Global Workplace Law & Policy

20 years Framework Agreement on Telework: looking back to move forward

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The emergence and implementation of the Framework Agreement

Twenty years ago, on the 16th of July 2002, the European social partners concluded the first autonomous Framework Agreement. The topic of this Framework Agreement, telework, could not be more relevant today. In the wake of the COVID-19 pandemic, the principles laid down in this agreement guided employers and employees through the crisis. On the other hand, as part of the new ways of working under the influence of digitalisation and globalisation, telework will also be utterly important for the future. All the more reason to celebrate this special day. For the occasion, the impact of the Framework Agreement on the telework practice is looked back upon in order to move forward for the challenges of the future.

The Framework Agreement on Telework is the main regulatory framework on telework in the European Union. It came into being within the ambit of article 155 of the Treaty on the Functioning of the European Union (TFEU), which states that social dialogue at the level of the Union can lead to contractual agreements. Subsequently, the Agreement should be implemented

according to the ‘procedures and practices’ specific to each Member State (article 155 (2) of the TFEU). This is in contrast with the previous framework agreements concluded on the European level, which were implemented through Council directives. The Member States could therefore choose their preferred practice to implement framework agreements – within three years after the date of signature – leading to a variety of instruments.

At the moment of conclusion in 2002, the European Union consisted of only 15 Member States. Former candidate countries which are now part of the EU participated as well and committed to the implementation accordingly, just as Iceland and Norway. In 2008 the Commission issued a report on the implementation of the Agreement in which they set out how the Member States implemented the Agreement. Furthermore, this report assesses the extent to which the implementation of the Agreement has contributed to the achievement of the Community’s objectives, hereby evaluating whether there is room for improvement. The overall appraisal of the Commission regarding the implementation is fairly positive: the implementation of the Framework Agreement is considered a success.

The definition of telework in the Framework Agreement

The definition of telework provided for in the Framework Agreement is very broad. It was the intention of the European social partners to cover various forms of regular telework in order for the agreement to stand the test of time. Telework is defined in article 2 of the Agreement as *“a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer’s premises, is carried out away from those premises on a regular basis.”*

This definition of telework highlights some very important elements, hereby narrowing the scope of the Agreement. Firstly, the use of information technology is created as a condition for the Framework Agreement to be applicable. ‘Information technology’ itself is not defined in order to maintain a broad application. With this condition, telework (as defined by the agreement) distinguishes itself from the pre-industrial practice of ‘homework’. However, in the contemporary world of work, hardly any employee works without using technology in one way or another. Secondly, the Framework Agreement specifies that only telework in the context of an employment contract falls within the scope of this agreement. This element ensures that no new employment status would result from telework, as emphasised again in article 3 of the Agreement, as well as in the ETUC interpretation guide. Thirdly, the Agreement applies only to activities that can also be performed at the employers premises. This means that mobile workers, such as sales representatives and home nurses, are excluded. And fourthly, for the Agreement to apply, it is necessary that telework is performed on a regular basis.

The report of the Commission shows that many Member States adopted the same or a similar definition. Some Member States made minor changes by leaving out one of the elements above or by explicitly including or excluding certain forms. The Commission only considers this problematic in two cases. The first issue they encounter is that countries interpreted the condition ‘on a regular basis’ too strictly, thereby narrowing the scope by only covering permanent telework. The second issue is that some Member States treat telework as equivalent to homework. According to the Commission the way homework is regulated cannot validly be applied to the modern employment relationship of teleworkers.

Key principles

Voluntariness

The first and most lengthy principle introduced by the Framework Agreement is the voluntary character of telework. Article 3 declares that telework requires mutual consent: it is therefore needed that both the employee and the employer are willing to organise telework and it cannot be imposed onto them. Both parties can come to an arrangement for telework as part of a worker's initial job description or can agree during the employment relationship. In this way, both the employer and the employee can offer or request telework, after which the other party can accept or refuse. The Framework Agreement emphasises that a refusal by the employee cannot be a reason for dismissal. When telework is not a part of the initial job description, the voluntary character is deemed to entail a right to return to the employer's premises. This right can be invoked by both parties. Under the Framework Agreement there is no right to telework nor an obligation. The report of the Commission indicates that the Member States widely affirmed this key principle when implementing the agreement. Only in some countries, legislation offers a 'right to request telework' on the behalf of the employee and an 'obligation to seriously consider' for the employer.

Equal treatment

One of the objectives of the Framework Agreement is to allow and encourage telework, thereby guarantying safeguards for equal treatment whilst acknowledging specific characteristics of telework. Therefore, article 4 of the Agreement states that teleworkers benefit from the same rights regarding their employment conditions as comparable workers at the employer's premises. In particular the elements of pay, involvement in business and termination of contracts are considered. Furthermore, explicit provisions are presented for equivalent workload and performance standards (article 9), same access to training and career development opportunities (article 10) and collective rights (article 11). To tackle the particularities of telework, specific complementary collective and individual agreements can be concluded. All Member States supported this fundamental clause in their implementing instruments.

Equipment and costs

A recurring question regards the existence of an obligation for the employer to cover the costs associated with telework. The Framework Agreement states in article 7 that the topic of equipment and costs should be sorted out clearly before starting telework. The general rule posed in this clause is that the employer should provide, install and maintain the equipment and should compensate the costs directly caused by telework, especially the costs of communication. The wording of this provision leaves leeway for the implementation. The report on the implementation therefore shows that there is a variety of solutions to be found in national instruments ranging from a general obligation to provide equipment and cover costs to a fall back regime that come into play when no individual agreement is made.

Privacy and data protection

The Agreement makes a distinction between the protection of data of professional nature and the teleworkers' privacy. Article 5 regarding data protection does not protect the teleworkers' personal data and only contains an obligation for the employer to inform the teleworker on the guidelines to handle data for professional purposes while processing it outside the employers premises. The teleworker is then responsible to act accordingly. In contrast with the latter, article 6 does articulate a right to privacy for the teleworker. Activities monitoring the teleworker should therefore be

proportionate to the objective and introduces in accordance with Directive 30/270/EEC on visual display units. In that respect, no qualitative or quantitative monitoring can be exercised without the knowledge of workers.

Health and safety

Article 8 states that the employer is responsible for the protection of the occupational health and safety of the teleworker. Therefore, he informs the teleworker of the company's policy on this subject. In addition, with regard to mental well-being, the employer has to ensure that isolation of the teleworker is prevented by offering opportunities to meet with colleagues on a regular basis (Article 9, third section). The challenge with these measures in a telework context lies in enforcement. According to the Framework Agreement, the correct application of the applicable health and safety provisions can be verified by accessing the telework place (within the limits of national legislation/collective agreements). However, when telework is conducted at the home of the teleworker prior notification and consent are needed, because of the constitutional value of the inviolability of the home. The implementation of this clause in the Member States is diverse: some generally apply health and safety measures, or adopted specific measures, while others decided that certain provisions only apply in a limited way because the employer has no control over the design of the telework place.

Future challenges for telework

The Framework Agreement captured and ensured some very important key principles, mentioned above. It laid a foundation upon which the Member States could develop their own telework strategy, hereby building on these fundamental rules. However, since then, telework itself underwent a significant transformation as well. It remains the question whether the principles of the Agreement are still useful and sufficient in the contemporary world of work. Yet, the evolving nature of telework was already foreseen in the Agreement. The contracting parties claim to have offered a definition broad enough to capture a myriad of appearances and kept in mind that telework entails a wide and fast evolving spectrum of circumstances.

With the new ways of working and the emergence of so-called 'autonomous work' which allows employees to work autonomously in a time and place independent manner, new challenges arise for the spectrum of telework possibilities. The definition can indeed be considered appropriate to cover this new way of working, although some aspects give away the age of the definition. The element of 'information technology' for example is self-evident in the contemporary world of work. Furthermore, the emerging idea of autonomy is not represented in the definition yet. The difficulty lies of course in providing a definition that captures all features and all situations on the telework spectrum, including different degrees of autonomy and independency. In that regard, it is said that we should abandon the one-size-fits-all approach.

Looking forward to the 20 years ahead, there are still other challenges for telework to overcome. Time and place independency together with autonomy and a widespread use of telework brings other points in question to the fore. This 20 years anniversary of the Framework Agreement is the ideal opportunity to reflect upon those challenges which should be considered in potential upcoming initiatives. Who knows when another framework agreement or directive on telework might be in the pipeline?

One of the most versatile issues is the regulation of working time in relation to telework.

Regarding working time, the Framework Agreement on telework only specifies that the teleworker is in charge of managing his or her working time, albeit within the framework of applicable legislation, collective agreements or company rules (article 9, first section). This provision offers flexibility in respect to working time, within the maximum limitations determined by law. According to the ETUC interpretation guide, this section means that the general rules on working time and rest time are the same, but that teleworkers can decide when to start, pause and stop working. Yet, the idea of working time and telework is more puzzling than that and has not the least of importance. Studies of Eurofound and the ILO show that teleworkers impacts both the duration and organisation of working time. Teleworkers typically work longer than other workers and outside regular business hours, for example in the evening and during the weekend.

The discussion starts with the applicability of working time regulations to teleworkers and more specifically the main instrument regulating working time in the EU, the Working Time Directive of 2003. Article 2 of this Directive provides a definition of working time, under which time performed by a teleworker can easily fall: "*any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice*". Yet, the Directive also foresees a possibility to derogate from (some of) the provisions in the Directive. Article 17, section 1 states that this is allowed *on account of the specific characteristics of the activity concerned, the duration of the working time is not measures and/or predetermined or can be determined by the workers themselves*. Some countries, including Belgium, use this provision to exclude all teleworkers in general from the scope of application, regardless the teleworkers' (in)capacity to determine their working hours themselves. In light of the tendency of the CJEU and the Commission to interpret exclusions in a narrow way and with the diverse spectrum of telework situations in mind, it might be said that Belgium violates the Directive on this point.

In addition to this critical challenge related to the scope, the Court of Justice of the European Union has added an obligation for employers with respect to the enforcement of working time obligations. In its famous *CCOO/Deutsche Bank* judgment of 2019, the CJEU ruled that, for the Working Time Directive to have useful effect, the number of hours worked each day should be objectively and reliably determined. Member States therefore must require employers to implement an objective, reliable and accessible system to measure the duration of the working time of each employee. This obligation is even more difficult in a telework context as it requires electronic remote monitoring of working time, which is hard to reconcile with the flexibility which the Framework Agreement provides.

A second challenge that should be taken into consideration regarding telework for the future is well-being. Because work-related information is available anytime and anywhere, teleworkers may experience techno-stress. Techno-stress described as any negative impact on attitudes, thoughts, behaviours or body physiology and is attributable to permanent connectivity. The use of information technology ensures that teleworkers are permanently reachable which can lead to the expectations that workers are permanently available, hereby impairing rest period and the chance to recover. As a result, teleworkers may suffer from overworking, overtiredness and burn-out. In order to counter these effects, initiatives are being taken, also at the European level, to implement a right to disconnect. Modelled on the French legal system, the right to disconnect entails a right not to engage in work-related activities outside working time. Employees therefore should be able to disconnect from work by switching off communications tools without any negative consequences (such as dismissal). In practice, this right to disconnect might be difficult to regulate and enforce. Moreover, it can be said that it discards the flexibility offered by telework. Future regulatory action

regarding telework should certainly address this particular challenge.

Another substantial question which calls for a European answer is the issue of cross-border telework. Globalisation and digitalisation enable a practice of place independency that goes beyond national borders. Teleworkers can work in one country for an employer in another, without physically moving. In this regard, several questions arise on whether or not this is allowed, on the applicable labour laws and on the principle of free movement of workers and services. This aspect of the evolution of telework was not foreseen in the Framework Agreement, but will certainly become more relevant in the future.

Conclusion

Looking back to the last 20 years, it is safe to say that the Framework Agreement on telework has taken its effect. It provided a broad definition that that was able to endure rapid digitalisation and other gamechangers in the world of work. The key principles laid down in the Agreement are timeless and are ready to easily last another 20 years. However, in order to move forward, there are several gaps to fill. The myriad legal challenges involving working time and well-being for teleworkers, as well as cross-border telework should certainly be addressed in upcoming initiatives, whilst keeping in mind the spectrum of telework possibilities with variable degrees of autonomy and independency.

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