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**“A” ITEM NOTE**

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from: Council General Secretariat

to: Council

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No. Cion prop.: 13157/14 - COM(2014) 559 final + 13158/14 - COM(2014) 563 final

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Subject: 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

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 social policy

- *Agreement in principle*

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1. On 12 September 2014, the Commission transmitted to the Council two proposals on the above subjects, corresponding to two different legal bases (judicial cooperation in criminal matters and social policy), to authorise Member States to ratify, in the interests of the EU, the 2014 Protocol to the 1930 Forced Labour Convention of the ILO.

2. The ILO Forced Labour Convention (Convention 29) of 1930, is one of the eight fundamental ILO Conventions that make up the core labour standards. In June 2014, in its 103rd session, the International Labour Conference (ILC) adopted a Protocol and a Recommendation to Convention 29.

These new standards aim at stepping-up the fight against new forms of forced labour as well as to make progress in international cooperation and in assistance to victims. For all those ILO members which ratify the Protocol, it will be a legally binding international instrument, linked to the Convention.

3. The Protocol contains aspects falling under EU competence. The Decisions provide an authorisation for the Member States to ratify the abovementioned Protocol for those aspects, thus removing legal impediments for the ratification of the Protocol by Member States.
4. On 20 February 2015, the Committee of Permanent Representatives approved the draft Decisions, as set out in documents 6424/15 and 6425/15, and agreed to forward these draft Decisions to the Council as "A" items for agreement in principle.
5. The proposals are subject to the European Parliament's consent.
6. The following delegations made statements or maintained reservations:
  - CZ, IE and UK entered statements to the Coreper minutes (see minutes of the 2530th Coreper meeting), as well as to the Council minutes (see Annexes 1, 2 and 3).
  - MT entered a statement to the Council minutes (see Annex 4), noting that it would abstain from voting on these Decisions.
  - DE, joined by EL, HU and RO, entered a statement to the Council minutes concerning the legal basis (see Annex 5).

- HU maintained a general scrutiny reservation.
  - The UK, while maintaining a parliamentary scrutiny reservation, is not in a position to support the Decisions.
7. The Council is invited to approve, as an "A" item, the agreement in principle on the draft Decisions, as set out in documents 6424/15 and 6425/15.

Subject to such an approval and following legal-linguistic revision, the text will be submitted to the European Parliament for its consent. The proposal will subsequently be adopted by the Council.

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**Statement by the Czech Republic**

The Czech Republic wishes to underline that it fully supports the above-mentioned Protocol and will not therefore oppose the adoption of the two related Council decisions.

Nevertheless, from the legal point of view, the Czech Republic would like to express its doubts as to the existence of EU exclusive competence and as to the necessity of the proposed decisions to be adopted, in particular bearing in mind the wording of Art 82(2) and Art 153(2) TFEU (both provisions allowing the European Parliament and the Council to establish minimum rules or requirements) as well as the Opinion 2/91 in which the Court concluded specifically in the ILO context that the provisions of an international agreement are not of such a kind as to affect rules adopted by the EU, when both the agreement and the EU legislation set out minimum standards.

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**Statement by Ireland**

Ireland wishes to underline that it fully supports the Protocol of 2014 to the Forced Labour Convention of the International Labour Organisation.

Ireland wishes to make clear however that it considers that the 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 as regards Articles 1 to 4 of the Protocol with regard to matters related to judicial cooperation in criminal matters only applies to areas falling within exclusive EU competence insofar as the Protocol may affect EU common rules.

**Statement by the United Kingdom**

The United Kingdom wishes to record its support for the Protocol of 2014 to the Forced Labour Convention, 1930, and to place on record its intention to ratify the Protocol.

The United Kingdom wishes to record its view that there is no exclusive external competence for the Union arising from the Protocol in respect of the subject matter referred to in the *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*. Accordingly, there was no requirement for the Member States to be authorised to this extent to ratify the Protocol in the interests of the Union. Accordingly, Member States should have been able to consider ratification of the Protocol in their own right.

Further, the United Kingdom considers that the draft *Council Decision in relation to matters related to judicial cooperation in criminal matters*, being a measure proposed pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, is subject to Protocol (No. 21) to the Treaties on the position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice.

Accordingly, the United Kingdom does not consider that it is automatically bound, as suggested by Recital (9), to participate in the Council Decision simply on account of its participation on 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.

As a result, the United Kingdom will not exercise its right under Protocol 21 to opt in to the *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*.

**Statement by the Republic of Malta**

The Republic of Malta fully supports the content of the 2014 Protocol to the Forced Labour Convention, 1930, of the International Labour Organisation and intends to ratify it.

The Republic of Malta however has strong legal and procedural concerns with these two proposed Council decisions authorising Member States to ratify the ILO Protocol.

The Republic of Malta does not consider that there exists exclusive EU competence arising from the areas covered by the Protocol, given that both Articles 82(2) and 153(2) TFEU allow the European Parliament and Council to establish minimum standards and taking into account Opinion 2/91 in which the Court concluded specifically in the ILO context that the provisions of an international agreement are not of such a kind as to affect rules adopted by the EU, when both the agreement and the EU legislation set out minimum standards. Therefore this raises questions about the necessity and appropriateness of having the proposed Council decisions. Moreover, the Republic of Malta also regrets the lack of detailed analysis by the Commission on the distribution of competences to justify the need for these decisions and the lack of clarity in the final text outlining the extent of the competences being exercised (exclusive or shared).

Furthermore, the Republic of Malta is still not convinced on the appropriateness of the use of Article 218(6) TFEU as a procedural legal base given that Article 218 (6) TFEU specifies that the Council, "on a proposal by the negotiator," may adopt a decision concluding agreements between the Union and international organisations. When a negotiator is nominated, this has to be done by decision of the Council as provided for in Article 218 (3) TFEU second clause of the sentence. In relation to the above-mentioned Protocol, no mandate for the negotiation and adoption of the Protocol at the 103rd International Labour Conference was given by means of a Council Decision. Therefore Article 218 (6) TFEU is at best questionable as a procedural legal basis.

Notwithstanding the abovementioned legal concerns, in view of the importance of the Protocol which Malta fully supports, the Republic of Malta has decided to abstain from voting on these Decisions.

**Statement by the Federal Republic of Germany, joined by the Hellenic Republic, Hungary and Romania, to the Council minutes**

The Commission presented two proposals for Council Decisions 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 for those parts that fall within the competences of the Union (1) in accordance with Article 153(1)(a) and (b) TFEU or (2) in accordance with Article 82(2) TFEU. Article 218(6) (a) (v) TFEU is named as the procedural legal basis for the Council Decisions.

The Federal Republic of Germany underlines the legal and political significance of the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation. It explicitly supports the aims of the instruments and the ratification of the Protocol by all Member States also in the interest of the Union and the call on Member States to ratify, and it will initiate the ratification process in Germany as soon as possible.

However, there are divergent legal opinions about the underlying procedural norms that could not yet be resolved. From the German point of view Article 218(6) TFEU which is used as the procedural basis does not qualify for this purpose. However, because of the legal and political significance of the Protocol the Federal Republic of Germany is ready to endorse the presented proposals and to disregard the procedural concerns outlined in its written comment of 23 October 2014. The Federal Republic of Germany therefore endorses the present Decision notwithstanding its legal opinion concerning the interpretation of Article 218(6) TFEU.

The Federal Government wishes to seize this opportunity to explore, together with the Member States and the European Commission, viable ways of reconciling the procedural interests of the EU Member States as autonomous constituents of the ILO on the one hand and of the European Union as the guardian of the *acquis communautaire*, on the other.