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“Towards safe, healthy and declared work in Ukraine”

Draft Laws Nos. 5054 and 5054-1
on the Employment Relationship
submitted by CMU and by People’s Deputy of Ukraine H.M. Tretiakova

Summary of the EU-ILO project
main technical recommendations on their better alignment
with the International and European Labour Standards and best practices

April, 2021

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Executive summary

The present document is aimed at supporting the discussions, to be held on 12 April 2021, within the round table organized by the Verkhovna Rada of Ukraine (VRU) Committee on Social Policy and Veteran's Rights, to address the draft Laws of Ukraine "On amending the Code of Labour Laws of Ukraine concerning the definition of the concept of employment relationship and the indicators of its existence"¹ (Reg. No. 5054) and "On amending the Labour Code of Ukraine concerning the Regulation of Some Matters of Employment Relationship"² (Reg. No. 5054-1).

It is provided by the EU-ILO Project "[Towards safe, healthy and declared work in Ukraine](#)", under the scope of its Activities 1.5.1(a) and 1.5.1(b), of Output 1.5.

This document summarizes the most important technical recommendations already provided by the Project regarding each one of the aforesaid draft laws. Its use, however, shall not dispense the full reading of the more detailed, comprehensive and duly substantiated recommendations already provided to each of these draft laws which it now tries to summarize.³

The recommendations it contains 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.

Kyiv, 11 April 2021

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"Towards safe, healthy and declared work in Ukraine"

ILO Office for Central and Eastern Europe

¹ Prepared by the Ministry of Development of Economy, Trade and Agriculture (ME), adopted by the Cabinet of Ministers of Ukraine (CMU) and subsequently submitted by the latter to VRU for consideration.

² Submitted to Verkhov na Rada of Ukraine (VRU) on 25 February 2021 (Reg. No. 5054-1) by People's Deputy of Ukraine H.M. Tretiakova, and sent for consideration of the relevant VRU committees on 1 March 2021.

³ The more comprehensive, detailed and duly substantiated technical recommendations regarding each one of these draft Laws can be easily retrieved from the EU-ILO Project Website, at the following hyperlinks: "[EU-ILO Project technical recommendations to the 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" \(5054\)](#)"; and "[EU-ILO Project technical recommendations to the Draft Law "On amending the Labour Code of Ukraine concerning the Regulation of Some Matters of Employment Relationship" \(5054-1\)](#)".

Draft Law of Ukraine No. 5054

In order to better align the draft Law of Ukraine “On amending the Code of Labour Laws of Ukraine concerning the definition of the concept of employment relationship and the indicators of its existence”⁴ (Reg. No. 5054) with the main applicable International and European Labour Standards and best practices, the following technical recommendations should be incorporated:

1. The essential elements of the employment relationship, which should be defined in the labour agreement (referred to in part 3 of Article 21¹), as well as the timing and the form in which they must be provided and updated, should be further improved and better aligned with Articles 3 to 7 of Directive (EU) 2019/1152 and with Articles 8 and 10 of Directive 89/391/EEC, through the inclusion of the recommended additional provisions.
2. As for Article 21², regarding the indicators of the existence of employment relationship, it is important to highlight the following:
 - a. Part 1 of Article 21² does not establish a legal presumption of the existence of an employment relationship when some indicators are present, but only states that, when they are present, “Work may be recognized as being performed within employment relationship”. Therefore, Part 1 of Article 21² 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. The latter is especially worrisome, 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. As such, it should also be established an appropriate, speedy, inexpensive, fair and efficient procedure for settling disputes regarding the existence and terms of an employment relationship, as foreseen in Paragraph 4(e) of ILO R198 and Articles 15 to 18 of Directive (EU) 2019/1152, which could be regulated as proposed, through the insertion of the recommended new parts 3 to 7 of this Article.
 - c. As for the nature of the indicators, and besides some proposed changes in two of them for clarity purposes (Parts 3 and 5 of Article 21²), it should be considered the inclusion of the recommended additional 4 indicators⁵, in order to better

⁴ Prepared by the Ministry of Development of Economy, Trade and Agriculture (ME), adopted by the Cabinet of Ministers of Ukraine (CMU) and subsequently submitted by the latter to VRU for consideration.

⁵ The recommended 4 additional indicators are as follows: (1) the worker is integrated in the organization of the person in whose interests the work is provided; (2) the work have a particular duration and have a certain continuity, or requires the availability of the worker; (3) the remuneration, periodically paid to the worker by

align this Article with paragraphs 13(a) and 13(b) of ILO R198, and to improve the capacity and the usefulness of the indicators as tools to determine the existence of an employment relationship.

3. As for the proposed Parts 3 and 4 of Article 24 (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), they should be amended (through the insertion of our recommended new Parts 3 to 5), 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.
4. As for Article 36¹ (on the legal succession in employment relationship), several aspects should be reviewed to better align it with Council Directive 2001/23/EC, in particular: (1) to prior define “transferor” and “transferee” (better clarifying their different obligations); (2) to complement the nature of the information to be provided; (3) to better specify who should provide it, to whom and within which time-frame; and (4) to establish the conditions within which the transferor and/or the transferee have to consult their workers.
5. 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 absence of such provisions is contradictory with:
 - a. 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"; and
 - b. Article 18 of ILO C81 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".

Draft Law of Ukraine No. 5054-1

The alignment of the draft Law of Ukraine “On amending the Labour Code of Ukraine concerning the Regulation of Some Matters of Employment Relationship” (Reg. No. 5054-1) with the main applicable International and European Labour Standards and best practices requires, **in addition to the amendments recommended above (regarding the draft Law 5054)**, the incorporation of the following additional recommendations:

the person in whose interests the work is performed, constitutes the worker's sole or principal source of income; and (4) the worker does not assume the financial risks of the execution of the work.

6. Part 6 (and its first paragraph) of Article 3 should be revised, as recommended⁶, because:
- a. Occupational Safety and Health (OSH) regulations are part of labour legislation, as also inferred from the Part 7 of this Article (which specifically highlights it in the sentence "The labour legislation (except the legislation on labour protection)";
 - b. According to the International and European Labour Standards and best practices, OSH regulations 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; and,
 - c. If the idea of this paragraph was to exclude independent workers (or truly self-employed) 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 Part 6 of Article 6 (in concrete: "with the status of individual entrepreneur") should be deleted, because they are unnecessary, as 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 also results from Paragraphs 9 and 12 of the ILO Employment Relationship Recommendation, 2006 (No. 198).
7. The Paragraph 2 of Part 6 of Article 3 and the Part 7 (and its paragraph) of Article 3 should be deleted, because:
- a. Contrary to what is written in Paragraph 2 of Part 6 of Article 3, if "a natural person performs work under a labour agreement", that natural person is automatically under the scope of labour legislation (as well as the respective employer); and because,
 - b. Contrary to what is written in Part 7 (and its paragraph) of Article 3, 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" is automatically under the scope of labour legislation (as well as the respective beneficiary - the employer).

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

⁶ The recommended wording is as follows: "The Code of Labour Laws shall not apply if: work is performed independently by an natural person. In this case, the occupational safety and health legislation applies *mutatis mutandis*".

existence, “a natural person who performs work under a labour agreement “ as well as, “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” have necessarily an employment relationship with the beneficiary of their activity and, therefore, the labour legislation should obviously apply to such natural persons (as well as to the beneficiary of their activity, i.e., their respective employers).

8. As for Part 1 of Article 21², regarding the indicators in whose presence “work may be recognized as being performed within an employment relationship”, and in addition to the recommendations already provided in Point 2 (above) - regarding the absence of a legal presumption, the needed amendments to some indicators and to insert 4 additional indicators and the need to establish a legal procedure to recognize the existence of an employment relationship -, the following additional recommendations should be incorporated into this draft Law text:

- a. Regarding the number of the necessary indicators (four indicators) in whose presence “work may be recognized as being performed within an employment relationship”, the required number should be set at “three or more”, in order to:
 - i. Ensure consistency with the “when there are three or more such indicators” referred to in the explanatory note of this draft Law;
 - ii. Better align with the number of indicators proposed in 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” (5054);
 - iii. Ensure a better and more 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.
- b. Regarding the last words of Part 1 of Article 21² (“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 these 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 is not, an "individual entrepreneur using hired labour".

iii. It raises concerns as regards 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 (e.g., they are 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, without any objective grounds that could justify such different treatment, solely because they work for an individual entrepreneur; and
- Employers of other types (which are not "individual entrepreneurs") are treated in a less favourable manner (having to support the higher costs associated with the compliance with the labour legislation and being subjected to the unfair competition exercised by the "individual entrepreneurs" which do not have to support them) than "individual entrepreneurs", without any objective grounds that could justify such different treatment, solely because they are not "individual entrepreneurs".

c. Concerning the enumeration of the indicators, it should not be a taxative enumeration list, but an exemplificative one, 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. As such, it should be inserted, as recommended, a new part (new Part 2), 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.

9. Part 2 of Article 21², establishing exclusively for "individual entrepreneurs", a higher number of indicators (6 indicators) whose presence may allow the recognition of the existence of an employment relationship, should be deleted, because:

- a. It 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,
- b. It puts into question the principle of equality and non-discrimination, for the same reasons already expended in Point 8(b)(iii) above.
10. Regarding the proposed new Part 2 of Article 259, the last words ("except for inspections of activities of individual entrepreneurs") should be deleted, for the following reasons:
- a. It is contradictory with the principle of equality and non-discrimination. In particular:
 - i. Workers of "individual entrepreneurs" will not be protected against the violation of their labour rights, as comparable workers of other types of employers and, therefore, 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"; and
 - ii. Employers of other types (which are not "individual entrepreneurs") will be 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" and, therefore, 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".
 - b. It exempts "individual entrepreneurs" (and their workers) from labour inspection activity and, consequently, this provision is contradictory with:
 - i. Articles 1, 2(1), 3(1)(a) and 18 of the ILO C81 and Articles 1, 3, 4, 6(1)(a) and 24 of the ILO C129 (both ratified by Ukraine in 10.11.2004). According to Article 9(1) of the Constitution of Ukraine, these ILO Conventions *"shall be an integral part of the national legislation of Ukraine"*.
 - ii. Articles 4(1) and 4(2) of EU Directive 89/391/EEC, which stipulates that Member States 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 and its Annex XL to Chapter 21 of the EU-Ukraine Association Agreement, Ukraine undertook to approximate its national legislation with the provisions of this EU Directive by 31.8.2020.
 - 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.

- c. 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 their compliance with labour legislation will not be neither controlled nor enforced and that their non-compliance, if detected, will not be sanctioned.
11. Finally, as for the proposed Paragraph 2 of the final and transitional provisions (establishing that the indicators of existence of an employment relationship cannot be applied to preceding periods), should be deleted because, otherwise, workers whose employment relationship is recognized according to the indicators enumerated in the first part of article 21² 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.