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2013/0085 (NLE)

Proposal for a

COUNCIL DECISION

authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

This proposal will enable Member States to legally ratify Convention No 189 concerning decent work for domestic workers, 2011, of the International Labour Organisation (ILO), hereinafter 'the Domestic Workers Convention No 189' or 'the Convention'.

The Domestic Workers Convention No 189 was adopted at the 100th Session of the International Labour Conference on 16 June 2011 and is due to enter into force in September 2013. It lays down global minimum labour protection for domestic workers.

As of December 2012, the Domestic Workers Convention No 189 has been ratified by three State parties to the ILO. It is among the ILO Conventions that have been classified by the ILO as up to date and are therefore actively promoted.

The European Union (EU) is committed to promoting the decent work agenda, both internally and in its external relations. Labour standards are a core element of the concept of decent work. The ratification of ILO Conventions by Member States thus sends an important signal as to the coherence of the Union's policy in improving labour standards worldwide.

In addition, as part of the EU's Strategy towards the eradication of Trafficking in Human Beings[1], the Commission urged Member States to ratify all international instruments, agreements and legal obligations which will contribute to addressing trafficking in human beings in a more effective, coordinated and coherent manner. These include the Domestic Workers Convention No 189.

It is therefore necessary that any legal impediments to ratification by Member States be removed at the level of the EU for the Domestic Workers Convention No 189, the substance of which does not cause concern in the light of the existing Union *acquis*.

The provisions of the Domestic Workers Convention No 189 are intended to help curb the abuse and exploitation of domestic workers. Article 1 of the Convention defines a domestic worker as any person engaged in domestic work (work performed in or for a household or households) within an employment relationship. The Convention requires ILO Member States to take measures to prevent violence and child labour in the domestic employment setting. Article 3 protects the fundamental labour-related rights of domestic workers by requiring each State party to take the measures set out in the Convention to respect, promote and realise the fundamental principles and rights at work. Subsequent provisions notably require ILO Member States to:

- establish a minimum age for domestic work and safeguards for workers under age 18;
- prevent abuse and violence;
- ensure fair terms and decent conditions of employment;

[1] EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, COM(2012) 286 of 19.6.2012.

- make certain that workers are informed of the terms and details of their employment;
- regulate foreign recruitment and ensure freedom of movement;
- mandate equal treatment between domestic workers and other workers with regard to compensation and benefits;
- regulate and monitor private employment agencies; and
- develop a specific complaints mechanism.

The Domestic Workers Convention No 189 addresses areas of Union law where the degree of regulation has already reached an advanced stage.

The Convention mainly deals with aspects relating to the social policy area, where Union law sets minimum requirements on health and safety at work, protecting young people at work, maternity protection, the written statement, working time, immigration and temporary agency work[2].

The Convention deals with aspects relating to the anti-discrimination area where Union law sets minimum requirements on employment equality, gender equality and maternity protection[3].

The Convention also deals with aspects relating to judicial cooperation in the criminal matters area and in the asylum and immigration area, where Union law sets minimum requirements on anti-trafficking and employers' sanctions[4].

In addition, Article 8 of the Domestic Workers Convention deals with the protection of migrant domestic workers, which includes aspects relating to the freedom of movement for workers under Union law[5].

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Not applicable.

3. LEGAL ELEMENTS OF THE PROPOSAL

In accordance with the rules on external competences that have been drawn up by the Court of Justice of the European Union[6], and more specifically as regards the conclusion and ratification of a Convention of the International Labour Organisation[7], Member States are not

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2 Directive 89/391/EEC, Directive 94/33/EEC, Directive 91/533/EEC, Directive 2003/88/EC, Directive 2011/98/EU, Directive 2008/104/EC.

3 Directive 2000/78/EC, Directive 2000/43/EC, Directive 2006/54/EC, Directive 92/85/EEC.

4 Directive 2011/36/EC, Directive 2009/52/EC.

5 Article 45 TFEU, Regulation No 492/2011.

6 AETR judgment of the ECJ, case 22/70 of 31 March 1971, ECR, 1971, 263; see also Article 3(2) TFEU which codified these principles.

7 Opinion 2/91 of the ECJ of 19 March 1993 relating to the Chemicals Convention No 170, ECR 1993-I, page 1061.

in a position to autonomously decide on the ratification of a Convention without the Council's prior authorisation, where parts of the Convention fall under Union competence.

At the same time, the European Union as such cannot ratify any ILO Convention, because only States can be parties to such conventions.

Consequently, if the subject-matter of an agreement or contract falls partly within the competence of the Union and partly within that of the Member States, the Union institutions and the Member States must take all the necessary measures to best ensure cooperation in ratifying the Convention and in implementing commitments resulting from that Convention[8].

As regards three ILO Conventions adopted over the last decade, parts of which fell under the competence of the Union, the Council has therefore authorised Member States to ratify, in the interests of the Union, those parts falling under Union competence[9]. The Commission has also adopted a proposal for such a Council decision as regards the Chemicals Convention No 170[10].

Specifically with reference to the Domestic Workers Convention No 189, the degree of regulation in the various aspects of social policy and in the areas of antidiscrimination, judicial cooperation in criminal matters and asylum and immigration covered by the Convention, has reached an advanced stage, to the point where Member States are no longer able to act sovereign in the external sphere in this regard[11]. Article 153 TFEU constitutes the main legal basis for the related Union law, which is in most cases more detailed than the general principles established in the Domestic Workers Convention No 189. There is no contradiction between the general principles established in the Convention and Union law, and there is no incompatibility between the provisions of the Convention and the minimum requirements in these areas laid down in the Union *acquis*.

It follows from Article 19(8) of the ILO Constitution that the Convention contains minimum standards, which means that national implementation can provide for higher standards than those under the Convention.

There is no inconsistency of approach between the rules on the protection and equal treatment of workers under the Convention and the minimum requirements under the Union *acquis* in this area. This means that Union measures can be more stringent than the ILO standards and vice versa[12].

The Domestic Workers Convention No 189 contains one article to protect migrant domestic workers (Article 8) that could potentially interfere with the freedom of movement for workers

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8 Opinion 2/91 of the ECJ (ibid), para. 36, 37 and 38.

9 Over the last decade, three Council decisions have been adopted authorising Member States to ratify ILO Conventions: Council Decision of 14 April 2005 authorising Member States to ratify, in the interests of the European Community, the Seafarers' Identity Documents Convention of the International Labour Organisation (Convention no 185), OJ L 136/1 of 30.5.2005; Council Decision of 7 June 2007 authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation (OJ L 161/63 of 22.6.2007); and Council Decision of 7 June 2010 authorising Member States to ratify, in the interests of the European Union, the Work in Fishing Convention, 2007, of the International Labour Organisation (Convention No 188), OJ 145/12 of 11.6.2010.

10 COM(2012) 677 of 20 November 2012.

11 Opinion 2/91 of the ECJ, para 25 and 26.

12 Opinion 2/91 of the ECJ, para 18.

— an area which falls under the Union's exclusive competence[13]. However, the main aim of the Convention is not to regulate an issue falling under the Union's exclusive competence. In addition, Article 8(2) of the Convention states that the requirement to receive a written offer prior to crossing national borders does not apply to regional economic integration areas. This safeguard clause prevents any potential incompatibility between the Convention and the Union *acquis* on the freedom of movement for workers under Article 45 TFEU and Regulation No 492/2011. Consequently, the provisions of the Convention in this area are not incompatible with the Union *acquis*.

The aim of this proposal is therefore to authorise Member States to ratify, in the interests of the Union, those parts the Domestic Workers Convention No 189 that fall under Union competence.

The proposal is based on Article 218(6) of the Treaty on the Functioning of the European Union (TFEU), applicable by analogy, in conjunction with Article 153 TFEU, which provides the main legal basis for Union legislation on the protection and improvement of workers' working conditions.

[13] Article 45 TFEU, Regulation No 492/2011.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 153 in conjunction with Article 218(6) (a) (v) and Article 218(8), first subparagraph thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament[14],

Whereas:

(1) The European Parliament, the Council and the Commission are promoting the ratification of international labour conventions that have been classified by the International Labour Organisation as up-to-date, as a contribution to the European Union's effort to promote decent work for all both inside and outside the Union, of which the protection and improvement of workers' working conditions is an important aspect.

(2) Most of the rules under Convention No 189 concerning decent work for domestic workers, 2011, of the International Labour Organisation (ILO), hereinafter 'the Convention', are covered to a large extent by Union *acquis* in the areas of social policy[15], anti-discrimination[16], judicial cooperation in criminal matters[17] and asylum and immigration[18].

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14 OJ C , , p. .

15 Including the health and safety framework Directive 89/391/EEC, the young people at work Directive 94/33/EC, the maternity protection Directive 92/85/EEC, the written statement Directive 91/533/EEC, the working time Directive 2003/88/EC, and the temporary agency work Directive 2008/104/EC.

16 Including the employment equality Directive 2000/78/EC, the gender equality Directive 2006/54/EC and the maternity protection Directive 92/85/EEC.

17 Including Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

18 Including the employers' sanctions Directive 2009/52/EC and the single permit Directive 2011/98/EU.

(3) The Convention's provisions on protecting migrant domestic workers potentially affect the freedom of movement for workers — an area which falls under the Union's exclusive competence[19].

(4) As a consequence, parts of the Convention fall within the competence of the Union, and Member States may not enter into commitments in relation to these parts outside the framework of the Union's institutions[20].

(5) The European Union cannot ratify the Convention, as only States can be parties thereto.

(6) In this situation, Member States and the Union's institutions must cooperate in regard to the ratification of the Convention.

(7) The Council shall therefore authorise the Member States that are bound by Union law on minimum requirements in the area of working conditions to ratify the Convention in the interests of the European Union.

HAS ADOPTED THIS DECISION:

Article 1

Member States are hereby authorised to ratify, for the parts falling under the competence conferred upon the Union by the Treaties, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189).

Article 2

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President

[19] Article 45 TFEU, Regulation No 492/2011.

[20] Opinion 2/91 of the European Court of Justice of 19 March 1993, ECR 1993-I, page 1061, para.26.