HUNGARIAN LABOUR LAW
E - J O U R N A L

Negotiating the new normal: Telework and Collective Bargaining in Spain

Lidia De La Iglesia Aza*

Abstract

Teleworking, as it is currently understood, is based on the existence of paid professional activity carried out on behalf of another person; performed with decentralisation of the workplace; characterised by the means and technology used to provide the services and with a certain attenuation of the relationship of subordination.

Therefore, it can be said that it is a specific form of remote working characterised by the intensive use of new information, communication and telecommunication technologies.

In this system of working, is there scope for the collective determination of working conditions? Is there room for collective bargaining? These are the questions that this article seeks to answer. The national collective bargaining agreement has sought to establish some rules for this collective regulation. Are they sufficient? Have they been transferred to collective agreements?

Keywords: teleworking; collective agreements; Spanish National collective bargaining agreement

1. Introduction

Working from home, and its evolution into teleworking, is not a new phenomenon. In fact, it could even be said that Isaac Newton was a pioneer of working from home. In 1665, England was besieged by one of the last epidemics of bubonic plague, which led to the closure of Cambridge to limit the spread of the disease. Newton then moved to his family home in Woolsthorpe, in the countryside of

* Assistant lecturer, Universidad de Santiago de Compostela.

Lincolnshire, and while "teleworking," he shaped the work that he would later publish in 1684, his Principia[1].

Beyond this anecdote, the evolution of working methods has accelerated in the 21st century, leading to the development of what has been called the "Digital Revolution"[2], a phenomenon that has changed the very organization of work. In fact, it is leading to changes in the systems of service provision by employees[3] and some of the paradigms of labour law. Among the innovations that have emerged, teleworking represents a change in one of the traditional assumptions of employment, namely that services are provided at the company or at a location decided by the employer.

The theoretical approach to the phenomenon of teleworking starts from the definition of the concept itself, a concept that has not been unanimously accepted in academia, and which is understood to have originated with the term 'telecommuting' coined by Jack Nilles in 1973[4], evolving the definitions of works prior to the COVID-19 pandemic[5], passing through the multiple variations that arose after the forced generalisation of this system of work[6].

The majority definition, following Martín-Pozuelo López[7] and its references, establishes that it is the form of organisation and/or execution of work that involves the regular provision of services remotely, that is, outside the company's premises, through the intensive use of new information and communication technologies. This definition has many points in common with that of other authors such as Pérez de los Cobos.[8] or Thibault Aranda[9].

A more comprehensive definition is that of Gray et al[10]

> "A flexible form of work organisation, consisting of the performance of professional activities without the physical presence of the worker at the company for a significant part of their working hours. […] Professional activities in teleworking involve the frequent use

1 Blog of the Institute of Mathematics at the University of Seville. https://institucional.us.es/blogimus/2021/02/newton-en-pandemia/

2 Pierre Beckouche: La révolution numérique est-elle un tournant anthropologique? *Le Debat,* n. 193 (2017) 153–166.

3 Leonora Tota – Lizmary Pereira – Desiree Curiel: TIC Tecnologías de información y Comunicación en la Cuarta Revolución Industrial 4.0. *Télématique: Revista Electrónica de Estudios Telemáticos,* Vol. 19, n. 1 (2020) 3–14.

4 Jack Nilles: *The telecommunication-transportation trad off. Options for tomorrow and today.* Jala International, 1973.

5 For illustrative purposes, Remigio Carrasco Pérez – José María Salinas Leandro: *Teletrabajo.* Ministerio de Obras Públicas, ransportes y Medio Ambiente, España, 1994. 13 y 27; José Antonio Carrasco Gutiérrez: El teletrabajo como nueva opción. *Estudios Financieros: Revista de Trabajo y Seguridad Social,* núm. 177 (1997) 121–158.; Francisco Pérez De Los Cobos – Javier Thibault Aranda: *El Teletrabajo en España. Perspectiva jurídico laboral.* Madrid, Ministerio de Trabajo y Asuntos Sociales, 2001.

6 Again, for illustrative purposes only, Tomás Sala Franco (Coord.): *El Teletrabajo.* Valencia, Tirant lo Blanch, 2020.; Wilfredo Sanguineti Raymond:"La noción jurídica del teletrabajo y el teletrabajo realmente existente. *Trabajo y Derecho,* n. 72, dic (2020), versión electrónica.

7 Ángela Martín-Pozuelo López: *El teletrabajo transnacional en la Unión Europea. Competencia internacional y ley aplicable.* (Tirant lo Blanch laboral, 273) Valencia, Tirant lo Blanch, 2022. 24.

8 Francisco Pérez De Los Cobos Y Orihuel: La subordinación jurídica frente a la innovación tecnológica. *Relaciones Laborales,* nº 10 (2005) 1.315–1.338.

9 Javier Thibault Aranda: *El teletrabajo. Análisis jurídico-laboral.* CES colección estudios, 2001. 32.

10 Mike Gray – Noel Hodson – Gil Gordon et al.: *El Teletrabajo.* Madrid, Ed. BT Telecomunicaciones – ECTF y Fundación Universidad Empresa, 1995. 5.

> of electronic information processing methods and the permanent use of some means of telecommunication for contact between the worker and the company".

These approaches to the phenomenon determine the same basic elements of the concept: paid professional activity performed for someone else; carried out with decentralisation of the workplace; characterised by the means and technology used to provide the services and with a certain attenuation of the relationship of subordination[11].

In fact, other authors[12] consider that teleworking goes beyond the concept of a work system, pointing out that "teleworking is more than just a simple way of providing services for others, as it affects the entire business organisation system".

Therefore, it can be said that it is a specific type of remote working. This type is characterised by the intensive use of new information, communication and telecommunication technologies.[13], as it is "a job in which ICTs are fundamental, not only as a support for the worker's activity (something that occurs in most jobs), but also because they are what make it possible for the worker to travel outside the company".[14]

Of the basic characteristics that have been pointed out, the weakening of the relationship of subordination is the one that poses the greatest problems. Subordination is one of the cornerstones of the definition of employment in Spain, as clearly established in Article 1.1 of the Workers' Statute, the main regulation governing labour relations[15], as opposed to self-employment. Therefore, for the defining characteristics of employment to continue to apply, it must be proven that, regardless of the relocation, the employer retains control over the teleworker's activity.

Another paradigm undergoing evolution is that of hierarchy as a form of work organisation in corporate headquarters. This has given rise to the term "liquid organisation", based on the concept of liquid modernity coined by Polish sociologist Bauman[16] to define fluid-based societies as flexible, horizontal organisational structures with much less pronounced hierarchies than in traditional organisations. These structures integrate teams made up of workers from different disciplines who share the common goal of developing a project, dissolving once that project has been completed. These liquid organisations have been widely implemented in the field of teleworking, forming teams that provide highly specialised services remotely, with an employment relationship, but with very attenuated notions of location and hierarchy.

---

11 Thibault Aranda op. cit. 18.

12 Luis Miguel Gómez Garrido: El teletrabajo: realidad, expectativas y riesgos. *Revista de Derecho Laboral vLex (RDLV),* n. 6 (2022) 182–185.

13 Martín Godino Reyes: *La nueva regulación del trabajo a distancia y el teletrabajo.* Sagardoy Francis Lefebre, 2020. 16–17.

14 Alejandro Zalvide Bassadone: El teletrabajo transnacional: una aproximación desde el concepto de actividad turística. *International Journal of information systems and tourism,* n. 2.2 (2017) 55.

15 Royal Legislative Decree 2/2015, of 23 October, approving the revised text of the Workers' Statute Act. *Official State Gazette (BOE),* No. 255, of 24 October 2015, pp. 100224–100308.

16 Zygmunt Bauman: *Modernidad Líquida*. 2ª ed. Madrid, Fondo de Cultura Económica de España, 2003.

These changes in productive organisation models, which have originated in the intensive and almost exclusive use of information and communication technologies, have altered labour relations in today's society. The phenomenon of liquid work as a new way of approaching labour relations that breaks with the classic patterns of hierarchy, fixed hours, job stability and the exclusive relationship between an employee and their employer is a clear example of this[17]. However, at present, this is still an emerging phenomenon. Therefore, without ignoring its existence, this chapter will take as its basis the ordinary system of service provision under a teleworking regime.

This has proven that subordination does not disappear but rather requires the assessment of indicators other than the classic ones in the provision of labour. In the words of Sanguineti, "what the emergence of these phenomena calls into question is the system of indicators used until now to determine the presence of subordination (attendance at the workplace, compliance with schedules, direct and constant control)"[18]. This evolution in subordination has led to the emergence of new remote surveillance and control systems, which, in certain situations, may even result in an increase in the worker's subjection to company orders.[19]

Another aspect of the phenomenon that has given rise to much controversy is the productivity of service provision through teleworking, or, previously, through home-based work. While in the latter case, the majority of wages were set through piecework payment systems, which limited the problem, doubts have resurfaced in the current development of teleworking.

2. Regulatory Framework[20]

The first international references to remote working, the precursor to teleworking, can be found in Article 1 of ILO Convention No. 26 concerning methods of fixing minimum wages (1928)[21]; in Articles 6(a) and (i) of Convention No. 97 concerning Migrant Workers (1949)[22]; in Articles 1 and 7 of Convention No. 103 on maternity protection (1952)[23]; in section VIII, point 34 of Recommendation No. 99 on vocational adaptation and rehabilitation of disabled persons (1955)[24]; and in section IV,

17 Guillermo García González: Trabajo líquido y prevención de riesgos laborales: la necesaria reformulación de la seguridad y salud laboral en la sociedad de la información. *Archivos de Prevención de Riesgos Laborales,* vol. 21 n. 1 (2018) Epub 21-Sep-2020.

18 Wilfredo Sanguineti Raymond: El teletrabajo: notas sobre su calificación y régimen jurídico. *Foro Jurídico,* n. 7 (2007) 151.

19 Luis Fernando De Castro Mejuto: La tecnología en las relaciones laborales y el poder del empleador. *Dereito,* vol. 31, n. 2 (2022) 1–11.

20 Lidia De La Iglesia Aza: Digitalización de las relaciones de trabajo: el teletrabajo transnacional e internacional. *Revista Galega de Dereito Social,* -2ª ET, nº 17 (2023) 117–124.

21 https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C026

22 https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242

23 https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C103

24 http://www.oit.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312437

point 21.1 of Recommendation No. 165 on workers with family responsibilities (1981)[25]. But what they all have in common is that they are very partial approaches to this phenomenon[26].

However, the first comprehensive international regulation of remote work did not emerge until ILO Convention 177[27]. Although this agreement dates to 1996 in Spain, it did not come into force until 25 May 2023. This regulation does not refer to teleworking but defines home working in Article 1.1.a) as work in which, with all the identifying features of an employment relationship, the essential characteristic is that the services are provided at the worker's home or at another location of their choice, which in any case is different from the employer's workplace.

Therefore, for the employment relationship regulated in this Agreement, the geographical element of the place where the services are provided is essential, but, in accordance with Article 1.1.b), the element of subordination and dependence is required, excluding cases in which "that person has the degree of autonomy and economic independence necessary to be considered a self-employed worker under national legislation or judicial decisions".

Subsequently, ILO Recommendation 184 on home work[28] specified the rights inherent in this system of work[29], but without any particular significance in terms of the definition of the concept itself. Further details on the definition can be found in the ILO technical note of 22 July 2020[30], which categorises teleworking as "a subcategory of the broader concept of 'remote working', which encompasses workers who use information and communication technologies (ICT) or landline telephones to perform their work remotely".

With regard to the European Union, in the European Commission's Green Paper on "Cooperation for a new organisation of work" of 16 April[31] reference was made to the 'issue of transnational teleworking'. This issue was addressed as one of the four basic freedoms of Union citizens, the free movement of workers and the right to work in another Member State while receiving the same treatment as nationals of that State.[32] Thus, paragraphs 75 to 80 of this instrument recognised the transnational dimension of information and communication technologies as an element to be considered in the development of future Community legislation. Similarly, the much later European Parliament Resolution of 15 June

25 https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R165

26 Yolanda Maneiro Vázquez: Los Convenios de la OIT en el Derecho Español. *Revista del Ministerio de empleo y Seguridad Social,* n. 117 (2015) 261–269.

27 https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C177

28 https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312522:NO

29 Francisca Fernandez Prol: Teletrabajo internacional: transnacional y móvil (o nomadismo digital internacional). *Revista del Ministerio de Trabajo y Economía Social,* n. 154 (2022) 104.

30 *COVID-19: Orientaciones para la recolección de estadísticas del trabajo. Definición y medición del trabajo a distancia, el teletrabajo, el trabajo a domicilio y el trabajo basado en el domicilio.* 7. Downloadable at: https://tinyurl.com/bdfp73du

31 https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:51997DC0128

32 Article 3(2) of the Treaty on European Union (TEU); Article 4(2)(a) and Articles 20, 26 and 45 to 48 of the Treaty on the Functioning of the European Union (TFEU).

2017[33] on a European Agenda for the collaborative economy, highlighted the importance of teleworking, defending "the need to put these working arrangements on an equal footing with traditional ones".

Another European Union regulatory instrument to bear in mind in this area is Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union.[34], since recital 15 refers to atypical forms of work, determining that these specific employment relationships are subject to minimum provisions on labour rights. This is in accordance with principle No. 5 of the European Pillar of Social Rights.

In 2000, Eurofound, in its report "*The Social Implications of Teleworking*"[35], recognised that teleworking was not a legal category for European Union countries, and as for the definition, it pointed out that

> "it is a work arrangement in which work is performed outside the employer's premises using information and communication technologies (ICT). The characteristic features of teleworking are the use of computers and telecommunications to change the usual place of work, the frequency with which the worker is working outside the employer's premises, and the number of places where workers work remotely (mobility)".

In line with this approach, in 2001 the European social partners (ETUC, UNICE-UEAPME and CEEP) began negotiations aimed at reaching an agreement on the implementation of teleworking in the Member States and in the countries of the European Economic Area. Already, in this same negotiating forum, under the joint declaration of the Lisbon Summit, a series of sectoral guidelines on teleworking had been agreed upon.[36], highlighting those of the Social Dialogue Committee for the Telecommunications Sector. These aimed to develop flexible working arrangements in all European companies in the sector, proposing their voluntary adoption in accordance with the collective bargaining laws and practices of each country. Similarly, the agreement between EuroCommerce, the employers' organisation for the commerce sector, and UNI-Europa Commerce, the trade union representing workers in that sector, states that teleworkers should enjoy the same rights as other salaried workers[37].

These partial negotiations culminate in the signing by the European social partners of the European Framework Agreement on Telework (AMET)[38], signed in Brussels on 16 July 2002, in accordance with Article 138 of the Treaty on European Union (TEU). The Agreement contains an express definition

---

33 https://www.europarl.europa.eu/doceo/document/TA-8-2017-0271_ES.html

34 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union OJEU No. 186, 11 July 2019, pp. 105–121.

35 The Social Implications of Teleworking. EUROFOUND, 2020. https://www.eurofound.europa.eu/topic/teleworking

36 See the Communication from the Commission titled *Modernising the Organisation of Work: A Positive Approach to Change*, dated 25 November 1998, COM(98) 592, which emphasizes the growing importance of telework.

37 Agreement signed in Brussels on 26 March 2001. The agreement applies only to salaried teleworkers in the sector and does not regulate occasional telework activity.

38 https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=LEGISSUM:c10131

of teleworking, establishing that it is "a form of organising and/or performing work using information technology, within the framework of a contract or employment relationship, in which work that could also have been performed on the employer's premises is usually performed outside those premises".

As has been pointed out[39]

> "The Framework Agreement raises an interesting question by conceiving teleworking as a form of work organisation rather than a worker status. […] Insofar as the Framework Agreement identifies teleworking with the way work is organised and not with the status of the worker, the voluntary option of teleworking does not affect the worker's employment status, equating them in all respects to other on-site workers and fully recognising all their rights."

This Agreement is the result of the free will of the social partners and has been signed by the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) / the European Association of Craft, Small and Medium-sized Enterprises (UNICE/UEAPME) and the European Centre of Public Enterprise (CEEP). It is therefore of a recommendatory nature and constitutes a mere general framework[40], although in Spain it was incorporated into the 2003 Interconfederal Agreement for Collective Bargaining[41]. This incorporation does not amount to acceptance in the strict sense, as the Interconfederal Agreement for Collective Bargaining is exclusively indicative of the criteria to be followed in collective bargaining. In the subsequent third Agreement for Employment and Collective Bargaining 2015, 2016 and 2017[42] (extended in this section by the IV Agreement), certain frameworks were established for the negotiation of collective agreements based on the content of the European Framework Agreement, recognising "teleworking as a means of modernising the organisation of work to make flexibility for companies and security for workers compatible". The Fifth Agreement on Employment and Collective Bargaining (AENC) will be analysed in the next section of this chapter.

In any case, regarding AMET, it has been pointed out[43] that "Time and the absence of other references have allowed it to also serve as a significant source of inspiration for national legislators, including our own."

---

39 Ángel Belzunegui – Ignasi Brunet – Inmaculada Pastor: Globalización, Relaciones Laborales y Teletrabajo. *Revista Universitaria de Ciencias del Trabajo,* n. 5 (2004) 717.

40 Lourdes Mella Méndez: Comentario general al Acuerdo Marco sobre el Teletrabajo. *Relaciones Laborales,* nº 1 (2003) 177.

41 BOE 24 February 2003.

42 BOE 20 June 2015.

43 Wilfredo Sanguineti Raymond: Teletrabajo y tecnologías digitales en la nueva ley de trabajo a distancia. In: J. Baz Rodríguez (Dir.): *Los nuevos derechos digitales laborales de las personas trabajadoras en España. Vigilancia tecnificada, Teletrabajo, Inteligencia artificial, Big Data*. Wolters Kluwer, 2021. 235.

The Community regulatory context cannot be considered complete without reference to the Framework Agreement on the application of Article 16(1) of Regulation (EC) No 883/2004 in cases of regular cross-border teleworking[44], given its recent approval and the fact that Article 1 defines transnational teleworking as

> "any activity that can be carried out from any location and could be performed at the employer's premises or at home, and which: 1. is carried out in one or more Member States other than that in which the employer's premises or home are located, and 2. relies on information technology to remain connected to the employer's or company's working environment, as well as to stakeholders/clients, in order to perform the tasks assigned to the worker by the employer or clients, in the case of self-employed workers".

Therefore, beyond the international element of the concept and the inclusion of cases of self-employment, it provides a definition of teleworking with its distinctive features: the geographical element outside the traditional workplace designated by the employer and the intensive use of ICT.

Given this international and EU context in the regulation of teleworking, it is necessary to delve into the Spanish legal system. The first reference to remote working in Spanish law can be found in the Royal Decree Law of 26 July 1926 on home working.[45], whose Article 1 defines it as "that performed by workers, at the premises where they are domiciled, on behalf of the employer, from whom they will receive remuneration for the work performed". This regulation was subsequently developed by the Royal Decree of 20 October 1927.[46], implementing regulations on home-based work under the Royal Decree-Law. Among the clarifications made by this Royal Decree is the determination of the types of work included in the concept of home-based work in section 1.1, which states: "Home-based work shall include manual work or work performed using pedals or small electric, hydraulic, gas or steam motors, etc., excluding for women and children work classified as dangerous and unhealthy by current legislation."

With regard to the definition of the type of work, section 2 of this article 1 excludes from this regulation*:*

> "a) Individual or collective work in a family workshop carried out in a home to directly meet domestic needs; b) Individual or collective self-employed work or work in a family workshop, self-employed work being understood as work carried out for the direct sale of the product without the intervention of the employer.

44 BOE n. 185, 4 August 2023.

45 https://drive.google.com/file/d/0B27DzfbcyPNBRWxfZWhVYTNrdFE/view?pli=1&resourcekey=0-G0UR4BM4qb1G-fxI-24ucQ

46 http://www.ub.edu/ciudadania/hipertexto/evolucion/textos/trabajo/1927.htm

If the work is mixed, for the public and employers, it shall be classified as home-based work. Nor shall work carried out in rooms of the worker's home that are directly or indirectly connected to other premises where workshops, factories and, in general, industrial workplaces or commercial centres are established be considered home-based work and shall be subject to general labour legislation. In such cases, it shall be subject to general labour legislation".

Following this initial internal approach, until Article 13 of the 1980 Workers' Statute[47] no new regulation is being introduced. This article regulated home-based work, a clear precursor to teleworking, stating that "a home-based employment contract shall be considered to be one in which the work is performed at the worker's home or at a place freely chosen by the worker and without supervision by the employer".

This concept highlights the express exclusion of '*supervision by the employer'* as a clear mitigating factor in terms of dependency.

The drafting of this article by Law 3/2012, of 6 July, on urgent measures for labour market reform[48] revolutionised the very concept itself[49], given that working from home became known as remote working, which could be carried out in a location freely chosen by the worker and had to be formalised in writing. The explanatory memorandum to the regulation expressly stated that the reason for the reform of Article 13 of the Workers' Statute was to accommodate "remote working based on the intensive use of new technologies". Despite this promising reference in the explanatory memorandum, the regulatory text does not regulate teleworking as such. Thus, according to doctrine[50] It has been understood that the new wording of Article 13 of the Statute was a "minimum regulation to leave room for freedom of choice".

Royal Legislative Decree 2/2015[51] outlined the concept minimally, but there was no significant regulatory leap until the crisis caused by the spread of Covid-19. Thus, Royal Decree Law 8/2020[52] prioritised remote working as a measure to contain the virus, although without proceeding to define it beforehand. While it is true that even before this crisis, the Organic Law on Data Protection[53], Articles

47 Law 8/1980, of 10 March, on the Workers' Statute. *Official State Gazette (BOE),* No. 64, 14 March 1980, pp. 5799–5815.

48 BOE n. 162, 7 July 2012, pp. 49113 a 49191

49 An in-depth study in Lourdes Mella Méndez: *El teletrabajo en España: aspectos teórico-prácticos de interés.* Wolters Kluwer, 2017. 19–76.

50 Fernando Lousada Arochena – Ricardo Pedro Ron Latas: Una mirada periférica al teletrabajo, el trabajo a domicilio y el trabajo a distancia en el derecho español. In: Lourdes Mella Méndez (edit.): *Trabajo a distancia y teletrabajo. Estudios sobre su régimen jurídico en el derecho español y comparado.* Thomson Reuters Aranzadi, 2015. 42.

51 Royal Legislative Decree 2/2015, of 23 October, approving the revised text of the Workers' Statute Law. Published BOE n. 255, dated 24 October 2015, pp. 100224–100308.

52 Royal Decree-Law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19. Published BOE n. 73, dated 18 March 2020, pp. 25853–25898.

53 Organic Law 3/2018, of 5 December, on the Protection of Personal Data and the Guarantee of Digital Rights. Published BOE n. 294, dated 6 December 2018, pp. 119788–119857.

87 to 91 indirectly regulated teleworking, establishing basic rights for the protection of people who work remotely using digital devices.

On 13 October 2020, Decree Law 28/2020[54] of 22 September on remote working comes into force. This regulation does proceed to define the concept of teleworking. Thus, Article 2.b) defines it as "remote work carried out through the exclusive or prevalent use of computer, telematic and telecommunications means and systems". This definition was not modified in the subsequent validation regulation, Law 10/2021, of 9 July, on remote work.[55]. It has been rightly pointed out[56] that "With the official publication of Royal Decree-Law 28/2020 of 22 September, a tradition in our labour law was broken, which until then had physically integrated the regulation of remote working into the framework of the Workers' Statute."

In these national regulations, going beyond the exceptional circumstances arising from the Covid-19 crisis, one of the essential characteristics of teleworking is determined to be that it is voluntary and that the decision to telework is reversible. Thus, teleworking must be the result of a voluntary agreement between the employer and the employee, both in terms of its initial arrangement and during the relationship, but always before the start of remote working.[57]. The third basic principle, in accordance with European Union regulations, is the equalisation of these workers' rights with those of ordinary service providers.

Furthermore, the legal framework calls for collective bargaining as the forum in which the specific conditions under which teleworking is to be carried out should be established, as already pointed out in legal doctrine[58] as desirable. Thus, the first additional provision of the Law refers to the identification of jobs and functions that can be performed under this modality; access to and development of the service; maximum duration; minimum on-site working hours; the percentage of working hours or reference period established for consideration as regular teleworking; the terms of reversibility and the additional contents of the individual teleworking agreement. Articles 7.b) and 12.2 refer to collective bargaining for the establishment of compensation mechanisms, while Article 8.3 refers to the mechanisms and criteria for switching from on-site to teleworking and vice versa, as well as the criteria for preference, together with criteria for overcoming historical gender role inequalities. Article 11.1 refers to the provision and maintenance of technical resources; Article 17 refers to the possibilities for personal use of the company's technical resources; Article 18.2 refers to measures

54 BOE n. 253, 23 September 2020, pp. 79929–79971.

55 BOE n. 164, 10 July 2021, pp. 82540–82583.

56 Silvia Fernández Martínez et al.: "Bloque 2: Trabajo a distancia y teletrabajo en la negociación colectiva", In: C. L. Alfondo Mellado et al (coord.): *Observatorio de la negociación colectiva. Políticas de empleo, trabajo a distancia y derechos digitales.* Cinca, 2022. 264.

57 Susana Rodíguez Escanciano: El teletrabajo y sus fuentes de regulación. Especial consideración a la autonomía colectiva. *Revista Galega de Dereito Social*, 2ª ET, 11 (2020), 54.

58 Cristina Aragón Gómez: El teletrabajo en la negociación colectiva. In: R. Escudero Rodríguez (coord.): *Observatorio de la negociación colectiva: empleo público, igualdad, nuevas tecnologías y globalización.* Cinca, 2010. 339: "…many of the challenges posed by telework naturally fall within the scope of collective bargaining."

to guarantee the exercise of the right to digital disconnection and the extraordinary possibilities for modulating this; in 19, the conditions for guaranteeing the exercise of workers' collective rights; and in 21, the conditions and instructions for the use of IT resources.

3. Teleworking in the fifth agreement on employment and collective bargaining and in the guidelines of the national advisory committee on collective agreements

The requirement for teleworking agreements to be in writing in individual agreements with employees has led to interest in establishing objective conditions both for access to this form of employment relationship and for determining its specific characteristics. Thus, under the auspices of the legal framework, it has become a subject of collective bargaining. Under this configuration, it should have been a clear focus of attention for the Agreement on Employment and Collective Bargaining and for the guidelines of the National Advisory Committee on Collective Agreements. Surprisingly, this has not been the case.

The Fifth Agreement on Employment and Collective Bargaining (AENC)[59] signed between the most representative trade unions and the majority business associations to establish the broad guidelines for collective bargaining for the years 2023, 2024 and 2025 devotes Chapter X entirely to teleworking. This is in response to the numerous calls made by Law 10/2021 for collective bargaining as the appropriate channel for the implementation of teleworking, adapting it to the specific characteristics of each sector or company. The AENC understands that collective agreements or accords must develop the provisions of Articles 5.3; 7.b); 8.3; 11.1; 17; 18.2; 19; 21 and Transitional Provision One of the legal text, but beyond identifying the matters that must be subject to collective bargaining, surprisingly offers no guidance on their content.

Further details are set out in Chapter XI, devoted to digital disconnection, which defines this right for workers, whether they are teleworkers or workers providing ordinary services. Thus, about this matter, it establishes the minimum criteria that collective bargaining should consider for its regulation. These criteria include the initial definition of the right itself: "digital disconnection is recognised and formalised as the right not to attend to digital devices outside working hours" but stating that a worker's voluntary connection will not entail any responsibility on the part of the company.

It establishes that ignoring calls or communications made outside working hours is a right of workers, except in exceptional circumstances of force majeure, i.e. except in cases where it derives from the application of the principle of good faith. Therefore, such disregard may in no case give rise to negative effects for workers who exercise their right to digital disconnection.

[59] Resolution of 19 May 2023, issued by the Directorate-General for Labour, registering and publishing the Fifth Agreement on Employment and Collective Bargaining. BOE n. 129, dated 31 May 2023, pp 75426–75447.

In addition, it regulates what it refers to as "good practices for better management of working time", which limits the programming of automatic responses during periods of absence and the use of the *'delayed sending'* system so that communications are made within the recipient's working hours.

Section XVI, entitled Technological, Digital and Ecological Transition, determines that sectoral and company collective agreements must incorporate measures in line with the European Framework Agreement on Digitalisation, promoting digital transformation in the workplace, establishing specific procedures for providing prior information to workers' legal representatives on business digitisation projects and their effects on employment, working conditions and the training and professional adaptation needs of the workforce, with a commitment to continuous training to improve workers' digital skills and facilitate this transition within the company. To this end, it establishes among the priority issues in relation to digitalisation that must be developed through collective bargaining the adaptation of the European Framework Agreement on Digitalisation to each area of negotiation, the promotion of collaboration between companies, workers and their representatives to address issues such as skills, work organisation and working conditions, boosting investment in digital skills and their updating, and promoting a people-oriented approach, in particular with regard to training and skills development, ways of connecting and disconnecting, and the use of safe and transparent artificial intelligence systems, as well as the protection of the privacy and dignity of workers

About reactions to this Agreement, Sanguinetti Raymond's reflection[60] deserves special attention. This author highlights that the regulation of the matters outlined here reiterates the legal provisions and the possibilities for mitigating the right to digital disconnection introduced in the V AENC, which, despite establishing the need for negotiation, allows for the establishment of *'extraordinary circumstances for the modulation*' of this right.

What is clear is that the AENC is a missed opportunity in terms of teleworking, as it merely reiterates the provisions of the Law without offering any precision on the desirable content of collective bargaining in this area.

The AENC has been analysed by the signatory trade unions, the majority trade unions in Spain, in their own guides. Thus, in the UGT V AENC guide[61] its precepts are analyse, and, in relation to teleworking, the Union's priority objectives are determined as follows: establishing the terms of reversibility; compensation for expenses and provision of work equipment; taking into account workers in special circumstances such as those arising from work-life balance, functional diversity, multiple activities or multiple jobs, etc.; guaranteeing the right to digital disconnection and the exercise of collective rights. All of this emphasises the important role that collective bargaining must play in shaping this form of work.

---

60 Wilfredo Sanguineti Raymond: El V AENC y las tareas de futuro de la negociación colectiva. *Trabajo y Derecho,* n. 105, sept. (2023), La Ley, pp. 1–7.

61 *GUÍA de UGT V AENC Acuerdo para el Empleo y la Negociación Colectiva 2023 – 2025. Presentación del texto íntegro del acuerdo y comentarios sindicales de UGT.* Unión General de Trabajadoras y Trabajadores, mayo 2023. https://tinyurl.com/5vy2up6x

In equivalent terms, the analysis of the other major trade union, CC.OO, on the V AENC[62].

In the 2023 Collective Bargaining Guide[63] published by the National Advisory Commission on Collective Agreements, surprisingly, no reference is made to teleworking, not even in Chapter IV, which refers to good practices in collective bargaining and outlines the matters that should be subject to negotiation in collective agreements. The only reference to this matter is in relation to access to teleworking for work-life balance reasons.

This omission is difficult to understand, given the content of Article 7 of Law 10/2021, with its reference to regulation in collective agreements. This is particularly true given that the first additional provision of the law expressly determines the scope that is intended to be part of collective bargaining, i.e. the possibility that, in view of the specific nature of the particular activity within its scope, collective bargaining may identify the positions and functions that can be performed through remote working, the conditions for access to and performance of work through this modality, the maximum duration of work, the additional content of the remote working agreement, among other matters. In fact, section 2 of this provision indicates as a matter for collective bargaining a minimum number of hours of presence at work in the case of remote working, the exercise of reversibility, a percentage or reference period lower than those established in this Law for the purposes of classifying the provision of services under a teleworking regime as 'regular', a percentage of on-site work in training contracts different from that provided for in the Law (provided that they are not entered into with minors) and even the possible extraordinary circumstances for modulating the right to disconnect that is provided for in the V AENC.

It is true that the National Advisory Committee on Collective Agreements has participated in the publication of materials related to teleworking[64], but only in the capacity of publisher of studies, specifically those derived from the 2020 national conference. They are therefore contributions prior to the approval of Law 10/2021 and cannot be considered guidelines for the development of collective bargaining.

4. The clause on teleworking in collective bargaining

To gain an overview of the clauses on teleworking included in collective agreements in various sectors, a generic search was carried out in the Aranzadi database, using collective agreements and teleworking between 2022 and 2023 (since the timelines for incorporating the new regulation into

62 V acuerdo para el Empleo y la Negociación Colectiva mayo 2023. https://tinyurl.com/mu6f6x28

63 Rafael Gomez Gordillo – María Francisca Ferrando Garcia – María del Carmen López Aniorte: *Guía de la Negociación Colectiva 2023*. Madrid, Ministerio de Trabajo y Economía Social, 2023. https://tinyurl.com/v5w6z4a7

64 *Teletrabajo y negociación colectiva,* XXXIII Jornada de estudio sobre negociación colectiva, Ministerio de Trabajo y Economía Social, Serie Relaciones Laborales n 124, 2022. https://libreriavirtual.trabajo.gob.es/libreriavirtual/descargaGratuita/WIYE1124

collective bargaining were to be assessed**)** as the only parameters. This means that all the results have at least a minimum level of regulation on the subject. Based on the results of this search, the clauses of twenty collective agreements were analysed.

Specifically, the collective agreements analysed are:

- State collective agreement for graphic arts, paper processing, cardboard processing, publishing and ancillary industries[65]
- State collective agreement for the travel agency sector[66]
- 18th State Collective Agreement for Consulting, Information Technology, Market Research and Public Opinion Polling Companies[67]
- Collective agreement for credit institutions[68]
- Collective agreement for the department store sector[69]
- VII Collective Agreement of Safety Kleen España, SA[70]
- V Collective agreement of Iberdrola Inmobiliaria, SAU[71]
- XXVIII Collective Agreement of Repsol Butano, SA[72]
- XX National collective agreement for engineering companies; technical study offices; inspection, supervision, and technical and quality control[73]
- Collective Agreement of Agfa Offset BV branch in Spain[74]
- Framework agreement of the FerroAtlántica group in Spain[75]
- Collective Agreement of Goldcar Spain, SL[76]
- Third Collective Agreement of Lo Bueno Directo Servicio de Ventas, SLU[77]
- State Collective Agreement for the trade of speciality and pharmaceutical product distributors[78]
- Collective agreement for Spanish stock exchanges and markets[79]
- Collective Agreement of the Bank of Spain[80]

65 BOE 13 October 2023, n. 245.
66 BOE 2 September 2023, n. 210.
67 BOE 26 July 2023, n. 177.
68 BOE 24 July 2023, n. 175.
69 BOE 9 June 2023, n. 137.
70 BOE 12 May 2023, n. 113.
71 BOE 10 April 2023, n. 85.
72 BOE 7 April 2023, n. 83.
73 BOE 10 March 2023, n. 59.
74 BOE 7 December 2022, n. 293.
75 BOE 8 Nobember2022, n. 268.
76 BOE 31 October 2022, n. 261.
77 BOE 17 October 2022, n. 249.
78 BOE 23 September 2022, n. 229.
79 BOE 23 September 2022, n. 229.
80 BOE 5 August 2022, n. 187.

- Collective Agreement for producers of cooked products for home delivery[81]
- State Collective Agreement for the meat industry sector[82]
- Collective agreement for the metalworking and metal packaging manufacturing industry[83]
- III Convenio colectivo de Bureau Veritas Inversiones, SL[84]

Therefore, the aim of this analysis is not to be exhaustive, given the daunting nature of the task, but rather to provide an overview of the regulation of teleworking in the various agreements without differentiating according to sector of activity. All the agreements studied are national in scope.

Although most of the collective agreements studied reveal incomplete regulations or regulations deferred to future developments at the company level, some agreements have the dubious honour of containing illegal and even unconstitutional clauses.

Among the clauses that raise constitutional issues, the most obvious is the one that obliges teleworkers to allow access to their homes for the purpose of verifying compliance with occupational risk prevention measures. Two of the collective agreements studied contain this provision, specifically those of Safety Kleen España, SA and Bureau Veritas Inversiones, SL. In the first of these, it is regulated twice, thus, "the OHS Department may access and check the conditions of the workstations at the worker's home', and 'the worker authorises the Company to carry out at least one audit per year, either remotely or in person, of the worker's computer, communication and security systems, allowing the auditors access to their private home, with at least forty-eight hours' notice".

In the second of the agreements, workers' consent is required for access to their homes to "verify the correct application of health and safety regulations, both by the company and by the workers' legal representatives". but a veiled threat is established if such access is not consented to in the following terms: "although workers shall cooperate fully in matters of health and safety."

As clearly regulated in Article 18.2 of the Spanish Constitution, "*the home is inviolable*. No entry or search may be made without the consent of the owner or a court order, except in cases of flagrante delicto", and the provisions of Article 553 of the Criminal Procedure Act are clearly not applicable in this case.

Although there is still no specific case law on this matter, the Supreme Court ruling of 11 April 2005 provides clear arguments against the possibility that collective autonomy can regulate provisions that violate the right to the inviolability of the home. As established in Constitutional Court Ruling 22/2003, and those cited therein, the home, as a private space, must be "immune to any type of invasion or external aggression by other persons or public authorities," and to guarantee this, "the prohibition of entry and search of the home is established," so that "except in cases of flagrante delicto, only entry or

81 BOE 29 July 2022, n. 181.

82 BOE 16 July 2022, n. 170.

83 BOE 19 July 2022, n. 172.

84 BOE 14 July 2022, n. 168.

search carried out with the consent of the owner or under a court order is constitutionally legitimate". These special guarantees are not in any way undermined by a generic authorisation established in a collective agreement, which, despite its negotiated nature, cannot regulate provisions that violate constitutionally recognised rights. It therefore remains outside the scope of collective autonomy decisions, and the clauses of both agreements must be considered null and void in this regard.

Multiple agreements among those studied raise legal issues regarding the regulation of reversibility. Thus, in this regard, AMET, point three, points out the essential voluntary nature of teleworking, unless it is part of the conditions prior to signing the employment contract, with the right to exercise the reversibility of the agreement modifying the work system, but also points out in its last paragraph that "the modalities of this reversibility shall be established by individual or collective agreement."

The regulation of this aspect in Law 10/2021, Article 5, categorically establishes that "remote working shall be voluntary for both the employee and the employer", with sections 2 and 3 of this article pointing out the right to return to in-person work, noting that this right "may be exercised under the terms established in collective bargaining or, failing that, under those set out in the remote work agreement referred to in Article 7." Does this reference to collective bargaining or the content of the individual agreement imply the possibility of limiting the voluntary nature of teleworking as a basic requirement? The very structure of Article 5 of Law 10/2021, as well as the explanatory memorandum to this text, seem to leave no room for doubt: voluntariness cannot be limited by collective bargaining or individual agreements, as determined by Article 3.5 of the Workers' Statute.

The terms of reversibility that can be negotiated are not its very existence, given that teleworking is voluntary under legal regulations.

Applying this conclusion to the sample of collective agreements studied, there are multiple agreed regimes which, while not directly contrary to the law, require interpretation in accordance with the wording of Law 10/2021. Thus, Article 33.3 of the collective agreement for credit institutions states that "if the remote working or teleworking regime is less than 100% of the working day, reversibility shall imply a return to the workplace and job in person". An interpretation that, contrary to its literal wording, seeks to imply that if teleworking is less than 100% of the working day, reversibility would not have such characteristics cannot be accepted.

Much more difficult to interpret in accordance with the law is the VII Collective Agreement of Safety Kleen España, SA, given that it establishes different conditions of reversibility depending on who exercises it, but in no case linked exclusively to the will of the parties. Thus, it requires reasons "related to work organisation, production or technological causes, or changes in the worker's position" if the initiative comes from the company and, if the initiative comes from the worker, "if the right of reversibility is exercised during the first six months from the start of the provision of services under the teleworking regime, it shall not take effect until the end of that period". Therefore, reversibility is

prevented in the first six months after its adoption if requested by the worker, but in the case of a request by the company, there is no time limit, and the justification is entirely at the discretion of the company.

The 18th Collective Agreement of Repsol Butano, SA, with regard to reversibility, establishes that "the Company Management may terminate the teleworking situation(s) at any time, with all teleworkers returning to work permanently at the employer's premises", although with the caveat that "the parties undertake to adapt this agreement to the regulations in force at any given time" The company is therefore allowed to make a unilateral decision without any prior notice, whereas workers are required to give prior notice, thus violating the equal rights of both parties and calling into question the voluntary nature of the agreement.

The State Collective Agreement for the trade of speciality and pharmaceutical product distributors and the State Collective Agreement for the meat industry sector contain the same regulations on this matter, possibly because both sectors are part of the Industry Federations of the various trade unions. The shared wording generally establishes a notice period of thirty calendar days for reversibility but refers to company agreements or accords that may establish the need for mutual agreement to proceed with reversibility. In addition, it expressly states that in companies that lack worker representation, such collective bargaining will not be a requirement for establishing the need for mutual agreement for reversibility. Clearly, once prior agreement between the parties is established as a requirement for reversibility, the individual voluntariness required by Law 10/2021 lapses.

In the Third Collective Agreement of Bureau Veritas Inversiones, SL, the notice period for reversibility is set at fifteen days, but requires objective justification for the decision, despite establishing that this type of service provision is voluntary and reversible. The need for justification is established for both parties, and there is no provision stating that reversibility may be denied if the justification is considered insufficient, so this modulation of voluntariness can be interpreted in accordance with the provisions of Law 10/2021.

The third legal violation that has been observed in the sample of agreements examined is contained in the Collective Agreement of Agfa Offset BV's branch in Spain, which, despite the legal obligation to make a copy of the individual teleworking agreement available to the workers' representatives within a maximum period of 10 days, as set out in Article 6.10, stipulates that this will only occur upon request by said representatives.

Finally, the fourth legal violation is contained in the XXVIII Collective Agreement of Repsol Butano, SA, which establishes that part-time workers are not allowed to telework, apart from workers who are eligible for reduced working hours for family reasons, cancer treatment or chronic illness. In accordance with the provisions of Directive 97/81/EC, with the objective set out in Article 1(a) of ensuring the elimination of discrimination against part-time workers, and given that no objective reasons are established that Article 4 of the Directive could understand as justifications for the difference

in treatment, the express exclusion of part-time workers from the possibility of opting for teleworking must be understood as contrary to law. In the same vein as the Directive, Article 12.4.d) ET.

5. Conclusions

Although reference to Law 10/2021 is common in the agreements examined, and despite recognising this legal text as the regulatory basis for teleworking, regulations contrary to its content are being implemented. In fact, eight of the twenty collective agreements examined contain provisions that limit the rights granted to workers by either the Constitution, Law 10/2021 or the Workers' Statute. This is a strikingly high percentage when no search has been made for agreements with these clauses, as the search has only been fed with 'teleworking' and proximity in time.

An analysis of the rest of the clauses in these agreements does not yield the same result, so the logical conclusion is that the negotiating parties are still unaware of the actual minimum content regulated by Law 10/2021, and therefore their agreements, although formally referring to this text, are based on their own ignorance. And in some cases, on a worrying ignorance of fundamental rights on the part of the social partners.

Apart from provisions contrary to law, the other major conclusion is that few agreements make their own contributions except, in the best of cases, to setting the notice period for exercising reversibility. Thus, the regulation of teleworking is entirely referred to the content of Law 10/2021, beyond the anecdote of the reference by some agreements to the repealed Royal Decree Law 28/2020.

This reference means that the regulatory gaps left by Law 10/2021 have not been filled, leaving them to the discretion of collective bargaining as a way of adapting the general regulation to the reality of each company or sector. Therefore, what was set up as a minimum legal regime is, for most companies, the complete regulation of this work system.

One of the questions that arises is whether the omission of specific regulation on telework reflects a deliberate stance taken by employers on this issue. That is, whether it has been decided that it is not worthwhile to regulate a phenomenon that is unlikely to materialize. This voluntary nature of regulatory neglect aligns closely with numerous reports in both national[85] and international[86] media regarding the abandonment of telework and the return to in-person work as a strategic business decision.

---

85 Luisja Sánchez: Los CEO españoles anuncian el final del teletrabajo y la vuelta a la presencialidad en los próximos tres años. *Economist&Jurist,* 17. 10. 2017. https://tinyurl.com/ykxwwnhs; Teletrabajo y futuro: ¿qué opinan los CEO? *bookercorp.org* https://www.bookkercorp.com/2023/10/18/teletrabajo-futuro/; Victor Millán: ¿El fin del teletrabajo en España? La mayoría de CEOs del país le han puesto fecha de fin. *elEconomista.es,* 18. 10. 2023. https://tinyurl.com/5n723jv3

86 https://kpmg.com/xx/en/home/insights/2023/09/kpmg-global-ceo-outlook-survey.html#economicoutlook; Juliana Kaplan – Madison Hoff: Is this the end of the remote work era? *World Economic Forum,* Apr 4, 2023. https://tinyurl.com/8fffu6zy

This strategic dimension of regulatory inaction in collective agreements concerning telework is further evidenced by the absence of concrete references in the instruments intended to govern collective bargaining in Spain. Law 10/2021 provides a broad framework for negotiation in matters related to telework. It establishes a minimum set of mandatory provisions, but its further development is intended to be carried out through the exercise of the rights enshrined in Article 37 of the Spanish Constitution.

However, both the Fifth Agreement for Employment and Collective Bargaining and the Guide of the National Consultative Commission on Collective Agreements make only tangential references to telework. In the case of the Fifth Agreement, the mentions are anecdotal in nature, merely reiterating the provisions of the legal framework without offering any substantive contribution or guidance regarding the desirable content of collective agreements on this matter. It entirely lacks conventional content that could serve as a reference point for collective bargaining within the respective negotiation contexts.

In the Guide of the Consultative Commission, the most striking feature is the deliberate omission of any reference to telework. This conspicuous silence is particularly noteworthy considering the enactment of Law 10/2021 and its repeated calls for the regulation of telework arrangements to be further developed through collective bargaining.