

CONSIDERATIONS REGARDING THE LEGAL TELEWORKING REGIME IN ROMANIA AND THE EUROPEAN UNION

Iuliana, Cebuc¹

Abstract

The increase in the competitiveness of enterprises and the protection of European workers, including the flexibilisation of labour relations and their adjustment to the current socio-economic conditions, have represented strategic objectives of the European Union. In 2002, the social partners signed the Framework Agreement on Teleworking applicable, according to the TFEU, in all Member States. The Agreement states that teleworking represents a form of work organisation where employees perform work activities outside the employer's premises, usually using information and communication technology (ICT).

Internally, the adoption of Law no.81/2018 guaranteed the legal framework for performing activities in a teleworking regime, the law being applicable in the fields of activity where the technology of information and communication can be used.

Key words : teleworking, European Union, technology of information and communication, labour relations

JEL classification : K31, K33

1. Teleworking within the European Union

The concept of teleworking first occurred during the oil crisis in the early 1970s, when Jack Nilles of the University of South Carolina, nicknamed "the father of teleworking," argued that information technology has the ability to replace physical displacement by electronic communications and thus the work can be done remotely. With the activation of the general interest, this flexible form of work has received great attention. A large number of definitions have been formulated to establish the exact content, first by doctrinal and then by regulation, including at European level.

One of the strategic objectives of the European Union, in the context of current global developments, is to become the most competitive and dynamic knowledge-based economy, to increase the competitiveness of companies, while maintaining a high level of social protection.

Digital technologies and new labour market demands are transforming the workplace, and in this context, the modernization of labour relations, including the establishment of flexible working means, the building of new contractual varieties, which will meet the needs of employees and employers to a greater extent has represented a permanent concern. Based on these considerations, the social partners from the European Union level were invited by the European Commission to start the negotiations for ensuring the legal framework for teleworking, negotiations that started on 20 September 2001 and ended on 16 July 2002 with the signing of the European Framework Agreement on Telework S / 2002 / 206.01.02.

The agreement does not have the nature of secondary legislation at European Union level, but it must be implemented by the social partners in the Member States under the conditions established by the Treaty on the Functioning of the European Union, according to which the dialogue between social partners can be implemented as agreements that can be implemented by other agreements entered into between the social partners in the Member States or, upon the request of the partners having concluded them, by decisions of the Council.

In September 2006, within the European social dialogue, the first joint report on the implementation of this Framework Agreement was completed. The Agreement has been implemented in most Member States so far, either through Collective Agreements, at national or sectoral level, or through guides, codes and recommendations (France, Belgium,

¹ Ph. D Lecturer, Constantin Brâncoveanu University of Pitești, iulianacebuc@yahoo.com

Luxembourg, Austria, Germany, Italy) or through national regulatory acts in countries such as the Czech Republic, Hungary, Poland, Slovakia or Slovenia, Romania, countries that do not have a strong tradition of collective bargaining between social partners.

According to art. 2 paragraph (1) of the mentioned Agreement, telework is defined as that form of organization and / or work provision by an employee, using information technology, under an employment contract / employment relationship, in which the activity, which can be also executed on the employer's premises / working sites, is regularly performed outside these spaces. The person performing the work under a telework contract is defined in the following paragraph, as a telework employee.

In order to determine the place where the work can be performed by the employee, the idea that the most used space for telework is actually the employee's home is expressed in the literature in the field, but the definition does not exclude the possibility of performing the activity in any other locations where the employee could have access to the necessary means of information and where appropriate conditions of data protection and occupational health and safety could be ensured. Article 9 of the European Framework Agreement on Telework even sets forth measures to prevent the isolation of the telework employee in the sense that his presence at the employer's headquarters is not forbidden but even accepted for a normal functioning of the relationship telework employee-employer.

Telework must be based on the express free consent of the two contracting parties, which cannot be imposed by the employer, being mutually agreed either at the conclusion of the individual employment contract or, subsequently, by signing an addendum.

The employee employed in the teleworking regime enjoys equal rights with the employees who carry out the activity in the framework of an ordinary employment contract at the employer's headquarters. Also, a series of sanctions can be enforced.

In addition, given the specific nature of teleworking, which involves carrying out working tasks by means of information technology, specific provisions are established which set out a series of obligations for the parties.

Thus, it is foreseen the responsibility of the employer to take the necessary measures, especially regarding the software used, for the protection of the data used and processed by the employee, as well as regarding the communication of the specific rules and restrictions regarding the employee (i.e. restrictions on the Internet networks used or on the use of the equipment made available).

The employer shall observe the employee's right to privacy, so that any means of monitoring used by the employer shall be proportionate to the objectives pursued. All the rules regarding the equipment used to perform the telework by the employee must be established before the telework begins. As a rule, the employer is responsible for providing, installing and maintaining the necessary equipment, except when the employee uses his own equipment. In addition, the employer shall offset the costs directly involved by teleworking, such as those related to ensuring the communication, as well as the necessary technical support.

The employer shall also comply with the rules regarding the employee's occupational health and safety. It has the possibility to verify the conditions in which the employee works to evaluate the fulfillment of the legal requirements of occupational health and safety, but it is necessary to have the prior approval of the employee to act as such when the employee works from home.

2. The regulation of telework in Romania

Based on the European Framework Agreement on teleworking, concluded between the social partners, in Brussels, in 2002 in Romania Law no. 81/2018 has been recently adopted

on the regulation of teleworking, published in the Official Gazette of Romania, part I, no. 296, as of April 2, 2018.

Prior to the approval of the mentioned regulatory act, in our country the work performance outside the spaces organized by the employer has benefited from regulation since the 70s, through the Decision of the Council of Ministers no. 1956/1970 regarding the use of work at home for the execution of handicraft articles and other products and works applicable until 1980, at that time the regulatory act establishing the economic fields that allowed labour mobility, the conditions regarding the duration and the form of the legal report on which this is based, as well as the way of providing the materials and raw materials necessary for the employee.

In order to make labour contracts more flexible, by creating new contract versions that correspond to the evolutions of the labour market and to give greater freedom to the contractual partners, although Romania has not ratified until now Convention no. 177/1996 of the International Labour Organization on work at home, Law 53/2003 of the Labor Code regulates the contract with work at home. The main peculiarity of this employment contract is given by the fact that the tasks are performed at the employee's address, the place of work being in this situation his domicile. In this context, unlike the regulation stipulated by the Convention no. 177/1996 of the International Labour Organization, according to which the place of work may be not only the domicile, but also in any other place chosen by the employee, the fact that the Romanian regulation offers only the possibility of providing the work at the employee's domicile appears to be more restrictive.

The law on the regulation of teleworking does not specifically determine the recipients of the law, by the provisions of art. 1 paragraph 2 stating abstractly that its provisions are to be applied in the areas of activity in which it is possible to carry out the activity in this regime.

Telework is defined by art. 2 letter a) in relation to art. 3 paragraph (1) of the Law, as that form of work organization by which the telework employee, on a regular and voluntary basis, fulfills his/her specific duties for the position, occupation or trade he/she may have, in a place other than the workplace organized by the employer, at least one day a month, using information and communication technology. This legal regulation entails that the most important elements of conditionality of the teleworking regime are those regarding (a) the activity in spaces that are not organized by the employer at least one day per month and (b) the use in this purpose of information and communication technology.

It follows from the legal provision stated that the activity of the telework employee, unlike that of the employee working at home, can be carried out at home or in any other place that allows him to connect to the computer networks for the activity, place that must be mentioned in the contract concluded between the parties. The literature in the field includes the idea according to which the notion of domicile shall also include the employee's place of residence, in fact, the reference to the domicile in the Labour Code being made by reference to the employee's residence, first or secondary as appropriate.

The agreement on how to provide telework can be concluded upon the conclusion of the employment contract or later by an addendum attached to the employment contract, providing for the change of the form of work organization. In this regard, the legislator expressly provided for in art. 3 paragraph (1) of the law that the employee's agreement to provide telework can be given either on the date of signing the individual employment contract or upon the conclusion of an addendum thereto. The employee's refusal to consent to the telework activity cannot be a reason for unilaterally amending the individual employment contract and cannot represent a disciplinary sanction thereof.

The telework contract, full time or part time, is concluded only in writing and contains the mandatory elements for any type of individual employment contract and, in addition, according to art. 5 paragraph 2:

- a) express mentioning that the employee works in a teleworking regime;
- b) the period and / or the days when the telework employee performs his / her activity at a working site organized by the employer;
- c) the place(s) where telework is performed, as agreed by the parties;
- d) the program when the employer has the right to verify the activity of the telework employee and the actual means of performing this verification
- e) the way of highlighting the working hours provided by the telework employee;
- f) the responsibilities of the parties agreed according to the place(s) of telework, including the responsibilities related to occupational health and safety
- g) the employer's obligation to ensure the transport to and from the place where telework is performed of the materials that the telework employee uses in his/her activity, as appropriate;
- h) the obligation of the employer to inform the telework employee about the provisions of the legal regulations, of the applicable collective employment agreement and / or the internal regulations, regarding the protection of personal data, as well as the obligation of the telework employee to comply with these provisions;
- i) the measures taken by the employer so that the teleworking staff is not isolated from the rest of the employees and which ensures the possibility of meeting with colleagues on a regular basis;
- j) the conditions in which the employer bears the expenses related to the activity performed in the teleworking regime.

In the absence of a civil sanction, we consider that the non-insertion of these clauses will not automatically attract the qualification of the employment contract in a classic labour law report, but, the real will of the parties can be proved by any means of proof. However, the fact of not inserting these clauses in the telework contract is considered contravention and is sanctioned, according to art. 11 lit. d) of the Law regarding the regulation of the teleworking activity, with a fine of 5,000 RON.

The employer is responsible, pursuant to art. 7 of Law no. 81/2018, and the provisions of Law no. 319/2016 on occupational health and safety, the task of ensuring the occupational health and safety at work, at the locations where telework is performed, in relation to the specific characteristics of these places and those agreed in the individual employment contract. Thus, it shall: a) provide the means related to information and communication technology and / or the secure work equipment necessary for the performance of the work, unless the parties agree otherwise; b) install, verify and maintain the necessary work equipment, unless the parties agree otherwise; c) provide conditions for the telework staff to receive sufficient and adequate training in the field of occupational safety and health, in particular in the form of information and working instructions, specific to the location of the teleworking activity and the use of the display screen equipment: upon employment, upon changing the location of the telework activity, upon introducing new work equipment, upon introducing any new working procedures.

From the way of drafting the provisions of art. 7, it follows that these obligations provided under letters a) and b) are not absolute, the law offering the possibility of the parties to derogate from them by convention.

According to any employment contract, the employer has the right to control the activity of his employees. The peculiarity is represented in the case of this type of contract by the fact that the law allows a control exercised by the employer over the activity of the

employee in the latter's spaces, considering the fact that they also have obligations and responsibilities regarding the occupational health and safety, as stipulated in the text of art.7 of the law. It is worth pointing out that the employer's right of control is limited by the pre-agreed program for this purpose with the employee and can only be achieved with his agreement. The employee who does not allow the access of the employer (or the one delegated by him to carry out the control according to the predetermined program) commits a disciplinary deviation.

Telework employees benefit from all the rights recognized by the law, the internal regulations and the collective employment contracts applicable to the employees who have the job on the employer's premises.

At the same time, the law sets forth a series of obligations. Thus, the telework employee has the legal obligation to carry out his activity, in accordance with his training as well as with the instructions received from the employer, so as not to expose to the danger of accident or professional illness both his own person and other persons who may be affected by his actions or omissions during the work process. Also, Law no. 81/2018 stipulates that, in particular, in order to achieve the objectives set out above, the telework employee is obliged to inform the employer about the work equipment used, equipment that does not represent a danger to his health and safety, to the conditions existing at the working sites and to allow the latter's access, in order to establish and carry out occupational health and safety measures at work, required according to the clauses of the individual employment contract or for investigating events, as well as the obligation to maintain these conditions.

He also has the obligation to carry out the activity in compliance with the provisions of the Law on occupational health and safety and in accordance with the clauses of the individual employment contract and observe the specific rules and restrictions established by the employer regarding the Internet networks used.

In order to verify the working conditions of the telework employee, the representatives of the trade union under the organization or the employees' representatives have access to the places where telework activity is performed (under the conditions stipulated in the collective employment agreement, the individual employment contract or the internal regulation) while the representatives of the competent authorities have access to the locations where telework activity is performed in order to verify the application and compliance with the legal requirements in the field of occupational health and safety. These verifications shall be performed, if the place where the telework activity is performed is at the employee's address, provided that the telework employee has been notified in advance and subject to his/her consent.

3. Conclusions

We can conclude to the extent that, both at European level, but also internally, there has been a constant concern for the modernization of work, in conjunction with the reconciliation of the active life with the social one, thus including new possibilities of achieving the balance between flexibility and job security.

Although the 2002 European Framework Agreement on telework was not incorporated into EU secondary legislation by a binding document, in most EU Member States it was applied in compliance with the mechanisms and traditions of the states in the field of work relations.

In Romania, once it was enforced by means of a distinct regulatory act, telework has now acquired new meanings, in accordance with the modern European laws. We consider it would have been appropriate that the regulation of telework should be made by the provisions of the Labour Code together with the other forms of the individual employment contract and not by a separate regulation.

Law no. 81/2018 on the regulation of the telework activity represents a modern legal instrument, whose adoption allows flexible working relations of some categories of employees, who can carry out their activity in any place where there is access to the Internet or to a similar local network and the possibility of using certain information and communication technology equipment, with obvious benefits for the contracting parties, while at the same time increasing the employment rate.

However, in relation to its current form, it can be stated, in a detailed analysis, that it could benefit from certain improvements and clarifications regarding the scope, the conditionality related to the use of telework, the compatibility of the locations where telework is performed with the regulatory acts governing occupational health and safety and ensuring the protection of the employees against the potential abuses of the employers, without diminishing the practical effect of the mechanism that it introduces in the labour legislation.

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