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

Draft Law
"On Occupational Safety and Health of Workers"
of the Ministry of Economy, Trade and Agriculture
(*Version of 16 May 2021*)

Technical recommendations on its better alignment with International and European Labour Standards and best practices

June, 2021

Executive summary

This fourth set of technical recommendations to the Ministry of Economy (ME) draft Law "On Occupational Safety and Health of Workers" are provided within the scope of the EU-ILO Project "Towards safe, healthy and declared work in Ukraine", under activities 1.1.1, 1.1.2 (of Output 1.1) and 1.2.1 (of Output 1.2).

They are made to the draft law version of 16 May 2021, which follows the discussions held during the tripartite workgroup meeting of 2 March 2021 and the subsequent formal consultations conducted by the ME with the social partners and other public authorities.

These technical recommendations are intended to promote the further alignment of the draft Law with the main International[1] and the European[2] labour standards and best practices on Occupational Safety and Health (OSH) and, subsidiarily, on Labour Inspection[3], as this draft law foresees amendments to the labour inspection legal framework.

The present technical recommendations 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.

It is our expectation that these technical recommendations may contribute to an improved legislation, better aligned with the main applicable International and European labour standards and best practices, which can effectively advance decent working conditions in Ukraine.

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[1] Namely: Occupational Safety and Health Convention, 1981 (No. 155); Protocol of 2002 to the Occupational Safety and Health Convention, 1981 (No. 155); Occupational Health Services Convention, 1985 (No. 161); Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187); and Night Work Convention, 1990 (No. 171).

[2] In particular: Council Directive 89/391/EEC, of 12 June 1989, concerning the introduction of measures to encourage improvements in the safety and health of workers at work; Directive 2003/88/EC, of the European Parliament and of the Council, of 4 November 2003, concerning certain aspects of the organization of working time; Directive 2009/104/EC, of the European Parliament and of the Council, of 16 September 2009, concerning the minimum safety and health requirements for the use of work equipment by workers at work; Council Directive 89/656/EEC, of 30 November 1989, on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace; Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace; Council Directive 92/85/EEC, of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Council Directive No. 94/33/EC, of 22 June 1994, on the protection of young people at work, as amended by Directive No. 2007/30/EC, of 20 June 2007, of the European Parliament and of the Council; and Council Directive No. 91/383/EEC, of 25 June 1991, supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.

[3] In particular, concerning Labour Inspection Convention, 1947 (No. 81) and Labour Inspection (Agriculture) Convention, 1969 (No. 129).

Technical recommendations for an improved alignment of the draft law with International and European Labour Standards and best practices

1. **Article1(1)(22):** revision of the definition of "night worker" as follows: "a worker who, during night time, works at least three hours of their daily working time **<u>or</u>** no less than ¼ of their annual working time", in order to better align with Article 2(4)(a) of Directive 2003/88/EC.
2. **Article 1(1)(37):** revision of the definition of National System for OSH ("system of state management in the field of safety and health of workers") as follows: "infrastructure which provides the main framework for implementing the national policy and national programmes on occupational safety and health", to better align it with Article 1(b) of ILO Convention 187, as the definition of the draft restricts the composition of the system for OSH to public entities, thus excluding private, cooperative and third sector entities. In addition, in order to better align with Article 4 of ILO Convention 187, the main components of such system (which will be responsible for the implementation of the OSH Policy and programmes), should be clearly specified, for example: laws and regulations, collective agreements; authority or body (or authorities or bodies) responsible for OSH; mechanisms for ensuring compliance including the system of labour inspection); arrangements to promote cooperation between management, workers and their representatives at the level of the undertaking; national tripartite advisory body (or bodies) on OSH; information, training, research and advisory services on OSH; occupational health services; mechanism for the collection and analysis of data on occupational injuries and diseases; collaboration with relevant insurance or social security schemes covering occupational injuries and diseases; support mechanisms for a progressive improvement of OSH conditions MSMEs and in the informal economy; collaboration with Ministry of Education; standardization, etc.
3. **Article 11** (special conditions for performance of high-risk works):
    a. **Article 11(1):** the offered possibility, of replacement of a prior authorization for the performance of high-risk works by an additional life and health insurance of the workers, undermines the objectives envisioned by the foreseen prohibition, limitation or establishment of prior authorization or additional controls for the performance of such works provided by Article 11(b) of ILO Convention 155. In fact, this provision of ILO C155, which provides for the subjection of such works to prohibition, limitations or authorization or control by the competent authority, does not foresee their replacement for an additional insurance. It provides that such works, due to their higher level of occupational risks, should be subjected to additional controls by the competent authority, in order to ensure the safety and health of workers in the performance of these particularly dangerous works.
    b. **Articles 11(8):** the fixing of just 10 days for the issuance of such authorization and, most especially, its tacit consent (whenever the authorization is not decided within that time-limit), should be revised, as meeting such short deadline might be

incompatible with the complex nature of some high-works to which performance the authorization is requested for, and/or with the available resources to meet it. In face of the above, keeping the current wording of this provision is likely to lead to the tacit authorization of most of the requests for the performance of high-risk works and, consequently, to the non-applicability, in practice, of the Article 11(b) of ILO C155.

c. **Articles 11(9) and 11(10):** It should also be considered, as constituting grounds for refusing/revoking an authorization for the performance of high risk works, the following:

   i. The applicant was convicted of violating OSH regulations regarding the performance of high risk works within the previous 2 years,

   ii. The applicant had fatal or serious occupational accidents performing high-risk works within the previous 2 years

   iii. Labour inspectors verify that employer is not able to ensure the safety and health of the workers performing such high-risk works;

4. **Article 12(9):** should be revised so as to foresee that the minimum safety and health requirements for the use of work equipment shall be set forth by the Cabinet of Ministers of Ukraine (instead, as proposed, by the central executive authority that ensures the formulation of the state policy on safety and health of workers), in order to ensure that the legal act aimed at transposing the EU OSH individual Directive 2009/104/EC[4], has the necessary legal power (at least, as a CMU Decree) to ensure its effective application and sustainability.

5. **Article 15** (Authorized entities for safety and health of workers): the requirements and different modalities of OSH services that should be ensured by the employers (external/internal and of safety/health) should be defined by workplace (and not globally for the employer), depending on the number of workers of each workplace and the nature of the occupational risks to which they are or may be exposed at each workplace, in order to align this proposed article with Article 7 of EU OSH framework Directive 89/391/EEC.

6. **Article 19** (Workers' health surveillance and health examinations): it should be revised, in order to ensure the obligation of the employer to monitor the occupational health of all workers and not just some of them (although with different periodicities), as the health surveillance is aimed at both preventively assess (from the outset) the fitness of the worker for the job and work requirements, and assessing the repercussions of the work and the conditions in which it is performed in the health of the workers. The latter would also ensure a better alignment with Article 14(2) of EU OSH framework Directive 89/391/EEC.

[4] Of the European Parliament and of the Council, of 16 September 2009, concerning the minimum safety and health requirements for the use of work equipment by workers at work.

7. **Article 22** (First aid, elimination of breakdowns, fire-fighting, and evacuation of workers):
    a. **Article 22(4)(1):** the information to be provided on the risks involved and of the steps taken or to be taken as regards protection (that must be given to all workers who are, or may be, exposed to serious and imminent danger), foreseen in Article 8(3)(a) of the Directive 89/391/EEC, should be provided as soon as possible and, in any case, before the occurrence of any real emergency situation and not, as foreseen in this provision, only "In case of emergencies that threaten life and health of workers (…)".
    b. **Article 22(6):** the wording "The fact of there being such a danger shall be confirmed, if necessary, by a commission established by the employer with mandatory involvement of a workers' representative and an authorized entity for workers' safety and health. A representative of the central executive authority that implements the policy on safety and health of workers shall also be invited to work in the commission", which is suggested to be included after the first sentence of this provision, should be revised, because is contradictory with Article 13 of ILO C155 and Articles 8(4) and 8(5) of EU OSH framework Directive 89/391/EEC. Not only because the worker's decision to removed himself from such work situation should be allowed in situations where he "has reasonable justification to believe presents an imminent and serious danger to his life or health", but also because a decision of a worker to leave the workstation/workplace is to be taken in the event of serious and imminent danger which, by definition, has to be taken immediately, and therefore incompatible with waiting for a decision of a commission, as regards the qualification of a given event as being dangerous.
8. **Article 35** (The employer's liability for violation of the legislation on safety and health of workers): this article should be revised, in order to ensure that "The enforcement system shall provide for adequate penalties for violations of the laws and regulations", as foreseen in Article 9(2) of ILO C155, in particular:
    a. **Article 35(4)(1) to Article 35(4)(17):** the infringements included in these provisions do not cover all the most serious infringements. Most of the infringements are aggregated into a residual provision [Article 35(4)(17)]. However, the different violations (and corresponding sanctions) should be, as much as possible, disaggregated into specific legal provisions (and not grouped in a residual provision) foreseeing specific and individualized infringements (and corresponding sanctions) for the violation of the more important legal provisions including, *inter alia*, on:
        i. Then protection of genetic heritage (Article 13);
        ii. The employers' obligations to implement the preventive and protective measures (e.g., replace de dangerous for the non-dangerous or less dangerous, formulate a occupational risk prevention plan, provision of collective protective equipment, provision of personal protective equipment) on the basis of the risk assessment and following the general principles of prevention (Article 16 - Occupational risk management and 25 - Employers' obligations);

iii. Safety and health of pregnant workers, workers who have recently given birth, and workers who are breastfeeding (Article 28);

iv. Safety and health of workers under 18 years of age (Article 29);

v. Safety and health of workers with disabilities (Article 30).

b. **Article 35(4)(17):** the second sentence of this provision (that establishes that "The fines mentioned in this paragraph shall be imposed in case of failure to comply with the labour inspector's order concerning elimination of such violations drawn up on the basis of the inspection visit findings"), should be deleted, due to the following reasons:

i. It takes out from the labour inspection activity and from the 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 employers to comply with OSH legislation from the outset, because they know that if their infractions are detected, they will always have the opportunity to correct them without being sanctioned. In fact, instead of complying with the legal provisions, they will be waiting for the labour inspectors to detect them and, if and when they do detect them, they will have the time to correct the infringements without any penalization.

ii. It is contradictory with:

- Article 17(2) of ILO Convention 81 and Article 22(2) of ILO Convention 129, according to which "It shall be left to the discretion of labour inspectors to give warning and advice instead of instituting or recommending proceedings";
- Article 9(2) of ILO Convention 155, according to which "The enforcement system shall provide for adequate penalties for violations of the laws and regulations";
- Article 18 of ILO C081 and Article 24 of ILO C129, according to which "adequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced"; and
- Article 4(2) of EU Directive 89/391/EEC, according to which the states "shall ensure adequate controls and supervision".

c. **As for the amount of the fines:**

i. **Article 35(4)(17):** the amount of "half a minimum wage", established in this provision as the amount of the fine to be applied to all other violations not specifically provided in Article 35, should be revised, because it is inconsistent with the amount of "a minimum wage" foreseen in the equivalent residual provision proposed as sub-paragraph 8) of the second part of Article 268 of the

Code of Labor Laws of Ukraine, for "the violation of requirements of the labour legislation other than those provided by paragraphs 1-7 of this part".

ii. The amount of fines should also be increased by the amount of the financial gain of the employer with the commitment of the infraction, in order to dissuade non-compliance.

d. Regarding the **nature of the sanctions**: it should also be considered the introduction of non-monetary accessory sanctions, more directed to the vital interests of the employers.

e. **Article 35(8):** should be reviewed, in order to better promote compliance and dissuade incompliance. It should be reworded, to provide that the employer, to benefit from the offered discount of 50% of the amount of the fine, besides paying it within 10 banking days, has also to correct the violation committed within the same period of time.

9. **Concerning the SECTION VIII - FINAL PROVISIONS**, in particular, regarding the proposed alterations to:

   a. CHAPTER XVIII - SUPERVISION (CONTROL) OF COMPLIANCE WITH THE LABOUR LEGISLATION of the Code of Labor Laws,

   b. Law of Ukraine "On the Basics of State Supervision (Control) in Economic Activities" (Vidomosti Verkhovnoi Rady Ukrainy, 2007, No. 29, Art. 389, as subsequently amended),

   c. Law of Ukraine "On the National Police" (Vidomosti Verkhovnoi Rady Ukrainy, 2015, No. 40-41, Art. 379, as subsequently amended),

   we refer to the technical recommendations already provided by the EU-ILO Project, in 3 April 2021, to the ME Draft Law "On Amending Some Legislative Acts on the Procedure of State Supervision (Control) of Compliance with the Labour Legislation", which content is similar to the one presented by this section.[5]

[5] The EU-ILO Project technical recommendations to the ME Draft Law "On Amending Some Legislative Acts on the Procedure of State Supervision (Control) of Compliance with the Labour Legislation", of 3 April 2021, are available at: https://www.ilo.org/budapest/what-we-do/projects/declared-work-ukraine/WCMS_779301/lang--en/index.htm.

References

EU, & Ukraine. (2014). Association Agreement between the European Union and its Member States and Ukraine. Official Journal of the European Union, L–161(2014-02–29), 1–2137 [available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&from=EN].

European Commission. (2014). *Communication COM(2014) 332 final, from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 6 June 2014, on a EU Strategic Framework on Health and Safety at Work 2014-2020*. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0332

European Council. (1989a). 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. *Official Journal of the European Communities*, *L391*, 183/1-183/8. http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:01989L0391-20081211&from=EN

European Council. (1989b). Directive No. 89/654/EEC, of 30 November 1989, concerning the minimum safety and health requirements for the workplace. *Official Journal of the European Communities*, *L 393*, 393/1-393/12. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0654&from=en

European Council. (1989c). Directive No. 89/656/EEC, of 30 November 1989, on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace. *Official Journal of the European Communities*, *L 393*, 393/18-393/28. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0656&from=EN

European Council. (1991). Directive No. 91/383/EEC, of 25 June 1991, supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship. *Official Journal of the European Communities*, *L 206*, 206/19-206/21. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31991L0383&from=EN

European Council. (1992a). Directive No. 92/58/EEC, of 24 June 1992, on the minimum requirements for the provision of safety and/or health signs at work. *Official Journal of the European Communities*, *L 245*, 245/23-245/42. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0058&from=EN

European Council. (1992b). Directive No. 92/85/EEC, of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. *Official Journal of the European Communities*, *L 348*, 348/1-348/7. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0085&from=PT

European Council. (1994). Directive No. 94/33/EC, of 22 June 1994, on the protection of young people at work. *Official Journal of the European Communities*, *L 216*, 216/12-216/20. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994L0033&from=EN

European Parliament, & European Council. (2009). Directive No. 2009/104/EC, of 16 September 2009, concerning the minimum safety and health requirements for the use of work equipment by workers at work. *Official Journal of the European Union*, *L 260*, 260/5-260/19. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0104&from=EN

European Parliament. (2014). *Resolution No. 2013/2112(INI), of 14 January 2014, on effective labour inspections as a strategy to improve working conditions in Europe*. http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0012

European Parliament. (2015). *Resolution No. 2015/2107(INI), of 25 November 2015, on the EU Strategic*

Framework on Health and Safety at Work 2014-2020.
Eurostat. (2001). *European Statistics on Accidents at Work (ESAW) - Methodology - 2001 Edition*. http://ec.europa.eu/eurostat/ramon/statmanuals/files/ESAW_2001_EN.pdf
ILO. (1923). *Recommendation 20, concerning Labour Inspection*. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R020
ILO. (1947a). *Convention No. 81, concerning labour inspection in industry and commerce - Labour Inspection Convention*. Adopted in the 30th ILC session, 11 July 1947. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312226:NO
ILO. (1947b). *Recommendation No. 81, concerning Labour Inspection*. International Labour Conference. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312419
ILO. (1969a). *Convention No. 129, concerning labour inspection in agriculture - Labour Inspection (Agriculture) Convention*. Adopted in the 53rd ILC session, 25 June 1969. http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312274
ILO. (1969b). *Recommendation No. 133, concerning Labour Inspection in Agriculture*. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312471:NO
ILO. (1981). *Convention No. 155, concerning occupational safety and health and the working environment*. Adopted in the 67th ILC session, 22 June 1981. http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_155.pdf
ILO. (1985). *Convention No. 161, concerning Occupational Health Services*. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312306:NO
ILO. (1996). *Recording and notification of occupational accidents and diseases- An ILO Codes of Practice*. International Labour Office. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107800.pdf
ILO. (1998). *Resolution concerning statistics of occupational injuries (resulting from occupational accidents), adopted by the Sixteenth International Conference of Labour Statisticians* (Issue October). International Labour Office. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087528.pdf
ILO. (2002). *Protocol No. 155, of 2002, to the Occupational Safety and Health Convention*. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312338:NO
ILO. (2006). *Convention No. 187, concerning the promotional framework for occupational safety and health*. Adopted in the 95th ILC session, 15 June 2006. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312332:NO
ILO. (2007). *Safe and healthy workplaces - Making decent work a reality*. International Labour Office. http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_108634.pdf
ILO. (2017). *Guidelines and recommendations to the concept on the reform of the national system for occupational risk prevention and promotion of occupational safety and health in Ukraine* (Issue November). International Labour Office. http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/projectdocumentation/wcms_618934.pdf
ILO. (2018a). *Ukrainian Labour Inspection Legal Framework - Analysis and Recommendations.* (Issue June). https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---

lab_admin/documents/projectdocumentation/wcms_632756.pdf
ILO. (2018b). *Brief notes on the main aspects of the alignment between Ukrainian national legislation and selected EU directives*. https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/meetingdocument/wcms_633189.pdf
ILO. (2018c). *National Occupational Safety and Health Profile of Ukraine*. https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/meetingdocument/wcms_627038.pdf
ILO. (2019a). *EU Directives and Reform of OSH and Labour Relation's Legislation - White Paper*. https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_689355.pdf
ILO. (2019b). *Observation (CEACR), concerning application of Conventions 81 and 129 in Ukraine - adopted 2019, published 109th ILC session (2020)*. https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4024791:NO
ILO. (2020a). "*Occupational Safety and Health (OSH): On-line training series on International and EU Labour Standards- Background paper". https://www.ilo.org/budapest/what-we-do/projects/declared-work-ukraine/WCMS_752049/lang--en/index.htm*
ILO. (2020b). "*Labour Inspection: On-line training series on International and EU Labour Standards- Background paper". https://www.ilo.org/budapest/what-we-do/projects/declared-work-ukraine/WCMS_751583/lang--en/index.htm*
Rodríguez, Arsenio Fernández. (2020c). "*A Study on Labour Inspectors' Careers", International Labour Office – Geneva: ILO.* https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_739165.pdf