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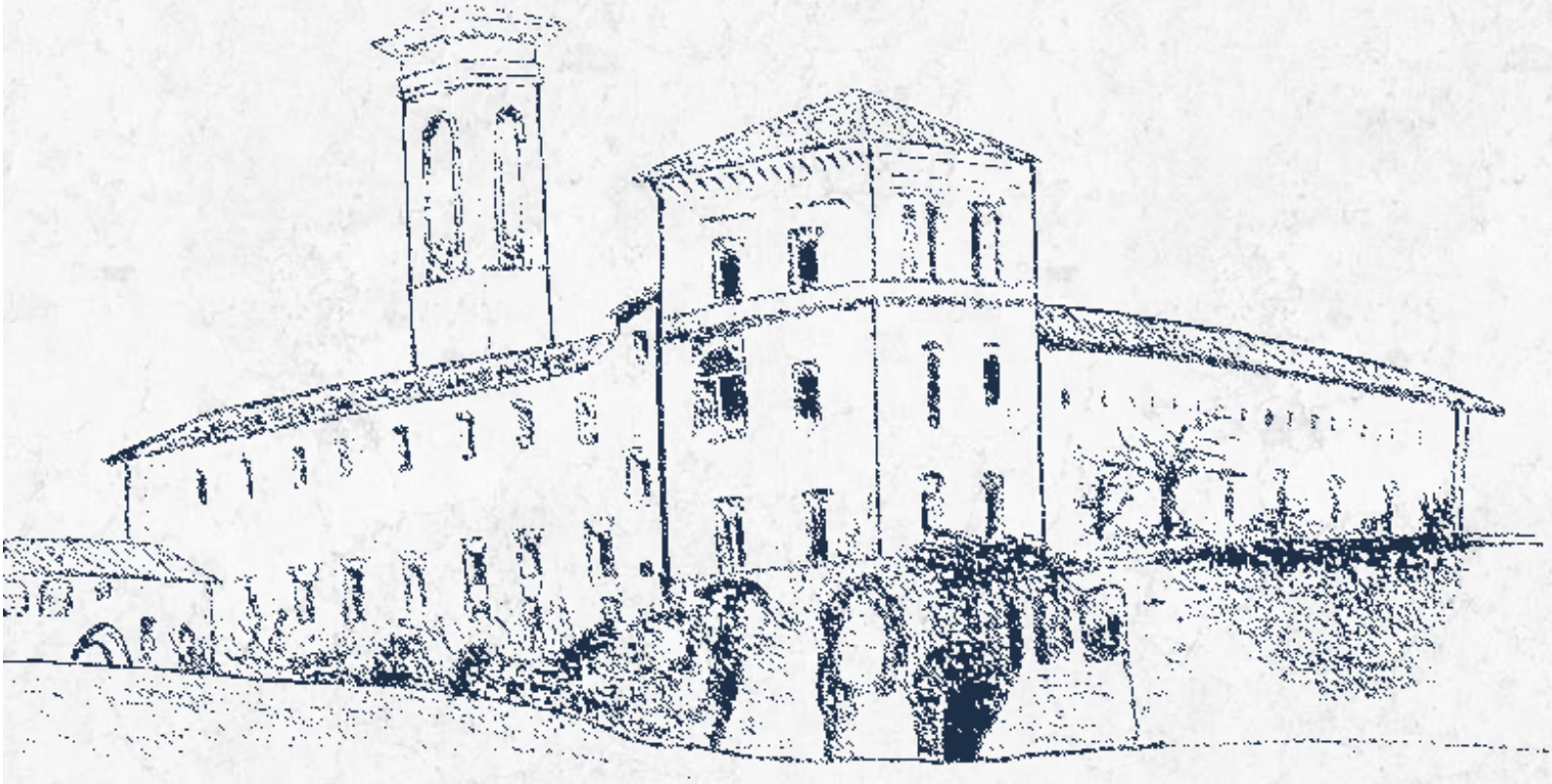

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Non-Standard Forms of Employment: Trends and Prospects of Ukraine's Legal Regulation

Yana Simutina and Sergii Venediktov [*]

Abstract

This paper examines the modern trends and problematic aspects accompanying the reform of labour legislation and the regulation of non-standard forms of employment in Ukraine. The complexity of reviewing labour law in Ukraine prompted the legislator to make targeted amendments to the current Labour Code, which was adopted in 1971, concerning non-standard forms of employment, i.e. remote work and homeworking. This paper focuses on current trends in Ukrainian law-making policy oriented towards deregulating employment relations and labour legislation, as well as the draft laws reviewing them. On the one hand, the reform put forward will expand the scope of fixed-term employment contracts, legalizing on-call work and gig workers. On the other hand, the Ukrainian legislator seeks to include in the Labour Code the indicators of employment relations which can help to identify and distinguish them from self-employment or civil-law relations. It is concluded that the legislator's law-making strategy of 'plugging a hole' in labour legislation does not deal with its obsolescence.

Keywords: *Fixed-term Employment Contract; Homework; On-call work; Platform-based work; Bogus self-employment.*

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1. Introduction

The last decades have witnessed an increase in non-standard forms of employment worldwide.[1] Among others, this phenomenon was the result of technological advances, globalization, and economic fluctuations. Undoubtedly, the COVID-19 pandemic that broke out last year affected the recourse to this way of working, for example through platform work. Engaging in task-based work, platform workers might face self-isolation without being entitled to paid sick leave and sickness benefits. Significantly, 7 platform workers out of 10 did not receive compensation and did not take paid sick leave when tested positive for COVID-19, posing risks to themselves and the others.[2]

Unfortunately, Ukraine is no exception. The introduction of quarantine in 2020 led to an increase in the number of orders and platform workers. Yet only Uber Eats pledged to bear the costs of masks and antiseptics[3].

National legislation fails to regulate all forms of non-standard employment, mostly because Ukraine's Labour Code (LC) entered into force almost 50 years ago. More than 140 amendments have been introduced since then, though this piece of legislation still retains its original structure, disregarding many developments in the world of work. The LC does not regulate multi-party employment relationships and on-call work and is silent on the different employment relationships and their main characteristics.

In Ukraine, the idea of adopting a new Labour Code has been around since national independence, and attempts to do so were reported in 2003, 2009, 2011, 2015, 2019 and 2020. In 2019, the Cabinet of Ministers of Ukraine (CMU) submitted a draft labour law, which moved away from the traditional codification of labour legislation, putting forward the free regulation of the employment relationship, an approach that is unusual in Ukraine.

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[1] Non-standard forms of employment, ILO, available at: https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm. (Accessed 01 June 2021).

[2] COVID-19 has highlighted the risks for platform workers, available at: https://ilo.org/infostories/en-GB/Campaigns/WESO/World-Employment-Social-Outlook-2021#regulatory-puzzle. (Accessed 10 June 2021).

[3] Kak karantin izmenil rabotu dostavcshikov edy. Otvechaet kurier. [How quarantine changed the work of food suppliers. The courier answers], *Commons* (14 April 2020), available at: https://commons.com.ua/ru/kak-karantin-izmenil-rabotu-dostavshikov-edy/?fbclid=IwAR1SWqrkF31AmKIM4FF1U_0f4mKmTiwpw2P89gVnXKa70W43IuuWTLptQf8. (Accessed 10 June 2021).

This draft was criticized by trade unions and seen as a limitation of workers' rights. The Federation of Trade Unions of Ukraine, supported by the statements of the International Trade Union Confederation, opposed the adoption of this bill. In January 2020, the Federation of Trade Unions filed a lawsuit with the District Administrative Court of Kiev on the lawfulness of this piece of legislation. Concurrently, the Committee of the Verkhovna Rada of Ukraine on issues of European Integration stated that the document 'weakens labour protection, narrows the scope of labour rights and social guarantees of employees in comparison with current national legislation, contradicting Ukraine's obligations contained in the Association Agreement and failing to comply with EU law.' It was the position of union activists that levelled criticism at the draft. However, experts argue that changes to labour law are inevitable. And they should meet the requirements of the time, rather than certain morally outdated views concerning the 'employer-employee' relationship[4].

The unsuccessful attempts to adopt new legislation – caused by disagreement between the government, trade unions and employers – led lawmakers to make targeted amendments to the current version of the LC. A number of draft laws were therefore tabled in. Some of them are under evaluation by the national parliament, while others have already entered into force. The distinctive trait of these provisions is that they mostly regulate some non-standard forms of employment. Against this backdrop, the purpose of this paper is to analyse the innovations, risks and prospects of this new legislation in relation to non-standard forms of employment, to investigate the correlation of these new rules with international labour standards, and to compare them with similar regulations in a number of European countries.

2. Discussion

2.1. The Deregulation of Employment Relationships

At the end of 2020, the Ministry for Development of Economy, Trade and Agriculture of Ukraine (MDETA) introduced a draft Law on the Deregulation of Employment Relationships (LDER). According to the explanatory note of the draft, this act is intended to liberalize employment

[4] Inna Krupnik. *The rules on the labour market. What are the chances for updates? Promote Ukraine* (3 April 2020), available at: https://www.promoteukraine.org/the-rules-on-the-labour-market-what-are-the-chances-for-updates. (Accessed 10 June 2021).

relationships, streamlining procedures limiting employers' action without considering today's world of work. The aim is to ensure flexibility when concluding a fixed-term employment contract (FTC).[5]

In most countries, specific provisions regulate fixed-term employment contracts, though in some of them (e.g. North Europe), it is collective agreements concluded at national, sectorial, and company level that govern this working scheme. A relatively common sanction for breaching relevant legal requirements is to convert the fixed-term contract to an open-ended one. Examining national labour laws, it can be noticed that different approaches are adopted to prevent the abuse of FTCs: prohibition of FTCs for permanent work; limitations to the number of successive FTCs and to the cumulative duration of FTCs.[6]

Presently, the LC provides a stringent framework for the conclusions of FTCs. Under Article 23 (2) of the LC, FTCs are concluded when the employment relationship cannot be established for an indefinite period, taking into account the nature of work, the conditions of its implementation, the interests of the employee and other cases provided by law. The provisions of this article illustrate lawmakers' attempt to harmonise the Code with existing international standards. However, this attempt has been far from successful. Here reference is made to ILO Recommendation No. 166, which supplements the Termination of Employment Convention, 1982 (No. 158), which was ratified by Ukraine in 1994.

Despite the fact that Recommendation No. 166 is devoted to termination of the employment relationships, some of its provisions also affect FTCs. In accordance with Article 3 of the Recommendation, adequate safeguards should be provided against the recourse to contracts of employment for a specified period of time. This article limits the use of contracts for a specified period to cases in which, owing either to the nature of work or to the circumstances under which it is performed or to the interests of the worker, the employment relationship cannot be of

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[5] Proekt zakonu Ukrayiny "Pro vnesenn'a zmin do deyakyh zakonodavchih aktiv Ukrainy cshodo deregul'acii trudivych vidnosyn" [Draft Law on Deregulation of Employment Relationships], 14 December 2020, available at: https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=fc4a8cf7-85ae-4c7f-b509-c224b924b3df&title=ProektZakonuUkrainiproVnesenniaZminDoDeiakikhZakonodavchikhAktivUkrainiSchodoDereguliatsiiTrudovikhVidnosin. (Accessed 10 June 2021).

[6] Mariya Aleksynska, Angelika Muller. *Nothing more permanent than temporary? Understanding fixed-term contracts*. Inwork Policy Brief No. 6 (27 March 2015), available at: https://www.ilo.org/travail/info/fs/WCMS_357403/lang--fr/index.htm. (Accessed 10 June 2021).

indeterminate duration. Thus, the provision on the 'interests of the worker' was literally transferred from Recommendation No. 166 to Article 23 (2) of the LC. Nevertheless, if we examine Article 3 of Recommendation No. 166 and Article 23 of the LC closely, we can see that their semantic meaning is completely different. The provisions of the Recommendation consider the interests of the employee not as a reason for concluding FTCs – as it actually draws on the content of Article 23 (2) of the LC – but as a tool against the abuse of these working arrangements. In practice, the employee's interest in concluding an FTC often coincides with the interest of the employer. In other words, an employee, preoccupied with being unable to find another job, may be compelled to conclude a FTC, indicating 'personal interests' when looking for employment. Another negative aspect of the legal regulation of FTCs in the LC is the absence of time limits for the validity of contract, which distinguishes Ukraine from other European countries. For example, in Estonia a fixed-term contract can have a maximum duration of 5 years (Article 9 of the Law on Employment Contract[7]); in the United Kingdom, it might last up to 4 years (Article 8 of The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002[8]); 3 years in Spain (Article 15 of the Workers' Statute[9]), and 33 months in Poland (Article 25-1 of the Labour Code[10]). A FTC currently in force can thus be extended endlessly, exposing workers to uncertainty and instability. In accordance with Article 39-1 of the LC, employment contracts that have been renegotiated one or more times are considered concluded for an indefinite period. However, in case of an extension of the term of the employment contract by means of an additional agreement, this Article of the Code does not apply. This mechanism is confirmed by current case law (e.g. Resolution of the Supreme Court No. 607/18964/18, of

[7]Employment Contracts Act, 17 December 2008, available at: https://www.riigiteataja.ee/en/eli/520062016003/consolide. (Accessed 10 June 2021).

[8] *The Fixed-term Employees (Prevention of Less Favourable Treatment)*, Regulations 2002. UK Statutory Instruments 2002 No. 2034, Part 2, Regulation 8, available at: https://www.legislation.gov.uk/uksi/2002/2034/regulation/8/made. (Accessed 10 June 2021).

[9]Estatuto de los Trabajadores [Law of the Workers' Statute], available at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430 (Accessed 10 June 2021).

[10]Kodeks pracy [Labour Code], 26 June 1974, available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf (Accessed 10 June 2021). (Accessed 10 June 2021).

22.01.2020)[11]. Returning to the LDER, it was opposed by trade unions, as they regarded it as a replay of 2019 draft labour law[12]. One of the reasons for this is that the LDER does not include restrictions on the conclusion of FTCs, giving the parties the opportunity to freely conclude this type of employment contract. This provision, in addition to having a negative impact, also contradicts the already mentioned Article 3 of Recommendation No. 166, which insists on limiting the application of fixed-term employment contracts.

In addition, the LDER enables one to lay down additional grounds for termination. This provision penalizes employees in comparison with the current LC, which establishes clear grounds for terminating employment. This circumstance points to the contradictory nature of the provisions of LDER when compared to Article 58 of Constitution of Ukraine, which provides that laws and other regulatory legal acts shall have no retroactive effect, unless they mitigate or nullify someone's responsibility. The LDER also contains some positive elements related to the regulation of temporary employment relationships. For instance, the bill establishes a maximum duration of FTCs, i.e. 5 years. It should be noted that this is duration is longer than that in other European countries. But, in any case, this provision of the LDER limits the abuse of FTCs in Ukraine.

2.2. Legal Regulation of Homeworking and Remote Work

The need to remain in quarantine to counter the spread of COVID-19 in the spring of 2020 necessitated a change in labour legislation, mostly regarding homeworking. The LC had not regulated this issue until March 2020. Employers could only introduce procedures for working from home in accordance with the Soviet-time Regulations respecting the Working Conditions of Homeworkers, dated 29 September 1981[13]. In order to solve this problem, the Parliament of Ukraine adopted Law No. 540-IX of 30 March 2020, which amended labour legislation, primarily the LC. These amendments were aimed at detailing the use of home-based

[11] Postanova Verchovnogo Sudu [Resolution of the Supreme Court] No. 607/18964/18, 22 January 2020, available at: https://reyestr.court.gov.ua/Review/87115229. (Accessed 10 June 2021).

[12] Deregul'aciya trudovych vidnosyn [Deregulation of Employment Relationships], *FPSU* (17 November 2020), available at: https://fpsu.org.ua/materialy/19354-deregulyatsiya-trudovikh-vidnosin. (Accessed 10 June 2021).

[13] Polozhenn'a pro umovy praci nadomnykiv [Regulations on working conditions of homeworkers], No 275/17-99 on 29 September 1981, available at: https://zakon.rada.gov.ua/laws/show/v0275400-81#Text. (Accessed 10 June 2021).

work as well as remote work. In turn, due to the fact that amendments to the Code were made hastily, they could not be regarded as positive ones. Specifically, the new version of Article 60 of the LC, which was amended through Law No. 540-IX, combined two different working schemes – 'remote work' and 'homework' – without establishing any difference between them. According to the amended version of Article 60 of the LC, remote (home) work is a form of work organization performed by an employee at his place of residence or in another place of his choice, with the help of information and communication technologies, but outside the employer's premises.[14] 'Homework' provides for the implementation of work directly at one's home or another, clearly-defined place, while 'remote work' does not require one to specify the place where work will be carried out.

In spring 2021, the Ukrainian parliament adopted a Law on Amendments to Certain Legislative Acts of Ukraine concerning the Improvement of Legal Regulation of Remote work, Homework and Work with the Flexible Working Hours[15]. The purpose of this legislation is to amend the LC in order to establish clear and understandable rules when resorting to remote work, homework and work with the application of flexible working hours, while ensuring compliance with labour rights. This Law has amended the LC in relation to: a) the employment contract to perform homework, which must be provided in writing; b) ad hoc regulation for homework (Article 60-1; c) the establishment of full financial liability for the damage caused by the lack or the destruction of equipment and facilities provided to an employee to perform work under the contract governing homeworking.

[14] Zakon Ukrayiny "Pro vnesennya zmin do deyakych zakonodavchych aktiv Ukrayiny, spryamovanykh na zabezpechennya dodatkovykh sotsial′nykh ta ekonomichnykh harantiy u zv″yazku z poshyrennyam koronavirusnoyi khvoroby (COVID-19)" [Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)], 30 March 2020, № 540-IX, available at: https://zakon.rada.gov.ua/laws/show/540-20#Text. (Accessed 10 June 2021).

[15] Zakon Ukrayiny "Pro vnesennya zmin do deyakykh zakonodavchykh aktiv Ukrayiny shchodo udoskonalennya pravovoho rehulyuvannya dystantsiynoyi, nadomnoyi roboty ta roboty iz zastosuvannyam hnuchkoho rezhymu robochoho chasu" [Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Legal Regulation of Remote work, Homework and Work with the Flexible Working Hours], 04 February, 2021, № 1213-IX, available at: https://zakon.rada.gov.ua/laws/show/1213-20#Text. (Accessed 10 June 2021).

In general, the changes made to the LC were welcomed. Article 60-1 of LC defines homework as a form of work organization in which work is performed by an employee at his place of residence or in other premises designated by him, featuring a fixed workplace, technical means for the manufacturing of products, the provision of services, the performance of works or functions specified in the documents, but outside the employer's premises. Under this article, performing homework does not entail changes as far as labour rights are concerned. As for remote work, an employee can work outside the employer's premises using information and telecommunication technologies[16]; i.e. they do not have a fixed workplace. Consequently, no employer's consent is required to change the workplace. Furthermore, remote work can be combined with work in the office (blended working), if specified in the employment contract. Unless the employment contract provides otherwise, a homeworker shall comply with working hours and labour regulations. Contrariwise, a remote worker can organize and distribute his working time, so the employer's rules do not apply unless the employment contract stipulates otherwise. Save for home workers, employees working remotely shall be provided with the right to disconnect, without this being considered a violation of the employment contract. Leisure time shall be defined in the employment contract on remote work (or in a document compiled by the employer). Arguably, it is impossible to summarise in two articles all the features of non-standard forms of employment when implemented in practice. Bulgaria is a good example in this sense, as a whole section of the Labour Code (VIIIa) is devoted to the regulation of homework.[17] Furthermore, the changes to the LC – which assign employees working from home full liability – are not clearly organized. For example, there are two articles concerning this aspect: Article 135 states that an additional agreement regarding full financial liability shall be concluded with the employee, while Article 134 is silent about this aspect.

2.3. On-call Work: Future Prospects

The Bill on Amendments to the Labour Code Regarding the Regulation of Certain Non-Standard Forms of Employment (LNSFE) is another piece of legislation put forward by MDETA at the end of 2020. It

[16] This type of work is known under the more common term "teleworking" or ICT-based work.

[17] Kodeks na truda [Labour Code], 1 April 1986, available at: https://www.noi.bg/images/bg/legislation/Codes/KT.pdf. (Accessed 10 June 2021).

introduces a new employment contract with no fixed working hours. Under its terms, the employee's obligation to work arises only if the employer provides it, without guarantees of stable employment. In accordance with the explanatory note of LNSFE, the use of an employment contract without fixed working hours provides employee mobility, greater freedom in relation to the right to work, and a convenient legislative mechanism for the legalization of labour for freelancers, who prefer short-term projects from different clients. The drafters of LNSFE emphasize that this provision will deal with non-standard forms of employment for persons performing work on a temporary basis, taking into account the specifics of this way of working and increasing the protection of workers.[18] To date, no legal regulation of on-call work has been implemented in Ukraine. In addition to defining an employment contract without fixed working hours, the LNSFE establishes that: a) the number of on-call work arrangements with one employer may not exceed 10 % of the total number of employment contracts concluded by the employer; b) an employee has the right to refuse to perform work if he was made aware of this opportunity in violation of the terms determined by the employment contract; c) the minimum number of monthly working hours under the on-call contract is eight; d) an employer cannot prohibit or interfere with on-call workers when performing work under other employment contracts.

Working without fixed working hours has become mainstream overseas. The 19th century was characterized by some employment schemes that did not give workers any stability (e.g. working at docks). In the 21st century, the use of this form of non-standard employment has become widespread and continues to grow. The number of people working on zero-hours contracts in the United Kingdom in 2000 was 225 thousand, but in 2021 that figure rose to 1.05 million.[19] In recent years, there has

[18] Proekt zakonu «Pro vnesennya zmin do Kodeksu zakoniv pro pratsyu Ukrayiny shchodo vrehulyuvannya deyakykh nestandartnykh form zaynyatosti» [Draft Law on Amendments to the Labour Code of Ukraine Regarding the Regulation of Certain Non-Standard Forms of Employment], available at: https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=73819a0c-b52b-4bcd-b94d-c427d7cac4bb&title=ProektZakonuUkrainiproVnesenniaZminDoKodeksuZakonivProPratsiuUkrainiSchodoVreguliuvanniaDeiakikhNestandartnikhFormZainiatosti. (Accessed 10 June 2021).

[19] Number of people on a zero-hours contract in the United Kingdom (UK) from 2000 to 2020, available at: https://www.statista.com/statistics/414896/employees-with-zero-hours-contracts-number/. (Accessed 10 June 2021).

been attempts to introduce restrictions or even ban zero-hours contracts. In New Zealand, a law made zero-hours contracts unlawful in 2016[20]. In Ireland, the Employment (Miscellaneous Provisions) Act 2018 – which entered into force on 4 March 2019 – prohibited the use of zero-hours contracts, introducing banded working hours on a statutory basis[21].

Unlike other European countries, it is not possible to enter into a valid zero-hours contract in Germany. German law follows the principle that the economic and employment risk of the employer should not rest with the employee. The parties must either designate the specific working time in the employment contract or conclude a 'work-on-demand' relationship in the context of fixed-term employment pursuant to Sec. 12 of the German Act on Part-Time Work and Fixed-Term Employment (TzBfG). A 'work-on-demand' relationship is only valid when complying with strict requirements to protect the employee, which in certain cases may be amended by a collective agreement. The work-on-demand agreement must include a specified duration of weekly as well as daily working time. The law permits the employer flexibility with regard to the allocation of each work assignment. Where weekly working time is not provided for, the agreement will provide for ten hours. Where the contract is silent in relation to daily working time, the employer must provide the employee with a minimum of three successive hours of work[22].

Thus, the legislative changes referred to above may be useful in overcoming undeclared employment or employment under civil law contracts. When entering into a contract of employment with no fixed working hours, the worker would receive minimum protection and social protection. However, there is a potential risk that these contracts may extend to traditional employment. As on-call work creates instability and the illusion of formal employment, the specific areas in which such contracts might be used should be clearly defined in order to avoid employers' violations.

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[20] Isaak Davison. Zero-hours contracts officially history, *NZHerald,* (10 March 2016), available at: https://www.nzherald.co.nz/nz/zero-hour-contracts-officially-history/VYIUDJTSE4KM5GCPHYJHZLL4VU/. (Accessed 10 June 2021).

[21] The Employment (Miscellaneous Provisions) Act 2018, *Williamfry* (4 March 2019), available at: https://www.williamfry.com/newsandinsights/news-article/2019/03/04/the-employment-(miscellaneous-provisions)-act-2018. (Accessed 10 June 2021).

[22] Jannis Breitschwerdt. *What rights and protections are there for workers on zero hours contracts in Germany*? Global Workplace Insider (23 September 2016), available at: https://www.globalworkplaceinsider.com/2016/09/what-rights-and-protections-are-there-for-workers-on-zero-hours-contracts-in-germany/. (Accessed 10 June 2021).

2.4. Gig-workers and Online Platforms

In November 2020, a Draft Law about Stimulating the Development of the Digital Economy in Ukraine (LSDDE) was submitted to the in Parliament and on 15 April 2021 its first version was adopted. The explanatory note of this piece of legislation specified that: 'Due to favourable tax conditions, the most common form of cooperation in the technology industry today are civil law contracts concluded with individual entrepreneurs. In addition to a favourable tax regime, this work arrangement gives the parties freedom and flexibility, which is not usual within employment relationships governed by labour law. At the same time, the employer is not under the obligation to ensure rest periods, the reimbursement of travel expenses, and paid leave for temporary work incapacity, among others. Furthermore, this model does not contribute to attracting investment and does not create preconditions for business stability. 'Gig-contracts preserves the benefits of flexibility of civil law relationships, eliminate the risk of retraining of relations into employment relationships and provides social guarantees to gig workers'.[23]

In the LSDDE, reference is made to the 'Action City' – an environment (eco-system) that will stimulate the development of the digital economy and advanced technologies featuring high- added value and the knowledge economy. Under Article 4 (5) of this draft law, to carry out economic activities, a resident of the 'Action City' (i.e. a legal entity recorded in a specific register) has the right to hire employees through employment contracts, gig-specialists through gig-contracts, as well as contractors, including natural persons or entrepreneurs, on the basis of other civil law and commercial contracts. In accordance with Article 1 of LSDDE, gig-contracts are civil law contracts under which an individual (a gig-specialist) undertakes to perform work and (or provide services on behalf of a resident of the 'Action City' (a customer). Concurrently, a resident of the 'Action City' undertakes to pay for the work performed and or the services provided, ensuring the gig-specialist performs work or supplies services in appropriate conditions and according to statutory protection. Relations based on a gig-contract have features specific to labour law: the open-ended duration of the gig-contract, the possibility of engaging in probation periods, and the limitation of the gig-specialist's liability (20%

[23] Proekt zakonu pro stymulyuvannya rozvytku tsyfrovoyi ekonomiky v Ukrayini [Draft Law on Stimulating the Development of the Digital Economy in Ukraine], available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70298. (Accessed 10 June 2021).

of his monthly remuneration). Also, Article 18 (1) of the draft law stipulates that gig-contracts or internal documents concluded by a resident of the 'Action City' may specify the following aspects, taking into account the provisions of LSDDE: working hours; rest time; working conditions and the place where work will be carried out; the rules established by the Action City resident (e.g. labour protection) and liability in case of violation; the procedure for processing personal data; provision of additional compensation; additional aspects (e.g. provision of services).

While the LSDDE aims to serve a noble purpose – i.e. to govern existing relations in the IT-sector – the drafters failed to include the arrangements it regulates in the context of labour law.

The introduction of a new gig-contract has a positive economic effect, though its implications regarding labour rights are yet to be seen. This is also due to the fact that the draft law does not give these workers the same rights provided to employees who have entered into an employment contract. However, the LSDDE is aimed to promote the use of information technology in Ukraine and does not define the general principles and guarantees for doing business in the 'digital economy'. Furthermore, it applies to a number of companies which want to be part of the 'Action City'. In addition to the IT sector, there is a significant number of people working on different online platforms which might benefit from this piece of legislation. As the growth of online work continues, it is important to understand its consequences for workers and for Ukrainian society. According to various sources, in 2013-2017, Ukraine ranked first in Europe and fourth in the world in relation to the financial flows and the number of tasks performed on digital labour platforms.[24]

The crucial element is whether people working via online platforms are to be regarded as 'workers' or as 'independent contractors/self-employed' under EU and national law. As they are often formally contracted by the platforms as independent workers and have working arrangements that do not correspond clearly to a traditional employment relationship, online platform workers have been difficult to classify in many EU and national law jurisdictions[25]. In order to ensure platform workers proper working

[24] Work on Digital Labour Platforms in Ukraine: Issues and Policy Perspectives. ILO. Geneva, 2018. URL: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_635370.pdf. (Accessed 10 June 2021).

[25] Sacha Garben. *'Old' rules and protections for the 'new' world of work*. Social Europe, (20 April 2021), available at: https://www.socialeurope.eu/old-rules-and-protections-for-the-new-world-of-work. (Accessed 10 June 2021).

conditions and social protection, and with a view of striking a balance between rights and interests of both parties, specific criteria should be laid down.

2.5. Legal Definition of an 'Employment Relationship': Main Features

The issue of who should be considered an employee, and the rights and obligations resulting from this status have become extremely problematic in Ukraine in recent decades. This is due to rapid digitalization, deep changes in workflow organization, as well as the lack of up-to-date regulation. The determination of the employment relation is even more important since in Ukraine the number of people engaged in the informal economy in 2020 was 3.2 million.[26] There is increasing difficulty in determining whether or not an employment relationship exists since the current LC does not provide an adequate frame for the application of labour law. No definition is provided of the notion of an 'employee', an 'employer' or an 'employment relationship'. The LC only gives a definition of the employment contract, based on which the categories referred to before are interpreted.

The Ukrainian labour market is characterized by a segmentation between salaried and self-employment. There are no particular safeguards against the use of civil contracts to retain labour or services. Moreover, hiring a self-employed person instead of an employee may be more convenient from an employer's point of view. The cost for hiring a self-employed person is unrelated to the minimum wage or other wage-setting methods (e.g. collective agreements). In addition, no social security contribution shall be paid. The most common examples of civil contracts used to retain the services of self-employed people concern task-specific contracts or contracts of services. These agreements can be entered into by people without a registered business as well as by self-employed individuals. It is for judicial authorities to establish if an employment relationship is in place. Taking into account the absence of the legal presumption of an employment relationship, judicial practice on these disputes is rather heterogeneous and contradictory. The issue of adopting specific

[26] Informally employed aged 15-70 in 2020, by sex, place of residence and employment status, available at: http://www.ukrstat.gov.ua/operativ/operativ2017/rp/eans/eans_u/arch_nzn_smpsz_u.htm. (Accessed 10 June 2021).

regulation and criteria related to an employment relationship was raised at the beginning of 2021, as demonstrated by two draft laws.

On 8 February 2021, the CMU approved the draft Law on Amendments to the Labour Code to Define the Concept and Features of an Employment Relationship (LCER). According to the government statement, the adoption of the law will help reduce undeclared labour in Ukraine, legalize wages and strengthen the protection of workers[27]. The LCER was submitted to the parliament in February 2021, but has not yet been considered.[28] The LCER defines employment relationships as relationships between an employee and an employer, which regulates work performed on behalf of or under the direction and supervision of the employer in exchange for remuneration. The employment relationship is characterized by the following features: 1) work performed as a result of a specific qualification, profession, position on behalf of and under the control of the person for whom work is carried out; 2) regulation of the labour process, which is permanent and, as a rule, does not establish one's person a specific result of work over a certain period of time; 3) performance of work at a workplace determined by or agreed with the person for whom work is carried out, in compliance with internal labour regulations; 4) organization of working conditions, in particular, provision of means of production (equipment, tools, materials, raw materials); 5) regular payment of remuneration; 6) establishment of working hours and rest periods; 7) reimbursement of travel and other financial costs associated with work performed. In accordance with this draft law, work can be recognized as being performed within the framework of an employment relationship, regardless of the name and type of contractual relationship between the parties, if three of more features among those outlined above exists. The above provisions of LCER are perceived positively. This draft law also defines the concepts of 'an employee' and 'an employer'. As already mentioned, the LC does not make reference to these concepts and does not clearly specify who the employer is.

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[27] Uryad skhvalyv zakonoproekt shchodo posylennya zakhystu pratsivnykiv [The government has approved a draft Law to strengthen the protection of workers], *Government portal*, (08 February 2021), available at: https://www.kmu.gov.ua/news/uryad-shvaliv-zakonoproekt-shchodo-posilennya-zahistu-pracivnikiv. (Accessed 10 June 2021).

[28] Proekt Zakonu pro vnesennya zmin do Kodeksu zakoniv pro pratsyu Ukrayiny shchodo vyznachennya ponyattya trudovykh vidnosyn ta oznak yikh nayavnosti [Draft Law on Amendments to the Labour Code to Define the Concept and Signs of Employment Relationships], Verkhovna Rada of Ukraine: official web-portal, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71071. (Accessed 10 June 2021).

The other act implemented – draft Law on Amendments to the Labour Code to Regulate Certain Issues in the Employment Relationship (LRER) – was submitted by the head of the Parliamentary Committee on Social Policy and Protection of Veterans' Rights, to the parliament on 9 February 2021. The current LC was defined in the context of the industrial economy and the existence of large enterprises, which were the flagships of the economy. Presently, as the number of employees in the production industry has decreased threefold since 2000, there is a need to adapt labour legislation to the needs of new relationships and new sectors.[29] Under the LRER, work may be recognized as performed within the employment relationship, regardless of the name and type of contract between the parties, if there are at least four (or six, when the employer is a physical person) criteria as discussed above.

In addition to these provisions of LRER, which are generally perceived positively, the draft law also contains some rules that negatively affect the regulation of employment relationships. For example, lawmakers provide for the possibility of establishing restrictions to the work of other employers. This provision is contrary to current national legislation. Under Article 43 (1) of the national Constitution, everyone shall have the right to work and to earn a living from the work he or she agrees to perform. In this sense, Article 9 of LC stipulates that those terms of employment contracts that worsen the conditions of employees in comparison with national labour legislation are null and void. Moreover, the LRER contains a number of provisions that are perceived as not compliant with the law. For example, at some point, the LRER specifies that 'labour law does not apply if: work is performed by an employer – a physical person operating independently or an individual conducting work under an employment contract'. In this case, it is impossible to interpret the meaning given to this paragraph by lawmakers.

3. Conclusions

To date, only one of the above-mentioned draft laws has been considered by the parliament. The impression, however, is that some concepts have

[29] Proekt Zakonu pro vnesennya zmin do Kodeksu zakoniv pro pratsyu Ukrayiny shchodo rehulyuvannya deyakykh pytan′ trudovykh vidnosyn [Draft Law on Amendments to the Labour Code to Regulate Certain Issues of Employment Relationships], Verkhovna Rada of Ukraine: official web-portal, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71251. (Accessed 10 June 2021).

been modelled so as to penalize employees, making believe this has been done to clarify the legal regulation of the employment relationship. While this seems to have been done intentionally, workers' interests might be affected for the sake of economic growth. In this regard, the authors share the view that 'the reforms must be paid by those who can afford it – aided, inter alia, by the modernization of the LC and the move towards European standards. Making the poorest foot the bill would be an irredeemable error, which would plunge Ukraine into public unrest and affect its European aspirations. It is the government's responsibility to prevent this situation 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 development'.[30] In some cases, the inconsistency of these provisions with existing national legislation and international standards is evident. Moreover, the strategy of 'plugging a hole' in labour legislation does not solve the problem of its obsolescence, but it only puts off its reform. This innovation process calls for the involvement of a wide range of stakeholders, i.e. the social partners, academics and relevant international organizations.

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