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# THE NEW MODEL OF LABOUR DISPUTE RESOLUTION FOR UKRAINE

(DEVELOPED BY THE EXPERT GROUP)

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## INTRODUCTION

The Ukrainian labour market, in spite of its long history and development of the social dialogue, requires fundamental changes. As of today, the provisions that form the existing system for safeguarding the rights and interests of employees are established in a number of regulations adopted in different periods, which makes their enforcement more complicated.

Analysis of labour dispute resolution practices in Ukraine showed that individual labour disputes are predominantly resolved in court, while collective labour disputes (with the exception of the collective labour disputes engaging the employees covered by the legal ban on strikes), by contrast, can only be resolved through out-of-court settlement procedures and, in fact, there is no opportunity for their consideration by court. This turns the judicial system into an insufficiently effective labour dispute settlement tool.

At the same time, the National Service for Mediation and Reconciliation (hereinafter NSPP) does not assist in resolution of labour disputes between the employer and employee through out-of-court procedures; meanwhile, the social dialogue potential, being the most important driving force behind the development of labour relations, is not used sufficiently.

All of this prompted representatives of the trade unions and employers, in co-operation with the NSPP, to start working on development of a new labour dispute resolution model for Ukraine towards the establishment and development of the streamlined and prompt out-of-court procedures.

Work on the new labour dispute resolution model for Ukraine intensified in 2011, when the Swedish-Ukrainian Labour Dispute Resolution Project (hereinafter – the Project) was launched with support from the Swedish Agency for Development and Cooperation (SIDA) in Ukraine based on co-operation of the National Mediation Service of Sweden and the National Service for Mediation and Reconciliation of Ukraine.

During the Project implementation in 2011-2013, the Ukrainian stakeholders, including the social dialogue parties, public authorities and experts in labour relations, obtained additional opportunities to learn more about the experience and outcomes of specific labour dispute resolution systems in various European countries, with the Swedish system as a reference.

The new labour dispute resolution model was developed by the Expert Group consisting of experienced professional representatives of the social dialogue parties, NSPP, independent Ukrainian and Swedish experts. The Expert Group used its analysis of the international and European experience as well as its analysis of the current Ukrainian system to identify the basic principles and key features of the Ukrainian labour dispute resolution model and formulate the most important terms and definitions related to dispute resolution and needed to understand the new model.

The New Labour Dispute Resolution Model for Ukraine (hereinafter – the New Model) has the objective of establishing an efficiently functioning labour dispute resolution mechanism based on European standards and best practices, where organizations of employers and trade unions play an important role and undertake specific responsibilities in dispute resolution, while the state guarantees basic rules and means for conclusive resolution of disputes.

The new model implies definition and distinction between the two types of labour disputes – disputes of interests and disputes of rights – as the basis for the respective labour dispute resolution procedures. The out-of-court resolution of the disputes of interests and disputes of rights is expected to include a minimum number of levels and maximum opportunities for engagement of trade unions and employers in the dispute resolution procedures at all stages. The role of the NSPP will also undergo a qualitative change because of expansion of its powers and functions.

A wide discussion of the New Model is envisaged among all parties to the social dialogue.

### DEFINITION OF TERMS

In the New Model, terms are used in this sense:

**Industrial action** – a disagreement openly proclaimed by a labour dispute party through action or inaction in order to put pressure on another party with the aim of resolving a labour dispute. Industrial actions may be exercised in any form that is not prohibited by the Constitution and laws of Ukraine.

**Registry of Labour Disputes (RLD)** - the open access automated database of electronic information about registered labour disputes established and maintained by the NSPP.

**National Service for Mediation and Reconciliation (NSPP)** - public authority established in compliance with the law to prevent labour disputes and promote their resolution and development of social dialogue.

**Employer's regulation** - document adopted by the employer according to the legislation regulating labour relations between the employer and employees (company rules and regulations, staff instructions etc.).

**Labour relations regulatory act** - official document adopted by the duly authorized regulatory entity in the form established by the law and according to the procedures established by the law, aimed at regulating labour relations. This act, which contains legal provisions, is not personalized and is intended for repeated application.

**Out-of-court labour dispute resolution procedures** - labour dispute resolution procedures by way of negotiations, mediation, and labour arbitration specified in the law and established in a collective agreement or labour contract.

**Negotiations** – a procedure for a labour dispute resolution through discussions of the subject-matter of the dispute by its parties in order to achieve a mutually acceptable solution.

**Mediation** – procedures aimed at assisting the parties in resolving a labour dispute with the aid of a labour mediator in the time and in the way envisaged in the law and established in a collective agreement (contract) or labour agreement (contract).

**Reconciliation** – procedures of labour dispute resolution through consolidated search for mutually acceptable solutions by the labour dispute parties, assisted by the National Service of Mediation and Reconciliation (NSPP).

**Judicial labour dispute resolution procedures** - the procedures for labour dispute resolution by court specified in the law.

**Labour mediator** – an individual duly appointed by the NSPP assisting the parties to a labour dispute in reaching a mutually acceptable solution regarding the essentials of the dispute.

**Labour dispute of interests** - unresolved differences over the establishment of rights and duties during collective bargaining on entering into new collective agreements and contracts or on amending valid agreements (contracts).

**Labour dispute of rights** - unresolved differences over implementation of rights and duties established by the laws and regulations on labour relations, enforcement of collective contracts and agreements, employer's regulations, labour agreements (contracts), or interpretation of collective agreements and labour contracts.

**Labour arbitration** - a body authorized to resolve labour disputes of rights that shall be created on an ad hoc basis in the framework of the NSPP head office and its regional branches.

**Labour arbiter** - an individual duly appointed by the NSPP reviewing labour disputes of rights within the labour arbitration.

PRINCIPLES OF THE NEW MODEL

*The new model in Ukraine will be based on the following principles:*

- 1) rule of law and legitimacy;
- 2) independence, equality and competence of parties to a labour dispute;
- 3) social dialogue-based labour dispute resolution;
- 4) prompt labour dispute resolution and optimal time-frames envisaged;
- 5) simplicity and accessibility of the labour dispute resolution procedures;
- 6) priority of reconciliation procedures and compromises in labour dispute resolution;
- 7) free-of-charge reconciliation procedures for the disputing parties;
- 8) the binding nature of a labour arbitration decision;
- 9) mutual responsibility of the labour dispute parties and their representatives for implementation of the labour arbitration decisions and commitments under achieved agreements.

## THE KEY FEATURES OF THE NEW MODEL

The New Model will be characterized by the following features:

**1. Classification of labour disputes by the dispute subject matter: labour disputes of rights and labour disputes of interests.**

Labour disputes in Ukraine shall be divided into labour disputes of rights and labour disputes of interests, differing in the subject and composition of parties to a dispute.

Labour disputes of rights arise from unresolved differences over implementation of existing labour rights and duties stipulated in the regulatory and legal acts in the labour law, collective agreements and contracts, employers' regulations, labour agreements (contracts), as well as from interpretation of contents of collective agreements and labour contracts.

Labour disputes of interests are related to the unresolved differences over the establishment of the rights and duties during the introduction of the new collective agreements and contracts or amendments to the existing agreements and contracts. Therefore, the labour disputes of interests are not stemming from the existing rights, but interests of one party to establish such a right through its inclusion into a collective agreement, contract and disagreement of another party.

Labour disputes differ with respect to the composition of the parties to a dispute.

Thus, parties to a labour dispute of rights shall be an employee, employees, trade union, association of trade unions united by a joint interest in labour dispute resolution – on the one hand; and the employer, employers' organization, association of employers' organizations, local executive authorities and local governments – on the other hand. Parties to a labour dispute of interests are collective agreement or contract parties, and the composition of their subjects shall be identified in compliance with the legislation on the social dialogue.

Labour disputes' categorization into labour disputes of rights and labour disputes of interests shall condition the procedures of their resolution. Thus, labour disputes of rights can be settled both with out-of-court and court procedures, while disputes of interests – only with the out-of-court procedures.

**2. The dispute resolution procedures shall include as few stages as possible, each of them offering a prompt and free-of-charge procedures and a realistic opportunity for the parties to arrive at a mutually acceptable solution regarding the essentials of the dispute.**

**2.1. Out-of-court procedures for dispute resolution**

Labour disputes of interests and labour disputes of rights related to the implementation of employers' regulations, implementation and/or interpretation of collective agreements and contracts, labour agreements (contracts) are settled in line with out-of-court procedures.

Labour disputes of interests are resolved through mediation, while labour disputes of rights are resolved through negotiations and labour arbitration.



The general procedures and maximum time limits for out-of-court resolution of labour dispute of rights shall be established by special law.

Particular features of the out-of-court labour dispute settlement will be stipulated in the collective contract or agreement at the respective level (if they are not available – in the special agreement on labour dispute resolution). They may also be established in the labour agreement (contract). Moreover, collective contracts and agreements may include opt-out clauses, in particular, in regard to priority of the out-of-court labour dispute resolution, terms for conducting negotiations, conditions for including into negotiations representatives of organizations of employees and employers of different levels, conditions for the work of labour mediators, procedures and terms for considering a labour mediator's recommendations and adopting a mutually acceptable decision on dispute resolution, etc.

### **2.1.1. The procedures for resolution of disputes of interests**

A labour dispute of interests arises at the moment when, within the period of collective bargaining, the parties fail to reach consensus on signing a new collective agreement, contract or amendments to them, or suspended negotiations upon request of one or both parties, and send a written request to the NSPP to assist in the dispute resolution, attaching the list of provisions, which constitute the dispute's subject matter.

If the decision to suspend negotiations and request the facilitation of the NSPP in dispute resolution has only been made by one party, this party shall send a written notice about this to the other party within the time stipulated by the law prior to addressing the NSPP.

Having received the request, the NSPP shall register the labour dispute of interests in the National Registry of Labour Disputes, study the sent files, consult representatives of the parties and, following that, appoint an independent mediator (or two or more mediators where necessary) to assist in resolution of labour dispute of interests within the time specified by the law.

For the purpose of optimizing work of independent labour mediators, and reaching a mutually acceptable solution together with them, the parties shall assign authorized representatives competent in the dispute's subject matter.

Labour mediators shall hear the arguments of the parties, analyze social and economic substantiation of the proposals made, conduct consultations and offer recommendations together with the draft resolution on the settlement of a dispute on its merits.

Recommendations and draft resolution submitted by the independent labour mediator(s) shall be duly considered by the labour dispute parties .

Duration of independent labour mediators' involvement in labour dispute resolution shall be identified by the NSPP, taking into consideration the scope and complexity of the dispute subject matter.

Signing of a collective agreement or contract (or amending the existing one) following a compromise decision shall lead to the resolution of the dispute of interests.

In the event of the failure to sign a new collective agreement or contract (or amendments to the existing one), the parties shall have the right to industrial actions.

The party that makes the decision on holding an industrial action shall be obliged to notify the other party and the NSPP prior to its launch within the time specified by the law.

In this case, the NSPP may decide to prolong the labour mediator's activity, whose major task at this stage shall be to bring the labour dispute parties back to efficient collective bargaining.

### **2.1.2. The procedures for resolution of disputes of rights**

The dispute of rights emerges when one party (the initiator) addresses the other party with a written request to consider issues that were not settled previously and are a subject matter of the labour dispute of rights, through negotiations over rights to reach a solution regarding the essentials of this dispute.

The other party shall be obliged to enter into negotiations within the time limit stipulated by law. Should the parties fail to start negotiations within the time stipulated by the law, the initiator party shall inform the NSPP according to the established procedure to make sure necessary measures are taken.

Negotiations shall be held directly between the parties to the dispute.

The parties may engage in the labour dispute negotiations:

- a) representatives of the trade union/organizations of employers, or another person authorized by the employee/employer – in case of a dispute between an individual employee and employer;
- b) representatives of regional or sectoral organizations of trade unions and employers and their associations – to resolve a dispute at the local level;
- c) representatives of national associations of trade unions and employers' organizations – to resolve a dispute at the sectoral and regional levels.

The negotiations shall take reasonable time set by parties in the beginning of the negotiations within the maximum term stipulated by the law. Intervals between negotiations have to be substantiated and can only be taken upon consent of the parties.

If negotiations result in a dispute settlement, the parties shall draft it as an agreement. After signing it, the parties shall be obliged to comply with the agreements reached as a result of negotiations.

If a dispute of rights is not resolved as a result of negotiations, the initiator party shall initiate labour arbitration of the dispute.

The initiator party to a labour dispute of rights shall submit a written application in line with the standard template and the required documents necessary for the dispute's consideration by labour arbitration within the time stipulated in the law to:

- a) the NSPP central office if labour disputes emerge at the sectoral and national levels;
- b) the NSPP regional office if labour disputes emerge at the local and regional levels, with a copy to the other party to the labour dispute.

Information about a labour dispute shall be entered to the National Register of Labour Disputes on the day when the application is filed in the NSPP.

The procedures for the establishment and activity of labour arbitration shall be set forth in the special law and detailed in the respective Regulation drafted and adopted by the NSPP in consultation with the representative bodies of the trade union and employers' parties at the national level.

Labour arbitration reviews labour dispute through the study and analysis of submitted documents and supplementary materials (the party facing the claim shall submit necessary materials upon request of the labour arbitration) and at the sessions, the progress and resolutions of which shall be reflected in their minutes.

The duration of case consideration shall depend on complexity of the dispute subject matter and the level where the dispute emerged, but it shall not exceed the maximum term set by the law.

The decision reached by labour arbitration shall be binding for implementation according to the procedures and within the timeframe specified in this decision.

## **2.2. The court procedures for resolution of disputes of rights**

Labour disputes of rights shall be heard by courts in line with the laws of Ukraine taking into account some distinctive features, for instance:

- 1) the case shall be heard by the court including delegated members of the employees and employers in equal numbers who have experience in social and labour issues. The particular features of the jury's involvement shall be determined by the legislation.
- 2) at the pre-trial consideration stage in the case of a labour dispute of rights that arose between an employer and employee, the court may decide to conduct reconciliation procedures involving an independent mediator. Following a court resolution, the NSPP shall appoint an independent mediator to conduct reconciliation procedures.
- 3) specific time limits shall be set for filing of cases in court and court consideration of:
  - dismissal, transfer to another job, refusal to sign a labour contract;
  - non-payment of wages or any payments owed to an employee or a primary trade union organization;
  - deeming industrial actions illegal;
  - annulment of a decision of labour arbitration.

Only the court shall consider cases on:

- reinstatement on the job regardless of the reasons for the termination of employment, change in wordings of dismissal reasons and date, as well as compensation for a forced absence from the workplace caused by the employee's unlawful dismissal;
- non-payment of wages and other payments due to the employee;

- rejection to employ;
- declaring an industrial action to be illegal;
- cancellation of the decision reached by labour arbitration in cases defined by the law. Moreover, the court shall not consider the case on its merits, but instead shall seek to determine whether labour arbitration adhered to the procedure for making this decision.

***3. The binding nature of decisions passed by labour arbitration, which shall be created in compliance with the law for resolving labour disputes of rights, and development of a clear mechanism for enforcement of these decisions.***

For the purpose of ensuring maximum efforts to resolve labour disputes of rights through the out-of-court procedures, the law shall stipulate that labour arbitration's decisions shall be binding for parties to a labour dispute and shall be implemented according to the procedures and within time-frames established by that decision.

A labour arbitration resolution shall be final and not subject to appeals, except as provided by the law for the following reasons:

- a) the labour dispute, decided by labour arbitration, does not fall within its jurisdiction under the law;
- b) decision reached by labour arbitration resolved the issues that do not constitute labour dispute's subject matter. If this is the case, it shall only be possible to annul the part of the decision covering the issues, which do not constitute the subject matter of the labour dispute.

An appeal for annulment of a decision reached by labour arbitration can be submitted to court within the time-frame stipulated by the law.

The court's annulment of a labour arbitration decision shall not deprive the parties of their right to once again appeal to labour arbitration.

If a decision reached by labour arbitration was cancelled in full or partly due to the fact that it was made in a dispute the subject of which is not the labour dispute subject matter, or this decision settles the issues that go beyond the scope of the labour dispute, the respective dispute shall not be subject to further consideration within labour arbitration. The part of the labour arbitration decision that was not cancelled is subject to implementation according to the procedure and within the time-frame established by this decision.

In case of non-compliance with the arbitral decision according to the procedure and within the time-frame set in this decision, and if it was not appealed to court in the cases stipulated by the law, representatives of a party, in whose favour the decision was made, shall submit to the NSPP an application for issuance of a certificate, which is an enforcement order. The certificate shall be issued by the NSPP in compliance with legal requirements on enforcement proceedings.

When the certificate is submitted to the state enforcement service in accordance with the established procedures, the decision reached by labour arbitration shall be enforced in line with legislation on enforcement proceedings.

**4. Guarantees of rights of parties to a labour dispute during its settlement:**

- filing complaints without any harm to themselves;
- personal participation or participation through representatives (including organizations of trade unions and employers at the highest level) in resolving a labour dispute;
- information needed for resolving the labour dispute and about the course of its resolution, as well as about the measures taken to settle the dispute;
- approaching the NSPP with the request for assistance in resolving a labour dispute;
- industrial actions.

**5. Enhancement of the role and development of the institutional capacity of the National Service of Mediation and Reconciliation.**

Capacity building for the NSPP – development of the potential and organizational, legal, economic and human resources of the NSPP in the labour dispute resolution system.

The NSPP will be endowed with additional powers and functions of labour dispute resolution through the out-of-court procedures, which will be supported by creating the respective organizational structure and appropriate funding for implementation of these powers and functions:

- facilitation of labour dispute resolution;
- consultative assistance to the labour dispute parties;
- organizing work of labour arbitrators and supporting their activity;
- appointment of an independent mediator and support for his/her activity;
- registration of labour disputes, and establishing and maintaining the National Registry of Labour Disputes;
- organization and support for professional training of labour mediators and labour arbiters; maintaining lists of labour arbiters and labour mediators;
- normative foundation of labour dispute resolution;
- forecasting potential labour disputes and implementing measures aimed at preventing disputes.

*Enhancement of institutional capacity of the National Service of Mediation and Reconciliation shall include:*

- 1) improvement of the legal framework concerning promotion of out-of-court labour dispute resolution in a civilized legal way;
- 2) transparent drafting, examination, approbation and adoption of the NSPP's regulation;
- 3) renewal of the NSPP's current organizational structure, and establishment of additional units at the central office and regional offices of the NSPP;
- 4) establishment of labour arbitration under the auspices of the central office and regional offices of the NSPP;
- 5) creation of a system to monitor efficiency of labour dispute resolution at all levels (local, regional, sectoral, national);
- 6) staff enhancement for the labour dispute resolution system, professional training and development of labour arbiters and mediators;
- 7) academic, expert, analytical, methodological, organizational, and other forms of support for the labour dispute resolution system;
- 8) methodological and advisory support of employees, trade unions and their associations, employers and their organizations, state authorities and local self-government bodies; dissemination of legal, academic and other information on labour dispute resolution;
- 9) ensuring efficient coordination of the labour dispute resolution process;
- 10) implementation of a set of measures aimed at imposing greater liability on the parties to the social dialogue for non-compliance with labour legislation provisions;
- 11) involvement of trade unions, employers' organizations, central and local executive authorities, local self-government bodies in the process of labour dispute resolution;
- 12) improving information support for the process of labour dispute resolution and raising public awareness of these issues;
- 13) holding international, national and regional seminars on labour dispute resolution issues.

***6. The defined role of trade unions and employers' organizations and their representatives in labour dispute resolution procedures at all levels – from the workplace up to the national level.***

With regard to labour dispute resolution procedures, legislation shall give trade unions and employers' organizations and their associations the right:

- to determine the particular features of the out-of-court procedures of labour dispute resolution in collective agreements and contracts;
- to represent interests of the employee(s)/employers who are members of these organizations in the dispute resolution process;
- to facilitate negotiations, where parties to the dispute are individual members of such organizations or member organizations of the associations/federations, through methodological and organizational assistance and direct participation of their

representatives in these negotiations;

- to take part in the work of labour arbitration by delegating their representatives to labour arbitration;
- to obtain information from public authorities, bodies of local self-government, and NGOs on issues related to the labour dispute subject matter;
- to delegate representatives to courts of general jurisdiction to serve as jurors.

**7. Specific legal liability shall be defined for violation of the labour disputes resolution procedures and regulations on labour relations, collective agreements and labour contracts.**

Liability shall be established for:

1) violation of the out-of-court labour dispute resolution procedures:

- refusal to participate / evasion of participation in negotiations on the dispute of rights;
- refusal to participate / evasion of participation in the work of a mediator aimed at resolving a dispute of interests;
- refusal to participate / evasion of participation in the work of labour arbitration aimed at resolving a dispute of rights;
- failure to provide a mediator or labour arbitration with the information required for the labour dispute's consideration;

2) violation of procedures for announcing and conducting industrial actions:

- untimely notice about the industrial action;
- obstructing organization of and participation in the industrial action;
- obstructing termination of a strike deemed illegal by court.

3) failure to implement the labour arbitration decisions and agreements reached by the parties to a dispute, in particular:

- an agreement concluded by the parties to a labour dispute following the negotiations over rights;
- decision reached by labour arbitration;
- decision made by the parties upon consideration of the labour dispute of interests.

4) Violation of, or failure to comply with a law or regulation on labour relations, a collective agreement (contract), employer's regulation, labour contract that caused a dispute of rights.

The type of liability depends on the socially harmful and negative consequences of violation of the labour dispute resolution procedures, and methods of protection and restoration of the violated rights.

In the case of law violations, an employee, a trade union, a trade union organization, an employer, employers' organization, association of employers' organizations have the right to claim damages from a wrongdoer according to the legally stipulated procedure.

The parties may incorporate into collective and individual agreements (contracts) specific methods, scope, and procedures for damages as well as ways of enforcing collective agreements and contracts.

Those who violate labour dispute resolution procedure are brought to account following the request submitted by the labour arbitration or labour mediator (labour mediation team leader) to the NSPP that studies the circumstances and notifies the party(ies) about the liability for violation of the labour dispute resolution procedure. Should the party(ies) fail to eliminate noted violations of the labour dispute resolution procedure, the NSPP shall take respective measures to bring the wrongdoers to account.

The court is authorized to apply a penalty for those violations; the amount of penalty is defined in a special law for every type of violation.

### ***8. Information support for the dispute resolution process.***

One of the ways to increase efficiency of labour dispute resolution is to ensure access to information about causes of disputes and procedures for their resolution.

For this purpose, it is planned:

#### *8.1) to establish the Registry of Labour Disputes open for public access.*

The Registry of Labour Disputes (hereinafter the Registry) is established to ensure open access to the information about labour disputes.

The Registry is established and maintained by the NSPP and shall comprise labour disputes of rights settled by labour arbitration and labour disputes of interests resolved with the help of labour mediators.

The Registry maintenance procedures shall be stipulated in a regulation (hereinafter the Regulation) approved by the head of the NSPP.

Registration of labour disputes and their entry in the Registry shall be performed after one or both parties to a labour dispute – in accordance with the established procedure - submit to the NSPP a written request to form a labour arbitration to resolve a dispute of rights or to delegate a mediator to facilitate resolution of a dispute of interests.

Publication of the official information about the labour dispute registration for free 24h access via the NSPP official web portal shall be made in accordance with the procedures established by the Regulation.

#### *8.2) Coverage of information about labour dispute resolution in printed media, online publications, radio/TV programs:*

- publication of information about registered labour disputes on the NSPP's official web site;
- publication of decisions reached by labour arbitration in the NSPP's printed publication in the category "Labour Dispute Resolution Practice";



- posting of explanatory materials on labour dispute resolution on web sites of the NSPP, trade unions, their associations, organizations of employers and their associations;
- publications in printed media with comments by NSPP employees, experts, scholars, trade union representatives, employers' organizations and their associations;
- organizing participation of NSPP management, experts, scholars, representatives of trade unions, employers' organizations and their associations in TV/radio programs;
- providing comments or interviews to professional electronic and printed media, online publications;

*8.3) Holding "round tables", seminars with participation of NSPP employees, experts, researchers, representatives of trade unions, employers' organizations and their associations to discuss the labour dispute resolution mechanism.*

### **9. Systemic national professional training of labour mediators and labour arbiters**

The new labour dispute resolution model for Ukraine envisages proper training of a highly qualified pool of labour mediators and labour arbiters based on:

- development of the procedures for recruitment of the staff who have experience in the field of labour relations, conflict studies, law, management;
- enhancement of the professional training system and advanced training programs;
- defining the procedures for evaluating performance indicators;
- improvement of labour remuneration system.

It is envisaged that persons with professional training and practical experience in social and labour relations, who hold authority and trust of the social dialogue parties shall be involved in labour dispute resolution procedures as labour mediators and labour arbiters.

## EXPECTED OUTCOMES OF THE NEW MODEL'S IMPLEMENTATION

*An effective labour dispute resolution system shall be created based on:*

- harmonization of Ukrainian legislation with international and European standards;
- enhancing the role of parties to the social dialogue and institutional capacity of NSPP, establishment of efficient cooperation between them and implementation of new approaches to shared responsibility;
- defining the particular features of consideration of labour disputes of rights by labour arbiters and courts;
- defining the system of resolution of labour disputes of interests with active participation of the social dialogue parties and mediation provided by the NSPP,
- *which will contribute to:*
- simplifying the existing Ukrainian labour dispute resolution system and establishing a new problem-solving model in the field of social and labour relations;
- effectiveness and swiftness of restoration of labour rights and employees' interests;
- achievement of social peace in the labour market and social stability;
- enhanced role of trade unions and employers' organizations;
- establishment of favorable conditions for doing business;
- improvement of working conditions, consensus on the need for technical changes and increased productivity, achievement of economic stability and adaptation to market changes;
- enhancement of legal awareness of the population, public awareness about the options of resolution of the social and labour issues by civilized legal methods at the negotiation table.

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## ANNEX 1

### THE NEW MODEL

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## CURRENT STATUS AND CHALLENGES OF THE EXISTING LABOUR DISPUTE RESOLUTION IN UKRAINE

Labour rights and interests of employees are guaranteed by the Constitution and the labour legislation of Ukraine. They are protected in individual and collective procedures. Therefore, the labour dispute resolution system in Ukraine provides for different procedures to address *individual* and *collective* labour disputes.

The provisions that constitute the current system of protection of labour rights and interests of employees can be found in a number of legislative acts, which makes it difficult to enforce them, and the established labour dispute resolution procedures are so complicated that making use of one's right to protection of his/her labour rights and interests is not an easy task.

Thus, the general pre-trial procedures for resolving *individual labour disputes* are established in Section XV of the Labour Code of Ukraine (hereinafter – the Labour Code); for certain categories of employees, special procedures are established, its features stipulated in the Laws of Ukraine "On the Prosecutor's Office", "On the Judicial System and the Status of Judges", "On the Civil Service", "On the Prosecutor General's Office", "On Police" and so on.

At the same time, the Constitution of Ukraine guarantees protection of rights and freedoms of a person and citizen by court. That is why, in spite of the fact that the Labour Code establishes the pre-trial procedures of individual labour dispute resolution, the employee has the opportunity to opt for the court dispute settlement procedures, as established by the Code of Civil Procedures of Ukraine and the Code on Administrative Legal Proceedings of Ukraine. Labour law enforcement is also performed in view of Resolutions of the Supreme Court of Ukraine.

The statistical data reveal a descending trend of the consideration of individual labour disputes by courts. The courts considered 201,000 labour-related cases in 2001; 157,700 in 2003, and 95,500 cases in 2005. Thus, majority of the cases were related to recovering overdue wages. So, in 2009 general jurisdiction courts considered 38,000 cases, including 32,700 cases about recovery of wages; administrative district courts considered 5,600 cases, including 3,700 cases related to wage recovery.

The reduction in the number of individual labour dispute cases, unfortunately, can hardly be associated with increasing economic stability, as wage arrears, illegal dismissals, etc. persist.

*Collective labour disputes* are dealt with in accordance with the Law of Ukraine "On Settlement of Collective Labour Disputes" and regulations of the National Service for Mediation and Reconciliation. Certain features that are associated with social dialogue acts, forms and parties and that impact collective labour dispute resolution are specified in the laws of Ukraine "On Collective Agreements and Contracts", "On the Social Dialogue in Ukraine", "On Trade

Unions, Their Rights and Guarantees of Activity", "On Employers' Organizations and Their Associations, Rights and Guarantees of Their Activity", "On Local State Administrations", "On the Local Self-Government in Ukraine".

Development of the collective labour dispute resolution system started after adoption of the Law of Ukraine "On Settlement of Collective Labour Disputes (Conflicts)", which established legal and organizational principles of the system for their resolution.

For the purpose of promoting settlement of collective labour disputes, the Decree of the President of Ukraine of November 17, 1998, No. 1258 established the standing national public authority - the National Service for Mediation and Reconciliation (hereinafter – the NSPP).

An important role in collective labour dispute settlement is played by bodies created on the initiative of parties to a collective labour dispute for its consideration (the reconciliation commission, labour arbitration).

The court is also authorized to resolve a collective labour dispute, but only in the case where it is forbidden for employees to hold a strike, and parties to the dispute did not take the NSPP's recommendations on its resolution into account.

During the 15 years of the NSPP's functioning (1999 - 2012 and January-October, 2013), the Service contributed to resolution of 1,902 collective labour disputes and 4,696 complaints filed by employees, trade unions in collective labour disputes on issues identified in Article 2 of the Law of Ukraine "On Resolution of Collective Labour Disputes (Conflicts)".

The predominant majority of complains filed by hired employees in 1,902 disputes arose in connection with differences regarding failures to comply with requirements of the labour legislation (2,500 complaints, or 53.2%) and owners' failures to comply with collective agreements, contracts or their certain provisions (1,475 complaints or 31.4%). The other complaints concerned differences between social dialogue parties regarding establishment of new socio-economic labour conditions and production routine or changing the existing one (583 complaints or 12.4%) and conclusion or amendment of a collective agreement or contract (138 complaints or 3.0%).

The total amount of collective labour disputes was distributed by the following levels: 5 at the national level, 17 at the sectoral, 68 at the regional, and 1,812 at the workplace level.

By economy sectors, the largest number of them was registered at machine engineering enterprises, institutions, organizations – 333 (17.0%), housing and utility services – 303 (15.9%), education – 222 (11.7%), transport – 201 (10.6%), coal industry – 192 (10.1%).

Thus, the major causes of collective labour disputes (conflicts) are, as a rule, the employer's failure to comply with the labour legislation on payment of wages and OSH, violation of employees' social rights and guarantees, failure to comply with provisions of collective agreements, etc.

Among the reasons that prevent development of labour relations and efficient resolution of labour disputes, the following should be noted:

*1. The labour dispute resolution system as established in the current labour legislation does not meet the realities and needs of the modern Ukraine:*

- 1.1) The current Labour Code, adopted in 1971, conceptually does not correspond to lots of modern challenges in the labour market, including labour dispute resolution. The law was adopted for the socialist social formation, and even taking into account the numerous amendments and additions, it is unable to properly regulate labour relations in the current conditions;
- 1.2) the pre-trial, out-of-court and court procedures of labour dispute resolution in Ukraine have not been supported with clear institutionalization;
- 1.3) the operating individual and collective labour dispute resolution procedures have been created in different periods of development of Ukraine's legal systems, and therefore they are not interconnected as a common integral ideology of rights protection depending on the dispute subject matter.

*2. Insufficient role of social dialogue participants in prevention and resolving of labour disputes:*

- 2.1) absence of practical tools for adequate participation in labour dispute resolution at all phases;
- 2.2) their role in prevention and resolution of individual labour disputes is not defined;
- 2.3) absence of legal provisions supporting prevention of labour disputes and their resolution in collective agreements and contracts at all levels;
- 2.4) involvement of social dialogue parties at the regional and sectoral levels into dispute settlement at the workplace level is not provided;
- 2.5) lack of professional staff, material, and organizational resources, especially at the level of social partners' regional and sectoral organizations.

*3. Issues in dealing with individual labour disputes:*

- 3.1) Absence of a ramified system to individual labour disputes' resolution by labour dispute commissions (LDCs) actually operating at each enterprise, institution, organization, which in most cases are "nominal", formal, and actually do not perform the functions of either labour dispute resolution in its substance or its prevention;
- 3.2) lack of compulsory registration and sufficient statistical information about individual labour disputes, especially at the pre-trial stage;
- 3.3) failure to use the potential of the NSPP as a possible consulting and organizational authority to resolve individual labour disputes.

*4. Issues in dealing with collective labour disputes:*

- 4.1) the flawed procedures of collective labour dispute resolution in the area of formation and approval of requests of employees and trade unions, definition of labour dispute

parties, the moment of stepping into a collective labour dispute, activity of reconciliation bodies and enforcement of their decisions;

- 4.2) lack of legal protection of the employees who enter into a collective labour dispute;
- 4.3) the flawed procedures of selection and organization of training of labour arbiters and mediators, as well as the fact that the legislation does not include any provisions to safeguard their rights and guarantees during their participation in work of reconciliation bodies and labour arbitration;
- 4.4) lack of legislative regulation of the issue of funding the labour dispute resolution process at the expense of the State Budget, including wages of labour arbiters, experts, mediators;
- 4.5) lack of legally defined procedures of industrial actions (including strikes) and adequate procedures for protection of labour rights for those categories of employees who are subject to a ban on industrial actions.

*5. Issues regarding labour disputes' consideration by court:*

- 5.1) individual labour disputes' consideration by courts of general jurisdiction and administrative district courts, which indicates an absence of an integrated system of competent specialized labour courts in Ukraine;
- 5.2) absence of judges' specialization to consider labour disputes in courts of general jurisdiction;
- 5.3) the legislation does not provide for the possibility to consider the major part of collective labour disputes in courts;
- 5.4) non-involvement of the authorized representatives of the social dialogue parties in the court consideration of labour disputes.

Analysis of the practice of labour dispute resolution in Ukraine revealed the absence of an integrated efficient conflict resolution system and the need for development and implementation of the New Labour Dispute Resolution Model.

## ANNEX 2

### THE NEW MODEL

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## PROPOSALS ON THE MAIN AREAS AND STEPS OF THE IMPLEMENTATION OF THE NEW MODEL

Development and implementation of the New Labour Dispute Resolution Model will be carried out in view of national, international and European standards, gradually and in specified areas.

### **1. Key areas for the New Model's development and implementation:**

*1) drafting and adoption of the Law of Ukraine "On Labour Disputes", which shall stipulate, in particular:*

- classification of labour disputes by the dispute subject matter - as disputes of rights and disputes of interests;
- labour dispute resolution principles;
- labour dispute resolution procedures at as few stages as possible, each of them offering the parties a realistic opportunity to arrive at a mutually acceptable solution regarding the essentials of the labour dispute and providing for the right of the parties to a dispute to determine particular features of the out-of-court procedures for labour dispute settlement in the labour agreement (contract) or collective agreement or contract at the respective level;
- out-of-court procedures for resolution of disputes of rights;
- specific features of court procedures for resolution of disputes of rights;
- out-of-court procedures for resolution of disputes of interests;
- procedures for industrial actions during the process of resolving labour disputes of interests;
- the binding nature of decisions reached by labour arbitration, which shall be created in compliance with the law for resolving labour disputes of rights, the mechanism for enforcement of these decisions, and control over their implementation;
- rights of parties to a labour dispute during its settlement;
- enhancement of the role and development of the institutional capacity of the National Service of Mediation and Reconciliation;
- stipulating specific liability for violation of the legislation on labour disputes;
- information support for the dispute resolution process;

- national professional training of labour mediators and labour arbiters.

*2) amendments to current laws to ensure legislative framework for the process and procedures of labour dispute resolution, as stipulated by the Law of Ukraine "On Labour Disputes":*

- Labour Code of Ukraine (new wording of Section XV);
- Code of Civil Procedures of Ukraine (amendments to Section I "Jurisdiction", Section III "Litigation Proceedings" regarding jurisdiction of labour dispute-related cases, introduction of new Section VII-2 "Proceedings in Cases of Appeals against Resolutions of Labour Arbitration" consisting of sections 'Proceedings in Cases Related to Labour Disputes', 'Proceedings in Cases Abolishing Decisions of Labour Arbitration' and 'Proceedings in Cases Ruling Protest Actions Illegitimate');
- Criminal Code of Ukraine (introducing criminal liability for gross violation of the law on labour disputes);
- Code of Administrative Offenses of Ukraine (introducing administrative liability for violation of the labour dispute resolution procedures, violation of the procedures of holding industrial actions during labour disputes, violation of the procedures of implementing agreements and arrangements agreed for labour dispute resolution, a failure to fulfil commitments stipulated in collective agreements and labour contracts that became labour dispute subject matters);
- Law of Ukraine "On Enforcement Proceedings" (amending Part Two of Article 17 on inclusion of the NSPP's certificates, issued if one of the labour dispute parties does not abide by a decision of labour arbitration, into the list of enforcement orders);
- Law of Ukraine "On Collective Agreements and Contracts" (amendments to Articles 7, 8 as to inclusion into collective agreements of a separate section on peculiarities of the procedures to resolve labour disputes of rights; to Article 11 regarding the procedures to resolve differences during collective bargaining for the purpose of signing a new collective agreement or contract, or amending them);
- Law of Ukraine "On Employers' Organizations, Their Associations, Rights and Guarantees of Their Activity" (introducing amendments for clear definition of rights of employers' organizations as parties to a labour dispute during its resolution, determining rights of employers' organizations and their representatives in labour dispute resolution procedures at all levels - from the workplace to the national level);
- Law of Ukraine "On Trade Unions, Their Rights and Guarantees of Their Activity" (introducing amendments for clear definition of rights of trade unions as parties to a labour dispute during its resolution, determining rights of organizations of trade unions and their representatives in labour dispute resolution procedures at all levels – from the workplace to the national level);



3) *enhancement of the labour dispute resolution system shall be carried out by means of:*

- introduction of the new mechanism, standards and procedures for labour dispute resolution defined by the law;
- renewal of the substance of activity of trade unions and their associations, employers' organizations and their associations, building their capacity and enhancing their strategic role in the process of labour disputes resolution;
- enhancement of institutional capacity of the National Service of Mediation and Reconciliation.

## **2. Phases of the New Model's development and implementation**

Development of the New Model and its implementation is expected to take three phases during four years.

*In the first, preparatory phase (2014), it is planned to:*

- 1) develop the Draft Law of Ukraine "On Labour Disputes" and the draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine in Connection with Adoption of the Law of Ukraine "On Labour Disputes";
- 2) ensuring transparency in the work of the NSPP, trade unions, employers' organizations and their associations, enhancing explanatory work among employees and their representatives, employers, and the public, including regular updates on the course of the labour dispute resolution system reform, which will promote public support for its implementation and quick response to misunderstandings arising in the course of implementing it;
- 3) conducting preparatory work to establish ad hoc labour arbitration under the auspices of the NSPP's central office and its branches in the Autonomous Republic of Crimea and the regions;
- 4) development of the NSPP's web portal to provide administrative services in the field of labour dispute resolution using modern information and communication technologies.

*In the course of the second phase (2015-2016):*

- 5) parties to the social dialogue discuss the draft Law of Ukraine "On Labour Disputes" and the draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine in Connection with Adoption of the Law of Ukraine "On Labour Disputes" and submit them to the Ukrainian Parliament according to the established procedure;
- 6) the Ukrainian Parliament adopts the Law of Ukraine "On Labour Disputes" and the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine in Connection with Adoption of the Law of Ukraine "On Labour Disputes";

- 7) establishment on ad hoc basis, and material and technical support for the functioning of labour arbitration under the auspices of the NSPP's central office and branches in the Autonomous Republic of Crimea, the regions, the cities of Kyiv and Sevastopol;
- 8) selection and training of labour arbiters and labour mediators;
- 9) drafting documents necessary for legal, methodological, and organizational support for implementation of the new labour dispute resolution principles, in particular:
  - establishing requirements for work experience, field of training (specialization) and the level of professional competence of labour arbiters and labour mediators;
  - training programs (modules) and themes of seminars at the educational institutions that will train labour arbiters, labour mediators; programs for retraining and advanced training of labour arbiters and labour mediators who already completed their training in previous years;
  - the regulation on the procedure for maintaining the Registry of Labour Disputes;
  - the regulation on the labour arbiter;
  - the regulation on the labour mediator;
  - the regulation on labour arbitration's operation;
  - the procedures of maintaining and storing individual records of labour arbiters and labour mediators, etc.;
- 10) establishment of the Registry of Labour Disputes at the NSPP;
- 11) monitoring of labour disputes using information and analytical system tools.

*In the third phase (2017), the following is planned:*

- 12) improved procedures for the establishment of labour arbitration based on the analysis of labour dispute resolution practice, and support for operation of labour arbitration;
- 13) creation and implementation of the independent external monitoring and evaluation of accessibility of the labour dispute resolution system;
- 14) implementing an awareness campaign to cover implementation of the new labour dispute resolution system;
- 15) conducting awareness and advocacy work among activists of trade unions and employers' organizations, lawyers, economists, civil servants, employees of local self-government authorities, and so on, including specialized seminars to involve them into work on promotion of labour dispute resolution.

## ANNEX 3

### TO THE NEW MODEL

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# RLDU UKRAINIAN-SWEDISH EXPERT GROUP

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