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Proposal for a

COUNCIL DECISION

on the position to be adopted on behalf of the European Union at the 103rd session of the International Labour Conference concerning a Recommendation to supplement the Forced Labour Convention n° 29, 1930, of the International Labour Organisation

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

As part of the objective of continuing and strengthening existing successful practices of cooperation between the Union and its Member States and in line with the rules of the Treaties, this proposal aims at establishing the Union position at the 103rd session of the International Labour Conference, as regards a Recommendation to supplement the Forced Labour Convention n°29, 1930 of the International Labour Organisation (ILO).

The Forced Labour Convention n°29, 1930, of the ILO, hereinafter "the Convention", is one of the eight fundamental Conventions of the ILO -the core international labour standards- and is considered as a Human Rights instrument. In adopting the convention in 1930, the International Labour Conference called upon member States to suppress the use of forced labour within the shortest possible period, and to criminalize the offence. Yet, over 80 years later, and 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, with the ILO estimating that at least 20.9 million people are victims of forced labour globally.

The aim of the ILO Recommendation to be considered by the 103rd session of the International Labour Conference, hereinafter "the Conference" is to address implementation gaps to advance prevention of trafficking for labour exploitation as well as protection and compensation of victims of forced labour.

The adoption of a Protocol on the same subject is also on the agenda of the Conference and is subject to a separate Recommendation for a Council Decision authorising the opening of negotiations.

1.1. Consideration and possible adoption of a Recommendation to supplement the ILO Forced Labour Convention n°29, 1930, at the 103rd session of the International Labour Conference on 28 May-12 June 2014

A standard setting item on "supplementing the Forced Labour Convention n°29, 1930" is on the agenda of the 2014 International Labour Conference with a view to adopt a Protocol and/or a Recommendation.

This Conference agenda item was selected by the 317th Session of the ILO Governing Body (March 2013) as a standard-setting, single-discussion item for the 103rd Session of the Conference.¹ This decision follows the recommendations of the February 2013 meeting of experts on forced labour and trafficking for labour exploitation convened by the ILO Governing Body "to identify gaps in existing coverage of ILO standards with a view to determining whether there is a need for standard setting to: (i) complement the ILO's forced labour Conventions to address prevention and victim protection, including compensation; and (ii) address human trafficking for labour exploitation"². The process forms part of the ILO framework for action for the effective and universal respect, promotion and realization of fundamental principles and rights at work 2012-2016³.

¹ GB.317/INS/2(Rev.) and Record of Decisions, 25 March 2013.

² Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation (Geneva, 11–15 February 2013), Report for discussion at the Tripartite Meeting of Experts concerning the possible adoption of an ILO instrument to supplement the Forced Labour Convention, 1930 (No. 29) (TMELE/2013); Final report (TMELE/2013/7); Conclusions adopted by the Meeting (TMELE/2013/6).

³ ILO: Resolution concerning the recurrent discussion on fundamental principles and rights at work, International Labour Conference, 101st Session, Geneva, 2012, paras 8–31

The form of the instrument(s) submitted - Protocol and/or Recommendation – is to be decided by the Conference itself, on the basis of the proposals made by the International Labour Office in the March 2014 report to the Conference, following the consultation of the ILO's tripartite constituents in late 2013⁴. Some constituents favour a Recommendation accompanying a Protocol, others a Recommendation only and the outcome of the Conference's decision to this regard is uncertain⁵. A Recommendation will supplement the Convention and possibly the Protocol by providing more detailed guidelines on how the basic principles of the Convention and possibly the Protocol are to be applied. This proposal focuses on the content of such Recommendation in either case, on the basis of the report submitted to the Conference.

1.2. Content of the proposed Recommendation

The aim of the standard(s) under consideration is “to address implementation gaps to advance prevention, protection and compensation measures, to effectively achieve the elimination of forced labour”.

The proposal for a Recommendation, which forms the report IV (2B) submitted to the 103rd session of the ILC⁶, addresses the following aspects:

- National policies: including plans of action, coordination and monitoring bodies, data collection;
- Prevention: strategies to address root causes of forced labour, including empowering specific at-risk population groups, coverage and enforcement of labour law, awareness raising, training programmes and pre-departure orientation for migrants, use of languages/translation, coherent migration policies and international cooperation on migration, social protection floors, reduction of trade in and demand for goods and services tainted by forced labour;
- Protection of victims on the basis of their informed consent and not conditional to their willingness to cooperate in criminal proceedings: providing immediate assistance and long-term recovery and rehabilitation for all victims, healthcare, housing, material, social and economic assistance, education and training, protection from intimidation and retaliation and from punishment for crimes they have been compelled to commit, specific protection for children with presumption of minor status and migrant workers with reflection and recovery period, temporary or permanent residence permit as appropriate as well as safe and preferably voluntary repatriation; measures against fraudulent placement services;
- Compensation and access to justice: access to appropriate remedies for all victims, right to obtain compensation and damages, information and advice, possible representation of victims, access to legal remedies irrespective of victims' nationality and legal status in the territory, victims compensation funds;

⁴ <http://www.ilo.org/ilc/ILCSessions/103/reports/reports-to-the-conference/lang--en/index.htm>

⁵ See replies received to the consultation in the report IV (2A) to the Conference http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239813.pdf

⁶ Publicly available on ILO website at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239814.pdf

- Enforcement: labour inspection, confiscation of profits of forced labour, liability of legal persons, punishment of perpetrators, indicators for identification of victims;
- International cooperation: technical cooperation, mutual legal assistance, sharing of information and good practice.

The proposal for a Recommendation will be the basis of the negotiations for the Recommendation to be adopted at the 103rd session of the International Labour Conference.

1.3. Division of competences in the field of the Convention and the proposed Recommendation

The proposed provisions of the Recommendation are in part covered by competences conferred upon the Union by the Treaties. In addition, many of them address areas of Union law in which the degree of regulation on the level of the EU has already reached an advanced stage.

The Recommendation deals with aspects relating to anti-trafficking and protection of victims, which are aspects related primarily to the judicial cooperation in criminal matters area⁷ where rules are set by 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”). These aspects are also dealt with by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, (“UN Trafficking Protocol”), to which the EU is a party.

The Recommendation is to deal with aspects related to the social policy area⁸, where requirements are notably set by Directive 91/533/EEC on an employer’s obligation to inform employees on the conditions applicable to the contract or employment relationship (“written statement”) and Directive 2008/104/EC on temporary agency work, as well as by Directives on health and safety at work, working time, protection of young people at work or maternity protection⁹.

The Recommendation is to deal with aspects related to the asylum and immigration area¹⁰ where requirements are notably set by Directive 2004/81/EC in the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, Directive 2009/52/EC on sanctions against employers who knowingly employ illegally staying third country workers (“employers’ sanctions”) providing for sanctions, including criminal ones, against employers exploiting irregular migrants and containing compensation measures for victims of such exploitation.

The Recommendation may, for the protection of migrant workers, have an impact on the freedom of movement for workers secured under Article 45 TFEU and Regulation 492/2011 on freedom of movement for workers within the Union. The Recommendation is further to affect EU international agreements, development

⁷ Art 82(2) and 83(1) TFEU

⁸ Art.153 TFEU

⁹ Directive 89/391/EEC, Directive 94/33/EEC, Directive 2003/88/EC, Directive 92/85/EEC

¹⁰ Art.79 TFEU

cooperation and trade instruments making reference to the core labour standards and the ratification and effective implementation of fundamental ILO Conventions by third countries, enlargement countries and in the EU.

At the same time, the Recommendation will also deal with matters which fall outside competences conferred upon the EU by the Treaties.

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

Not applicable.

3. LEGAL ELEMENTS OF THE PROPOSAL

The 103rd session of the International Labour Conference is to be entrusted to consider and adopt the said proposal for a Recommendation to supplement the ILO Forced Labour Convention, n°29, 1930.

A Recommendation has as such no binding force and is not subject to ratification by ILO members. However, a Recommendation is used by ILO standard supervisory bodies to assess the application of the related labour standards and provides guidance as to national policy, legislation and practice. In accordance with Article 19(6)(b) and (c) of the ILO Constitution, the adoption of a Recommendation implies certain obligations for the parties. In this respect, each Party has to launch legislative or administrative procedures within a fixed period of time to consider its implementation in its domestic legal order, must inform the ILO of the measures taken to bring its legal order in line with the Recommendation and, where it decides not to apply the Recommendation, must report to the ILO in appropriate intervals the current state of domestic law and practice as regards the matters dealt with by the Recommendation.

It follows that the envisaged Recommendation will constitute an act of a body set up by an international agreement which will produce legal effects in the sense of Article 218(9) TFEU.

Only States are members of the ILO, can propose amendments and vote on the adoption of the Recommendation at the International Labour Conference. The Union is invited to the Conference with an observer status.

However, given that the Recommendation will relate to issues covered both by competences conferred upon the Union by the Treaties and sole national competences, the Union and Member States must act together in the spirit of sincere cooperation, as provided for in Article 4(3) TEU. To that effect, when acting in the ILO, Member States should also act jointly in the interest of the Union.

At this stage, it appears that the proposed Recommendation is in accordance with the orientations of Union law and policies in this area. There is no contradiction between the general principles pursued by the proposed Recommendation and Union law and policies, and there is *prima facie* no incompatibility between the proposed Recommendation and the Union *acquis*.

However, amendments to the proposed text during the Conference should only be proposed or accepted if they are compatible with existing Union legislation.

4. PRACTICALITIES

Member States should act within the bodies of the ILO jointly in the interest of the Union in a coordinated manner. Given the legal framework of the ILO, only Member States can propose amendments and cast votes throughout the negotiation process. Therefore, Member States acting both on national competences and jointly in the interest of the Union, and the Commission should act together in the spirit of sincere cooperation. To that aim, Member States and the Commission should assist each other in carrying out the tasks to ensure the best possible defence of the interests of the Union and its Member States and should be supported, in the exercise of their tasks, by the best available experts of both Member States and the Commission.

Because of the interplay between the Protocol and the Recommendation subject the discussions and negotiations at the conference in the same Committee, the detailed position of the Union should be taken after considering the negotiating position established for the Protocol.

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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, Articles 82(2), 83(1), 153 and 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Forced Labour Convention n°29, 1930, of the International Labour Organisation (ILO), hereinafter ‘the Convention’, requires its Parties to suppress the use of forced labour within the shortest possible period, and to criminalize the offence.
- (2) Proposals for a Recommendation to supplement the Convention, hereinafter “the draft Recommendation”, are on the agenda of the 103rd session of the International Labour Conference on 28 May - 12 June 2014, hereinafter “the Conference”, for consideration and adoption.
- (3) The aim of the draft Recommendation is to address implementation gaps to advance prevention of trafficking for labour exploitation as well as protection and compensation of victims of forced labour.
- (4) The rules under the Convention and the provisions under the draft Recommendation are covered in part by competences conferred upon the Union by the Treaties. In addition, the draft Recommendation will interplay with existing *acquis* in the areas of social policy¹¹, asylum and immigration¹², freedom of movement for workers¹³ and fundamental rights¹⁴. In particular, most of the provisions of the draft Recommendation have been the subject of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (“anti-trafficking”), where appropriate, and Directive 2012/29/EU establishing minimum standards on the

¹¹ 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.

¹² In particular Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, employers’ sanctions Directive 2009/52/EC.

¹³ Article 45 TFEU and Regulation 492/2011 on freedom of movement for workers within the Union.

¹⁴ Charter of fundamental rights of the EU articles 4 (prohibition of torture and inhuman or degrading treatment or punishment), 5 (prohibition of slavery and forced labour), 15 (freedom to choose an occupation and right to engage in work), 24 (rights of the child), 31 (fair and just working conditions) and 32 (prohibition of child labour and protection of young people at work).

rights, support and protection of victims of crime (“victims’ rights”). These aspects are also dealt with by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, (“UN Trafficking Protocol”), to which the EU is a party. The draft Recommendation is further to interplay with international agreements, development cooperation and trade instruments making reference to core labour standards and the ratification and effective implementation of fundamental ILO Conventions by third countries, candidate countries and in the EU.

- (5) In accordance with Article 19(6)(b) and (c) of the ILO Constitution, the adoption of a Recommendation implies certain obligations for the parties. A Recommendation further provides guidance as to national policy, legislation and practice and is used by ILO standard supervisory bodies to assess the application of the related labour standards. It follows that the draft Recommendation will constitute an act of a body set up by an international agreement which will produce legal effects.
- (6) Given the above, in accordance with Article 218(9) TFEU, it is necessary that the Council adopts a decision to establish the position to be adopted on the Union's behalf as regards matters falling within the Union's competence. Member States will act jointly in the interest of the Union, which is not a member of the ILO¹⁵.
- (7) Given that certain changes may be made to the draft Recommendation before its adoption by the International Labour Conference, it is necessary to provide that Member States, acting jointly in the interest of the Union, may propose amendments or agree to amendments during the course of the Conference as regards matters falling within the Union's competence, as long as they are compatible with existing EU legislation.

HAS ADOPTED THIS DECISION:

Sole Article

1. The position of the Union at the 103rd session of the International Labour Conference shall be to support the approval of the envisaged draft Recommendation. The text of the draft Recommendation forms the report IV (2B) submitted to the 103rd session of the ILC¹⁶.
2. The position of the Union as set out in paragraph 1 shall be taken by the Member States, acting jointly in the interest of the Union when adopting the provisions of the Recommendation at the 103rd session of the International Labour Conference.
3. Non-substantial changes to this position may be agreed to within the bodies of the ILO by the Member States acting jointly in the interest of the Union, without further decision of the Council.

Done at Brussels,

*For the Council
The President*

¹⁵ Opinion 2/91 of the European Court of Justice of 19 March 1993, ECR 1993-I, page 1061, para. 26.

¹⁶ Publicly available on ILO website at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocuments/wcms_239814.pdf