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Ana ȘTEFANESCU

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CRITICISM REGARDING THE REGULATION OF THE "REGULAR" CHARACTER FOR TELEWORK ACTIVITY IN ROMANIA AND DE LEGE FERENDA

Ana ȘTEFĂNESCU¹

Abstract

While the Telework Framework Agreement concluded on July 16, 2002 between the European Community Industrialists Association, the European Union of Craftsmen and Small and Medium-Sized Enterprises, the European Centre for Enterprises with Public Participation, and Enterprises of General Economic Interest and the European Confederation of Trade Unions on telecommunication defines it as "a form of organization and / or performance of work using information technology (...) achieved (...) regularly (...)", for our country Law no. 81/2018, although it resumes the reference to the "regular" character, contradicts it clearly and in an unconcealed manner, translating it into the fact that such work would take place "at least one day a month".

We want to raise this issue, showing the consequences for practice and maintain a proposal for de lege ferenda formulated since 2010.

¹ Ana ȘTEFĂNESCU is Ph.D. in Law, Associate Profesor at „Dunărea de Jos” University Galați, Faculty of Legal, Social and Political Science, titular university lector within Public Administration Department, Member of the Legal, Administrative, Social And Political Research Centre. She is also collaborator and member of the Editorial College at Wolters Kluwer Publishing House (Romania, Bucharest) - Romanian Labour Law Review. She is also member and secretary at Romanian Labor Law Association and member of U.N.E.L.M. Email Address: ana@anastefanescu.ro; Web: www.anastefanescu.ro.

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1. The situation of the apparent "mirror" regulation of the "regular" character of telework

By Law no. 81/2018, for the first time in our country, the telework activity was apparently regulated in terms of its "regular" character, in line with the Framework Agreement on Telework concluded on July 16, 2002 between the European Community Industrialists Association, the European Union of Craftsmen and Small and Medium-Sized Enterprises, the European Centre for Enterprises with Public Participation, and Enterprises of General Economic Interest and the European Confederation of Trade Unions².

Undoubtedly, as emphasized in the legal research literature (Ștefănescu, 2017: 359; Ioan, 2009: 33-67), it was necessary to take into account in this respect the European normative model and, as a recommendation, the regulations of other states which had a tradition and which have complied in this respect.

While the European framework agreement on telework defines it as "a form of organization and / or performance of work using information technology under a contract or employment relationship, where this - which could be achieved equally, at the employer's premises - is regularly performed outside it "[Article 2 paragraph (1)], Law no. 81/2018 states that telework is "the form of work organization whereby the employee, on a regular and voluntary basis, performs his / her duties specific to his / her position or occupation or job he/she holds in a place other than the workplace organized by the employer, at least one day a month, using information and communication technology "[in Article 2 letter a)].

2. The issue of the "regular" character for teleworking activity

We clearly notice a contradiction in the latest provisions. Indeed, according to the simplest and most impartial logic, as it is known, the regular

² <http://www.teleorg.org/ro/index.htm> (accessed on 3.05.2018).

character of an activity refers to its regular deployment, that is to say, predominantly, usually in the specific regime of telework (in this case); or, if the period in relation to which the consideration of the parties from an individual employment contract is generally established is the month, as the Romanian legislator rightly provides (being able to "descend" to a 4-week interval³), it is clear that the fulfilment of the job-specific duties in this regime of "at least one day per month" does not have a regular character but rather an occasional, incidental one.

As a matter of fact, in the first comprehensive (PhD level) study (Ștefănescu, 2011: 219-220) in agreement, for example, with another one of reference (Blanpain, et. all, 2007: 247), we have shown that the "regular" character refers to a work provided for about three days of the working week of five days, further making reference to the working month; thus, we have concluded, that we are talking only of a telework clause in a "standard" (Ioan, 2009: 57).⁴ individual employment contract that behaves at the micro level following the special contract model. Recently, the legal research literature (Țiclea, Georgescu, & Purcaru, 2018: 207) has also given the example of telework regulation in France - according to Article L.1222-9 of the Labour Code (as amended by Law no. 2018-217 of March 29, 2018)⁵, telework being that form of work organization whereby a worker who is able to work at the employer's premises performs it outside these establishments in a regular and voluntary manner using information and communication technologies under an employment contract or an act amending it.

3. Consequences for practice due to incorrect regulations

Beyond the theoretical / doctrinal rigor which, however, we are fond of, which would seemingly only leave room for the hilarious, the problem is much serious for practitioners: the failure to observe the content of an individual telework contract according to Law no. 81/2018 - which requires sensitive clauses and elaborated especially in the system with other "referral"

³ See for analogy Article 103 of the Labour Code – Law no. 53/2003, republished in the Official Romanian Gazette, Part I, no. 315 din April 10, 2017, subsequently amended.

⁴ I took the 'standard' attribute

⁵ www.interphiliv.com › Droit › Droit Public, Code du travail 80e éd., Annotations jurisprudentielles.

normative acts, both of state origin and of negotiated origin or issued by the employer - may result into contravening fines to be taken into account in terms of the amount (Article 11 of Law no. 81/2018). for this. However, to perform the work "at least one day a month" under this scheme requires such a contract, subject to particular content requirements and with the pecuniary risk involved.

We also notice that such contraventions are regulated punctually and in a detailed and diversified manner (seven) only for this type of special contract; in relation to the content of the other contracts, the Labour Code provides generically, in Article 260 paragraph (1) letter d) that "the stipulation in the individual employment contract of clauses contrary to the legal provisions" is a contravention, without giving details.

The problem, in practice, would lead to the circumvention of the law and the use of such a contract only in fact, that is, by its express failure to conclude it. Moreover, with all the obligation to conclude such a contract when the factual situation imposes, it is difficult to identify any telework without legal forms ("black market"), as we have already shown (A., Ștefănescu, 2011: 224). And, clearly, not even Law no. 81/2018 encourages in this respect, which does not lead to the protection of Romanian teleworkers.

De Lege Ferenda

Considering the problem exposed de lege ferenda, since 2010 we stressed (Ștefănescu, 2011: 236-237) the need to regulate such a meaning of the regular character for teleworking – the achievement under the regime of teleworking of more than half the work load expressed or, where appropriate, related to the time standard/working time of a month. That is why we maintain our proposal.

References

Treatys, course of study and reviews

Blanpain, R., Colucci, M., Dirks, C., Engels, C., Goldman, A., Hendrickx, F., Jacobs, A., Keating, M., Morin, J., Neal, A., Nyström, B., Ray, J-E., Rojot, J., Swiatkowski, A., Di van den Broek, Weiss, M. (2007). *European Framework Agreements and Telework. Law and Practice, A*

- European and Comparative Study*, Kluwer The Netherlands: Law International Publishing House.
- Ioan, M. (2009), *Contractul individual de muncă și convenția civilă de prestări servicii*. Bucharest; Romania: Wolters Kluwer Romania Publishing House.
- Ticlea, A., Georgescu, L., Ilie, D., & Purcaru, D. (2018). *Noutăți legislative, jurisprudențiale și doctrine în relațiile de muncă*. Bucharest: Universul juridic Publishing House.
- Stefanescu, I.T. (2017), *Tratat teoretic și practic de drept al muncii*, 4th Edition, Universul juridic Publishing House, Bucharest.
- Stefanescu, A. (2011), *Munca la domiciliu și telemunca – drept intern și comparat*. Bucharest; Universul juridic Publishing House.

Legislation:

- The Telework Framework Agreement concluded on July 16, 2002 between the European Community Industrialists Association, the European Union of Craftsmen and Small and Medium-Sized Enterprises, the European Centre for Enterprises with Public Participation, and Enterprises of General Economic Interest and the European Confederation of Trade Unions on telecommunication;
- Law no. 81/2018 about telework, published in the Romanian Official Gazette, Part I, no. 296 of April 2, 2018;
- Law no. 53/2003 – Labor Code, republished, with modifications and completions, in Romania's Official Monitor, Part I, no. 315 from 10th of April 2017, amended.