

<p>EU-UKRAINE CIVIL SOCIETY PLATFORM</p>		<p>ПЛАТФОРМА ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА УКРАЇНА-ЄС</p>
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**LABOUR MARKET RULES IN THE EUROPEAN UNION AND UKRAINE:
COMMON FEATURES AND DIFFERENCES. BRINGING UKRAINIAN LABOUR
LAW INTO LINE WITH EU LEGISLATION**

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Introduction

The implementation of the association agreement between the European Union and Ukraine will have important implications not least in terms of adapting Ukrainian employment and social policy to European standards. The text of the association agreement addresses the issue of core labour standards with a view to strengthening democratic principles, the rule of law, respect for human rights, fundamental freedoms and anti-discrimination measures. However, it does so in very general terms, as a contribution to a stronger national reform process. The jointly agreed association agenda is slightly more precise, referring to full respect for trade union rights and core labour standards based on International Labour Organization conventions, and to measures to promote effective use of collective bargaining. It also deals more specifically with cooperation between both sides in the field of social policy, specifying, *inter alia*, measures to boost administrative capacity in order to implement occupational health and safety rules as well as labour law, with an emphasis on labour inspection. It also stresses the need to develop a strategic approach to employment in order to ensure decent working conditions and transform the informal sector into formal employment and to promote anti-discrimination measures with a view to guaranteeing equal opportunities. Of key importance is the agenda's focus on support for the development of social dialogue and measures to strengthen the social partners.

A crucial feature of the association agreement, which may have a significant impact on the Ukrainian economy, trade policy and industrial relations and therefore on the Ukrainian labour market and social policies, is the entry into force of further provisions of the deep and comprehensive free trade area (DCFTA). The DCFTA provides Ukraine with the possibility to modernise its trade relations and develop its economy through open markets by gradually

removing tariffs and quotas and harmonising laws, standards and rules in trade-related areas across the board. It enables key sectors of Ukraine's economy to be aligned with European standards.

Optimistic forecasts suggest that closer economic integration through the DCFTA will act as a catalyst for Ukraine's economic growth. One factor which should facilitate this are measures to align Ukraine's standards, rules and legislation with the *acquis communautaire*. Favourable conditions are to be put in place to develop business and modernise the economy. The outcome should be better quality goods and a higher level of public services with improved accessibility. The Ukrainian economy should also gain the ability to compete on the international market. New jobs should be created, especially in export-led economic sectors and productivity is expected to grow as a result of advanced technologies being introduced. However, even the most optimistic analysts acknowledge that in the initial stages of the DCFTA's implementation the losses may outweigh the gains, even if they are subsequently offset, but that eventually implementation of the DCFTA will have a very positive effect on the Ukrainian economy. This process will inevitably impact on the Ukrainian labour market and social situation as a well as public support for the reform process. It is therefore extremely important that labour market rules take account of any initial disruptions and provide for measures to protect jobs and mitigate the shock of coming into contact with an efficient and competitive market economy.

The liberalisation of the Ukrainian economy and the opening up of markets associated with the reform process could in the longer term lead to higher real wages. This forecast is, however, heavily dependent on the success of reforms and productivity growth in particular. There is a risk that the reforms, even if successful, may initially be accompanied by a decline in employment in individual sectors as a result of changes to the organisational structure of production and employment and as a consequence of privatisation. It is therefore essential to adopt an active industrial policy and innovative labour market rules to avoid squandering the potential of a skilled workforce as a result of a fall in employment or attempts to seek employment abroad.

There are concerns that, contrary to expectations, the fall in employment may be particularly acute in small and medium-sized enterprises, because forecasts that the DCFTA will lead to the spectacular growth of these businesses may not materialise in the short term. In order to cope with increased competition from major European manufacturers or service providers, Ukrainian business will need investment loans. Even if the promise of cutting the administrative costs of business is met, adapting to the rules and provisions of the single market will be expensive and time-consuming. SMEs do not have sufficient access to credit to be able to respond to these challenges. This could result in an increase in manufacturing costs, offset by passing on part of these costs to consumers, which in turn will reduce demand and economic growth or lower labour costs, meaning lower wages or simply redundancies. Each of these scenarios is negative and it is best to prevent them from happening by offering

appropriate assistance to SMEs. However, the possibility that such problems might temporarily arise during the transition process cannot be ruled out.

The implementation of the EU-Ukraine association agreement together with the DCFTA and the associated transition process is accompanied by other support programmes, including those of the International Monetary Fund. The IMF programme requires budget cuts and is designed in such a way that successive loan instalments are conditional on making sufficient progress in the consecutive stages of the reform programme, which are mostly difficult from a social point of view. This combination gives rise to considerable public resistance to the transition programme, and the budget inspired by the IMF austerity programme was initially rejected by the parliament and adopted only under threat of the financial programme being suspended. Implementation of the association agreement and the DCFTA while at the same time implementing the IMF's austerity programme may prove difficult for the public to accept and both social and labour market policy must provide for mechanisms to alleviate tensions, and for safety net programmes.

The challenges facing the Ukrainian economy and Ukrainian society are huge and the current difficulties, in addition to armed conflict and part of the country being cut off, owing to years of neglect, the democratic deficit and deviation from European standards in many areas, complicate implementation of the association agreement and the DCFTA and have repercussions for the labour market. Nonetheless, comprehensive integration into the EU single market, even with all the difficulties this entails, is an opportunity for Ukraine. However, in order to achieve this integration, Ukrainian laws should be harmonised with European legislation in most areas. This is about ensuring fair competition for business, providing consumers on both sides with a guarantee of their rights and the quality of imported goods and services and creating legal conditions of employment for workers which protect them against social dumping and which mean that competitiveness is not achieved by cutting labour costs, i.e. wages. European standards on labour law and social policy should therefore also be adopted.

The European social model (ESM)

The European Union's competences in the area of social policy and the labour market are limited by the Treaties and only include those set out therein. The general principle of proportionality also applies, meaning that the content and scope of EU measures shall not exceed what is necessary to achieve the objectives of the Treaties, as does the subsidiarity principle, which stipulates that in areas not falling within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the individual Member States and if they can be better achieved at EU level. This means that the development and implementation of social policy remains primarily the responsibility of Member States. The same principle will apply to Ukraine, which will,

however, be required to comply with rules derived from European law, irrespective of whether they are based on the Treaties, directives, regulations or decisions of another kind.

The set of principles on social policy, the labour market, social dialogue and the labour code is often referred to as the “European social model” (ESM). However, as a large number of the competences in these areas remain at Member State level, there is often an academic discussion of whether or not there is one ESM or perhaps a set of 28 social models. This discussion relates to the controversy about whether the EU has sufficient powers in the social field or whether the transfer of further powers to Community level would strengthen the EU’s social dimension and the consistency of its policies. For the time being, this debate is of secondary importance to Ukraine. What is important, however, is to make it clear that the rules in the social *acquis*, i.e. the tools of the ESM, form the basis of what is expected from Ukraine as it implements the social dimension of the association agreement.

The social dimension of the EU is primarily based on the Treaties. The Treaty on European Union states that the single market is based on a social market economy, aiming at full employment and social progress. In addition, the Union combats social exclusion and discrimination, and promotes social justice and protection. The Treaty on the Functioning of the European Union also specifies that, when setting and implementing its policies, the EU shall aim to combat all forms of discrimination and shall take into account requirements linked to promoting a high level of employment, ensuring social protection and tackling social exclusion. Taking account of the differences between national systems, the Union recognises and supports the role of the social partners, respecting their autonomy. Furthermore, the Lisbon Treaty recognises the legal value of the Charter of Fundamental Rights of the European Union, which is binding and may be invoked before a court. It guarantees, among other things:

- workers’ right to information and consultation within undertakings
- the right to collective bargaining and the right to strike
- the right to access placement services
- protection in the event of unjustified dismissal
- the right to fair and just working conditions
- prohibition of child labour and protection of young people at work
- a work-life balance
- social security.

In addition, there is an entire legislative network consisting of directives which often serve to implement bilateral agreements between social partners, and other horizontal or sectoral level decisions. These go to make up the European social dimension and cover, *inter alia*, the following issues:

- the protection of employees in the event of the insolvency of their employer

- various occupational health and safety rules
- prohibition of forced labour
- rules on the posting of workers
- protection of the right of employment in the event of a change of owner of the undertaking
- special rights of workers in the event of collective redundancies
- organisation of working time
- teleworking
- parental leave
- employment by temporary employment agencies
- fixed-term employment contracts
- part-time work
- rules on employee representation.

It is clear that the enactment of such a large number of laws will be costly and will take time. However, it is important even now, as Ukraine amends its laws and introduces new legislation, to take account of their compatibility with the fundamental spirit of the ESM, and thus to take into consideration norms such as the fundamental right of association, collective bargaining and collective action, and the right of workers to information and consultation. This calls for the strengthening of the social partners, measures to provide them with an appropriate platform for dialogue, respect for their independence and thus the possibility to develop wider public legitimacy for action. At the same time, the tripartite consultation system involving the social partners and the government should be reinforced.

Reform and adaptation of Ukrainian labour law

Aside from the new state of affairs ushered in by the entry into force of the Association Agreement and the DCFTA – and the need to move towards European standards – debates have been taking place for several years in Ukraine about reforming Ukrainian labour law. The first attempts to pass a new labour law took place in 2007. The debate has not died down since then; the new bill was finally adopted at first reading in the parliament in November 2015. However, the legislative procedure is still ongoing, and the project has come in for criticism from employers and especially from trade unions. The current labour code dates back to 1972 – the Brezhnev era – and although it has been repeatedly amended and complemented with new, related legislation, it is clear that it does not reflect contemporary views. The texts of both the new Ukrainian labour code and accompanying legislation should take European standards into consideration, as stipulated in the Association Agreement. However, trade unions fear that these standards, which are quite broad and leave a lot of room for more specific national regulations to be adopted, will be used as a pretext to lower Ukrainian standards that currently exist or are planned in the new legislation. It should therefore be clearly stated that, in accordance with the principle of non-regression, European standards are minimum requirements for Ukrainian rules, which may be more stringent, as well as more precise and more favourable. Meanwhile, some employers are saying that the

planned new law makes only superficial changes to the "socialist" 1972 law and constrains businesspeople.

One of the more significant problems with the Ukrainian labour market is the fact that the current labour code is somewhat unsuited to new and evolving forms of employment such as teleworking, online working, atypical working hours, casual and part-time work, or work requiring a degree of flexibility on the part of the employee or employer due to the use of new technologies or the need to balance private and professional life. European standards can be a source of good practices on these issues.

However, merely adopting a new law or regulations does not guarantee that they will not be violated on a large scale. The extent of the informal sector within Ukraine's economy and labour market is severely damaging the country's budgetary revenue. Informal employment and undeclared income are particularly widespread in sectors such as construction, commerce, hotels and restaurants, and agriculture. Salaries are often covertly paid in cash, or paid into a bank account with the note "transfer not connected with economic activity". The most common combination is formally paying an employee the minimum wage, with the remaining salary paid under the table. According to some studies, this payment method might be used with over half of employees in certain categories. A failure to respect working hours, late payment of salaries, employment without a written employment contract, health and safety violations, and non-payment of contributions for mandatory social security are other common contraventions of the regulations. Most of these problems stem from the weakness of the state labour inspectorate.

It is possible that the adoption of the new labour law will alleviate some of the Ukrainian labour market's problems. However, it should be noted that the current proposal has attracted criticism from all sides, based on occasionally contradictory arguments. The critics include several employers' organisations and – especially – trade unions and even the International Trade Union Confederation, the International Labour Organization and the Eastern Partnership Civil Society Forum. The list of criticisms is long; the principal ones include:

- the non-transparent procedure for adopting the proposal
- the exclusion of some partners from the work of the parliamentary committee on labour law reform
- non-compliance with international labour standards
- the introduction of provisions that run counter to freedom of association in trade unions
- the ability given to employers to engage in unequal treatment of trade unions
- the prohibition against employees informing trade unions of their salary
- inadequate regulations regarding the terms of social dialogue
- the ability given to employers to engage in electronic surveillance of employees
- the unlimited ability to transfer an employee to another business
- the expansion of the list of reasons for dismissal

- the worse situation for single mothers
- the loss of rights for employees of small businesses
- a rigid, socialist approach giving employees full protection against dismissal
- employers being prevented from stimulating employee productivity
- administrative problems affecting recruitment and dismissal
- bureaucratic labour inspectorate
- Ukrainian standards may be higher – but not lower – than European ones, which is unfair
- the provisions of the proposal are too rigid and make Ukraine less attractive to investors.

Without wishing to prejudge the legitimacy of these complaints or whether or not the proposed labour code complies with European standards and the ILO core conventions, it should be noted that this point is not giving rise to a great deal of debate in Ukraine, despite the fact that the new labour code is being hotly debated. This may be due to the fact that European standards are sufficiently broad and flexible to allow the Ukrainian proposal to easily comply with them; it may also mean that there is no widespread confidence in effectively building on the Association Agreement to draw up Ukrainian regulations. The weakness of autonomous social dialogue should also be mentioned. While trade unions and employers' organisations are active in discussions with legislative bodies and with government and parliamentary politicians, they discuss matters amongst themselves much more rarely. Meanwhile, negotiating a joint project among the social partners and forwarding it to the government for legislation could constitute a potentially effective procedure. As successful labour law reform may prove to be an important factor in promoting the implementation of the Association Agreement, including in other areas, a consultative mechanism should be set up that goes beyond the social partners to cover the whole of organised civil society. The EU-Ukraine Civil Society Platform could serve as an example of this kind of body.

Conclusions

Ukraine has arrived at a crucial juncture for the success of the Association Agreement and the area enjoying free trade with the European Economic Area. These projects must be implemented successfully – including their social dimension, which involves moving towards European standards in terms of labour and social policy – if support for Ukraine's European prospects is to continue. Given the current geopolitical situation in which Ukraine has found itself, it is perfectly clear that undertaking a successful socio-economic transformation and completely reconstructing its legal system out of a need to bring a substantial portion of Ukrainian law into line with the *acquis communautaire*, while waging a defensive war with Russia, is an extremely difficult task. It is also evident that the aim of the hybrid war waged by Russia against Ukraine is not to occupy portions of Ukrainian territory – which have no military worth for Russia and represent an economic burden – but rather to destroy Ukraine's European prospects and to bring its entire territory and all of its state structures into Russia's sphere of influence. It will be very difficult to resist Russia's aggressive intentions without

public support for Ukraine's European prospects, and public support is largely dependent on the successful and effective implementation of European standards in social policy and the labour market.

In the current situation, it seems that while bringing Ukrainian labour law into line with European standards is vital, it is even more important that these changes are not merely made on paper but are actually put into practice. Disregard for the law, corruption, and demoralisation inherited from the Soviet system and the regime of President Yanukovich, which was built on lawlessness and fraud, are all currently widespread in Ukraine and must be eliminated. This cannot come about without solidarity-based cooperation among the whole of society, in particular organised civil society. In terms of the labour market and business, this means that the state labour inspectorate must be dramatically strengthened and it must dismantle the alliance between the industrial oligarchy and the governing class – an alliance built on corruption that damages the country's finances and deprives workers of the rights and wages that are their due.

Effective collaboration between the social partners is necessary – particularly at the current stage – for the transition to be successful. Even if it is understandably very difficult, they can achieve so much more for the sake of the common interest, and the interest of Ukraine as a whole, by means of direct dialogue and by submitting joint proposals to legislative and regulatory bodies than by recourse to the mediation of politicians and government officials. Strengthening effective social dialogue will also contribute to improving employers' and trade unions' legitimacy in society. Their prestige in Ukrainian society declined in the past due to some organisations' dubious links with the ruling class and organised crime. Doubts about the role of the social partners mean that a certain portion of public opinion does not consider them to be part of civil society. However, it is evident that organised civil society cannot fulfil its mission without strong social partners.

Its involvement in Euromaidan showed what future organised civil society wants for Ukraine and that it will support a European course. However, it is the state that bears the primary responsibility for making a success of difficult and costly reforms. External assistance is, of course, important, but spreading the burden fairly within Ukraine is key. The reforms must be paid for by those who can afford it – aided, *inter alia* by the modernisation of the labour code and the move towards European standards. Making the poorest foot the bill would be an irredeemable error which would plunge Ukraine into chaotic public protests and would shatter its European aspirations. It is the state's responsibility to stop this from happening and to put in place adequate protection and support for those who possess the least and risk the most and whose support is vital for Ukraine's transition.