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Proposal for a

COUNCIL DECISION

authorising Member States to ratify, in the interest of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation with regard to matters related to judicial cooperation in criminal matters

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The proposed Council Decisions will enable Member States to ratify the Protocol to the Forced Labour Convention, 1930, of the International Labour Organisation (ILO), hereinafter ‘the Protocol’.

The Forced Labour Convention, 1930 (No 29) of the ILO (‘the Convention’) is one of the ILO’s eight fundamental Conventions that make up the core international labour standards, and it is considered a human rights instrument. In adopting the Convention in 1930, the International Labour Conference (‘the Conference’) called upon States to end the use of forced labour within the shortest possible period, and to criminalise the offence. Yet, more than 80 years later, despite almost universal ratification of the Convention, the practice still exists, albeit in different forms to those that provoked such concern in the early twentieth century. The ILO estimates that at least 20.9 million people globally are victims of forced labour.

The Protocol, adopted by the 103rd session of the Conference, seeks to address gaps in implementation and to make progress on preventing trafficking for labour exploitation and protecting and compensating victims of forced labour.

The European Union (EU) is committed to promoting human rights and decent work and to eradicating trafficking in human beings, both internally and in its external relations. Of particular importance in the context of the Protocol is also the commitment of the EU to the promotion of the protection of the rights of the child and gender equality, as women may be particularly vulnerable to some forms of forced labour. Rights at work are a key pillar of decent work. In ratifying ILO Conventions and related Protocols, EU Member States send an important signal on the coherence of the EU’s policy in promoting fundamental principles and rights at work and improving working conditions worldwide.

In addition, as part of the EU’s strategy on eradicating trafficking in human beings¹, the Commission urged EU Member States to ratify all relevant international instruments, agreements and legal obligations. This will help address trafficking in human beings in a more effective, coordinated and coherent manner. Strengthening victims’ rights in the EU has also been a strategic priority of the Commission over the past few years. The horizontal Victims’ Rights Directive will ensure that victims of crime benefit from common minimum standards of rights during police investigations and court proceedings. The Protocol should be seen as part of this work.

It is therefore necessary that any legal impediments at EU level to ratification of the Protocol by EU Member States be removed at EU level. The Protocol’s substance does not cause any concern in the light of the existing EU *acquis*.

The Protocol’s provisions strengthen the international legal framework by establishing obligations to prevent forced labour and to provide victims with protection and access to remedies, such as compensation.

The Protocol, in its Articles 1 and 6, requires ILO Member States to develop a national policy and plan of action for the effective and sustained suppression of forced labour and to take measures to apply the Protocol’s provisions, in consultation with employers’ and workers’ organisations.

¹ EU strategy towards the eradication of trafficking in human beings 2012-2016, COM(2012) 286 of 19.6.2012.

Article 2 of the Protocol sets out the measures that ILO Member States must take to prevent forced labour, namely:

- educating and informing people, especially those who are particularly vulnerable, and employers;
- making efforts to ensure that the coverage and enforcement of legislation relevant to the prevention of forced labour apply to all workers and all sectors of the economy and that labour inspection services are strengthened;
- protecting people, especially migrant workers, from potentially abusive and fraudulent recruitment and placement practices;
- supporting due diligence by both the public and private sectors; and
- addressing the root causes heightening the risks of forced labour.

As regards the victims of forced labour, Article 3 provides that effective measures are to be taken for their identification, release, protection, recovery and rehabilitation and other forms of assistance and support. Article 4 requires ILO Member States to ensure that all victims have access to remedies, such as compensation, and that competent authorities are entitled not to prosecute victims for unlawful activities that they have been compelled to commit.

In addition, Article 5 provides for international cooperation to prevent and eliminate forced labour and Article 7 deletes the transitional provisions from the Convention.

The Protocol addresses areas of EU law that are already subject to an advanced degree of regulation.

In its provisions on preventing forced labour, the Protocol deals with aspects covered by EU social policy, in respect of which EU law sets minimum rules on working conditions².

In its provisions on protection of victims and access to remedies, the Protocol deals with aspects relating to judicial cooperation in criminal matters, in respect of which EU law sets minimum standards on anti-trafficking and victims' rights³.

Parts of the Protocol also interplay with freedom of movement for workers⁴ and rules on asylum and immigration⁵.

In addition, the Protocol interplays with rules under the common commercial policy, EU international agreements, development cooperation and trade instruments that make reference to core labour standards and the ratification and effective implementation of fundamental ILO Conventions by third countries and in the EU.

² Including Directive 91/533/EEC on an employer's obligation to inform employees on the conditions applicable to the contract or employment relationship ('written statement'), Directive 2008/104/EC on temporary agency work, as well as Directives on health and safety at work, including the framework Directive 89/391/EEC, the working time Directive 2003/88/EC, the protection of young people at work Directive 94/33/EEC and the maternity protection Directive 92/85/EEC.

³ Directive 2011/36/EU ('anti-trafficking'); Directive 2012/29/EU ('victims' rights').

⁴ Article 45 TFEU and Regulation 492/2011 on freedom of movement for workers within the Union.

⁵ Directive 2004/81/EC ('residence permit for victims') and Directive 2009/52/EC ('employers' sanctions'). Directive 2008/115/EC ('return'), Directive 2011/98/EU ('single permit') and Directive 2014/36/EU ('seasonal workers') are also concerned by selected provisions of the Protocol and the related Recommendation.

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

Not applicable.

3. LEGAL ELEMENTS OF THE PROPOSAL

The Protocol is a binding international agreement, subject to ratification, and is linked to the Convention. It creates legal obligations applicable to ratifying States and can only be ratified by States that have ratified the Convention.

At the ILO, a Protocol is used to partially revise or add to a Convention, allowing it to adapt to changing conditions, and making it more relevant. Article 19(4) of the ILO Constitution, on the adoption and ratification of Conventions, also applies to a Protocol.

In accordance with case law of the Court of Justice of the European Union (ECJ)⁶, and more specifically on concluding and ratifying an ILO Convention⁷, Member States are not able to decide to ratify the Protocol outside the framework of the EU's institutions, as parts of the Protocol fall into areas of EU competence.

However, the EU as such cannot ratify an ILO Protocol, because under the ILO rules only States can be parties to such Protocols.

As the subject matter of this Protocol falls partly within areas of EU competence and partly within those of Member States, the EU institutions and Member States must take the necessary measures to cooperate in ratifying the Protocol and in implementing commitments resulting from that Protocol⁸.

Over the last decade, the Council has already authorised Member States to ratify, in the interests of the EU, five ILO Conventions, parts of which fell into areas of EU competence⁹.

With reference to the Protocol, regulation is at an advanced stage in the various aspects of anti-trafficking, victims' protection and labour policies covered by the Protocol, to the point where Member States are no longer able to act as sovereign in dealing with external parties in this regard¹⁰. Article 82(2) and 153 of the Treaty on the Functioning of the European Union

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.

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

⁹ 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);

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;

Council Decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the International Labour Organisation (Convention No 170) (2014/52/EU);

Council Decision of 28 January 2014 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) (2014/51/EU).

¹⁰ Opinion 2/91 of the ECJ, para 25 and 26.

(TFEU) constitute the main legal basis for the relevant EU legislation, which is more detailed than the general principles established in the Protocol.

There is no incompatibility between the provisions of the Protocol and the minimum requirements in these areas laid down in the EU *acquis*.

In line with Article 19(8) of the ILO Constitution, the Protocol sets out minimum standards. The EU *acquis* takes the same approach. This means that EU law may be more stringent than the ILO standards, and *vice versa*¹¹.

The proposed Council Decisions will therefore authorise Member States to ratify, in the interest of the EU, those parts of the Protocol that fall into areas of EU competence, and recommend them to make efforts to do so by the end of 2016.

The proposed Council Decisions are based on the one hand on Article 218(6) TFEU, in conjunction with Article 82(2) TFEU, which provides the main legal basis for EU legislation on judicial cooperation in criminal matters relevant to addressing trafficking in human beings and victims' rights, and on the other hand on Article 153(2) second subparagraph TFEU, in conjunction with Article 218(6) TFEU, which provides the main legal basis for EU legislation on protecting and improving working conditions, relevant to preventing forced labour.

The Protocol pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other. In particular, the Protocol aims at achieving decent working conditions on the one hand and protecting the victims of forced or compulsory work and sanctioning the perpetrators on the other. Therefore, it must be founded both on Article 82(2) TFEU and 153(1) (a) and (b). A single decision cannot be adopted on a dual legal basis where the procedures required by each legal basis are incompatible with each other.¹² Such is the case here in view of the fact that matters related to judicial cooperation in criminal matters do not bind Denmark, which leads to diverging voting rights in the Council. Consequently, two separate Council decisions are required.

As regards the objective of protecting the victims of forced or compulsory work and sanctioning the perpetrators, Article 82(2) TFEU is the single legal basis that the present proposal should be founded on. It is true that the Protocol also touches upon the residence status of victims of forced or compulsory labour to the extent that this is required to enable these victims to have access to appropriate and effective remedies (see, in particular, Article 4 of the Protocol). However, this purpose relating to Article 79 TFEU is merely incidental whilst the objectives of preventing and combating trafficking in human beings and protecting victims relating to Article 82(2) TFEU¹³ are identifiable as the predominant purpose and component.

The Commission recalls in that context that on 14 April 2014, pursuant to Article 218(3) and (4) TFEU, it has submitted to the Council a Recommendation for a Council Decision authorising the opening of negotiations and negotiating directives at the 103rd session of the International Labour Conference on a Protocol to supplement the forced labour Convention n°29, 1930, of the International Labour Organisation (COM(2014)238 of 14.4.2014). The Commission further recalls that this recommendation has been discussed in Council Working

¹¹ Opinion 2/91 of the ECJ, para 18.

¹² See, most recently, ECJ, judgment of 11 June 2014, Case C-377/12, para 34.

¹³ See, in particular, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, which is based on Article 82(2) TFEU, and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, which is based on Articles 82(2) and 83(1) TFEU. Articles 1(1), 1(2), 1(3), 2(a), 2(c), 3, 4(1) and 4(2) of the Protocol are of direct concern to the matters governed by these Directives.

Party meetings of 5 May, 14 May and 16 May 2014 and that, despite several attempts to reach an agreeable solution, it was decided at the Coreper meeting of 23 May 2014 not to pursue the matter further and, therefore, not to submit the draft decision to the Council for adoption. As a consequence, the Commission issued the following declaration which was recorded in Coreper minutes:

"The Commission recalls the obligation of sincere cooperation between Member States and the Commission in all circumstances. The absence of these decisions will lead to a situation which is not in compliance with the Treaties as Member States are legally not free to make legal commitments on issues of Union competence in international negotiations without the framework of Union decisions. The Commission will assess the appropriate measures to take in this regard. The Commission recalls the need to respect Union competences, to avoid any incompatibility between the Union acquis and the ILO instruments to be negotiated and for Member States to act in the interests of the EU at the ILO."

The Commission further notes that, despite the absence of the adoption of the said draft decision, Member States have proceeded to the negotiation and adoption, within the ILO, of the Protocol 2014 to the Forced Labour Convention. Given the importance of the Protocol 2014 to the Forced Labour Convention, the Commission hereby proceeds to propose, on the basis of Article 218(6) TFEU, that Member States are authorised to ratify the said Protocol, acting jointly in the interest of the Union. The Commission at the same time highlights that this proposal cannot in any way be considered as an acceptance by the Commission of the legality of the procedure which has led to the adoption of the said Protocol within the ILO.

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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 82(2) in conjunction with Article 218(6)(a)(v) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹⁴,

Whereas:

- (1) The European Union is promoting the ratification of international labour conventions that have been classified by the International Labour Organisation as up-to-date, to contribute to the European Union's efforts to promote human rights and decent work for all as well as to eradicate trafficking in human beings both inside and outside the EU, of which the protection of fundamental principles and rights at work is a key aspect.
- (2) Parts of the rules under the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation (ILO), hereinafter 'the Protocol', falls within the competences of the Union, as laid down in Article 82(2) TFEU. Furthermore some of the rules of the Protocol are already covered by EU *acquis* in the areas of judicial cooperation in criminal matters.¹⁵
- (3) As a consequence, Member States may not enter into commitments in relation to these parts outside the framework of the European Union's institutions¹⁶.
- (4) Article 19(4) of the ILO Constitution, on the adoption and ratification of Conventions, similarly applies to a Protocol, which is a binding international agreement, subject to ratification and linked to a Convention.
- (5) The European Union cannot ratify the Protocol, as only States can be parties thereto.
- (6) It is therefore necessary that Member States are authorised to ratify the Protocol, acting jointly in the interests of the European Union, for the parts falling under European Union competence in accordance with Article 82(2) TFEU.

¹⁴ OJ C , , p. .

¹⁵ Several provisions of the Protocol were the subject of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims ('anti-trafficking') and Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime ('victims' rights').

¹⁶ ECJ, Case 22/70 Commission vs Council ("AETR") [ECR] 1971, 263, paragraph 22, Opinion 2/91 ("ILO"), ECR 1993-I, 1061, paragraph 26 and Case C-45/07, Commission vs Greece [ECR] 2009 I-701, paragraph 31.

- (7) Article 82(2) TFEU is the single legal basis that the present decision should be founded on. It is true that the Protocol also touches upon the residence status of victims of forced or compulsory labour to the extent that this is required to enable these victims to have access to appropriate and effective remedies (see, in particular, Article 4 of the Protocol). However, this purpose relating to Article 79 TFEU is merely incidental whilst the objectives relating to Article 82(2) TFEU are identifiable as the predominant purpose and component.
- (8) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not bound by this Decision and is not subject to its application to judicial cooperation in criminal matters.
- (9) The United Kingdom and Ireland are bound by Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims and Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and are therefore taking part in the adoption of this decision,
- (10) The provisions of the draft Protocol other than the provisions related to judicial cooperation in criminal matters will be subject to a Decision adopted in parallel to this Decision.

HAS ADOPTED THIS DECISION:

Article 1

Member States are hereby authorised to ratify, for the parts falling under the competence conferred upon the European Union in Article 82(2) TFEU, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation.

Article 2

Member States should take the necessary steps to deposit their instruments of ratification of the Protocol with the Director-General of the International Labour Office as soon as possible, preferably by 31 December 2016.

Article 3

This Decision is addressed to the Member States.

Article 4

In this Decision, the term "Member State" shall mean any Member State with the exception of Denmark.

Done at Brussels,

*For the Council
The President*