INTRODUCTION

The International Labour Organisation, with less formal powers, but strong management capacities and a direct link to employers and workers associations is at least as good to ensure compliance with international labour standards at enterprise level as the European Union.2

The theme of the present study is the critical assessment of the traditional perception of the relationship between the International Labour Organisation (ILO)3 and the European Union (EU), as that is expressed in the opening quote. There is a pragmatic need to revisit the debate that concentrates on the dynamics of the relationship between these two legal regimes, because of the substantive impact that modern phenomena have had on the evolution of labour rights. Those phenomena relate primarily to the coming of the modern era of

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internationalisation and globalisation that has introduced the beginning of a fresh phase of intense transformation for the regime of labour rights.\textsuperscript{4} The essence of the new developments is characterised by the need to rebalance economic considerations that are related to employment with the human rights dimension of labour standards. As a corollary, it becomes imperative to assess the effect of those influences on the relationship between the ILO and the EU.

The exegesis of the current state of labour rights is founded on the working hypothesis that there is a dynamic system connecting different legal organisations that interact and interpenetrate in order to contribute to the evolution of the corpus of labour rights. At the epicentre of the process of transformation is the relationship between the ILO and the EU. It is, therefore, essential to engage in the analytical assessment of the relationship between these two legal regimes that represent the epitome of the impact that globalisation phenomena have on the formation, interpretation and enforcement of labour standards.

The stepping stone for introducing the purposes and methodological targets of this paper is the description of the parameters of the relationship between the ILO and the EU that will form the field of analysis. An essential component of the framework of study is the narrowing of the thematic focus to the examination of the specific area of equal remuneration.\textsuperscript{5} Nonetheless, it must be clarified that equal pay is inherently linked with the broader concept of non-discrimination, thus certain parameters that have an impact on the development of the principle of equal pay at work will be examined. The second integral component of the framework of study refers to the adoption of the methodological perspective of the enforcement capacity of the two legal regimes.\textsuperscript{6} The enforcement capacity is approached as a generic term that is directly linked with the concept of compliance. Naturally, it is acknowledged that the formation of norms and the creation of legislative measures are essential aspects of the enforcement processes and influence the scope and character of legal systems that operate in parallel.


To sum up, the enforcement capacity of the ILO and the EU in relation to combating discrimination in pay form the framework of operation of the present study, while the working hypothesis is that between the two systems there is mutual interaction and interpenetration.

Needless to say, there is a plethora of pre-existing analytical accounts that have undertaken a similar task. The monitoring and improvement of the compliance rate by national authorities with the numerous standards established by the ILO and the EU has resulted in the systematic comparison of the two systems,7 with the broad consensus endorsing the view that the EU has been more effective in inducing compliance8 because of the existence of a strong legal enforcement network dominated by the European Court of Justice (ECJ)9 and complemented by the European Commission’s role as watchdog10 of the 1957 EC Treaty11 and by specific legal provisions12 contained therein, coupled with constitutional principles empowering the individual to act as enforcer of State obligations.13

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13 On Direct Effect see De Witte, B., “Direct Effect, Supremacy and the Nature of the Legal Order,” in Craig and...
Nonetheless, it has been argued that it is counterproductive to compare the two legal regimes with the objective of stressing the enforcement superiority of the legal procedures of the EU over the enforcement mechanisms available under the ILO rules. The unsuitability of such a comparison is to be found in the lack of an appreciation for the differing objectives of the two systems and in an oversimplified analysis of the complementary relationship between the ILO and the EU in the setting of norms to be implemented by national entities. It is the essence of the relationship between the ILO and the EU and the deeper understanding of the nature and types of enforcement mechanisms that aim to promote national compliance that must operate as the bases for the repositioning of the debate.

Therefore, the purpose of the study is threefold: to offer a descriptive account of the enforcement mechanisms utilised by the ILO and the EU; to create an explanatory rationale for the interrelationship between the two legal systems; and to assess whether the converging and diverging enforcement characteristics can be reconciled within an exegetical account of enforcement as a process.

In response to the title, it is submitted that the two systems exist in parallel and have different objectives and enforcement mechanisms at their disposal, but there is now a state of coexistence through the circulation and movement of labour standards. The ILO has been setting the minimum requirements and the EU has incorporated the essence of those standards when forming the regional framework of legislative regulations. Therefore, there is a circle in which both the ILO and the EU are participating and it includes the stages of norm formation, transition to binding effect of those norms, and enforcement. The segments of the circle are not autonomous, since the ILO has functioned as the source for minimum benchmarks for the EU, thus the presence of the ILO is continuous at both levels. In terms of enforcement, there are types of tactics that form a spectrum that includes enforcement proper, supportive management, and soft persuasion. This spectrum is the second bridging element between the ILO and the EU, and points to the existence of all three shades of enforcement in both systems but in different degrees of intensity. Nonetheless, at the EU level, the availability of more stringent legal enforcement provisions has been used to create a web of protection for equal pay that is unparalleled at the ILO level, with the ECJ taking a proactive role in its


14 Hartlapp, *op. cit.*, note 6, at p. 2; Hartlapp, *op. cit.*, note 1, at p. 1.


judicial decisions to contribute to the formation of that conclusion. It is, therefore, submitted that it is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as non-existent. Rather, an intermediate state exists that takes the form of interpenetration\textsuperscript{17} of standards and degrees of enforcement.

In terms of structure, the paper is divided into three parts. The first section focuses on the theoretical approaches to enforcement as a concept, in order to create the theoretical basis for the repositioning of the debate that focuses on the relationship between the ILO and the EU. The advantage of that methodological approach relates to the introduction of the innovative element of a theoretical rationale that has been absent in the pre-existing assessments of the relationship between the ILO and the EU. In that respect, the present study departs from methodological orthodoxy and remedies the unsystematic character of the debate thus far. The second section concentrates on the descriptive analysis of the mechanisms of enforcement applied by the ILO and the advantages and shortcomings of that system. Moreover, the impact of the 1998 ILO Declaration on Fundamental Principles and Rights at Work\textsuperscript{18} on the state of the law on discrimination in pay is examined in order to reach a conclusion as to the possible impact it has had. The third section turns to the EU’s enforcement methods with the emphasis being placed on the work of the ECJ in the field of discrimination in pay and the related fields of social security contributions and affirmative action.

In conclusion, the present study introduces certain novel elements to the study of the relationship between the enforcement mechanisms of the ILO and the EU aiming to combat discrimination in pay. These elements include the adoption of the working hypothesis of interaction and interpenetration between the legal regimes, the introduction of a theoretical foundation that revisits the different facets of enforcement, and the realisation that different tasks and purposes are fulfilled by the ILO and the EU. The degree of success of both legal regimes in creating those conditions that would ensure the equality in pay in the field of employment is a complex matter that cannot be answered accurately, due to the different and subjective expectations of the assessor. What can be argued is that it is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete; a middle state exists that takes the form of


interpenetration of standards and degrees of enforcement. The aforementioned themes form the skeleton of analysis in the following sections.

1. The Concept of Enforcement: Theoretical Perspectives and its Role as Analytical Yardstick

1.1 Compliance and Enforcement: Two Sides of the Same Coin?

The relationship between the ILO and the EU in the light of their attempts to combat employment discrimination in pay has traditionally centred round the adoption of a comparative efficiency yardstick that attempts to measure the degree of compliance of State actors with the norms created by the two organisations.19 The orthodox approach sees the issue of compliance as being inherently linked with the concept of enforcement, thus implying that, originally, there was a lack of compliance on behalf of the State that triggered those procedures of the ILO and the EU designed to induce compliance by the defaulting State.20 In other words, enforcement follows lack of compliance in order to finally ensure the objective of compliance. Moreover, enforcement is construed as a deterrent, thus having a prospective dimension that pre-empts lack of future compliance.

The compliance of States with legal obligations created at the international level and by bodies that are often supranational in nature, as is the case mainly with the EU, has created numerous problems especially in view of the domination of the principle of legalisation.21 This principle sees norm creation as the amalgam of political initiatives forming the core of the created norms and their actual definition and procedural parameters as creating the subsidiary element of “legal consequences requiring compliance.”22 In other words, the process of norm creation at the supranational level, whether at the ILO or the EU level, and the monitoring of the compliance by the States form part of the assessment of the relationship between the ILO and the EU.

20 Hartlapp, M., op. cit., note 1, at p. 2.
The ILO and the EU have been described by Zangl and Zürn as “having reached a high degree of legalisation,” thus creating the need for examining the reception of that intense legalisation and the subsequent compliance of States with the norms created. The issues of reception and reaction by States form the starting point for reaching an understanding of the concept of compliance, since there is the practical issue of an external body in the form of the supranational organisation, creating – through different processes – measures that have different types of binding effect upon States. It is the immediate aftermath of the adoption of the different norms that is the focal point of analysis, in the sense that compliance by States can take different forms that range from mere observance of the requirements of the norm, to the exercise of discretionary powers in the form of taking implementing measures that have the purpose of adhering to the objective of the norm created at the supranational level. Therefore, the issue of compliance is a complex concept that depends on the nature of the legislative norm and the requirements it imposes on the State as well as on the powers delegated to the State for ensuring compliance with the requirements of the measure.

In summary, the relationship between the ILO and the EU when approached from the perspective of mechanisms that have the purpose of combating discrimination in pay must be seen as a bi-dimensional matter. One dimension relates to the norm creation/standard setting at the supranational level and the reception of the norms. The second dimension refers to the reaction of States to those norms. In more detail, compliance is in effect the resultant of action and reaction taking place in two phases. In the first phase and at the level of the supranational body where the norm creation takes place, there is the action element that then triggers a reaction at the national level that is required to comply with the set norm. In the second action/reaction phase, the national level has to act in order to comply, whether by merely following the requirements of the norm or by taking implementing measures (action stage). At the supranational level of phase two, the organisation would react through monitoring State action and, if necessary, it would trigger those enforcement procedures designed to induce compliance (reaction stage). Moreover, the reaction of States is equated primarily with the practical matter of compliance that must in turn be approached from the point of view of the procedural form of the norm. In other words, the norm could create an immediate obligation that must be complied automatically, akin to the legal effect of regulations at the EU level, and which requires no further implementing action by the State. Alternatively, there is also the

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The possibility of the norm setting a task for the States by establishing a binding objective that needs to be given legal effect through implementing measures taken by the State, as is the case with the legal effect of directives at the EU level.

Consequently, the concept of compliance has a complex nature that cannot be automatically equated with the concept of enforcement, if the latter is defined in terms of sanctioning powers aiming to trigger compliance. However, if the concept of enforcement is broadened to include the task of triggering compliance, then enforcement must be seen as a broader phenomenon and can possess elements of persuasion and delegation that could prove more productive than the sanctioning process. It is in this multidimensional manner that the comparison between the ILO and the EU as regards combating discrimination in pay must be approached, since the idea of combating discrimination can have a wider scope that facilitates compliance in conjunction with imposing sanctions after the failure to comply has taken place.

The aforementioned reasoning that distinguishes between norm creation, compliance, and degree of discretion delegated to States provided the foundation for Hartlapp to present a descriptive pattern that identifies three different types of enforcement: sanctioning enforcement, management, and persuasion. These three variations will now be analysed in turn.

1.2 Three Variants of Enforcement: Moving Beyond Sanctioning

The enforcement approach stems from the utilitarian ideas of rational calculating actors that estimate the cost-benefit of non-compliance and determine whether to comply with the obligations set on the basis of the assessment of possible sanctions flowing from non-compliance. Based on this line of reasoning, international bodies that possess significant enforcement powers that include sanctioning of failure to comply with the set norms, are assumed to be in an advantageous position to ensure compliance. It is this view that has formed the foundation for the majority of analyses focusing on the enforcement power of the ILO and EU, and it this specific angle that has been criticised as presenting a distorted and mono-dimensional picture of the concept of enforcement. In other words,

27 Hartlapp, *op. cit.*, note 2, at p. 3.
29 Hartlapp, *op. cit.*, note 2, at p. 3.
compliance has been equated with the enforcement mechanisms available to the supranational body that created the norm for imposing compliance on the State primarily through sanctions.

A second variant of enforcement has been proposed in the form of the **management method** that perceives failures to comply with norms set by international organisations as a corollary of “financial, administrative or technical shortcomings due to lack of resources or expertise, not to opposition to norms.” Therefore, if non-compliance is the result of lack of resources and expertise, then the imposition of sanctions would be counterproductive in ensuring compliance. If this perspective is adopted, then the enforcement mechanisms of the ILO can be seen in a different light and this point will be made when those mechanisms are considered **infra**.

The third variant is coined **persuasion** and it stresses that “compliance with norms is not achieved via instrumental influence, but by recognition of norms following a logic of appropriateness” to which a State responds. Therefore, the logic is to convince the State that it is appropriate and aligned to its interest to comply, thus triggering the response of that State. On this basis, the pragmatic aspects of enforcement are reflected, since the persuasion element can be seen as inherent in the negotiating processes that take place during the adoption of norms and in latter stages when the organisation tries to ensure compliance with avoidance of resorting to sanctions.

The meaning of enforcement that this paper refers to consists of the three aforementioned elements of enforcement, management, and persuasion, thus offering a holistic perception of the term enforcement. For purposes of clarity, and in order to avoid terminological confusion, enforcement would be the generic label that includes enforcement proper, supportive management, and soft persuasion. The three terms have been supplemented with the descriptive subtexts of proper, supportive, and soft in order to ensure that the meaning of each term is explained through the label.

31 Hartlapp, *op. cit.*, note 2, at p. 3.
33 See Section 2.
34 Hartlapp, *op. cit.*, note 2, at p. 3.
36 Hartlapp, *op. cit.*, note 2, at pp. 3-5.
1.3 Why the Expanded Meaning of Enforcement?

The advantage of offering the preceding brief theoretical analysis is conceptually and methodologically significant, since perceptions of enforcement in the contexts of the ILO and the EU have omitted to draw this trichotomy that would now provide the yardstick for assessing the effectiveness of the enforcement mechanisms of each system. The comparison of the two systems on the basis of enforcement as sanctioning would result in the formation of a distorted picture that would practically reflect the procedural superiority of the EU in ensuring compliance. The legal procedures taking the form of infringement actions and primarily the use of individuals as enforcers of EU law, in conjunction with the existence and operation of the ECJ that has the jurisdiction to deliver binding judgments, would essentially point to the superiority of the EU’s enforcement system. In contrast, the ILO’s reporting procedures are not effectively a counterweight to the ECJ, but there could be a different type of significance attributed to the tripartite system of the ILO that encourages compliance and essentially supports and facilitates compliance through support mechanisms.

Additionally, the expanded version of the concept of enforcement allows for the meaningful analysis and description of the basic characteristics of the ILO and the EU that would not be otherwise possible if the focus was on sanctioning. The similarities between the two legal regimes especially in terms of delegating powers to States have not thus far supported analyses that attempted a broader comparison. A holistic understanding of the characteristics, strengths, and weaknesses of the ILO and the EU would surely “contribute to a better understanding of the partial success or failure of policy implementation by States.”

In conclusion, the theoretical repositioning of the concept of enforcement that is in effect more aligned to compliance by States with the norms set by the ILO and the EU, offers the methodological tool that enables the more accurate comparison of the mechanisms available under the two legal regimes for combating pay discrimination or for ensuring the protection of any other labour right. In Alter’s words, “it would be silly for an international organisation not to use all of these levers to encourage compliance.” It would also be misleading for the analyst to ignore these levers when describing and assessing the mechanisms at the disposal

37 See infra, Section 3.
38 See infra, Section 2.
41 Hartlapp, op. cit., note 2, at p. 2.
42 Alter, op. cit., note 12, at p. 56.
of the ILO and the EU, to which the next section turns.


2.1. General Background: The Origins, the Constitution and the Organs of the ILO

The historical origins of the ILO can be traced back to the founding document of the ILO that was Part XIII of the 1919 Peace Treaty of Versailles. The driving ideas, principles, and objectives of the ILO are both summarised and reflected in the preamble to the ILO Constitution: “[U]niversal and lasting peace can be established only if it is based upon social justice.” The driving ambition of the organisation has been the creation of those conditions that would facilitate the existence of enduring peace through the removal of unfair working conditions. The rationale stated that the fragile peace settlement after the First World War could be further endangered if there was minimal improvement of the conditions in such areas as the regulation of working hours, the prevention of unemployment, the provision of an adequate living wage, the protection of certain groups of workers, and the principle of the freedom of association. In May 1944, the 26th Session of the International Labour Conference adopted a Declaration Concerning the Aims and Purposes of the International Labour Organisation and the principles which should inspire the policy of its Members. Known as the Declaration of Philadelphia, it reaffirmed the essence and broadened the scope of the principles and responsibilities of the ILO in the field of social policy as laid down in the original Constitution. The importance of the Philadelphia Declaration remains paramount in both symbolic and practical terms since it is annexed to, and part of, the ILO Constitution, thus forming an integral part of the regulatory system.

Needless to say, the setting of labour standards has been promoted long before the establishment of the ILO, while the factors that created a negative feeling towards the

49 Art. 1 (1) ILO Constitution.
internationalisation of labour standards were associated with disbelief as to whether it was practically possible to monitor and to enforce such standards. The breakthrough came in the form of the ILO, even if the monitoring concerns remain until today, due to the realisation that the lack of universally applicable labour standards created an inequality between States that granted a competitive advantage to those that failed to adhere to the minimal labour standards requirements. Therefore, the background ideology to the ILO is an amalgam of concerns about the rights of workers, concerns about fair competition, and concerns about monitoring.

Once again, the preamble to the ILO Constitution mirrors those concerns by stating: “Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”

The main organs of the ILO are the annual General Conference, the Governing Body, and the International Labour Office. An important function is performed by the International Labour Office headed by a Director-General, with regional representation and numerous officers that in effect form the bureaucratic and technocratic backbone of the ILO. The Conference is the most important body and consists of representatives of all 178 States which are currently members and comprises Government, Employers’ and Workers’ delegates, an arrangement coined as tripartite. The voting process is based on the tripartite arrangement that provides for each country to have two Government delegate seats, one Employers’ delegate seat and one Workers’ delegate seat. Therefore, the votes are distributed equally, with a balance between the State votes and the employers’ and workers’ votes taken as a unit.

Finally, the understanding of the tripartite arrangement is dependent on the realisation that the epitome of the ILO structure is the independence of the delegates from their national identity. In other words, the delegates approach issues by transcending national boundaries and with the interests of the class they represent rather than national interests. At least, that is the ideal situation, but as will be shown infra, that is not always the case.

52 Wisskirchen, op. cit., note 5, at p. 255.  
54 Art. 2 ILO Constitution.  
56 Art. 7 ILO Constitution.
In terms of procedure, the ILO’s main quest was the groundwork and adoption of international labour standards that took the form of Conventions and Recommendations. Currently, there is an official corpus of 185 Conventions and 195 Recommendations.\(^{57}\)

The formal procedure for adoption starts with the Governing Body placing the examination of a specific question on the agenda of a forthcoming International Labour Conference and then naming different preliminary actions that would contribute to the promotion of the identified matter. After consultation with States and delegates representing the employers and employees, a preliminary draft is produced, which is given a first reading and possibly amended during the International Labour Conference by a technical committee set up to deal with the matter. A second reading normally follows the next year, in the course of which the competent committee establishes the formal character of the standard (a Convention or a Recommendation). The final adoption of a Convention or Recommendation requires a two-thirds majority of the votes cast by the delegates present.\(^{58}\)

Conventions become binding on every State which has ratified them, while the issue of ratification naturally remains within the constitutional jurisdiction of the States and their respective rules contained therein. In relation to the nature of implementation at State level, according to Art. 19 (5) (d) ILO Constitution, a Member must inform the Director-General of ratification and “will take such action as may be necessary to make effective the provisions of such Convention.” Therefore, the effectiveness of implementing measures is monitored in order to remove the possibility, at least in theory, of consenting to measures that are not given effect at the national level during the stage of exercising the discretion in the form of adopting implementing measures. In contrast, Recommendations cannot be ratified and remain non-binding \textit{stricto sensu}.\(^{59}\)

The preceding general and selective description of the main organisational and procedural features of the ILO is intended to operate as the introductory step needed for forming a general understanding of the broader workings of the organisation prior to concentrating on the specific theme of equal pay.

\(^{57}\) \textless http://www.ilo.org/ilolex/english/convdisp1.htm\rangle; \textless http://www.ilo.org/ilolex/english/recdisp1.htm\rangle.

\(^{58}\) Art. 19 (2) ILO Constitution.

\(^{59}\) Wissskirchen, \textit{op. cit.}, note 5, at pp. 256-58.
2.2 General Background: The ILO and Equal Pay

Its long history, extensive membership, and the plethora of Conventions and Recommendations it adopted, position the ILO at the forefront of establishing labour norms. Central to the theme of this paper are the Equal Pay Convention (No. 100) and Recommendation (No. 90), adopted in 1951, but the most useful insight into the state of the law is to be found in the General Survey by the Committee of Experts on the Application of Conventions and Recommendations. Adherence to the principle of equal remuneration has been an objective of the ILO since its establishment and was contained in Art. 41 of the ILO Constitution as part of the general principles “of special and urgent importance that men and women should receive equal remuneration for work of equal value.” The principle is again enshrined in the preamble to the present Constitution and consequently in other instruments predating Convention No. 100 and Recommendation No. 90.

During the negotiations for the adoption of Convention No. 100, equal pay was acknowledged as a prerequisite and material precondition for placing the status of men and women in a horizontal relationship. The significance of the principle of equal remuneration had also been recognised at the international level through Art. 23 of the Universal Declaration of Human Rights 1948 and Art. 7 of the International Covenant on Civil and Political Rights 1966, and at the regional level through Art. 141 (former Art. 119) of the 1957 EC Treaty, Art. 4 of the European Social Charter 1961, and the African Charter on Human and People's Rights 1981.

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66 Article 427 of the Treaty of Versailles, ibid., para. 3.
67 Ibid.
71 General Survey, op. cit., note 34, at para. 4.
72 Ibid., para. 5.
Turning to the substantive provisions *per se*, Convention No. 100 and Recommendation No. 90 cite numerous instruments to be implemented to promote, ensure, encourage, or facilitate “the application of the principle of equal remuneration for men and women workers for work of equal value.”74 What is focal to this paper is the methods used for the enforcement and monitoring of the principles and measures included in the legal framework.

2.3. The Enforcement Mechanisms of the ILO

The stepping stone for describing the enforcement mechanisms of the ILO must be the principle that ILO Conventions are binding only on those States that ratify them,75 thus in the event of a systematic failure to ratify legal norms, other States could be discouraged from agreeing to ratify Conventions. Therefore, the issue of enforcement of implementation has a practical impact on the legitimacy of the ILO. Inherent in that process is the premise that the ILO sets the minimum standards and leaves the implementation to the discretion of States.76 Therefore, once a Convention has been ratified, the national governments are under an obligation to ensure the proper implementation of the relevant labour standards, thus making the enforcement a crucial parameter.

The enforcement mechanisms of the ILO have been described as unique77 since they fall into two overlapping categories: reporting obligations and adversarial procedures.78

The reporting procedures aim to establish a dialogue between the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the Centres for Corporate Accountability (CCA), and the States, and those procedures take three different forms. Firstly, under Art. 22 ILO Constitution,79 States are required to submit periodical reports on the Conventions they ratified, but nonetheless it must be noted that thirteen States have failed to comply for two or more years with that reporting obligation.80 The CEACR examines conformity with the respective Convention concerned. Secondly, under Art. 19 ILO

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76 Ibid.
77 Hepple, op. cit., note 20, at p. 47.
78 Hepple, op. cit., note 20, at pp. 47-8.
Constitution, Governments may be requested to submit reports explaining the reasons for failing to ratify specific Conventions and describing what steps they are taking through national legislative measures to achieve the objectives of these Conventions. These reports are subsequently analysed by the CEACR in the General Surveys. Thirdly, under Art. 19 ILO Constitution, States are obliged to submit a Convention for ratification to the competent national legislative body and to report on progress, with the CEACR entrusted with the responsibility to examine the reports and give advice.

The CEACR performs an instrumental role in the reporting procedure through reviewing the reports for compliance with the Conventions, making requests for clarifications, by preparing its own report on progress and difficulties in implementing stages, and by issuing observations in situations of ongoing serious violations. The CEACR publishes a general survey annually in which it examines the law in a specific area, irrespective of whether the Convention has been ratified or not. Moreover, the CEACR can decide to attend to a potential problem by submitting a direct request for additional information to States. In addition, there is also the possibility in the yearly meeting of the International Labour Conference when the CCAS reviews the CEACR report, to discuss the specific case of a State and to request explanatory comments on implementation difficulties. The CCAS invites participation in the discussion through requests for comments and adopts conclusions where reference can be made to persistent failures. Finally, for fundamental Conventions there is a compulsory reporting requirement, irrespective of whether the State has ratified that Convention, with the Director-General reviewing and reporting on success and failure, and presenting a scoreboard on implementation for all States.

The second enforcement procedure is quasi-judicial and more adversarial in nature, with representations being submitted under Art. 24 from workers or employers in relation to non-compliance by a State. An ad hoc committee could then be set up by the Governing Body to examine the complaint and make recommendations that could be considered by the Governing Body by asking the State to appear before it when the matter would be considered. Moreover, complaints can be submitted under Art. 26 for serious cases of failure to comply with ratified Conventions, by States that have ratified the Convention, by the Governing Body

83 Ibid., at p. 2.
84 Hepple, op. cit., note 20, at p. 49.
86 Hartlapp, M., “Two Variations on a Theme: Different Logics of Implementation Management in the EU and the ILO” (2005) Vol. 9 No. 7 European Integration online Papers <http://eiop.or.at/eiop/texte/2005-007a.htm>, at p. 11.
acting on its own initiative, or after a delegate has filed a complaint. The next step that might take place is the establishment of a Commission of Inquiry, which is rather rare with only three examples so far. A report will be prepared and discussed by the Governing Body, but without a vote, while the State has to reply within three months as to whether it accepts the proposals of the report, and if not, then the State can appeal against the recommendations before the ICJ. Finally, in the Myanmar case, a complaint procedure in relation to child labour had been pending since 1996 and a Commission of Inquiry in 1998 severely criticised the State for its inaction. In June 2000, the ILO called for sanctions under Art. 33 for the first time in its history and on the basis that there was persistent and serious breach of the standards. Even so, the powers of the ILO are extremely limited in such instances and the sanctions were effectively indirect since other States were requested to reconsider any actions that could be contributing factors in the continuity of the breach.87

2.4. Assessment of the ILO’s Enforcement Mechanisms

The first point to be made is that enforcement as a generic term consists of enforcement proper, supportive management, and soft persuasion;88 those elements would provide the skeleton for assessment.

In relation to enforcement proper, the reporting procedure that dominates the enforcement mechanisms of the ILO is suffering from exactly that reliance on it to promote implementation. Therefore, in 2005, 2,569 reports were requested and 1,645 of these reports were received,89 which marks a tremendous workload for the secretariat and an increase of 1025 % since 1927.90 It is also problematic that the selection of cases to reach the ILO is classified, thus leading to claims for transparent and streamlined procedures.91 The workload problem is magnified by the consensus element92 that reflects the tripartite structure of the ILO, involving the workers, employers, and States.93 This creates difficulty because workers

87 On Myanmar, see at Hartlapp, op. cit., note 44, at pp. 51-2.
88 Hartlapp, op. cit., note 44, at pp. 3-5.
91 Hepple, op. cit., note 20, at p. 55.
92 Hepple, op. cit., note 20, at pp. 50, 53.
and employers vote en bloc, while there is problem with the representation element since it is often the case that employers’ and employees’ organisations are too weak nationally or are under the effective control of the State, with the consequence that their independence is effectively nominal. Therefore, the bargaining process that is at the heart of the ILO does not always efficiently support enforcement. One example of this is the Myanmar case where it took thirty years of CEACR observations before a Commission of Inquiry was set up and four years to make use of Art. 33, yet the issue was not satisfactorily resolved.\textsuperscript{94} The example shows that there is direct dependence on the goodwill of the offender, because the lack of enforcement proper measures grants discretion to the non-compliant State.\textsuperscript{95} In the same light, the CEACR expresses satisfaction with the progress in 30 cases from 24 States in 2003,\textsuperscript{96} while in 2005 64.03\% of requested reports were submitted to the CEACR.\textsuperscript{97} However, 15 States had not submitted the instruments of 1999 to the competent authorities in relation to the Worst Forms of Child Labour Convention of 1999 (No. 182),\textsuperscript{98} thus leading to the comment that the backlog of specific States raises serious cause for concern.\textsuperscript{99} In relation to the reporting procedure, it was not used in the first 40 years of the ILO,\textsuperscript{100} and currently there are 26 cases, while eleven Commissions of Inquiry had been established by 2003, but compliance with the observations was not uniform.\textsuperscript{101} For example, Germany failed to comply with its obligations by banning individuals from professions on the basis of political beliefs, Poland failed to comply with the right to freedom of assembly and Myanmar ignored the findings on child labour.\textsuperscript{102} Moreover, Art. 33 was only used once in the Myanmar case, but the sanctions imposed were indirect and depended on the willingness of States to take action rather than on the ILO as an organisation. In addition, the outcome of that case was not positive because even Art. 33 was applied in 2000, the State suspended a joint action plan in 2003, and in 2005 the State was finally visited.\textsuperscript{103} There is also the problem with the nature of action to be taken under Art. 33 as the provision is unclear as to whether economic sanctions are included and if

\textsuperscript{94} Hartlapp, \textit{op. cit.}, note 44, at pp. 13-4; Hepple, \textit{op. cit.}, note 20, at p. 54.
\textsuperscript{95} Hepple, \textit{op. cit.}, note 20, at p. 54.
\textsuperscript{98} <http://www.ilo.org/ilolex/english/convdisp2.htm>.
\textsuperscript{101} Hartlapp, \textit{op. cit.}, note 44, at p. 12. With reference to Germany see the case Extremisten, BVerfGE 39, 334 and the findings by the ECtHR in Vogt v Germany [1996] (ECtHR).
\textsuperscript{102} Elliott, \textit{op. cit.}, note 40, at p. 5, n. 14.
\textsuperscript{103} Hartlapp, \textit{op. cit.}, note 44, at p. 14.
that is the case, whether the States or the ILO should impose such sanctions.\footnote{Hepple, op. cit., note 20, at p. 55.}

On the other hand, there is an element of strengthening of the enforcement proper by the Director-General’s score-board on fundamental Conventions, because it establishes “direct comparability between all member countries, and, second, by doing so it increases the (moral) pressure on those states that are lagging behind in ratification.”\footnote{Hartlapp, op. cit., note 44, at p. 12.}

In conclusion, despite the useful work and the relatively high rate of compliance with the different reporting obligations and the paradigm of Myanmar as possibly setting a new trend in enforcement proper, it can be argued that the ILO’s enforcement proper is relatively weak. It remains indirect through reporting, dependent on formation of consensus, rare – the only example is Myanmar – and even then lacks direct imposition of clear sanctions.

In relation to supportive management, the process of direct requests for clarifications by the CEACR used for the collection of information introduces an element of dialogue, as does the selection of the cases by the CEACR and the establishment of *ad hoc* Committees for representations that are made on the basis of consensus. The same applies for the discussion of the report of a Commission of Inquiry, while for the next step of Art. 33 sanctions a vote is necessary. Moreover, technical and financial assistance\footnote{Dufty, N.F., “Organizational Growth and Goal Structure: The case of the ILO” (1972) 26 (3) *International Organization* 479.} is provided in order to promote the “capacity-building”\footnote{Hartlapp, op. cit., note 44, at p. 12.} of the States that do not comply. Practically, there are advisory bodies offering expert opinion on the drafting of national implementing legislation and a department entrusted with the task of organising projects funded by the ILO.\footnote{Elliott, op. cit., note 40, at p. 4.}

These technical programmes can be seen in action in the field of child labour in Bangladesh, where a memorandum of understanding between the ILO, UNICEF and the Bangladesh Garment Manufacturers Association was signed and which provided for the removal from work of all children for whom schools were available.\footnote{Ibid.}

The funding and monitoring of the project was coordinated by the ILO, and since 1995, 353 schools have been established in conjunction with a rapid drop in the number of children at work.\footnote{US Department of Labour, Bureau of International Labour Affairs, *By the Sweat and Toil of Children: Efforts to Eliminate Child Labour* 5, Washington, 1998, p. 89.} Furthermore, direct contacts or visits are used by the ILO. These include discussions with governmental officials on the problems of implementation in an informal and confidential tone that has proved to be highly

104 Hepple, op. cit., note 20, at p. 55.
105 Hartlapp, op. cit., note 44, at p. 12.
107 Hartlapp, op. cit., note 44, at p. 12.
108 Elliott, op. cit., note 40, at p. 4.
109 Ibid.
110 Ibid.
effective. Finally, even in the Myanmar situation, after the call for sanctions the ILO appointed a Liaison Officer in 2002 for the transition of the implementation to compliance, while in 2003 a joint plan of action was discussed, and in 2005 a team visited that State.

To sum up, the element of supportive management is strong and that is understandable because the ILO depends on consensus, as its tripartite structure shows, and thus concentrates on “capacity-building” through a combination of dialogue, action after agreement and financial/technical assistance.

The distinction between soft persuasion and supportive management is a delicate one, as is illustrated by the Myanmar example of follow-up action after the sanctions and the consensus element engrained in the ILO’s structure. In addition, the direct contact visits can be seen as evidence of both soft persuasion and supportive management. Therefore, the soft persuasion element is quite strong in the ILO. The enforcement proper element has been strengthened but the main ethos of the ILO and the procedural provisions are positioned against the application of a strong element of enforcement proper. That is not to say that enforcement as an entity is not entirely effective. With the emphasis on consensus and capacity building and with the different practices in place aiming to complement them, the lacunae in enforcement proper are partly, yet not fully, filled. The issue is how the same analysis would apply to the EU, but prior to addressing that theme, it is necessary to turn the analytical focus to the relatively recent development of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

2.5. The Formation of “Core Labour Rights” under the 1998 ILO Declaration: Changes and Problems

The ILO has performed an instrumental role in creating and effectively imposing an international labour rights regime, to the extent that the system has been “long held up as one of the most successful of international regimes.” The system has nonetheless undergone a radical transformation that is associated partly with the deficiencies of the monitoring system

114 Hartlapp, op. cit., note 44, at pp. 12, 16.  
115 1998 ILO Declaration. See supra note 17.  
of the ILO\textsuperscript{117} and partly with the shift in the rationale that favours globalisation. Accordingly, Charny argues that there is “a list of series of insurmountable barriers to international labour standards. They include irreconcilable cultural traditions, the unaffordability of social insurance schemes in the absence of international transfer payments, the inflexibility of international immigration policies which inhibits labour flexibility, and the problematic nature of international enforcement mechanisms.”\textsuperscript{118} Instead, what is preferable according to Sykes is the adoption of soft, flexible arrangements, which leave most of the choices at the national level in order to promote trade that tends to advance human rights.\textsuperscript{119} In a similar line of reasoning, Bhagwati argues that issues of trade and labour must be kept institutionally separate, each being dealt with by the international agencies suited to the specific agendas for which they have been set up.\textsuperscript{120}

The shift in the rationale materialised during the process of adoption of the 1998 ILO Declaration and with the 1995 Copenhagen World Summit for Social Development that followed the recommendations contained in the 1994 Report of the then Director-General of the ILO Michel Hansenne.\textsuperscript{121} The proposals referred to the need for some differentiation among the rights promoted by the ILO and asked for concentration on a list of seven conventions.\textsuperscript{122} The process of adoption of the 1998 ILO Declaration started and the final document contains a set of four “core labour standards” that include the freedom of association, freedom from forced labour and from child labour, and non-discrimination in employment.\textsuperscript{123} The main change introduced relates to the monitoring procedures that is decentralised through the “follow-up procedures” annexed in accordance with Art. 4 1998 ILO Declaration.\textsuperscript{124} There are two main activities: the preparation of an annual report reviewing the efforts of member States which are not parties to the fundamental conventions, and the global report which provides a “dynamic global picture” of a state of implementation


\textsuperscript{121} Alston, op. cit., note 74, at pp. 464-66; Art. 2 1998 ILO Declaration.


\textsuperscript{123} Alston, op. cit., note 74, at p. 458.

\textsuperscript{124}<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONFOLLOWUP>.
of each category of fundamental principles and rights. In order to emphasise that the first activity has nothing to do with supervision, the existing Committee of Experts was not entrusted with the task of presenting an analytical introduction to the factual reports compiled by the International Labour Office. Instead a new group of seven Experts-Advisers was appointed in 2001 for that purpose.

The effectiveness of the follow-up procedure has been approached in diverging ways. On the one hand, there is satisfaction with the described arrangements as the 1998 ILO Declaration is felt to represent “a constitutional moment in the life of the ILO.” Moreover, the principles contained in the 1998 ILO Declaration have been characterised as “fundamental international norms” and have “attained the jus cogens status,” while the four principles were portrayed as forming “the constitutive of the essence of humanity” and as “transforming the international discourse of labour rights.” The enforcement issue has met with an enthusiastic reception since the Declaration was seen as establishing a decentralised system of labour standards implementation that reduces the burden on States and brings into the equation all types of private entities. Moreover, the Declaration removes the counterproductive element of enhanced legalisation and creates a more flexible framework that departs from the sanctioning mentality and emphasises promotional techniques that are preferred by employers and States.

Finally, and in connection with the impact of the 1998 ILO Declaration on the overall labour rights regime, it has been argued that the ILO methods designed to ensure compliance were based on suppositions that are no longer relevant in the new era of globalisation, of expanded flexibility, and with a plethora of actors involved in trade. In this light, Verma argues that the core labour standards contained in the 1998 Declaration need to replace the ILO collection of standards, and that the former should be used as “a regime of process standards.”

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125 Alston, op. cit., note 74, at p. 511.
126 Ibid.
131 Alston, op. cit., note 74, at p. 459.
132 Ibid., at p. 460.
133 Ibid., at p. 460.
134 Ibid., at p. 509.
be used by States as the minimum to be ratified by States that should subsequently be used as the basis for setting new goals designed to improve the situation on an annual basis.\textsuperscript{136} Therefore, the twin ideas of pluralism and decentralisation would be applied since the States would be contractually bound to comply with the core labour standards of the Convention and to pursue the expansion of these standards at the national level.\textsuperscript{137}

On the other hand, the critics of the 1998 ILO Declaration argue that the selection of the four core labour standards is arbitrary and represents a “very limited core list that offers de minimis protection.”\textsuperscript{138} This is this case, since the 1998 ILO Declaration, despite the inclusion of the non-discrimination standard, fails to protect essential components of working rights such as “workplace safety, limits on the hours of work and rights to periods of rest, and freedom from workplace abuse…nor does it assert a global minimum wage, or a create a right to a fair or living wage.”\textsuperscript{139} In addition, there is criticism related to the selection of the four core standards because that phrase could be construed as creating a hierarchy between the included core standards and those conventions that were excluded.\textsuperscript{140} Therefore, Alston regards the selection of the core standards as creating two classes of status. This view is supported by the fact that the promotional activities taking the form of reports and technical help apply only to the four core labour standards and not to the excluded standards.\textsuperscript{141}

Furthermore, there is a theoretical objection to the terminology used because it is seen as creating uncertainty as to whether the included core standards and the reference made in the title of the 1998 ILO Declaration refer to principles or rights.\textsuperscript{142} The argument states that the emphasis is placed on principles, and evidence in that respect is drawn from two different sources, namely, the ILO’s official stand that describes the document as “a reaffirmation…of central beliefs set out in the …Constitution,”\textsuperscript{143} and the content of the 1995 Copenhagen text stating that the four core standards would have a status of rights for States that ratified the relevant conventions and the status of principles for those States that were not parties to the relevant conventions.\textsuperscript{144}

\textsuperscript{136} Ibid., at p. 534.
\textsuperscript{137} Ibid., at p. 534.
\textsuperscript{138} Di Matteo \textit{et al.}, “The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime” (2003) 36 \textit{Vand. J. Transnat’l L.} 95, at p. 124.
\textsuperscript{139} Ibid.
\textsuperscript{141} Alston, \textit{op. cit.}, note 74, at p. 488.
\textsuperscript{142} Ibid., at p. 483.
A different line of criticism refers to the confusion about the relationship between the core labour standards contained in the 1998 ILO Declaration and the ILO Conventions. The relevant text states that “the principles and rights have been expressed and developed in the form of specific rights and obligations in conventions recognised as fundamental both inside and outside the Organisation.” Consequently, there is uncertainty as to the nature of the relationship of the four core labour standards with the eight conventions covering the same themes. Of this relationship it has been said that “a fuller understanding of the meaning of those four core rights comes from the eight core ILO conventions underlying them,” while the European Commission stated that “these four core labour standards are currently covered by eight ILO conventions.” The last statement coming from the EU reiterates the argument put forward by this paper which sees the creation and development of labour standards as an interconnected process that involves both the ILO and the EU.

In the same line of reasoning, reference can be made to EU Regulation 2501/2001 that indirectly and partly resolves the issue of the relationship between core labour standards and the various ILO Conventions. The Regulation provides for special incentive arrangements to States that offer actual protection to labour rights through the creation of legislative structures that incorporate the substance of the standards set in the fundamental ILO Conventions. As Novitz observes, the EU’s emphasis was placed on the ILO Conventions and not on the 1998 ILO Declaration that was in effect seen as auxiliary to and dependent on the ILO conventions.

The 1998 ILO Declaration has also been criticised as introducing a relegation of the ILO’s enforcement mechanisms by decentralising monitoring duties. The follow-up mechanism, described above, has been unsuccessful with a 64% reporting from States in 2003, while the information contained in those national reports has been described by the Expert-Advisers as limited and it was stated that “[i]t is unacceptable that the number of comments provided by the social partners is so limited.” Moreover, the contributions by the associations of

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146 Bellace, op. cit., note 98, at p. 275.
employers and employees were “almost non-existent,”151 thus creating serious doubts as to how effective those bodies consider the follow-up procedures to be. In addition, the central idea of “private enforcement and voluntarism”152 delegated to States seems to be ineffective and potentially dangerous for the supervision and enforcement mechanisms traditionally used by the ILO.

At this point, it may be concluded that the 1998 ILO Declaration introduced certain important changes to the labour right regime of the ILO and to the non-discrimination in employment right that is included in the 1998 ILO Declaration. Nonetheless, the lack of reference to equal pay in specific could create a problem in downgrading the status of Convention No. 100 through its exclusion, while the major changes in the monitoring system are different from the traditional enforcement mechanisms of the ILO analysed in the previous sections. The consequence of the weakened supervision system could further the low intensity of enforcement proper of the ILO, while at the same time it can be seriously doubted whether the management and persuasion aspects of the expanded enforcement concept that this study uses, would be promoted. In other words, if the 1998 ILO Declaration is the paradigm for the future of the ILO and if the equal pay right is brought within the spirit of the 1998 ILO Declaration, the enforcement capacity of the organisation will be seriously and unnecessarily weakened. Then, any comparison with the EU’s enforcement mechanisms would be unfavourable for the ILO, as the next section explains.

### 2.6 Conclusion

The work of the ILO in establishing and solidifying a labour rights regime has been consistent, intense, and highly influential. Imposing standards that would be complied with by States is a delicate task, and the ILO’s mechanisms for ensuring compliance are representative of the strict dichotomy between States and international organisations that show deference to the sovereign rights of the States to self-regulate issues of public importance. In other words, the ILO is not equipped with those enforcement mechanisms that could support imposition of drastic sanctions but has been granted the powers of a political body that is entrusted with the setting of standards that would then be transposed at the national level through effective cooperation with the States and essentially through granting a high degree of discretionary responsibility to the national authorities. Therefore, the implementation of the ILO standards

151 Ibid., at para. 17.
by the competent national authorities depends on cooperation and dialogue rather than on imposition. Therefore, the soft persuasion element is quite strong in the ILO. The enforcement proper element has been strengthened but the main ethos of the ILO and the procedural provisions are positioned against the application of a strong element of enforcement proper. Overall, it can be concluded that the element of enforcement as an entity is only partly effective.

3. The EU and Enforcement of Equal Pay: The Role of the ECJ

3.1. The Enforcement Mechanisms of the EU

The establishment and promotion of equality in pay has been a key belief of the EU from the early stages of its formation and remains a priority at the core of the EU’s labour policies, while it has evolved into an integral part of the social policy agenda. Attaining the objective of equality between women and men is at the forefront of the labour policies of the EU and its realisation requires the participation and involvement of all social actors. Moreover, the equality in pay has an economic dimension in ensuring the same application of equality rules to all Member States in order to remove the possibility of unfair competitive advantage in favour of defaulting parties, while at the same time the purpose of offering a protective network for employees remains. For these obvious reasons, the principle of equal pay is enshrined in the EU’s primary law and it has been followed through and supplemented in secondary legislation. Nonetheless, significant differences in the positions of women and men remain and it is interesting to consider how the EU system has managed to take progressive steps and how it compares in terms of effectiveness of enforcement with the ILO.

There is broad consensus within the academic body on the instrumental role that the EU has performed in transforming and fundamentally changing the law and practice of discrimination, especially in relation to equal pay.153 The humble origins of non-discrimination action can be traced back to Art. 141 EC that was adopted into the 1957 EC Treaty and which ensured equal pay at the insistence of the French government that wanted to pre-empt a competitive disadvantage arising from the fact that its domestic legislation offered equal pay protection.154 These originally economic considerations that supported the introduction of Art. 141 EC were

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coupled with the work of the ECJ that elevated the principle of equal pay to a fundamental principle of EU law\textsuperscript{155}. This was recognised in the Treaty of Amsterdam that amended Art. 141 EC to cover not only equal work but also work of equal value, while the promotion of equality between women and men was recognised as one of the fundamental tasks of the EU. It also introduced a requirement to eliminate inequalities and to promote equality between women and men in all activities. Finally, it inserted a new article allowing the EU to take measures tackling all forms of discrimination based on sex, alongside a number of other grounds.

The role of secondary legislation has been paramount in complementing the principle of equal pay as expressed in Art. 141 EC. The starting point must be the setting of the framework for EU enforcement of equal pay. Legal measures have formed the tools for the enforcement of equality between men and women in the EU, and by using the legal bases provided by the Treaties, the Union has adopted thirteen directives on gender equality since the 1970s. These have ensured, among other things, equal treatment concerning access to work, training, promotions and working conditions, including equal pay and social security benefits, as well as guaranteed rights to parental leave.

In more detail, the principle of equal pay is guaranteed in substantive terms under Arts. 13 and 141 EC\textsuperscript{156}, the Equal Pay Directive 75/117\textsuperscript{157} and the Equal Treatment Directive 76/207\textsuperscript{158} thus offering a deep protective basis for equal pay that is still expanding. Moreover, that legislative framework has been supplemented and safeguarded by the ECJ, and that forms a crucial point of difference with the ILO system. Numerous landmark cases have tested the legislation in practice and have led the ECJ to examine and define the meaning and scope of the legislative framework, thereby contributing clarity and precision to the directives. In this way, gender equality law remained responsive to modern social needs and at the same time the litigation before the ECJ contributed to the effective implementation of legislation by the Member States, as individuals can challenge the compatibility of national laws with the European directives.

There are, therefore, four essential differences between the EU and the ILO in the legalisation process: directional, institutional, constitutional and procedural.

\textsuperscript{156} Art. 141 EC is based on ILO Convention 100.
\textsuperscript{157} [1975] OJ L45/19.
Firstly, the directional difference between the ILO and the EU. The enforcement of equal pay is the general and shared purpose of the two regimes, with the EU being a supranational system that has functioned progressively for the attainment of economic, legal, and political integration. This difference must be remembered because the EU has a much broader scope of application, both thematically and substantively, and it is for these two material differences in nature that the legal framework of operation of the EU is fundamentally different from that of the ILO. In other words, the legalisation process is at the epicentre of the EU system as a medium for attaining the integrationist ideals, while at the ILO level, legalisation is narrower in scope and intensity.

Secondly, there is the institutional difference. The institutionally distinguishing feature of the EU is the ECJ that has operated as the locomotive for legal integration in certain periods, thus providing prima facie an essential enforcing mechanism that is absent in the ILO. Moreover, the enforcement mechanics of the EU are orientated towards the ECJ, but there is also a panoply of supplementing institutional support for the ECJ in the form of the Commission, the Member States, and the other Institutions. These must be approached in conjunction with a web of procedural provisions that enable those enforcement agencies to perform a supervisory task. These procedural provisions are not matched in the ILO system, thus providing the third point of difference.

The fourth difference is constitutional in nature. The crucial constitutional difference between the two systems is the fact that under the EU regime the individual is empowered to have a primary role in the enforcement process through the medium of the principle of direct effect. Consequently, the individual has the capacity to enforce rights before national courts, if the relevant conditions are present. The EU system is a constitutional legal order, with supremacy of EU law over conflicting national measures, and with the principle of State liability enabling the individual to claim compensation for the failure of the State to

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162 Art. 234 EC, Art. 230 EC, Art. 226 EC, Art. 227 EC, Art. 228 EC.
comply with its implementing and other obligations.

Therefore, the EU is materially different from the ILO with reference to the web of provisions facilitating enforcement, the plethora of potential enforcers that include individuals, and the operation of a Court entrusted to safeguard the law of the Treaty under Art. 220 EC. The contrast could not be starker, but by taking the approach that regards enforcement as consisting of enforcement proper, supportive management, and soft persuasion, the existence of a spectrum of enforcement with varying degrees at each level would offer a clearer view of the nature of the relationship between the ILO and the EU in the enforcement of equal pay.

3.2. Enforcement of Equal Pay: the Variations of Enforcement

In terms of supportive management, “bilateral and package meetings are examples of instruments to improve the transposition of directives by means of knowledge transfer and capacity-building.”\(^{167}\) There are also exchange programmes for labour inspectors, the Agency for Occupational Health and Safety in Bilbao, and the meetings of Senior Labour Inspectors that operate on the same rationale. The supportive management measures mentioned above are sporadic and are unjustifiably seen as gaining in importance within the EU,\(^{168}\) while the situation is worse in relation to soft persuasion to the extent that Tallberg sees the EU as a “management and enforcement ladder.”\(^{169}\)

The EU is a system built around enforcement proper in relation to equal pay, with enforcement actions and preliminary references combining with individual enforcement of equal pay rights. The main layer of enforcement proper is the work of the ECJ, and to this topic this paper now turns.


\(^{168}\) Ibid., at p. 16.

3.3. **The Instrumental Role of the ECJ in Enforcement: Enforcement Proper**

The landmark decision in *Defrenne I*\(^{170}\) represents the first step in a long journey towards ensuring equal pay, with the ECJ accepting equal pay as a fundamental principle and Art. 141 EC as directly effective, but limiting the effect of the judgment for prospective purposes. Yet the first crucial step was made. In *Defrenne v. Sabena (No. 2)*,\(^{171}\) the Court held that Art. 141 EC had horizontal and direct application. The Court created the distinction between direct and indirect discrimination, the former being identifiable by the criteria of Article 141, whereas indirect discrimination is identified by reference to more explicit implementing provisions of a Community or national body. Moreover, Advocate General Trabucchi in *Defrenne v. Sabena (No. 2)* expressed the view that Art. 141 EC was not considered by the Commission and the Member States to be a complete and directly effective provision.\(^{172}\) Furthermore, Trabucchi concluded that while the words of Art. 141 EC may be regarded as vague and unspecific, the purpose of the provision is sufficiently precise. It was exactly this approach that was adopted by the Court, whereby the principle of equal pay was derived from the provision with no regard given to the complexity of factual situations where different types of work could be involved. The judgment can be seen as an example of the Court trying to derive a principle from a general and vague provision in order to expand the scope of the prohibitions imposed on Member States, but it lead to unnecessary confusion. The issue was clarified in *Jenkins*\(^{173}\) where it was held that a difference in pay between full-time employees does not amount to discrimination prohibited by Article 141 EC automatically, but only if it is an indirect way of reducing the pay of part-time workers because that group is made up exclusively or predominantly of women. This issue was a matter for the national courts to decide.

The ECJ went further in enforcing pay equality in *Commission of the European Communities v. Grand Duchy of Luxembourg*\(^{174}\) where the ECJ insisted that a Member State could not invoke provisions, practices, or circumstances existing in its internal legal system in order to justify a failure to comply with Directive 75/117. Nonetheless, the approach of the ECJ has been dynamic and in *Gisela Rummler v. Dato-Druck*\(^{175}\) the issue of equal work was approached in the context of setting promotion criteria based on an objectively quantifiable criterion of muscular strength. It was ruled that for criteria governing pay rate classification to be non-discriminatory, it must ensure that the work which is objectively the same attracts the


same rate of pay whether it is performed by a man or a woman. In Danfoss\textsuperscript{176} the burden of proof was placed on the employer to show that there was no discrimination in pay when the pay structure is not transparent.

The Barber\textsuperscript{177} case presents an interesting example where the limitation of the retrospective effect of the judgment challenged the authority of the ECJ.

The starting point is the decision in Defremne v. Sabena (No. 2)\textsuperscript{178} and the ambiguity about what constitutes pay. In Garland v. BRE\textsuperscript{179} and in Worringham v. Lloyds Bank,\textsuperscript{180} benefits conferred as a result of the relationship of employment and contributions to the employees’ occupational pension scheme were held to constitute pay coming within Art. 141 EC. The expansion of the meaning of ‘pay’ in the fields of social security benefits and pensions was bound to create difficulties and reactions.

The Court’s approach can be seen as an attempt to supplement the area of non-discrimination and to broaden the scope of the principle, but in relation to pensions and social security benefits complex issues are involved. The framework is completed by Directive 79/7\textsuperscript{181} and the proposal for Directive 86/378\textsuperscript{182} intended to supplement the former, in the sense that occupational pensions were now to be seen as social policy matters. The consequence would be that pensions would not be regarded as pay, thus taken outside the strict scope of Art. 141 EC and within the more flexible structure of Directive 79/7. All these factors can be seen as setting the framework for the analysis of Barber.\textsuperscript{183}

The approach of the Court must be seen in light of the case law preceding Barber. In Bilka-Kaufhaus\textsuperscript{184} the ECJ had to consider the claim by a female part-time worker challenging the employer’s occupational pension scheme, under which part-time employees could benefit from the scheme if they had been employed for at least fifteen years. The scheme was financed by the employer, with no contributions from the workers, while it was adapted to correspond with the existing statutory social security scheme. The claimant was arguing that the scheme was in breach of Art. 141 EC because the majority of the part time workers were women.

\textsuperscript{176} Case 109/88 Danfoss [1989] ECR 3199.
\textsuperscript{178} Ibid.
\textsuperscript{179} Case 12/81, Garland v. BRE, [1982] ECR 359.
\textsuperscript{184} Case 170/84, Bilka-Kaufhaus, [1986] ECR 1607.
The Court made two important points, one in relation to the case and the second in relation to the proposals considered for Directive 86/378. In relation to the former, it was held that a non statutory pension scheme could be within the scope of Art. 141 EC as it could constitute ‘pay’, which was a clear message to the Institutions in relations to the plans that excluded pension schemes from Art. 141 EC. Nevertheless, Directive 86/378 was adopted and it clearly excluded pension schemes from the scope of Art. 141 EC, which in effect contradicted the reasoning in *Bilka-Kaufhofaus*.

In *Barber* a group of male employees challenged payments made by their employer payable at different ages for men (65 years) and women (60 years). The scheme was contracted out, which meant that it was set up by the employer as a substitute for the statutory social security scheme and a statutory redundancy scheme. Therefore, the issue was whether a statutory scheme or a scheme contracted out as part of the obligations under the statutory scheme constituted ‘pay’ or social security benefit. The claimants argued that because the resulting payments from the scheme were in effect paid by the employer, they qualified as ‘pay’.

Therefore, the question was whether the specific type of scheme was within *Bilka or Defrenne I*.185 The latter classified statutory pension schemes resulting from agreement with the national unions as being outside Art. 141 EC, while the former classified contracted out schemes as ‘pay’. Alternatively, the issue was whether such pension schemes were within the strict scope of Art. 141 EC or within the scope of Directive 79/7 that allowed for exceptions in relation to the pensionable age and other related benefits.

The ECJ ruled that contracted out pension schemes constituted ‘pay’, thus coming within the scope of the equal pay principle in Art. 141 EC,186 while the scheme was in breach of the aforementioned provision.187 The approach of the Court was therefore expanding the scope of Art. 141 EC in an area of high complexity and with severe financial consequences affecting a vast number of employers and with an ever greater number of potential applicants. The Court followed its approach in *Defrenne v. Sabena (No. 2)*188 whereby it ruled that judgment in relation to schemes of the same type could not be relied on to claim entitlement to a pension with effect prior to the date of the decision.189 The only exception was for workers that had initiated legal proceedings, at the Community or the national level, prior to the date of the

186 *Barber*, at para. 28.
ruling. However, the judgment created considerable uncertainty and confusion. The issue was whether Art. 141 EC applied to claims in relation to time in work completed before the decision of 17 May 1990 or whether it applied to claims for time in work after that decision. The interesting and differing point of this case is that the Member States were reluctant to wait for the Court to clarify the ambiguity, especially because of the nature of the issues involved and because of the financial element involved. Moreover, the Member States could not predict with certainty the approach of the ECJ in subsequent cases, since the Court had departed from Defrenne I and had bypassed the provisions of Directive 79/7 as supplemented by Directive 86/378. Therefore, the Member States took the remarkable step of attaching a Protocol to the 1992 EU Treaty of Maastricht that limited the retrospective effect of Barber to claims for time in work after the decision.

It must be noted that the effect of a Protocol has the legal status of a Treaty provision in accordance with Art. 311 EC, with the effect that any decision of the ECJ that predates the Protocol will no longer be valid law from the moment of entry into force of the Protocol. The date of entry into force was 1 November 1993, thus leaving a window of opportunity for the ECJ to rule on one of the pending issues in order to indicate its reaction to the Protocol.

The opportunity came in the Ten Oever case where the ECL followed the will of the Member States. In Ten Oever, the issue was the ambiguity of the limitations to the retrospective effect of Barber, and the Court adopted an identical approach to that of the Protocol. The Court held:

Given the reasons explained in paragraph 44 of the Barber judgment for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the Barber judgment, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.

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190 Ibid., paras. 44-45.
191 Protocol No. 2 attached to the Treaty of Maastricht.
Certain comments must be made in relation to the judgment. Firstly, the Court did not make a reference to the Protocol, thus trying to bypass the clear and direct challenge to its authority. The challenge came in the form of the Member States clarifying a legal situation without waiting for the ECJ to rule on the issue, which can be interpreted as lack of trust in the approach of the Court and as a possible loss of confidence in the ability of the ECJ to receive and understand the messages coming from the involved parties. Secondly, the ECJ approached the Ten Oever case as a mere expansion of its earlier case law, by trying to link the limitations to the scope of Barber on the basis of the reasoning of that case. Barber was referred to twelve times in the judgment in Ten Oever, which implies that the ECJ was approaching the latter case as an opportunity for clarification of the existing case law, which was not unnatural in the process of development of legal principles.

The significant element of this approach is the existence of a Protocol that effectively pre-ruled on the issue, thus in practical terms making the decision of the ECJ in Ten Oever a formality. However, the symbolic effect of the Ten Oever ruling was bound to have an impact on the legitimacy of the ECJ’s approach. In this sense, the Court took a pragmatic approach whereby it did not insist on challenging the will of the Member States as expressed in the Protocol. The consequences of such a course of action would have irreparably undermined the legitimacy of the ECJ and would have created a constitutional crisis in which the Member States could not have been prevented from prevailing. The point is that within enforcement proper there is a disadvantage if the process is dominated by a court that is pursuing a strategically complex agenda when developing its case law. The consequence is that the actual protection of the right to equal pay, as was the case in Barber, becomes embroiled in a broader power struggle between the ECJ and the Member States. The adoption of the Protocol surely had an impact on the willingness of the ECJ to continue the expansion of its case law on equal pay discrimination, thus placing what is in effect a basic human right in a negotiable position. Nevertheless, even such examples are extreme and rare, and could not in any way counterbalance the effectiveness attributed to the enforcement process by the workings of the ECJ. In addition, the ECJ has proved sufficiently competent to strike those balances that would avoid a constitutional crisis and/or undermining the standard of protection afforded to equal pay.

Therefore, the Court made the best possible use of the opportunity presented in Ten Oever by complying with the Protocol and presenting that compliance as based on the Barber case and the natural process of developing and clarifying issues resulting from earlier decisions of the Court. That approach was founded on the numerous references to Barber and on the omission to refer to the Protocol. At the same time, it has to be remembered that the Court’s decision in Barber was not overruled either by the Protocol or by the Ten Oever judgment. Instead, the
focus was on the scope of the limitation that the Court set in relation to the retrospective effect of *Barber* and not on the provisions of the Protocol.

In conclusion, the Court expanded the scope of Art. 141 EC, the essence of *Barber* was not challenged, the Court reacted in the most constructive way possible in the circumstances, and it did not express any preference in relation to the scope of the limitation it introduced in *Barber*. As for the timing, the *Ten Oever* judgment was delivered on 6 October 1993 and the Protocol entered into force on 1 November 1993. The complexity of the reasoning and the plethora of factors influencing the Court’s approach are in effect practical constraints on the development of the case law on equal pay and have pushed the ECJ close to a collision course with the Member States.

3.4 Conclusion

The enforcement proper approach of the ECJ has been instrumental in ensuring enforcement of equal pay and it has adopted a dynamic approach that favoured equal pay and elevated it to a fundamental human right that is justiciable before national courts. It is in this respect that enforcement by the ILO is weaker, but that can be explained on the basis of the different structures, purposes, and degrees of protection within the three types of enforcement. Enforcement by the ILO and the EU cannot be compared directly because of these differences, while if the yardstick adopted is closer to enforcement proper, the EU system offers a higher degree of protection. What is important is the realisation of the existence of types and degrees of enforcement; only then can a comparison be meaningful. It is, therefore, submitted that is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete; a middle state exists that takes the form of interpenetration of standards and degrees of enforcement.

CONCLUSION

The purpose of this study has been the assessment of the relationship between the ILO and the EU and the comparative analysis of the effectiveness of the two organisations in combating discrimination in pay. The basic organisation premise of the present thesis has been the exegesis of the current state of labour rights on the basis of the working hypothesis that there is a dynamic system connecting different legal organisations that interact and interpenetrate in order to contribute to the evolution of the corpus of labour rights.
That working hypothesis was methodologically important in creating the theoretical foundation that would enable the comparison of the two systems on an equal basis and at the exclusion of any preconceptions favouring either system. Such preconceptions would naturally be derived from the current bibliography that collectively emphasises the superiority of the EU’s system in ensuring compliance with the legislative framework that regulates non-discrimination in pay. The removal of preconceptions is also supported by the adoption of a theoretical foundation that focuses on the nature, meaning and attributes of the concept of enforcement. That methodological analysis resulted in the identification of types of tactics that form a spectrum of enforcement that includes enforcement proper, supportive management and soft persuasion.

The enforcement proper approach stems from the utilitarian ideas of rational calculating actors that estimate costs and benefits of non-compliance and determine whether to comply with the obligations set through assessing possible sanctions flowing from non-compliance. The supportive management method perceives failures to comply with norms set by international organisations as a corollary of financial, administrative, or technical shortcomings due to a lack of resources or expertise, and not to opposition to norms. In the soft persuasion approach, compliance with norms is not achieved via instrumental influence, but by recognition of norms following a logic of appropriateness to which a State responds.

The meaning of enforcement that this paper refers to consists of the three aforementioned elements of enforcement, management, and persuasion, thus offering a holistic perception of the term enforcement. The mechanisms at the disposal of the ILO and the EU are very different as are their objectives and structural arrangements, with the EU having a more advanced position on the scale of legalisation. The adoption of the conceptual definition of enforcement as containing the three elements analysed above removes the possibility of comparing the ILO and the EU on the basis of a yardstick that represents just the enforcement proper element. In other words, the comparative analysis is exercised on a broader and more inclusive scale that allows the ILO to present certain important aspects of its machinery entrusted with the promotion of compliance by States.

This paper submits that the two systems exist in parallel and have different objectives and enforcement mechanisms at their disposal, but there is now a state of coexistence through the circulation of labour standards. The ILO has been setting the minimum requirements and the EU has incorporated the essence of those standards into the regional framework of regulations. Therefore, there is a circle in which both the ILO and the EU participate and it includes the stages of norm formation, transition to binding effect of those norms, and enforcement. The segments of the circle are not autonomous, since the ILO has functioned as the source for
minimum benchmarks for the EU, thus the presence of the ILO is continuous at both levels. In terms of enforcement, there are types of tactics that form a spectrum that includes enforcement proper, supportive management, and soft persuasion. This spectrum is the second bridging element between the ILO and the EU, and points to the existence of all three shades of enforcement in both systems but in different degrees of intensity. Nonetheless, at the EU level the availability of more stringent legal enforcement provisions has been used to create a corpus of protection for equal pay that is unparalleled at the ILO level, with the ECJ taking a proactive and contributive role in its decisions. It is, therefore, submitted that it is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete; a middle state exists that takes the form of interpenetration of standards and degrees of enforcement.

In relation to the ILO’s assessment, the soft persuasion element is quite strong, while the element of supportive management is highly relevant. That is understandable because the ILO depends on consensus, as its tripartite structure shows, and thus concentrates on capacity-building through a combination of dialogue, action after agreement and financial/technical assistance. The enforcement proper element has been strengthened but the main ethos of the ILO and the procedural provisions are positioned against the application of a strong element of enforcement proper. That is not to say that enforcement as an entity is not effective, because with the emphasis on consensus and capacity building and the different practices to complement them, the lacunae in enforcement proper are filled. The 1998 ILO Declaration introduced certain important changes to the labour right regime of the ILO and to the non-discrimination in employment right. Nonetheless, the lack of specific references to equal pay could create a problem in downgrading the status of Convention No. 100 through its exclusion, while the major changes in the monitoring system are different from the traditional enforcement mechanisms of the ILO. The consequence of the weakened supervision system could further reduce the low intensity of enforcement proper of the ILO, while at the same time it can be seriously doubted whether the management and persuasion aspects of the expanded enforcement concept used in this study, would be promoted. In other words, if the 1998 ILO Declaration is the paradigm for the future of the ILO and if the equal pay right is brought within the spirit of the Declaration, the enforcement capacity of the organisation would be seriously and unnecessarily weakened.

The EU is a system built around enforcement proper while supportive management measures are sporadic and are unjustifiably seen as gaining in importance within the EU, and the situation is worse in relation to soft persuasion to the extent that it could be argued that it is at an embryonic stage of development. The main layer of enforcement proper is the creation of the work of the ECJ that has been instrumental in ensuring enforcement of equal pay and has
adopted a dynamic approach that has elevated the principle to a fundamental human right that is justiciable before national courts. Moreover, there is a plethora of enforcement actors that could utilise the ECJ through initiating proceedings in national courts or the ECJ itself and essentially individuals are a crucial part of that system. The main downside of the ECJ’s enforcement proper system is evident in the case law that concerned and followed the Barber case and it relates to the complexity of strategic considerations that influence the Court. In other words, the Court is often a step ahead of the political actors and that creates a power gap that could victimise the individual in a specific case. Nonetheless, the EU’s system is highly legalised and predictable, and the individual enjoys protection of equal pay akin to the protection offered to fundamental human rights. What is still a reminder of the practical problems is the documented existence of a pay gap in Member States of the EU, which emphasises the complexity involved in ensuring compliance.

Therefore, the enforcement proper by the ILO is weaker, but that can be explained on the basis of the different structures, purposes, and degrees of protection within the three types of enforcement. The enforcement by the ILO and the EU cannot be compared directly because of these differences, while if the yardstick adopted is closer to enforcement proper, the EU system offers a higher degree of protection. What is important is the realisation of the existence of types and degrees of enforcement, and it is only then that a comparison can be meaningful.

It is, therefore, submitted that is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete. A middle state exists that takes the form of interpenetration of standards and degrees of enforcement. The divergence of the mechanisms used by the ILO and the EU is evident with regard to enforcement proper, while there are trends of convergence in relation to soft persuasion and supportive management with the EU following the ILO’s lead. Moreover, there is an overlap as to the norm formation between the two organisations, and that represents the most important element of convergence between the ILO and the EU in the sense that neither can be analysed in isolation from the other.

Whether the future will bring total convergence is doubtful and also undesirable. The issue of future divergence is possible but only in terms of mechanisms and not in relation to the content of labour rights in general and equal pay in particular. The desirability of such an outcome of divergence is still undefined; time will be the ultimate judge.