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# Negotiating telework: thinking outside the comfort zone

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## 1. *Introduction*

The European social partners have made new attempts to find an updated agreement on telework. Labour markets experienced a rapid rise of telework worldwide since the Covid-19 pandemic. During the sanitary crisis, it was central to the many measures taken by governments and companies alike. In this context, telework became even a general rule for many situations of work, either recommended, or mandatory. Yet, telework is not a novelty. Teleworking has long been on the policy and labour law agenda. In 2002, the European social partners concluded a European framework agreement on teleworking. It is also a fact that telework is here to stay. Recently, European-wide negotiations started in the framework of European social dialogue to update the rules on telework, including the role of working time and the right to disconnect. The negotiations have not yet led to a final agreement. Negotiating telework requires a real effort. The Covid pandemic taught us that telework presents many challenges, especially given its almost inevitably specific and rather disruptive dimensions of time and location. Those challenges are also legal in nature. This editorial contribution aims to foster the discussion and proposes that a negotiated instrument on telework will have to take on a number of novelties and will need to fit within a new paradigm shift related to work and employment relations. The focus will be on discussions related to working time law in light of telework.

## 2. *Telework: a solution for which problem?*

The rise of new ways of working, with the use of digital technologies, is irreversible. Whereas telework, in many cases also known as "hybrid working", a combination of telework and "office work", became a necessity during the pandemic, it now has become structurally embedded in our labour markets. Organising telework is, however, a real challenge. Many organisations have embraced telework as a regular feature of the new way of working. But there is also reluctance, with some work organisations even falling back to older ways of working, with more office work, in order to avoid various downsides connected to telework.

What telework has taught us during the pandemic is that it brings new concerns. For example, teleworkers run the risk of missing information and/or lacking communication. Notwithstanding the positive sides of working remotely, the value of physical presence and (often informal) information and communication in person should not be underestimated. Another issue with working remotely is the danger of real "social" distance, in its social and mental sense. Being connected to work, to a job, also implies being connected to the organization, and establishing relations with others. This identification with the work environment is less evident in a physically distant world. These issues do not make telework impossible, they are rather points of attention which can be overcome, for example with the right leadership and with appropriate training. At the same time, telework also requires a response to very practical questions. What tasks can be undertaken with telework? Can a teleworker choose his/her own place of work and determine his/her own working time? How will telework be monitored and who bears the costs of telework? These are all justified questions.

The European social partners have responded to some of these questions in the European Framework Agreement on Telework of 16 July 2002. Their actual initiative to start a new round of negotiations on telework, departs from their wider work programme and relies on their earlier response to the digitalisation agenda with the adoption of the "European framework agreement on digitalisation" of 22 June 2020. This 2020 agreement addresses different aspects of the digital agenda for work, including work content, modalities of connecting and disconnecting, the role of Artificial Intelligence (AI) and surveillance. For telework, the aim is to take learnings from the use of telework during the pandemic, hybrid work, the right to disconnect, the

organisation of work, the issue of working time, work-life balance, privacy and data protection.

These are, of course, important issues. But as issues for social dialogue, they pose a number of challenges. The workplace is not a one-size-fits all place anymore. In addition to this, telework, or hybrid working, is not necessarily a "one-size" story itself. Furthermore, the telework discussion goes to the essence of the regulation of work. How do we understand the employment relationship of a teleworker and how is this different from a more traditional employment relationship? The relevant question is to know what solutions telework regulations will be for which kind of problems. Looking into telework, and negotiating telework, requires to be open for a mental shift.

## 3. *From a classic model to a mental shift*

Telework is an issue that should be seen in the context of a broader development, namely the growing interaction between technology and labour and the shaping of new forms of work on the labour market.

With the idea of the Fourth Industrial Revolution, a fundamental shift in the way we work and live has been announced. The "fourth" industrial revolution draws comparisons with other great strides made in technological progress over time. This fourth revolution concept builds on the growing digitalisation, but is also fundamentally different as a further merging of technologies and the blending of the physical and digital worlds brings new challenges[1].

The core of the problem is that we need to fundamentally rethink how we view an employment relationship. Contemporary labour law is still predominantly based on the view that the employment relationship is a hierarchical relationship in which the employee is "subordinate" to the authority of the employer. As a result, this implies different powers and rights for the employer: the employer's right to direct, to organise work, to give orders and instructions, to exercise control. Hierarchy, like subordination, is not just

[1] SCHWAB, *The fourth industrial revolution: what it means and how to respond*, in *WEF*, January 14, 2016; SCHWAB, *The Fourth Industrial revolution*, New York, Random House Usa Inc., 2017; NEUFREIND, O'REILLY, RANFT, *Work in the digital age, challenges of the fourth industrial revolution*, London, Rowman & Littlefield International, 2018.

a legal construct. It responds to a (distant) past, when people still spoke of "Fordism", but it also responds to a certain need. A classic labour law model has become the result of it. In many labour organisations, such as a factory or even an office, those classical approaches still largely work. But the evolution of the labour market shows that this is only partly so. The standard work situation and ditto employee (full-time, long-term employed, fixed hours, fixed place of work) is giving way to other models. In the final decades of the 20th Century, deviations from the standard form of work have been sought and adapted arrangements such as fixed-term, part-time, temporary work have been implemented. Hence the debate on flexibility and the rise of all kinds of new forms of work.

However, we are entering a phase where our labour relations are evolving at a more fundamental level. A common element is that this is accompanied by new technologies. The "platform economy" is a good example. But telework, or the "virtual" workplace, is another example. Telework is a new way of working. Instead of subordination, autonomy is becoming more essential, as the teleworker is not on the employer's premises and will primarily organise the work him/herself. The teleworker is an autonomous worker. This raises new questions. How can an employer exercise authority over this situation of work, or how can he control the work? The answer is not to be blinded by the legal reasoning that subordination is an initial condition of any employment contract. The prior question is what subordination means and whether it still has a meaning. And perhaps we should move away from a one-size-fits-all narrative. We will have to move to a different definition of the employment relationship. In this way, we can address responses to the right challenges.

### 4. *The autonomous work relationship and working time*

In an autonomous working relationship, some form of authority will still exist, but it will be based on trust rather than direct control and thus relying more on personal responsibility than on hierarchy. The 2002 European Telework Framework Agreement points at this different way of looking at the employment relationship. In the "general considerations" of the agreement, it is stated that teleworkers are given "greater autonomy in the accomplishment of their tasks". This seems to suggest that teleworkers have

more job-related autonomy in terms of determining how they perform their tasks and define their goals. It may, furthermore, be understood as giving larger degrees of discretion to the worker as to when and how tasks are performed. In section 9 of the Agreement, it is provided that "the teleworker manages the organisation of his/her working time". This implies that the organisation of telework is not bound by the confines and structures of regular and fixed working time arrangements.

This view stands somewhat in contrast with the existing European legal framework. It also may stand in opposition to the practices and needs of work organisations. There remain plenty of telework situations where tasks, performed as telework, will require regular or strict working hours. The labour market's "total" shift to full autonomous work is, most likely, not realistic, and perhaps not desirable in a number of cases. In other cases, however, working hours may simply have no relevance. Autonomy, if present, will refer to increased flexibility in the worker's advantage (such as organising personal time in combination with working time), and the absence of direct control from the employer. In other instances, a teleworker will have no fixed working hours, but will be left completely free. The telework context, indeed, is diverse in itself. The question is whether European Union law currently facilitates this diversity.

## 5. *The working time definition*

As is well-known, the European Working Time Directive[2] was adopted in 1993[3] and, since then, the world of work has seen many new developments[4]. Revisions of the European Directive, such as the one in 2003[5], have not introduced significantly new elements. It is relevant to note that the legal basis for the European standards are founded in article 153 (1) (a) TFEU (the original basis of article 118a of the EEC Treaty), in other words, it is a mea-

[2] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ* L 299, 18.11.2003.

[3] OJ [1993] L307/18.

[4] Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2017/C 165/01), p. 4.

[5] OJ [2003] L299/9.

sure of health and safety. It implies that remuneration is left to the competence of the member state[6], an excluded area from the EU's regulatory competences.

It may be wondered to what extent European working time concept takes recent labour market views or trends into account. There is an increasing amount of case law from the CJEU which interprets the notion of working time in an autonomous manner, in light of new developments on the labour market. Most of the attention goes to both the idea of time and place. In the famous case of *Matzak*, stand-by time performed at home with a duty to actively respond to work calls within a very short time (eight minutes) and to be prepared for physical presence at a place determined by the employer, was qualified as working time. The Court took into account that this duty imposed limitations on the worker's enjoyment of his free time. The case may seem to give an interesting link with telework, but the differences with telework are also important. The *Matzak*-case concerns "time spent at home" by the worker, with an obligation to be available both in time and space. The connection with the employer's physical location was relevant. Furthermore, the *Matzak*-case does not cover a situation where workers themselves organise their own work and decide themselves when to perform their work.

The relevance of the "workplace" concept, as a location, comes to the fore in the *Stadt Offenbach am Main*-case[7]. Here, the CJEU held a broad view of a "workplace" including "any place where the worker is required to exercise an activity on the employer's instruction, including where that place is not the place where he or she usually carries out his or her professional duties"[8]. The case gives some more relevant aspects of assessing the qualification of working time, such as the consequences of the worker's response time and the significant constraints imposed on the worker's ability to freely manage his/her time and to devote that time to his or her own interests.

Not only is it a relevant aspect to assess the impact on the worker's personal life and the freedom to organise one's own (free) time. It also to be

[6] CJEU, Order of 11 January 2007, *Jan Vorel v Nemocnice Český Krumlov*, C-437/05, ECLI:EU:C:2007:23, para. 32-35; CJEU, Judgement of 21 February 2018, *Ville de Nivelles v Rudy Matzak*, Case C-518/15, ECLI:EU:C:2018:82, para. 49.

[7] CJEU, Judgement (Grand Chamber) of 9 March 2021, *RJ v Stadt Offenbach am Main*, Case C-580/19, ECLI:EU:C:2021:183.

[8] Para. 35.

found evident that, in a telework context, the concept of workplace is not limited to the workplace "owned" by the employer.

The impact of work obligations on personal life also comes through in the *Radiotelevizija Slovenija*-case[9]. Workers were on a stand-by system and could be contacted by phone with an obligation to be at the place of work within a short period of time. This was not considered as a significant constraint of the possibility to freely manage one's personal time. This stands thus somewhat in contrast with the situations of *Matzak* and *Stadt Offenbach am Main*[10].

It may be wondered why a connection with (and the obligation to return to) the physical workplace of the employer, thus the "traditional" physical workplace as such, is a relevant issue in determining the delineation between working time and "rest" time or "free" time. This "space-bound" requirement also came through in *MG v Dublin City Council*[11], in which the Court considered stand-by periods during which the worker (a firefighter) could still carry out another job (as a taxi driver), while nevertheless under the obligation to reach the employer's premises in case of emergency within ten minutes. The worker's ability to carry out another professional activity during his stand-by time, was nevertheless taken into account to deny the qualification of working time. Interestingly, in the binary division between "working time" and "resting time", such stand-by time, was then falling within the worker's so-called rest period[12].

The question is what lessons can be drawn from this case law for telework. The answer is perhaps: none.

The existing cases concern different settings in which both time and space were relevant benchmarks and workers were under a specific obligation to be available in a rather top-down relation. The question is whether the situation would be different in cases where workers are able to work more autonomously and organise the work (and time and place) themselves. A critical response to this could be that there would never be a situation of full freedom or free choice, as expectations of colleagues, teams, clients, or

[9] CJEU, Judgement of 9 March 2021, *Radiotelevizija Slovenija*, C-344/19, ECLI:EU:C:2021:182.

[10] Para. 47-48.

[11] CJEU, Judgement of 11 November 2021, *MG v Dublin City Council*, Case C-214/20, ECLI:EU:C:2021:909.

[12] Cf. para. 46.

more generally, tasks, deadlines and deliveries, will be present anyway. However, the flexibility on the side of the worker may nevertheless increase and personal life may be better organized. What the case law teaches is that the binary division between working time and rest periods may be too strict and perhaps unlucky in existing non-standard forms of work, let alone in the more complex variety of situations in a telework context. Two other aspects from the case law are: working at home does not exclude working time and the degree of self-organisation of working time and "free" time may influence the working time concept.

The question, then, is how to proceed the discussion. A more refined view on envisaging working time could be useful to advance the working time debate, certainly in relation to telework.

## 6. *Four modes of telework*

In light of what has been said above, a more nuanced picture of working time law for telework could be envisaged. Hereafter, we propose four different views of telework. It relates to four combinations or patterns of telework, through perspectives or degrees of (more or less) autonomy, as seen in the picture below.

*Four modes of telework:*

| | |
|---|---|
| **Not organising work one-self** | Fixed working hours |
| Free working hours | **Organising the work one-self** |

The first pattern concerns telework in which the worker has limited autonomy. These telework settings obviously still exist. In such cases, the worker does not really organize the work him/herself and there is likely a need, or an agreement, to work according to a fixed working time schedule.

For such cases, the traditional views on the organization of working time will most likely remain highly relevant.

The second pattern relates to telework, where the worker is not organising the work him/herself, but is left free in organising the working hours. This would be a situation where the worker has very specific and pre-determined assignments and tasks to perform, or little room of discretion to set priorities, while the time-frame in which work is performed is less relevant, or at least, the condition to be available within a certain period of time might not be crucial. Freedom over time could thus be an essential feature, although not yet with full task or job autonomy.

The third pattern concerns situations in which workers have a high degree of job autonomy, but rather limited working time autonomy. Both in administrative, managerial or technical functions, task autonomy and the capacity of self-organisation of work may be part of the job, while this may go along with a fixed structure on working time, for example, office hours.

The fourth pattern relates to situations where the highest levels of autonomy are reached. The worker organises the work him/herself in an autonomous way and has full freedom over the organization of "own" working time.

If we take these patterns or telework modes as a "template" to deal with the diversity of telework, it may not only help to conceptualise telework, but it may also assist in negotiating working conditions for a diverse group of teleworkers, with not necessarily a pure one-size-fits all approach. Not every single telework situation will need the same approach to supervision of the work, to the registration of working time, to the same levels of control and monitoring, the same approach to the right to disconnect, or to similar ways of evaluation and rewarding workers. The foundations of the *CCOO*-case law[13] might, for example, not fit cases where workers have large degrees of autonomy in the organization of working time. Overall, a too rigid view on the existing legal frameworks might hamper, instead of develop, telework. Furthermore, it may lead to in-adapted working conditions for teleworkers.

Obviously, if social partners would use such an approach in negotiating telework, the question is whether this still can be compliant with the existing European legal standards. The European Working Time Directive allows for

[13] CJEU, Judgement of 14 May 2019, C-55/18, ECLI:EU:C:2019:402.

deviations from the strict confines of working time rules, under article 17, where specific circumstances and autonomy are valued, but derogations are related to "specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves". The provisions of article 17 are still open for further discussion and interpretation and, of course, they are exceptions to the general rule, and the question remains to what extent telework regimes can be brought under the derogations[14]. At the same time, the purpose of the Working Time Directive is the protection of the worker's health and safety and, while this is a large area if seen in a wide sense, exceptions may also need be tested against broader social policy and employment relations objectives, in order to facilitate alternative – but still protective – ways of regulating autonomy[15]. More clarity would be useful on this point and a revision of the Working Time Directive remains thus desirable.

## 7. *Functions of working time*

A discussion and assessment of a more diverse regulatory model of telework, also needs to take into account, of course in a critical way, the different roles and functions of working time. Obtaining a view on the role of working time (autonomy) also implies keeping a view on aspects underlying the functions of working time. These functions are:

Rest period: This stems with the objectives of the European Working Time Directive, which is the protection of health and safety. This can in the first place be realized with limiting working time and with providing sufficient rest periods to workers.

Work volume: What the working time provisions perhaps not explicitly regulate, but rather implicitly, is regulating work volume. This is, of course, also a health and safety issue. The limitation of working time and stand-by-time, therefore protecting time "off work", leads to a limitation of work volume or workload. Time and volume are intrinsically connected.

[14] Cf. Huybrechts, *Working time and autonomy: lessons for the new ways of working*, in *ELLJ*, 2023, Vol. 14, 4, pp. 570-587.

[15] Cf. Glowacka, *A little less autonomy? The future of working time flexibility and its limits*, in *ELLJ*, 2021, Vol. 12, 2, pp. 128-131.

Pay: Although beyond (or outside) the purposes and scope of the European Working Time Directive, working time is generally a basis to reward workers. Workers are in most cases hired for a specific amount of time and salary will be connected to the time spent at work, or, at least, spent as working time. This does not take away that also "on call time", even when not qualified as working time, may become "paid time" for workers. But this proofs the point that the underlying goals of working time law need a closer look when discussing the relevance of working time.

Measuring work: Connected with the remuneration of workers, is working time as a way to measure work. Workers are often expected to be at work, to be present, or to be available for work. Work, and even the quality of work, is often evaluated on the basis of the amount of time that a worker has spent at the workplace, or spent on a specific assignment.

Monitoring and control: Time is a unit that can be measured and followed, so working time is used to monitor and control the work and the worker. When the working time "clock" is running, the employer's authority is also activated and workers are more clearly within subordinated time and under control of the employer. With time registration systems, the employer has a tool to monitor and control the presence and availability of the worker.

Private life: Working time also regulates private life. In principle, when limiting working time, workers also have "time off", meaning that they can devote themselves to their "own" personal time and develop their private life outside the work context (this nuance is relevant since private life is, of course, also enjoyed in the work context). Maintaining work-life-balance is perhaps a modern way of looking at this aspect, as it wishes to guarantee a workable combination of working life and private life. The work-life-balance concept is strongly related to the underlying functions of working time.

These underlying functions of working time need to be taken into account when regulating, or negotiating, telework deals. When they are made more explicit in the discussion, it might lead to solutions in which the strict "working time language" can make room for other benchmarks and standards. It will also make some of the discussions more visible. For example, workload and work-related stress may become a more interesting point of departure than working time. Or, leaving the concept of "payment for time" behind may also lead to a more results-oriented deal in employment contracts. This may go against the traditional view of the employment relation-

ship, implying obligations of means rather than results, but it may bring solutions for the rewarding of new types of work, including platform work. It also makes the discussion of work-life balance more clear and the relation between working time and private life. Working life and private life, obviously, are interconnected and not clearly separable. For some workers, a balance will be better found in the self-organisation of work with working time autonomy, while other workers might prefer to rely on fixed and pre-set working time arrangements with clear confines and delineations.

## 8. *Negotiating future-proof telework deals*

This editorial made an attempt, in an explorative or perhaps experimental way, to point at the complexity of the telework debate. The proposition is that negotiating telework is a real challenge, as it requires a mentality shift towards the employment relationship. Telework is a phenomenon to be seen in light of new ways of working and, in addition, not every telework situation is the same. This makes general rules challenging. Telework discussions will have to take on a number of novelties and perhaps a new paradigm related to work and employment relations.

With an openness of mind, foundations can be laid for forward-looking telework arrangements. This naturally involves customization and addressing numerous aspects of the employment relationship. It also looks like, from the analysis above, that discussions on telework and working time are much broader and complex than, for example, debating the right to disconnect, which, although relevant, was deliberately left out of this contribution (although it is implicitly present). Working time issues represent a broader discussion on how to look at "telework deals". If working time will no longer (solely) serve to delineate or define work, the employment relationship may partly shift to another set of rules related to place and time (independency) of work. Any regulation will have to keep fundamental social rights and foundations in the horizon. Therefore, benchmarks and rights, such as well-being at work, equality, fair remuneration, worker involvement, work-life balance, and privacy will remain crucial.