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EU-ILO Project
"Towards safe, healthy and declared work in Ukraine"

Draft Law No. 5054-1
"On amending the Labour Code of Ukraine concerning the Regulation of Some Matters of Employment Relationship"

submitted by People's Deputy of Ukraine H.M. Tretiakova

EU-ILO project technical recommendations on its better alignment with the International and European Labour Standards and best practices

March, 2021

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EXECUTIVE SUMMARY

The draft Law of Ukraine "On amending the Labour Code of Ukraine concerning the Regulation of Some Matters of Employment Relationship" was submitted to Verkhovna Rada of Ukraine (VRU) on 25 February 2021 (Reg. No. 5054-1, of 25.02.2021) by People's Deputy of Ukraine H.M. Tretiakova, and sent for consideration of the relevant VRU committees on 1 March 2021.

The present technical advice and recommendations, to the aforesaid draft law, are provided within the scope of the EU-ILO Project "Towards safe, healthy and declared work in Ukraine", under activity 1.4.1 (of Output 1.4).

They are intended to promote a better alignment of the draft Law "On amending the Labour Code of Ukraine concerning the Regulation of Some Matters of Employment Relationship" with the main applicable International[1] and European[2] labour standards and best practices. In particular, such areas as the employment relationship, the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, the promotion of transparent and predictable working conditions, the safeguard of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses and on occupational safety and health (OSH).

They follow three on-line trainings, provided by the EU-ILO Project in the summer of 2020, on the "Employment Relationship", "Employers' obligations to inform workers and to ensure transparent and predictable working conditions", "Working Time" and "OSH".[3]

They also follow the participation of the ILO in a series of technical assistance meetings and round-tables held within the work group set up by the Parliament to discuss the CMU draft Law "On Labour" No. 2708, during the first quarter of 2020, and a first set of technical recommendations, regarding the better alignment of the CMU draft Law "On Labour" No. 2708 with the main applicable International and European Labour Standards on the employment relationship, working time and on the employers' obligations to inform workers, to ensure transparent and predictable

[1] Namely with the Employment Relationship Recommendation, 2006 (No. 198).

[2] In particular, with Council Directive 91/533/EEC, of 14 October 1991, on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship; Directive (EU) 2019/1152 of the European Parliament and of the Council, of 20 June 2019, on transparent and predictable working conditions in the European Union; Council Directive No. 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses; and Council Directive No. 89/391/EEC, of 12 June 1989, concerning the introduction of measures to encourage improvements in the safety and health of workers at work.

[3] Integrated in the "Summer Marathon of Online Trainings on International and European Labour Standards and best practices", these sessions were carried out, respectively, on 25th June, 2nd July and 30th July, and were attended, respectively, by 416, 300 and 500 experts from the government, parliament, trade unions, employers' organizations, research institutions and academia. The video records and supporting materials of each of these online training sessions can be retrieved by clicking, for the concerned training module, in the following corresponding hyperlink: employment relationship; employers' obligations to inform workers and to ensure transparent and predictable working conditions; OSH.

working conditions and to safeguard employees' rights in the event of transfers of undertakings or businesses, provided by the ILO on March 2020.

Furthermore, they are consistent with three recent sets of technical recommendations provided by the EU-ILO Project (in October and November of 2020 and in February 2021), regarding the Ministry of Economy (ME) draft Law "On Occupational Safety and Health of Workers" and with the technical recommendations, provided by the EU-ILO Project in March 2021, concerning the ME draft Laws "On amending the Labour Code of Ukraine concerning the definition of the concept of employment relationship and the indicators of its existence" and "On Amending Some Legislative Acts of Ukraine to Regulate Some Non-standard Forms of Employment".[4]

They should not be seen as official comments of the ILO or as a replacement of the positions of the supervisory bodies of the ILO.

Moreover, the expert technical opinions expressed therein neither reflect the official opinion of the European Union nor its responsibility can be attributed to the European Union.

Looking at the provisions foreseen in this draft law, in the light of the applicable International and European Labour Standards and best practices, it is possible to identify some positive aspects along with some remaining gaps and challenges that need to be further addressed and improved, in order to better align it with the applicable International Labour Standards (ILS) and EU Acquis:

Main positive aspects:

1. The definition of the key concepts of employment relationship, employer and worker;
2. The enumeration of indicators to guide the determination of the existence of an employment relationship;
3. The regulation towards better safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, by ensuring the transfer of the employment relationship from the transferor to the transferee.

[4] The technical recommendations on the ME draft Law "On Occupational Safety and Health of Workers", provided in February 2021, are available at: https://www.ilo.org/budapest/what-we-do/projects/declared-work-ukraine/WCMS_774341/lang--en/index.htm; the technical recommendations on the ME draft Law "On amending the Code of Labour Laws of Ukraine concerning the definition of the concept of employment relationship and the indicators of its existence", provided in March 2021, are available at: https://www.ilo.org/budapest/what-we-do/projects/declared-work-ukraine/WCMS_774597/lang--en/index.htm; and the technical recommendations on the ME draft Law "On Amending Some Legislative Acts of Ukraine to Regulate Some Non-standard Forms of Employment", provided in March 2021, are available at: https://www.ilo.org/budapest/what-we-do/projects/declared-work-ukraine/WCMS_775063/lang--en/index.htm.

Main aspects to improve:

1. The formulation of the sixth part of Article 3, when taken together with its first paragraph, should be revised, as recommended, because, according to the International and European best practices, Occupational Safety and Health regulations - which is part of labour legislation [as also inferred from the part seven of this Article, which specifically highlights it in the sentence "The labour legislation (except the legislation on labour protection)"] -, should also apply, with the necessary adaptations, to independent or self-employed workers, as well as to trainees, apprentices and informal workers (and not just to employees), with the purpose of extending decent work to all workers, irrespectively of their status regarding employment. Should also be revised because, if the idea of this first paragraph was to exclude independent (or truly self-employed) workers from the scope of application of labour relations legislation (due to the inexistence of an employment relationship), then the last words of this first paragraph of the sixth part of this Article (in concrete: "with the status of individual entrepreneur") should be deleted. Indeed, the status of "individual entrepreneur" is irrelevant for the qualification or determination of the existence of an employment relationship, whereas the independence between the worker and the beneficiary of its activity is sufficient for disqualifying their relation as an employment relationship, as results from Paragraphs 9 and 12 of the ILO Employment Relationship Recommendation, 2006 (No. 198).
2. The second paragraph of the sixth part of Article 3 should be deleted because a natural person that has a labour agreement (as well as the respective employer) is automatically under the scope of labour legislation. In fact, and considering that the existence of a labour agreement between a worker and the beneficiary of its activity is a sufficient condition for the existence of an employment relationship (although not a necessary one), because it proves its existence, a natural person who performs work under a labour agreement has an employment relationship with the beneficiary of its activity and, therefore, the labour legislation should obviously apply to such a worker (as well as to the beneficiary of its activity, i.e., the respective employer).
3. The seventh part of Article 3, along with its paragraph should also be deleted because, contrary to what is written there, the situation where "a natural person discharges the obligations undertaken thereby under a labour agreement that provides for performance of certain work by the natural person for the benefit of the other party to the agreement" (as well as the respective beneficiary - the employer) is automatically under the scope of labour legislation. In fact, and considering that the existence of a labour agreement between a worker and the beneficiary of its activity is a sufficient condition for the existence of an employment relationship (although not a necessary one), because it proves its existence, a natural person who performs certain work for the benefit of the other party to the labour agreement has necessarily an employment relationship with the beneficiary of its activity and, therefore, the labour legislation should obviously apply to such a worker (as well as to the beneficiary of its activity, i.e., the respective employer).

4. Some terms need further improvement to be better aligned with International and European Labor Standards (employment relationship, employer, employment agreement and workstation *versus* workplace), as mentioned, for example, in the recommendations to parts 1 and 4 of Article 21, part 1 of Article 21^1 (the latter, is here proposed to be renumbered as Article 21^2) and paragraph 3 of the first part of the proposed Article 21^2 (here proposed to be renumbered as Article 21^1). This is particularly true when it comes to the use of the terms:

    a. Employment relationship (in the first part of Article 21) - it should be changed, to insert “where the worker performs personally work or services for the benefit of the employer, with a certain continuity, at a place and time instructed by the employer, for a remuneration paid by the employer”, in order to ensure a better alignment with Paragraph 13(a) and 13(b) of ILO R198; and

    b. Employer (in the fourth part of Article 21) - which should also be changed, for the following reasons:

        i. To insert "who has an employment relationship with a worker", immediately after "a legal or natural person", because the distinctive characteristic of a natural or a legal person that allows its qualification as an employer is precisely the circumstance of having an employment relationship with a worker, irrespectively of its nature (regardless of being a legal person, natural person, its branch, division, representative office or other standalone unit situated in the territory of Ukraine or some other possible formulation);

        ii. To delete the part "as well as its branch, division, representative office or other standalone unit situated the territory of Ukraine and carrying out its activities under the legislation of in Ukraine", because the jurisdiction, legality or (lack of) registration of a legal or natural person should not prejudice its qualification as an employer, if s/he has an employment relationship with a worker. The qualification of an employer (and of the existence of an employment relationship) should not consider the jurisdiction, (lack of) registration or legality of the parties, but primarily the facts relating to the performance of work and the remuneration of the worker, as foresee in Paragraph 9 of ILO R198. The questions regarding the jurisdiction, legality or registration of the parties should be addressed in other sphere and should be without prejudice to the qualification of a natural or legal person as an employer, if it has an employment relationship with a worker.

    c. Workstation (instead of workplace), in the third paragraph of the first part of Article 21^2 (here proposed to be renumbered as Article 21^1) - which should be replaced by the term “workplace”, in order to improve consistency and alignment with the definition of the term “workplace” foreseen in Article 3(c) of ILO Occupational Safety and Health Convention, 1981 (No. 155) and Article 2 of EU Council Directive No. 89/654/EEC, of 30 November 1989, concerning the minimum safety and health requirements for the workplace.

5. The foreseen possibility of the employer to limit, through the employment agreement, of the employees' right to conclude employment agreements with one or more employers at the same time (part 2 of Article 21^1, here proposed to be renumbered as Article 21^2), should be better aligned with Article 9 of Directive (EU) 2019/1152.

6. The essential elements of the employment relationship (referred to in part 3 of Article 21^1 - proposed to be renumbered as Article 21^2) regarding which, according to Articles 3 to 7 of Directive (EU) 2019/1152 and with Articles 8 and 10 of Directive 89/391/EEC, the employer should provide information to workers, as well as its frequency and form of transmission, needs to be further improved and better aligned with the mentioned EU Directives.

7. As for Article 21^2 (here proposed to be renumbered as Article 21^1), regarding the indicators of the existence of employment relationship, it is important to highlight the following:

    a. Part 1 of Article 21^2 (proposed to be renumbered as Article 21^1), contrary to what is argued in the explanatory note to this draft law, does not establish a legal presumption of the existence of an employment relationship when some indicators are present, but only states that, when four or more are present, "work may be recognized as being performed within employment relationship", which is clearly different and noticeably dissonant and falling short, when compared with the above mentioned International and European Labour Standards and best practices. Especially when the legal procedure to recognize the existence of an employment relationship (mentioned in part 8 of Article 21) does not exist and it is not established by this draft law. In addition, and differently than its foreseen in the respective explanatory note, this draft provides that the employment relationship may be recognized if there are four or more of the enumerated indicators of the existence of employment relationship (instead of the three mentioned in the explanatory note). In fact, the draft law provision does not create a legal presumption of the existence of an employment relationship. What it does is simply to define the conditions (the presence of four or more of the enumerated indicators in a given relationship) under which a relationship "may be recognized as being performed within employment relationship", which is completely different. As for the number of the indicators whose presence leads to the presumption of the existence of an employment relationship, it should be considered to set it as "three or more". The latter is precisely the number proposed by the ME in its recent draft Law "On amending the Code of Labour Laws of Ukraine concerning the definition of the concept of employment relationship and the indicators of its existence" and seems adequate, considering that this number should be a balanced compromise: as large as necessary to avoid the misclassification of a service contract as an employment relationship and, at the same time, as short as possible, to prevent the omission of the qualification, as an employment relationship, of situations where the facts relating to the performance of work and the remuneration of the worker clear indicate the performance of work with subordination and dependence of the worker in relation to the beneficiary of the activity. As such, the proposed part 1 of Article 21^2 (proposed to be renumbered as Article 21^1), should be changed, as recommended, in order to effectively establish a legal presumption of the existence of an

employment relationship, whenever one or more relevant indicators are present, as foreseen in Paragraph 11(b) of the ILO R198 and in Points 35 and 39 (of the Preamble) and Articles 11 and 15(1)(a) of Directive (EU) 2019/1152.

b. As for the last words of this part of the Article (in particular: "except in cases provided for by the third part of this Article"), they should be deleted, for the following reasons:

   i. First and foremost, because this Article does not have a third part, but only two parts;

   ii. Secondly, because, if those words (instead of referring to the absent third part) are meant to the second part, they are contradictory with Paragraphs 9, 12 and 13 of ILO R198, as well as with Point 8 (of the Preamble) of Directive (EU) 2019/1152 and with the case law of the EU Court of Justice and of EU Member States, which sustain that the determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and the remuneration of the worker and not by the legal or fiscal nature of the employer and, in particular, if the employer is, or not, a "individual entrepreneur using hired labour".

c. The latter, moreover, raises some other concerns, including the non-observance of the principle of equality and non-discrimination, because:

   i. Workers of "individual entrepreneurs" are treated in a less favourable manner than comparable workers of other types of employers, without any objective grounds that could justify such different treatment, solely because they work for an individual entrepreneur. In particular, the workers of "individual entrepreneurs" will more likely be excluded from their labour rights, as employees, awarded and protected by the labour legislation, than comparable workers of other types of employers; and

   ii. Employers of other types (which are not "individual entrepreneurs") are treated in a less favourable manner than "individual entrepreneurs", without any objective grounds that could justify such different treatment, solely because they are not "individual entrepreneurs". These other employers will be subjected to the unfair competition exercised by the "individual entrepreneurs", which use workers without the costs associated with the compliance with the labour legislation.

d. Regarding the nature of the indicators, and besides some proposed changes in two of them for clarity purposes (paragraphs 4 and 6 of first part of Article 21^2 - here proposed to be renumbered as Article 21^1), it should be considered the inclusion of the proposed additional 4 indicators, in order to better align this Article with paragraphs 13(a) and 13(b) of ILO R198, and to improve the capacity and the usefulness of the indicators to be used as tools likely to help to determine the existence of an employment relationship, especially in a changing context, characterized by the appearance of new and increased complex atypical and non-standard forms of work.

e. It should be inserted, as recommended, a new part, establishing that the indicators whose presence leads to the presumption of the existence of an employment relationship are not restricted to the ones referred to in the first part of this Article and may include others, in order to allow the consideration of other indicators which presence, according to Paragraph 11(b) of ILO R198 and Points 8, 35 and 39 (of the Preamble) and Articles 11 and 15(1)(a) of Directive (EU) 2019/1152, should lead to the presumption of the existence of an employment relationship, as foreseen in Paragraphs 13(a) and 13(b) of the ILO R198, in the case law of the EU Court of Justice and in the case law of EU Member States.

f. The proposed second part of Article 21^2, establishing exclusively for "individual entrepreneurs", a higher number of indicators whose presence may allow the recognition of the existence of an employment relationship, should be deleted because is contradictory with Paragraphs 9, 12 and 13 of ILO R198, as well as with Point 8 (of the Preamble) of Directive (EU) 2019/1152 and with the case law of the EU Court of Justice and of EU Member States, which sustain that the determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and the remuneration of the worker - and not by the legal or fiscal nature of the employer and, in particular, if the employer is, or not, a "individual entrepreneur using hired labour". It should also be deleted because it puts into question the principle of equality and non-discrimination. In particular:

   i. Workers of "individual entrepreneurs" are treated in a less favourable manner than comparable workers of other types of employers, without any objective grounds that could justify such different treatment, solely because they work for an "individual entrepreneur". The workers of "individual entrepreneurs" will more likely be excluded from their labour rights (as employees, awarded and protected by the labour legislation), than comparable workers of other types of employers; and

   ii. Employers of other types (which are not "individual entrepreneurs") are treated in a less favourable manner than "individual entrepreneurs", without any objective grounds that could justify such different treatment, solely because they are not "individual entrepreneurs". These other employers will be subjected to the unfair competition exercised by the "individual entrepreneurs", which use workers without the costs associated with the compliance with the labour legislation.

8. The present draft law does not establish any specific procedure for the recognition of the existence of an employment relationship, notwithstanding the fact that it does not exist yet and, in spite of that, the draft law refers to in part 8 of Article 21. It is therefore important to consider the establishment, as proposed in our recommendations to Article 21^2 (here proposed to be renumbered as Article 21^1) the existence of a speedy, inexpensive, and fair procedure and mechanism for settling disputes regarding the existence of an employment relationship (as foreseen in Paragraph 4 of ILO R198) and the existence of appropriate redress and early settlement mechanisms to protect workers against adverse

treatment or consequences [as foreseen in Articles 15(1)(b), 16 and 17 of Directive (EU) 2019/1152].

9. Concerning the provisions foreseeing that a worker may not be admitted without the conclusion of a labour agreement and its communication to the proper authority, as well as regarding the timings of such communication (proposed changes to part 3 of Article 24), they should be amended, as recommended, not only because it should be for the employer to authorize the employee to start working and to provide him/her with the necessary means to do so and, as such, for ensuring the formalization of the employment relationship, but also to ensure their better alignment with ILO R198, Directive (EU) 2019/1152 and best practices.

10. As for the legal succession in employment relationship (Article 36^1), several aspects should be reviewed, as recommended, in order to better align it with Council Directive 2001/23/EC, in particular in what regards to;

    a. The definition of the transferor and transferee, in order to better clarify their different obligations;

    b. Complement the nature of the information that is necessary to be provided, better specify who should provide the information and to whom the and, finally, within what time-frame;

    c. Foresee the conditions within which the transferor and/or the transferee have to consult their workers.

11. Regarding the proposal of adding a second part to Article 259, the last words of the proposed sentence (in concrete: "except for inspections of activities of individual entrepreneurs") should be deleted, for the following reasons:

    a. It exempts "individual entrepreneurs" from labour inspection activity and, consequently, their workers, which, moreover, is contradictory with:

        i. Articles 1, 2(1), 3(1)(a) and 18 of the ILO Labour Inspection Convention, 1947 (No. 81) and Articles 1, 3, 4, 6(1)(a) and 24 of the ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129), both ratified by Ukraine in 10.11.2004.

        ii. Articles 4(1) and 4(2) of EU Directive 89/391/EEC, which stipulates that MS shall ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for its implementation and shall, in particular, ensure adequate controls and supervision. According to Article 424 of the EU-Ukraine Association Agreement, Ukraine shall approximate its legislation with the provisions of this EU Directive, within the timetable foreseen in its Annex XL to Chapter 21 of the AA.

        iii. Article 9 of ILO C155 (ratified by Ukraine in 04.01.2012), which foresees that the enforcement of laws and regulations concerning OSH shall be secured by an adequate and appropriate system of inspection and that

adequate penalties for violations of the laws and regulations shall be provided by the enforcement system.

b. It takes out from the labour inspection system, as well as from the subsequent infringement proceedings, the effect of general prevention (i.e., the fact that the subjects of legal provisions tend to comply with them in order to avoid being sanctioned). This legal provision is likely to disincentive "individual entrepreneurs" to comply with labour legislation from the outset, because they know that if their compliance with labour legislation will not be neither controlled nor enforced and that their non-compliance will not be sanctioned.

c. It is contradictory with the principle of equality and non-discrimination. In particular:

    i. Workers of "individual entrepreneurs" are treated in a less favourable manner than comparable workers of other types of employers, without any objective grounds that could justify such different treatment, solely because they work for an "individual entrepreneur". Workers of "individual entrepreneurs" will not be protected against the violation of their labour rights, as comparable workers of other types of employers; and

    ii. Employers of other types (which are not "individual entrepreneurs") will be treated in a less favourable manner than "individual entrepreneurs", without any objective grounds that could justify such different treatment, solely because they are not "individual entrepreneurs", as their compliance with labour legislation will be controlled and enforced by labour inspection and the violation of the legal provisions will be sanctioned. These other employers will be, therefore, subjected to unfair competition exercised by the "individual entrepreneurs", which will not be forced to comply with labour legislation, enabling them to practice "social dumping".

12. The paragraph 2 of the final and transitional provisions, should be deleted because, otherwise, workers whose employment relationship is recognized according to the indicators enumerated in the first part of articled 21^2 (here recommended to be renumbered as Article 21^1) will automatically lose their accumulated rights *ab initio* (since they started working for that employer), including in terms of seniority, promotions, salary increments, paid annual leaves and mandatory contributions to social protection systems. If, by hypothesis, this rule were maintained, the legislator would be benefiting the infringer, i.e., would be granting a disproportionate and unjustified advantage and treatment to employers who used workers without guaranteeing their rights and without fulfilling the employer's typical obligations towards them, at the expense of their workers and to the detriment of their competitors who have been complying with the labour, fiscal and social security legislation.

13. Finally, no provisions are introduced in order to dissuade and sanction the non-compliance regarding the newly inserted and/or amended provisions, most especially concerning the eventual infringement of the provisions related to the employment relationship, labour agreement and transfer of businesses or part of businesses.

The more detailed recommendations concerning the main aspects referred to above, as well as many others, along with their respective rationale, are presented in the next section.

Subsequently, some examples of legal provisions regulating the employment relationship in other countries are shared.

It is our expectation that, at the end of this process, Ukraine may benefit from an improved legislation on the employment relationship, properly aligned with the applicable International and European Labour Standards, which effectively contributes to foster decent working conditions in the country.

Kyiv, 18 March 2021

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ILO Office for Central and Eastern Europe

EU-ILO PROJECT DETAILED RECOMMENDATIONS

CMU draft law provision's wording	Recommended wording	Rationale
I. Amend the Code of Labour Laws of Ukraine (Vidomosti Verkhovnoi Rady URSR, 1971, Annex to No. 50, p. 375) as follows:		
1. Reword Article 3 as follows:		
"Article 3. Relations regulated by the labour legislation		
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The labour legislation shall not apply if:	**The Code of Labor Laws shall not apply if:**	The formulation of this part, when taken together with its first paragraph, should be revised as recommended, for the following reasons: 1. On the one hand, because, according to the International and European best practices, OSH regulations [which are part of labour legislation - as also inferred from the part seven of this Article, which specifically highlights it in the sentence "The labour legislation (except the legislation on labour protection)"] should also apply, with the necessary adaptations, to independent or self-employed workers, as well as to trainees, apprentices and informal workers (and not just to employees), with the purpose of extending decent work to all workers, irrespectively of their status regarding employment.
work is performed independently by an natural person with the status of individual entrepreneur;	**work is performed independently by an natural person. In this case, the occupational safety and health legislation applies *mutatis mutandis*.**	

CMU draft law provision's wording	Recommended wording	Rationale
		2. On the other hand, because, if the idea of this paragraph was to exclude independent (or truly self-employed) workers from the scope of application of labour relations legislation, due to the inexistence of an employment relationship, then the last words of this first paragraph of the sixth part of this Article (in concrete: "with the status of individual entrepreneur") should be deleted. Indeed, the status of "individual entrepreneur" is irrelevant for the qualification or determination of the existence of an employment relationship, whereas the independence between the worker and the beneficiary of its activity is sufficient for disqualifying their relation as an employment relationship, as results from Paragraphs 9 and 12 of the ILO Employment Relationship Recommendation, 2006 (No. 198).
a natural person performs work under a labour agreement.	**Should be deleted.**	This paragraph should be deleted because a natural person that has a labour agreement (as well as the respective employer) is automatically under the scope of labour legislation. In fact, and considering that the existence of a labour agreement between a worker and the beneficiary of its activity is a sufficient condition for the existence of an employment relationship (although not a necessary one), because it proves its existence, a natural person who performs work under a labour agreement has an employment relationship with the beneficiary of its activity and, therefore, the labour legislation should obviously apply to such a

CMU draft law provision's wording	Recommended wording	Rationale
		worker (as well as to the beneficiary of its activity, i.e., the respective employer).
The labour legislation (except the legislation on labour protection) shall not apply if: a natural person discharges the obligations undertaken thereby under a labour agreement that provides for performance of certain work by the natural person for the benefit of the other party to the agreement.	**Should be deleted.**	This part should be deleted because "a natural person discharges the obligations undertaken thereby under a labour agreement that provides for performance of certain work by the natural person for the benefit of the other party to the agreement" (as well as the respective beneficiary - the employer) is automatically under the scope of labour legislation. In fact, and considering that the existence of a labour agreement between a worker and the beneficiary of its activity is a sufficient condition for the existence of an employment relationship (although not a necessary one), because it proves its existence, a natural person who performs certain work for the benefit of the other party to the labour agreement has an employment relationship with the beneficiary of its activity and, therefore, the labour legislation should obviously apply to such a worker (as well as to the beneficiary of its activity, i.e., the respective employer).
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2. Reword the title of Chapter III as follows:		
"Chapter III - EMPLOYMENT RELATIONSHIP AND LABOUR AGREEMENT".		
3. Reword Article 21 as follows:		
Article 21. Employment relationship		
Employment relationship shall mean the relations between the worker and the employer that provide for performance, personally by the worker for remuneration, of work designated by	Employment relationship shall mean the **relation** between the worker and the employer **where the worker performs personally work or services for the benefit of the employer**, **with a certain**	Should be changed, to insert "where the worker performs personally work or services for the benefit of the employer, with a certain continuity, at a place and time instructed by the employer, for a

CMU draft law provision's wording	Recommended wording	Rationale
the employer, under the employer's authority, direction and control.	**continuity, at a place and time instructed by the employer**, for **a** remuneration **paid by the employer and** under the employer's authority, direction and control.	remuneration paid by the employer", in order to ensure a better alignment with Paragraph 13(a) and 13(b) of ILO R198.
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The employer shall mean a legal or natural person, as well as its branch, division, representative office or other standalone unit situated in the territory of Ukraine and carrying out its activities under the legislation of Ukraine.	The employer shall mean a legal or natural person **who has an employment relationship with a worker**.	Should be changed, for the following reasons: • To insert "who has an employment relationship with a worker", immediately after "a legal or natural person", because the distinctive characteristic of a natural or a legal person that allows its qualification as an employer is precisely the circumstance of having an employment relationship with a worker, irrespectively of its nature (regardless of being a legal person, natural person, its branch, division, representative office or other standalone unit situated in the territory of Ukraine or some other possible formulation); • To delete the part "as well as its branch, division, representative office or other standalone unit situated the territory of Ukraine and carrying out its activities under the legislation of in Ukraine", because the jurisdiction, legality or (lack of) registration of a legal or natural person should not prejudice its qualification as an employer, if s/he has an employment relationship with a worker. The qualification of an employer (and of the existence of an employment relationship) should not consider the jurisdiction, (lack of) registration or legality of the parties, but primarily the facts relating to the performance of work and

CMU draft law provision's wording	Recommended wording	Rationale
		the remuneration of the worker, as foresee in Paragraph 9 of ILO R198. The questions regarding the jurisdiction, legality or registration of the parties should be addressed in other sphere and should be without prejudice to the qualification of a natural or legal person as an employer, if it has an employment relationship with a worker.
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	The rights and obligations set out by this law and relevant specific laws, including on occupational safety and health, shall apply, regardless of the absence of a formal written employment agreement and regardless of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between them.	Should be added for clarity and also in order to: • Better specify what legislation applies to both employer and employees in the context of an employment relationship; • Better clarify that those rights and obligations should apply whenever there is an employment relationship, regardless of the existence or form of any arrangements (contractual or otherwise) between employer and worker; • To determine that the mentioned legislation should apply whenever there is an employment relationship, and not only when such employment relationship is recognized, so as to ensure that, once the recognition occurs, the rights of the worker should be ensured *ab initio* (i.e., since the employment relationship started, and not only since the moment that the employment relationship was recognized). Should also be changed because the mentioned "established procedure" (to recognize an

CMU draft law provision's wording	Recommended wording	Rationale
		employment relationship) does not exist, was not established in the present draft law, and the present draft law does not include any legal provision establishing it.
The parties to a labour agreement shall be obligated to inform, within the time limits set out thereby, of any circumstances likely to affect conclusion, execution or termination of the labour agreement.	**Should be deleted and the employer's obligation to inform employees on the main conditions applicable to the employment agreement or employment relationship should be inserted in a specific section and properly aligned with EU Directive 91/533/EEC and Directive (EU) 2019/1152. They are therefore included as recommendations to part 3 of Article 21 (below).**	Should be deleted, for the following reasons: • To improve legislative systematics, the employer's obligation to inform employees of the conditions applicable to the employment contract or employment relationship [which provisions, moreover, should be in line with Directive 91/533/EEC and Directive (EU) 2019/1152], should all be provided for, as much as possible, in a specific article or section, in order to avoid being dispersed along several articles; • This provision does not ensure that the timeframe agreed between employer and worker is within the one foreseen in: ➢ Directive (EU) 2019/1152: during a period starting on the first working day and ending no later than the seventh calendar day [Article 5(1)]; before departure of the expatriate employee [Article 7(1)]; and, at the earliest opportunity and at the latest on the day on which any change takes effect [Article 6(1)]. ➢ Directive 91/533/EEC: Not later than two months after the commencement of employment [Article 3(1)]; before departure of the expatriate employee [Article 4(1)]; and, at the earliest opportunity and not later than one month after the

CMU draft law provision's wording	Recommended wording	Rationale
		date of entry into effect of any change [Article 5(1)].
4. Add Articles 21^1 and 21^2 as follows:		
Article 21^1. Labour agreement	**Article 21^2. Labour agreement**	Should be renumbered as Article 21^2, in order to improve structural systematics, ensuring that the legal presumption of the existence of an employment relationship follows immediately its definition (which is made in Article 21).
A labour agreement shall mean an arrangement between the worker and the employer under which the worker undertakes to personally perform the work designated by the arrangement, in the employer's interests, whereas the employer undertakes to provide work to the worker thereunder, pay remuneration timely and in full, and provide proper working conditions.	**A labour agreement shall mean a formal written contract between employer and employee that defines the main aspects of the employment relationship and specifies the main rights and obligations of the parties.**	To simplify and better align the intended provision with Directive 91/533/EEC and Directive (EU) 2019/1152.
The worker shall have the right to conclude labour agreements with one or more employers at the same time, unless otherwise provided for by the legislation or the labour agreement.	The worker shall have the right to conclude labour agreements with one or more employers at the same time, unless otherwise provided for by the legislation. ~~**or the labour agreement**~~.	To foresee that employer cannot limit the right of the employees to celebrate employment agreements with other employers, unless such is foreseen in law, with the specificities provided for in the next two suggested paragraphs, aimed at better aligning this provision with Articles 9(1) and 9(2) of Directive (EU) 2019/1152.
	The employer cannot prohibit a worker from taking up employment with other employers outside the work schedule established with that employer, neither subject the worker to adverse treatment for doing so.	To better align the proposed provision with Article 9(1) of Directive (EU) 2019/1152.
	The employer may agree with the worker, within the employment agreement, the establishment of incompatibility restrictions on the	To better align the proposed provision with Article 9(2) of Directive (EU) 2019/1152.

CMU draft law provision's wording	Recommended wording	Rationale
	basis of duly substantiated and objective grounds, such as safety and health, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests.	
A particular labour agreement form shall be a contract where its validity period, rights, obligations and liability of the parties (including financial liability), conditions of the worker's material provision and work organization, and conditions of the contract termination, including early termination, may be set out by agreement between the parties. The scope of the contract shall be defined by law.	**The employment agreement shall include, at least, the following essential information:** **1) The identities of the parties to the employment relationship;** **2) The place of work; where there is no fixed or main place of work, the principle that the worker is employed at various places or is free to determine his or her place of work, and the registered place of business or, where appropriate, the domicile of the employer;** **3) The title, grade, nature or category of work for which the worker is employed or a brief specification or description of the work;** **4) The date of commencement of the employment relationship or, in the case of a fixed-term employment relationship, the end date or the expected duration thereof;** **5) The duration and conditions of the probationary period, if any;** **6) The training entitlement provided by the employer, if any;** **7) The amount of paid leave to which the worker is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;**	To better align the intended provision with Articles 4 and 7 of Directive (EU) 2019/1152.

CMU draft law provision's wording	Recommended wording	Rationale
	8) The procedure to be observed by the employer and the worker, including the formal requirements and the notice periods, where their employment relationship is terminated or, where the length of the notice periods cannot be indicated when the information is given, the method for determining such notice periods;	
	9) The remuneration including the initial basic amount, any other component elements, if applicable, indicated separately and the frequency and method of payment;	
	10) If the work pattern is entirely or mostly predictable, the length of the worker's standard working day or week and any arrangements for overtime and its remuneration and, where applicable, any arrangements for shift changes;	
	11) If the work pattern is entirely or mostly unpredictable, the employer shall inform the worker of: **i. The principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;** **ii. The reference hours and days within which the worker may be required to work;** **iii. The minimum notice period to which the worker is entitled before the start**	

CMU draft law provision's wording	Recommended wording	Rationale
	of a work assignment and, where applicable, the deadline for cancellation.	
	12) Any collective agreements governing the worker's conditions of work or in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of such bodies or institutions within which the agreements were concluded;	
	13) Where it is the responsibility of the employer, the identity of the social security institutions receiving the social contributions attached to the employment relationship and any protection relating to social security provided by the employer;	
	14) The safety and health risks and protective and preventive measures and activities in respect of both the undertaking and/or establishment in general and the employee's job in particular;	To better align the intended provision with Articles 4 and 7 of Directive (EU) 2019/1152 and with Article 10 of Directive 89/391/EEC.
	15) Where applicable, the measures taken for first aid, fire-fighting and evacuation of workers, including the identification of the workers designated to implement them.	To better align the intended provision with Articles 4 and 7 of Directive (EU) 2019/1152 and with Articles 8(2) and 10(1) of Directive 89/391/EEC.
	The information referred to in the preceding points 5 to 10 and 13 can be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.	To better align the intended provision with Article 4(3) of Directive (EU) 2019/1152.
	The information referred to in the preceding points 1 to 5 and 9 to 14 shall be provided individually to the worker in the form of one or more documents during a period starting on the	To better align the intended provision with Article 5(1) of Directive (EU) 2019/1152.

CMU draft law provision's wording	Recommended wording	Rationale
	first working day and ending no later than the seventh calendar day.	
	Where not previously provided, the information referred to in the preceding points 6 to 8 and 15, shall be provided individually to the worker in the form of a document within one month of the first working day.	
	Regarding the workers required to work outside the country for a period or periods which each duration exceeds four consecutive weeks, the employer shall provide each one of them the information of the preceding points 1 to 15 above before the worker's departure and the documents shall include, at least, the following additional information: **1) The country or countries in which the work abroad is to be performed and its anticipated duration;** **2) The currency to be used for the payment of remuneration ;** **3) Where applicable, the benefits in cash or kind relating to the work assignments;** **4) Information as to whether repatriation is provided for and, if so, the conditions governing the worker's repatriation.**	To better align the intended provision with Article 7 of Directive (EU) 2019/1152.
	The employer shall ensure that any change in the essential aspects of the employment relationship referred to in this Article and any change to the additional information for workers sent to another country shall be provided in the form of a written document by the employer to the worker at the earliest opportunity and at the latest on the day on which it takes	To better align the intended provision with Article 6(1) of Directive (EU) 2019/1152.

CMU draft law provision's wording	Recommended wording	Rationale
	effect and, in the case of workers sent to other country, before their departure.	
	The preceding paragraph shall not apply to changes that merely reflect a change in the laws, regulations and administrative or statutory provisions or collective agreements cited in the information previously provided.	To better align the intended provision with Article 6(2) of Directive (EU) 2019/1152.
	The employer shall provide each worker with the information required pursuant to this Article in writing and transmitted on paper.	To better align the intended provision with Article 3 of Directive (EU) 2019/1152.
	The employer may transmit to each worker the written information required pursuant to this Article in electronic form, provided that:	
	1) The information is accessible to the worker;	
	2) That it can be stored and printed; and	
	3) That the employer retains proof of transmission or receipt.	
Article 21[2]. Indicators of the existence of employment relationship	**Article 21[1]. Legal presumption** of the existence of **an** employment relationship	Should be renumbered as Article 21[1], in order to improve structural systematics, ensuring that the legal presumption of the existence of an employment relationship follows immediately its definition, which is made in Article 21. Should also be changed, in order to better clarify the content of the article, which is the establishment of a legal presumption of the existence of an employment relationship, whenever one or more relevant indicators are present, thus ensuring a better alignment with Paragraph 11(b) of the ILO R198 and with Points 35 and 39 (of the Preamble) and Articles 11 and 15(1)(a) of Directive (EU) 2019/1152.

CMU draft law provision's wording	Recommended wording	Rationale
Work may be recognized as being performed within employment relationship regardless of the name and type of contractual relations between the parties, if there are four or more following indicators of the existence of employment relationship, except in cases provided for by the third part of this Article:	**It is assumed that an employment relationship exists if, regardless of the absence of a formal written employment agreement and regardless of how the relationship is characterized in any contrary arrangement, contractual or otherwise, three or more of the following indicators of the existence of an employment relationship are present:**	Should be changed, as recommended, in order to effectively establish a legal presumption of the existence of an employment relationship, as foreseen in Paragraph 11(b) of the ILO R198 and in Points 35 and 39 (of the Preamble) and Articles 11 and 15(1)(a) of Directive (EU) 2019/1152. Moreover, in the explanatory note to this draft law it is said that: • "*Analysis of the current labour legislation (…) evidenced the need to regulate in the legislation the principle of employment relationship existence presumption*", and that • "*The principle of employment relationship existence presumption is that the Code of Labour Laws of Ukraine provides for the indicators of the existence of employment relationship, in particular when there are three or more such indicators the work is regarded as being performed (services being provided) within the employment relationship regardless of the name and type of contractual relations between the parties. In such a case, the parties must enter into a labour agreement*", however, the text of the draft law does not establish a legal presumption of the existence of an employment relationship when some indicators are present, but only states that, when four or more are present, "work may be recognized as being performed within employment relationship", which

CMU draft law provision's wording	Recommended wording	Rationale
		is clearly different and noticeably dissonant and falling short, when compared with the above mentioned International and European Labour Standards and best practices. Especially when the legal procedure to recognize the existence of an employment relationship (mentioned in part 8 of Article 21) does not exist and it is not established by this draft law, in addition, and differently than its foreseen in the respective explanatory note, this draft provides that the employment relationship may be recognized if there are four or more of the enumerated indicators of the existence of employment relationship (instead of the three mentioned in the explanatory note). In fact, the draft law provision does not create a legal presumption of the existence of an employment relationship. What it does is simply to define the conditions (the presence of four or more of the enumerated indicators in a given relationship) under which a relationship "may be recognized as being performed within employment relationship", which is completely different! As for the number of the indicators whose presence leads to the presumption of the existence of an employment relationship, it should be considered to set it as "three or more". The latter is precisely the number proposed by the ME in its

CMU draft law provision's wording	Recommended wording	Rationale
		recent draft Law "On amending the Code of Labour Laws of Ukraine concerning the definition of the concept of employment relationship and the indicators of its existence" and seems adequate, considering that this number should be a balanced compromise: as large as necessary to avoid the misclassification of a service contract as an employment relationship and, at the same time, as short as possible, to prevent the omission of the qualification, as an employment relationship, of situations where the facts relating to the performance of work and the remuneration of the worker clear indicate the performance of work with subordination and dependence of the worker in relation to the beneficiary of the activity. Finally, and regarding the last words of this part of the Article (in particular: "except in cases provided for by the third part of this Article"), they should be deleted, for the following reasons: 1. First and foremost, because this Article does not have a third part, but only two parts; 2. Secondly, because, if those words (instead of referring to the absent third part) are meant to the second part, they are contradictory with Paragraphs 9, 12 and 13 of ILO R198, as well as with Point 8 (of the Preamble) of Directive (EU) 2019/1152 and with the case law of the EU Court of Justice and of EU Member States, which sustain that the

CMU draft law provision's wording	Recommended wording	Rationale
		determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and the remuneration of the worker and not by the legal or fiscal nature of the employer and, in particular, if the employer is, or not, a "individual entrepreneur using hired labour". The latter, moreover, raises some other concerns, including the non-observance of the principle of equality and non-discrimination, because: • Workers of "individual entrepreneurs" are treated in a less favourable manner than comparable workers of other types of employers, without any objective grounds that could justify such different treatment, solely because they work for an individual entrepreneur. In particular, the workers of "individual entrepreneurs" will more likely be excluded from their labour rights, as employees, awarded and protected by the labour legislation, than comparable workers of other types of employers; and • Employers of other types (which are not "individual entrepreneurs") are treated in a less favourable manner than "individual entrepreneurs", without any objective grounds that could justify such different treatment, solely because they are not "individual entrepreneurs". These other employers will be subjected to the unfair

CMU draft law provision's wording	Recommended wording	Rationale
		competition exercised by the "individual entrepreneurs", which use workers without the costs associated with the compliance with the labour legislation.
…….		
…….		
the work is performed at the **workstation** designated by, or agreed upon with, the person in whose interests the work is performed, with observance of the internal labour regulations set out thereby;	the work is performed at the **workplace** designated by, or agreed upon with, the person in whose interests the work is performed, with observance of the internal labour regulations set out thereby;	The term "workstation" should be replaced by the term "workplace", in order to improve consistency and alignment with the definition of the term "workplace" foreseen in Article 3(c) of ILO Occupational Safety and Health Convention, 1981 (No. 155) and Article 2 of EU Council Directive No. 89/654/EEC, of 30 November 1989, concerning the minimum safety and health requirements for the workplace.
…….		
remuneration in cash and/or in kind is systematically paid to the person performing the work;	remuneration in cash and/or in kind is **periodically** paid to the person performing the work;	To better align with Paragraph 13(b) of ILO R198.
…….		
…….		
	the worker is integrated in the organization of the person in whose interests the work is provided;	These paragraphs should be included, in order to establish these additional indicators, better aligning this Article with the provisions foreseen in Paragraph 13(a) of ILO R198.
	the work have a particular duration and have a certain continuity, or requires the availability of the worker;	
	the remuneration, periodically paid to the worker by the person in whose interests the work is performed, constitutes the worker's sole or principal source of income.	These paragraphs should be included, in order to establish these additional indicators, better aligning this Article with the provisions foreseen in Paragraph 13(b) of ILO R198.
	the worker does not assume the financial risks of the execution of the work;	Moreover, and considering that the economic dependence of the worker regarding the

CMU draft law provision's wording	Recommended wording	Rationale
		beneficiary(ies) of the activity provided is gaining importance as an indicator of a disguised employment relationship under civil or commercial contracts for services or of a bogus self-employment, it is recommended to include this economic dependence indicator to the proposed list of indicators.
	The indicators whose presence leads to the presumption of the existence of an employment relationship are not restricted to the ones referred to in the first part of this Article and may include others.	This part should be inserted, in order to allow the consideration of other indicators which presence, according to Paragraph 11(b) of ILO R198 and Points 8, 35 and 39 (of the Preamble) and Articles 11 and 15(1)(a) of Directive (EU) 2019/1152, should lead to the presumption of the existence of an employment relationship, as foreseen in Paragraphs 13(a) and 13(b) of the ILO R198, in the case law of the EU Court of Justice and in the case law of EU Member States. This is particularly important, when considering the atypical and non-standard forms of work, in particular when the work pattern is entirely or mostly unpredictable, such as the cases within the scope of zero hour contracts and digital platforms. Regarding the latter, for example, one of the indicators that is being commonly applied by the supreme courts of EU Member States is the fact that the digital platform workers (such as Uber drivers of Deliveroo food deliverers) cannot define the final price of the service provided by the platform within which they work.

CMU draft law provision's wording	Recommended wording	Rationale
When establishing the existence of employment relationship, under a labour agreement concluded by a natural person with an individual entrepreneur using hired labour, the work may be recognized as being performed within employment relationship regardless of the name and type of contractual relations between the parties if there are six or more specified indicators of the existence of employment relationship.	**Should be deleted.**	This part should be deleted because is contradictory with Paragraphs 9, 12 and 13 of ILO R198, as well as with Point 8 (of the Preamble) of Directive (EU) 2019/1152 and with the case law of the EU Court of Justice and of EU Member States, which sustain that the determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and the remuneration of the worker - and not by the legal or fiscal nature of the employer and, in particular, if the employer is, or not, a "individual entrepreneur using hired labour". It should also be deleted because it puts into question the principle of equality and non-discrimination. In particular: 1. Workers of "individual entrepreneurs" are treated in a less favourable manner than comparable workers of other types of employers, without any objective grounds that could justify such different treatment, solely because they work for an "individual entrepreneur". The workers of "individual entrepreneurs" will more likely be excluded from their labour rights (as employees, awarded and protected by the labour legislation), than comparable workers of other types of employers; and 2. Employers of other types (which are not "individual entrepreneurs") are treated in a less favourable manner than "individual entrepreneurs", without any objective grounds that could justify such different treatment,

CMU draft law provision's wording	Recommended wording	Rationale
		solely because they are not "individual entrepreneurs". These other employers will be subjected to the unfair competition exercised by the "individual entrepreneurs", which use workers without the costs associated with the compliance with the labour legislation.
	The worker may lodge a lawsuit before the competent court for the recognition of the existence of an employment relationship since its beginning and may also file a complaint with the central executive authority that implements the state policy on labour.	This paragraph should be inserted to better align this draft law with paragraph 4 of ILO R198 and with Articles 15(1)(b) and 16 to 18 of Directive (EU) 2019/1152. In fact, it is necessary to specify the procedures that might be taken to ensure the recognition of an employment relationship, thus feeling the gap of this draft law (already identified above) that does not define the procedure for the recognition of the existence of an employment relationship to which it refers to in part 8 of Article 21 (above). Moreover, it is important to ensure the existence of a speedy, inexpensive, fair procedure and mechanism for settling disputes regarding the existence of an employment relationship (as foreseen in Paragraph 4 of ILO R198) and the existence of appropriate redress and early settlement mechanisms to protect workers against adverse treatment or consequences [as foreseen in
	Whenever a labour inspector verifies a situation legally presumed as being an employment relationship, notifies the employer to recognize the employment relationship with the employee since the beginning of the employment relationship and to formalize it with the employee, within the following 15 days, through a formal written employment contract.	
	The notification mentioned in the previous point is without prejudice to the right of the concerned employer or employee to judicially contest the administrative decision.	
	The judicial appeal mentioned in the previous paragraph does not have suspensive effect.	

CMU draft law provision's wording	Recommended wording	Rationale
		Articles 15(1)(b), 16 and 17 of Directive (EU) 2019/1152].
	In case of supervening establishment of the existence of an employment relationship, the employer shall reconstruct the employment relationship since the date the employee started to work, recognizing, *ab initio*, all the employee's rights, including in terms of seniority, promotions, salary increments, paid annual leaves and mandatory contributions to social protection systems.	In order to ensure the dissuasion of the practice of disguising employment relationships and to protect worker's rights in case of abuse. In addition, the code of labour laws should also foresee appropriate and dissuasive penalties for the abusive use of service contracts or civil contracts in situations characteristic of employment relationship.
5. Replace the third part of Article 24 by the following parts:		
"A worker may not be admitted to work without a concluded labour agreement formalized by an order or decree of the employer, and without notification of the central executive authority that implements the state policy on administration of a single contribution for mandatory state social insurance about the worker's being hired, according to the procedure established by the Cabinet of Ministers of Ukraine.	**The employer shall ensure the formalization of the employment relationship through an employment agreement and notify the central executive authority that implements the state policy on administration of a single contribution for mandatory state social insurance about the admission of an employee in accordance with the procedure established by the Cabinet of Ministers of Ukraine, at least 24 hours before the first working day or, when special circumstances related to the urgency of the employee's admission duly justifies it, in the first half of the first working day.**	Should be changed because the existence of an employment agreement prior to the commencement of the work and the communication of the admission of the worker to the proper authorities mainly depends on the will of the employer and not of the employee. In fact, is for the employer to authorize the employee to start working and to provide him/her with the necessary means to do so. The employee cannot work if the employer does not allow him/she to, whereas the contrary is not true. The obligation should therefore be imposed on the employer. Moreover, according to European best practices (e.g., Belgium, France, Spain, Portugal), the notification of the admission of the workers by the employer to the competent social security institution (or tax authority) should be done before the commencement of the work or, in exceptional and duly substantiated cases, on the day of its commencement (not later). Otherwise, it

CMU draft law provision's wording	Recommended wording	Rationale
		will be very difficult to tackle undeclared work because, when undeclared works are detected, employers can always argue that the worker begun working precisely on the day s/he was detected working (without an employment agreement and without the communication of its admission to the tax or social security authorities).
Within a week from the date of such notification, the employer shall inform the worker in written or electronic form of having sent the notification.".	**The employer shall inform individually each work about having sent the notification mentioned in the previous part, through a written document transmitted on paper or in electronic form, not later than the seventh calendar day following the first working day.**	To better align with Articles 3 and 5(1) of Directive (EU) 2019/1152.
	Employer's failure to ensure the conclusion of a formal employment agreement with a worker and or of notifying the competent authority about his/her admission does not prejudice the qualification or recognition of their relation as an employment relationship from the day it started.	Needs to be inserted, in order to clarify that, in situations where an employment agreement has not been signed or the admission was not notified to the Social Insurance Fund, it does not imply the inexistence of an employment relationship, as results from ILO R198 and Directive (EU) 2019/1152. This is especially important in the cases of undeclared work where, most frequently, there is no employment agreement and the admission of the worker was not notified to the Social Insurance Fund but there is an employment relationship (yet, non-declared or undeclared).
Due to that, the fourth-sixth parts shall be regarded as the fifth-seventh parts, respectively.	Due to that, the fifth and sixth parts shall be regarded as the **seventh** and **eighth**, respectively.	Due to the insertion of an additional (the previous) part.
6. Reword Article 25^1 as follows:		
Article 25^1. Restriction on simultaneous work of relatives		
.....		
.....		

CMU draft law provision's wording	Recommended wording	Rationale
7. In Article 36:		
1) reword the third part as follows:		
"Any change of subordination or name of an enterprise, institution or organization, or leasing of integral property complexes of an enterprise, institution or organization or their structural units shall not terminate the labour agreement.";	Any change of subordination or name of **the employer**, or leasing of **its** integral property complexes **or its** structural units shall not terminate the labour agreement.	Should be changed, in order to simplify and to ensure consistency (as the term "employer" was already defined above).
2) delete the fouth part.		
8. Add Art. 36^1 as follows:		
"Article 36^1. Legal succession in employment relationship		
Legal succession in employment relationship shall mean continuation of the employment relationship with workers in case of change of the owner of an enterprise, institution or organization, or in case of reorganization of an enterprise, institution or organization (merger, affiliation, division, transformation, separation).	Legal succession in the employment relationship shall mean **the legal transfer of the employment relationship with a worker from a transferor to a transferee,** in case of change of the owner of an enterprise, institution or organization, or reorganization of an enterprise, institution or organization (merger, affiliation, division, transformation, separation).	To better align with the provisions of Articles 1 and 2 of the Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
Legal succession in employment relationship between workers and a natural person using hired labour shall mean continuation of the employment relationship with the workers in case of change of the owner of the property or parts thereof.	Legal succession in employment relationship between **workers** and a natural person **who is the employer** shall mean **the legal transfer of the employment relationship with the workers from the transferor to the transferee,** in case of change of the owner of the property or parts thereof.	
	Transferor shall mean any natural or legal person who, by reason of a transfer within the meaning of the first part of this Article, ceases to be the employer.	For clarity, defining precisely who is the transferor and who is the transferee, allowing to better define (below) the different obligations of each one of them, avoiding confusions with the term "employer" and better aligning with the provisions of Articles 2(1)(a) and 2(1)(b) of Directive 2001/23/EC
	Transferee shall mean any natural or legal person who, by reason of a transfer within the	

CMU draft law provision's wording	Recommended wording	Rationale
	meaning of the first part of this Article, becomes the employer.	
In case of legal succession, the employment relationship of the workers shall continue with the legal successor.	**In case of a transfer within the meaning of the first and second parts of this Article, the transferor's rights and obligations arising from an employment contract or from an employment relationship existing on the date of the transfer shall, by reason of such transfer, be transferred to the transferee.**	To better align with Article 3(1) of Directive 2001/23/EC.
Prior to giving effect to legal succession, the **employer** shall be required to inform, in written or electronic form, the workers and the elective body of the primary trade union organization (trade union representative) or, in case of absence a primary trade union organization, freely elected and authorized representatives (representative) of workers, within one week, about:	**The transferor and transferee shall be required to inform their employees** and the elective body of the primary trade union organization (trade union representative) or, in case of absence of a primary trade union organization, freely elected representatives (representative) of their employees **affected by the transfer, of the following**:	Should be changed to improve clarity and to better align with the provisions of Article 7(1) of Council Directive 2001/23/EC.
1) ……		
2) economic, technological and structural consequences of legal succession or similar consequences that will affect the workers' rights.	2) **technological and structural** consequences **of the transfer** or similar consequences that will affect the workers' rights;	Sub-paragraph 2 should be changed and sub-paragraphs 3) and 4) should be added, in order to include additional information that should be provided, according to Article 7(1) of Council Directive 2001/23/EC.
	3) the legal, economic and social implications of the transfer for the employees; and	
	4) any measures envisaged in relation to the employees.	
The legal successor shall be obligated to provide the workers and the elective body of the primary trade union organization (trade union representative) or, in case of absence of a primary trade union organization, freely elected and authorized representatives (representative)	**The transferor must give the information referred to in the sixth part of this Article to their employees** and the elective body of the primary trade union organization (trade union representative) or, in case of absence of a primary trade union organization, freely elected	Should be subdivided in order to take account of the different information obligations of the transferor and transferee, also ensuring a better alignment with the provisions of Article 7(1) of Council Directive 2001/23/EC.

CMU draft law provision's wording	Recommended wording	Rationale
of workers, with information, in written or electronic form, referred to in the fourth part of this Article no later than prior to commencement of actions that will affect the workers' labour rights and interests.	representatives (representative) **of their employees in good time, before the transfer is carried out.**	
	The transferee must give the information referred to in the sixth part of this Article to their employees and the elective body of the primary trade union organization (trade union representative) or, in case of absence of a primary trade union organization, freely elected representatives (representative) **of their employees in good time and, in any event, before their employees are directly affected by the transfer as regards their conditions of work and employment.**	
	Where the transferor or the transferee envisages measures in relation to their employees, they shall consult in good time their employees and the elective body of the primary trade union organization (trade union representative) or, in case of absence of a primary trade union organization, freely elected representatives (representative) of their employees on such measures, with a view to reaching an agreement.	To also include the obligations of the transferor and transferee to consult workers in good time, whenever they envisage measures in relation to their employees, as foreseen in Article 7(2) of Council Directive 2001/23/EC.
The legal successor shall have the right to dismiss workers only on the grounds provided for by this Code or special laws.".	**The transfer in the meaning of the first and second parts of this Article shall not in itself constitute grounds for dismissal by the transferor or the transferee.**	Should be changed, in order to better align with the provisions of Article 4 of Council Directive 2001/23/EC.
	This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce provided for by this Code or special laws.	

CMU draft law provision's wording	Recommended wording	Rationale
9. In Article 42^1 add a new part after the first part as follows:		
…….		
…….		
10. ……		
11. ……		
12. ……		
13. ……		
14. Throughout the text of the Code, except the sixth part of Article 235, replace the words "natural person", "natural person owner", "individual entrepreneur using hired labour", "natural person using the labour of employees", and "individual entrepreneur", in all cases and number forms, by the words "natural person using hired labour" in a respective case and number.	14. Throughout the text of the Code, except the sixth part of Article 235, replace the words "natural person", "natural person owner", "individual entrepreneur using hired labour", "natural person using the labour of employees", and "individual entrepreneur", in all cases and number forms, by the words **"employer"** in a respective case and number.	Should be changed, for terminology consistency, because in the definition of the term "employer", (see part 4 of Article 21), employer shall mean "a legal or natural person who has an employment relationship with a worker", which means that it also includes natural persons.
Add the second part to Article 259 as follows:		
"Central executive authorities shall exercise control of compliance with the labour legislation in the enterprises, institutions and organizations functionally subordinated to them, **except for inspections of activities of individual entrepreneurs**.".	**Should be deleted.**	The last part of this provision ("except for inspections of activities of individual entrepreneurs") should be deleted, for the following reasons: 1. It exempts "individual entrepreneurs" from labour inspection activity and, consequently, their workers, which, moreover, is contradictory with: a. Articles 1, 2(1), 3(1)(a) and 18 of the ILO Labour Inspection Convention, 1947 (No. 81) and Articles 1, 3, 4, 6(1)(a) and 24 of the ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129), both ratified by Ukraine in 10.11.2004.

CMU draft law provision's wording	Recommended wording	Rationale
		b. Articles 4(1) and 4(2) of EU Directive 89/391/EEC, which stipulates that MS shall ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for its implementation and shall, in particular, ensure adequate controls and supervision. According to Article 424 of the EU-Ukraine Association Agreement, Ukraine shall approximate its legislation with the provisions of this EU Directive, within the timetable foreseen in its Annex XL to Chapter 21 of the AA. c. Article 9 of ILO C155 (ratified by Ukraine in 04.01.2012), which foresees that the enforcement of laws and regulations concerning OSH shall be secured by an adequate and appropriate system of inspection and that adequate penalties for violations of the laws and regulations shall be provided by the enforcement system. 2. It takes out from the labour inspection system, as well as from the subsequent infringement proceedings, the effect of general prevention (i.e., the fact that the subjects of legal provisions tend to comply with them in order to avoid being sanctioned). This legal provision is likely to disincentive "individual entrepreneurs" to comply with labour legislation from the outset, because they know that if their compliance with labour legislation will not be neither

CMU draft law provision's wording	Recommended wording	Rationale
		controlled nor enforced and that their non-compliance will not be sanctioned. 3. It is contradictory with the principle of equality and non-discrimination. In particular: a. Workers of "individual entrepreneurs" are treated in a less favourable manner than comparable workers of other types of employers, without any objective grounds that could justify such different treatment, solely because they work for an "individual entrepreneur". Workers of "individual entrepreneurs" will not be protected against the violation of their labour rights, as comparable workers of other types of employers; and b. Employers of other types (which are not "individual entrepreneurs") will be treated in a less favourable manner than "individual entrepreneurs", without any objective grounds that could justify such different treatment, solely because they are not "individual entrepreneurs", as their compliance with labour legislation will be controlled and enforced by labour inspection and the violation of the legal provisions will be sanctioned. These other employers will be, therefore, subjected to unfair competition exercised by the "individual entrepreneurs", which will not be forced to comply with labour legislation,

CMU draft law provision's wording	Recommended wording	Rationale
		enabling them to practice "social dumping".
…….		
II. Final and transitional provisions		
1. ……		
2. The employment relationship existence indicators provided for by the first part of Article 21^2 shall apply since taking effect by this Law and shall not apply to the preceding periods.	**Should be deleted.**	Should be deleted because, otherwise, workers whose employment relationship is recognized, in accordance with the indicators enumerated in the first part of articled 21^2, will automatically lose their accumulated rights *ab initio* (since they started working for that employer), including in terms of seniority, promotions, salary increments, paid annual leaves and mandatory contributions to social protection systems. If, by hypothesis, this rule were maintained, the legislator would be benefiting the infringer, i.e., would be granting a disproportionate and unjustified advantage and treatment to employers who used workers without guaranteeing their rights and without fulfilling the employer's typical obligations towards them, at the expense of their workers and to the detriment of their competitors who have been complying with the labour, fiscal and social security legislation.
2. ……		
3. ……		
…….		
…….		

EXAMPLES FROM OTHER COUNTRIES[5]

Albania

The employment contract is concluded and amended in writing and it should stipulate a minimum of essential elements, such as the identity of contracting parties, the place of work, general job description, start date, the specified duration if it is a fixed-term contract, paid leave, notice period, wage components and modalities of wage payment, weekly normal working time, reference to applicable collective labour contract, probation period, and if there is no collective contract the type and procedures of disciplinary measures. Under special and justified circumstances, if the contract is not concluded in compliance with the above requirements, the employer must conclude it within 7 days from employment, otherwise the employer is sanctioned by the labour inspector with a fine up to 30 times the minimum wage [LC, Arts. 21(1) (4), 202 (2)].

The written form requirement of the employment contract has been introduced with the 2015 Labour Code amendments. Until then, the employment contract could be concluded either in writing or orally. However, in case of a contract concluded orally, the employer had the obligation to conclude it in writing within 30 days from the start of employment. Furthermore, the Code clearly provided that the lack of the written document did not affect the validity of the contract and made the employer liable under the Code.

Argentina

There shall be an employment contract, whatever its form or name, whenever a physical person is obliged to do something, carry out labour or provide services for the other person and dependent on them, for a determined or undetermined period of time, by the payment of remuneration. Its clauses with regard to the form and conditions of provision shall submit to the provisions of public order, statutes, collective agreements or rulings with like power, and habits and customs [Employment Contract Act, Art. 21].

Australia

In Australia, the Fair Work Act 2009, prohibits misrepresenting an employment relationship as an independent contracting arrangement; dismissing or threatening to dismiss an employee for the purpose of re-engaging them as an independent contractor; or making a knowingly false statement to persuade or influence an employee to become an independent contractor, also providing sanctions in the event of a breach of the relevant provisions.[6]

[5] *in*, *Employment Relationship. Online training series International and EU Labour Standards - Background paper*, Geneva: International Labour Office pp. 33-40.
[6] *in* ILO (2016), *Non-standard employment around the world: Understanding challenges, shaping prospects*. Geneva: International Labour Office, p. 262.

Belgium

In Belgium, sections 337(1) and (2) of the Programme Act (I) of 2006 create the presumption of employment in certain at-risk economic sectors (e.g., construction; surveillance; transport; cleaning; agriculture; and horticulture). In the absence of proof to the contrary, the employment relationship is presumed to be performed under the terms of an employment contract if over half of the listed criteria are met (ILO, 2020c).

Bosnia and Herzegovina

If an employer fails to conclude a written employment contract with an employee, who performs work for remuneration, an employment relationship for an indefinite period is deemed to have been established, unless the employer proves otherwise [LC, Art. 24(3)].

Côte d'Ivoire

Employment relationship is one in which there is a relationship of subordination, remuneration and the provision of services [LC of 2015].

Croatia

(1) The employment contract shall be concluded in writing.
(2) The existence and validity of the contract shall not be affected by the failure of contracting parties to enter into a written contract.
(3) Where an employment contract is not concluded in writing, the employer shall be obliged to deliver to the worker a letter of engagement prior to the start of employment.
(4) Where the employer fails to conclude a written employment contract with the worker or fails to deliver to the worker the letter of engagement prior to the start of employment, it shall be deemed that he entered into the employment contract of indefinite duration with the worker.
(5) The employer shall be obliged to deliver to the worker a copy of the application for mandatory pension and health insurances within eight days after the expiry of the time limit for the application for mandatory insurances under specific laws and regulations.
(6) The employment contracts for seafarers and workers on board seagoing fishing vessels shall be registered with the county public administration office or the City of Zagreb office responsible for labour.
(7) The Minister shall by virtue of an ordinance stipulate the registration procedure and the contents of the registry of employment contracts for seafarers and workers on board seagoing fishing vessels [Labour Act, Article 14].

Cuba

When the employment contract is not formalized in writing, the employment relationship is presumed by the fact that the worker performs work with the knowledge of and without opposition from the employer [LC, Sect. 23].

Dominican Republic

The employment contract does not reside in documents but in facts. Any contract is void if it was concluded on the basis of fraud, whether by simulating contractual terms that does not pertain to an employment contract, through the use of intermediaries or by any other means. In such cases, this Code shall continue to regulate the employment relationship [LC of 1992, Principle IX].

Germany

The employment contract obliges the employee in the service of another person to perform work in personally, heteronomously and in accordance with instructions. The right to issue instructions may relate to the content, performance, time and place of work. Anyone who is not essentially free to organize his activity and determine his working hours is bound by instructions. The degree of personal dependence also depends on the nature of the activity in question. An overall assessment of all circumstances must be made in order to determine whether an employment contract exists. If the actual performance of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant [Section 611a of the Civil Code].

Malta

In Malta, the presumption of an employment relationship operates where at least five of the following criteria are satisfied in relation to the [persons] performing the work:

1. [they depend] on one single person for whom the service is provided for at least 75 per cent of their income over a period of one year;
2. [they depend] on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;
3. [they perform] the work using equipment, tools or materials provided by the person for whom the service is provided;
4. [they are] subject to a working time schedule or minimum work periods established by the person for whom the service is provided;
5. [they] cannot sub-contract [their] work to other individuals to substitute [themselves] when carrying out work;
6. [they are] integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy;
7. [the persons'] activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and

8. [they carry out] similar tasks to existing employees, or, in the case when work is outsourced, [they perform] tasks similar to those formerly undertaken by employees.[7]

Montenegro

Employment contracts must be in writing and must be concluded prior to the commencement of work. If an employer fails to ensure this, it is considered that the employee has entered into an employment relationship for an indefinite period of time.
If an employee continues to work after the expiry of the fixed-term of the employment contract, it is considered that an employment contract for an indefinite period of time has been concluded [LA, Arts. 22 and 26].

Namibia

Namibia amended its Labour Act to introduce a rebuttable presumption of the existence of an employment relationship if one or more of the following factors are present:

1. The manner in which the individual works is subject to the control or direction of that other person;
2. The individual's hours of work are subject to the control or direction of that other person;
3. In the case of an individual who works for an organization, the individual's work forms an integral part of the organization;
4. The individual has worked for that other person for an average of at least 20 hours per month over the past three months;
5. The individual is economically dependent on that person for whom he or she works or renders services;
6. The individual is provided with tools of trade or work equipment by that other person;
7. The individual only works for or renders services to that other person; or
8. Any other prescribed factor.[8]

Netherlands

In the Netherlands, where "if an employee works for an employer on a regular basis for a period of three months (weekly or at least 20 hours a month), then the law automatically presumes that a contract of employment exists".[9]

[7] *in* ILO (2016), *Non-standard employment around the world: Understanding challenges, shaping prospects*. Geneva: International Labour Office, p. 265.
[8] *Idem, p*. 266.
[9] *Idem, p*. 265.

Panama

Economic dependence exists in any of the following cases: (1) when the amounts received by the natural person rendering the service or performing the work constitute the workers' sole or principal source of income; (2) when the amounts referred to in the previous subsection come directly or indirectly from a person or company, or as a consequence of its activity; (3) when the natural person who provides the service or performs the work does not enjoy economic autonomy, and is economically linked to the activity undertaken by the person or company that can be considered as an employer. In case of doubt about the existence of an employment relationship, the proof of economic dependence determines that the relationship shall be so qualified [LC Sect. 65].

Poland

By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration. Employment under the conditions specified above is considered employment on the basis of an employment relationship, regardless of the name of the contract concluded between the parties [LC, Art. 22].

Portugal

Notion of labour contract:

Labour contract is one by which a natural person undertakes, for remuneration, to provide his activity to another person or other persons, within their organization and under their authority [LC, Art. 11].

Presumption of the existence of a labour contract:

1 – The existence of a labour contract shall be presumed when, in the relationship between the person providing an activity and another or others who benefit from it, some of the following characteristics are present:

a) The activity is carried out in a place belonging to or determined by the beneficiary;
b) The work equipment and instruments used belong to the beneficiary of the activity;
c) The activity provider observes start and end times of the activity provided, determined by its beneficiary;
d) A certain amount is periodically paid to the activity provider, in return for its provision;
e) The activity provider performs management or supervisory functions in the beneficiary's organic structure.

2 – It constitutes a very serious offence attributable to the employer the provision of activity, in an apparently autonomous manner, under conditions characteristic of a labour contract, which may cause damages to the worker or the State.

3 – In case of recidivism, the ancillary penalty of deprivation of the right to subsidy or benefit granted by an entity or public service is applied for a period of up to two years.
4 – For the payment of the fine, are jointly liable the employer, the companies that with him are in a relation of reciprocal participations, domain or of holding group, as well as the manager, administrator or director [LC, Art. 12].

Republic of Moldova

An individual employment contract not concluded in writing is deemed to have been concluded for an indefinite term and to be effective form the first day the employee has been admitted to work. The employer is obliged to draft the contract, following the control of the labour inspectorate [LC, Art. 58(3-4)].

Romania

The employment contract is consensual and legally enforceable even if not concluded in written form. In case of oral contract, the parties may be penalized for undeclared work, but the existence of the contract can be recognized and can be proved by any means of evidence.
If the parties label the contract as a contract of service or collaboration when it is, de facto, an employment relationship, tax inspection may re-classify the contract [LC Art. 16(1); Fiscal Code L 227/2015].

Independent work is classified as work carried out by a person to obtain revenue: when the person is free to choose the place and the work schedule; the person is free to carry out activities for several clients; the person carries the risks inherent in the business (this is a decisive factor as employees do not assume financial risks); the activity is financed through the assets of the person performing the work; performance of work is personal or by a hired third-party; the person is a member of a professional body or association.

Serbia

Employment contracts must be concluded in writing before the employee starts working. If the employer fails to conclude a contract, it is deemed that the employee has entered into an employment relationship for an indefinite term on the day work is assumed [LC, Art. 32].

Slovenia

In case of dispute on the existence of the employment relationship between the worker and the employer, it shall be assumed that employment relationship exists, if the elements of employment relationship exist [Employment Relationship Act, Art. 165, §16].

United Kingdom

In the United Kingdom, the Supreme Court has given consideration, in its 2011 ruling concerning the Autoclenz case, as regards the application of the principle of primacy of facts, to the relative bargaining power of the parties when drafting the terms and conditions of their arrangement and characterizing the work relationship. The Supreme Court observed that "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part". This approach aims to avoid a party trying, by virtue of its stronger relative bargaining power, to evade or circumvent labour protection simply by inserting into the work agreement "boilerplate" clauses that are typical of self-employment relationships (such as, for instance, the right to substitute workers, or the lack of any obligation on the parties to offer or receive work) and do not reflect the reality of the work relationship between the parties.[10]

United States of America

In the United States, the US Department of Labor clarified the criteria under the Fair Labor Standards Act (FLSA) that should be taken into account in determining whether a person should be regarded as an employee under the Act – and therefore be entitled to minimum wage and working-hour protection. These criteria are based on a "multi-factor 'economic realities' test". These factors typically include:

1. The extent to which the work performed is an integral part of the employer's business;
2. The worker's opportunity for profit or loss depending on his or her managerial skill;
3. The extent of the relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. The permanency of the relationship; and
6. The degree of control exercised or retained by the employer.

In carrying out this analysis, each factor is examined and analyzed in relation to one another, and no single factor is determinative. The 'control' factor, for example, should not be given undue weight. The factors should be considered in totality to determine whether a worker is economically dependent on the employer, and thus an employee.[11]

[10] *Idem,* pp. 262-263.
[11] *Idem,* pp. 263-264.

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