopted by the [Union] institutions within the framework of the Treaty provisions or the acts of accession.

8 The exclusive nature of the [Union]'s competence has been recognized by the Court with respect to [Article 207 TFEU] (Opinion 1/75, cited above; judgment in Case 41/76 *Donckerwolke and Schou v Procureur de la Republique* [1976] ECR 1921, paragraph 32) and to Article 102 of the Act of Accession (judgment in Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paragraphs 17 and 18). It follows from that line of authority that the existence of such competence arising from a Treaty provision excludes any competence on the part of Member States which is concurrent with that of the [Union], in the [Union] sphere and in the international sphere (see Opinion 1/75 above).

9 The exclusive or non-exclusive nature of the [Union]'s competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the [Union] institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis. As the Court stated at paragraph 22 in its judgment in Case 22/70 *Commission v Council* [1971] ECR 263 (the *AETR* judgment), where [Union] rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the [Union] institutions, assume obligations which might affect those rules or alter their scope.

10 Contrary to the contentions of the German, Spanish and Irish Governments, the authority of the decision in that case cannot be restricted to instances where the [Union] has adopted [Union] rules within the framework of a common policy. In all the areas corresponding to the objectives of the Treaty, [the second and third paragraphs of Article 4(3) TEU] requires Member States to facilitate the achievement of the [Union]'s tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.

11 The [Union]'s tasks and the objectives of the Treaty would also be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or of altering their scope.

12 Finally, an agreement may be concluded in an area where competence is shared between the [Union] and the Member States. In such a case, negotiation and implementation of the agreement require joint action by the [Union] and the Member States (judgment in *Kramer,* cited above, paragraphs 39 to 45, and Opinion 1/78, cited above, paragraph 60).

III

13 It is necessary to bear in mind the foregoing when examining the question whether

Convention No 170 comes within the [Union]'s sphere of competence and, if so, whether that competence is exclusive in nature.

14 Convention No 170 concerns safety in the use of chemicals at work. According to the preamble, its essential objective is to prevent or reduce the incidence of chemically induced illnesses and injuries at work by ensuring that all chemicals are evaluated to determine their hazards, by providing employers and workers with the information necessary for their protection and, finally, by establishing principles for protective programmes.

15 The field covered by Convention No 170 falls within the 'social provisions' of the [Treaty on the Functioning of the European Union] which constitute [Title X] on social policy.

16 Under [Article 153 TFEU], Member States are required to pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and to set as their objective the harmonization of conditions in this area, while maintaining the improvements made. In order to help achieve this objective, the Council has the power to adopt minimum requirements by means of directives. It follows from [the second indent of Article 153(4) TFEU] that the provisions adopted pursuant to that article are not to prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with the Treaty.

17 The [Union] thus enjoys an internal legislative competence in the area of social policy. Consequently, Convention No 170, whose subject-matter coincides, moreover, with that of several directives adopted under [Article 153 TFEU], falls within the [Union]'s area of competence.

18 For the purpose of determining whether this competence is exclusive in nature, it should be pointed out that the provisions of Convention No 170 are not of such a kind as to affect rules adopted pursuant to [Article 153 TFEU]. If, on the one hand, the [Union] decides to adopt rules which are less stringent than those set out in an ILO convention, Member States may, in accordance with [the second indent of Article 153(4) TFEU], adopt more stringent measures for the protection of working

conditions or apply for that purpose the provisions of the relevant ILO convention. If, on the other hand, the [Union] decides to adopt more stringent measures than those provided for under an ILO convention, there is nothing to prevent the full application of Com- munity law by the Member States under Article 19(8) of the ILO Constitution, which allows Members to adopt more stringent measures than those provided for in conventions or recommendations adopted by that organization.

19 The Commission notes, however, that it is sometimes difficult to determine whether a specific measure is more favourable to workers than another. Thus, in order to avoid being in breach of the provisions of an ILO convention, Member States may be tempted not to adopt provisions better suited to the social and technological conditions which are specific to the [Union]. The Commission there- fore takes the view that, in so far as this attitude risks impairing the development of [Union] law, the [Union] itself ought to have exclusive competence to conclude Convention No 170.

20 That argument cannot be accepted. Difficulties, such as those referred to by the Commission, which might arise for the legislative function of the [Union] can- not constitute the basis for exclusive [Union] competence.

21 Nor, for the same reasons, can exclusive competence be founded on the [Union] provisions adopted on the basis of [Article 115 TFEU], such as, in particular, Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work (OJ 1980 L 327, p. 8) and individual directives adopted pursuant to Article 8 of Directive 80/1107, all of which lay down minimum requirements.

IV

22 A number of directives adopted in the areas covered by Part III of Convention No 170 do, however, contain rules, which are more than minimum requirements. This is the case, for instance, with regard to Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative

practices relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967, p. 234), adopted pursuant to [Article 115 TFEU] and amended by, *inter alia,* Directive 79/831/EEC of 18 September 1979 (OJ 1979 L 259, p. 10) and Directive 88/379/EEC of 7 June 1988 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ 1988 L 187, p. 14), adopted pursuant to [Article 114 TFEU].

23 Those directives contain provisions which in certain respects constitute measures conferring on workers, in their conditions of work, more extensive protection than that accorded under the provisions contained in Part III of Convention No 170. This is so, in particular, in the case of the very detailed rules on labelling set out in the abovementioned Directive 88/379.

24 The scope of Convention No 170, however, is wider than that of the directives mentioned. The definition of chemicals (Article 2(a)), for instance, is broader than that of products covered by the directives. In addition (and in contrast to the pro- visions contained in the directives), Articles 6(3) and 7(3) of the Convention regulate the transport of chemicals.

25 While there is no contradiction between these provisions of the Convention and those of the directives mentioned, it must nevertheless be accepted that Part III of Convention No 170 is concerned with an area which is already covered to a large extent by [Union] rules progressively adopted since 1967 with a view to achieving an ever greater degree of harmonization and designed, on the one hand, 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.

26 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 [Union] rules laid down in those directives and that consequently Member States cannot under- take such commitments outside the framework of the [Union] institutions.

V

27 Part II of Convention No 170 contains general principles relating to its implementation; these are set out in Articles 3, 4 and 5.

28 In so far as it has been established that the substantive provisions of Convention No 170 come within the [Union]'s sphere of competence, the [Union] is also competent to undertake commitments for putting those provisions into effect.

29 Article 3 requires that the most representative organizations of employers and workers should be consulted on the measures to be taken to give effect to the provisions of Convention No 170. Article 4 provides that each Member must, in the light of national conditions and practice and in consultation with those organizations, formulate, implement and periodically review a coherent policy on safety in the use of chemicals at work.

30 Admittedly, as [Union] law stands at present, social policy and in particular cooperation between both sides of industry are matters which fall predominantly within the competence of the Member States.

31 This matter, has not, however, been withdrawn entirely from the competence of the [Union]. It should be noted, in particular, that, according to [Articles 154 and 155 TFEU], the Commission is required to endeavour to develop the dialogue between management and labour at European level.

32 Consequently, the question whether international commitments, whose purpose is consultation with representative organizations of employers and workers, fall within the competence of the Member States or of the [Union] cannot be separated from the objective pursued by such consultation.

33 Article 5 of Convention No 170 requires that the competent authority is to have the power, if justified on safety and health grounds, to prohibit or restrict the use of certain hazardous chemicals, or to require advance notification and authorization before such chemicals are used.

34 As to that, even if the competent authority referred to in that article is an authority of one of the Member States, the [Union] may nevertheless assume the aforementioned obligation for external purposes. Just as, for internal purposes, the [Union] may provide, in an area covered by [Union] rules, that national authorities are to be given certain supervisory powers (see in particular Article 4 of Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work, OJ 1980 L 327, p. 8, cited by the Council), it may also, for external purposes, undertake commitments designed to ensure compliance with substantive provisions which fall within its competence and imply the attribution of certain supervisory powers to national authorities.

VI

35 Finally, as the French Government has observed, the substantive scope of the Convention lies outside the scope of the association scheme for overseas countries and territories and consequently, as the Court observed at points 61 and 62 of Opinion 1/78, cited above, it is for the Member States, which are responsible for the inter- national relations of those territories and which represent them in that regard, to conclude the Convention in question.

VII

36 At points 34 to 36 in Ruling 1/78 [1978] ECR 2151, the Court pointed out that when it appears that the subject-matter of an agreement or contract falls in part within the competence of the [Union] and in part within that of the Member States,

it is important to ensure that there is a close association between the institutions of the [Union] and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the [Treaty on the Functioning of the European Union] since it results from the requirement of unity in the international representation of the [Union].

37 In this case, cooperation between the [Union] and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States.

38 It is therefore for the [Union] institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention No 170 and in the implementation of commitments resulting from that Convention.

VIII

39 It follows from all the foregoing considerations that the conclusion of ILO Convention No 170 is a matter which falls within the joint competence of the Member States and the [Union].

In conclusion,

THE COURT

composed of:

gives the following opinion:

The conclusion of ILO Convention No 170 is a matter which falls within the joint competence of the Member States and the [Union].

Due	Kakouris	Rodriguez Iglesias
President	President of Chamber	President of Chamber
Zuleeg	Murray	Mancini
President of Chamber	President of Chamber	Judge
Joliet	Schockweiler	Moitinho de Almeida
Judge	Judge	Judge
Grevisse		Diez de Velasco
Judge		Judge
Kapteyn		Edward
Judge		Judge

Luxembourg, 19 March 1993.

J.-G. Giraud
Registrar