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Measurement of Working Time in Telecommuting

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ABSTRACT: *The paper focuses on the special characteristics of working time in the case of telecommuting and in particular, on the problematic of teleworking time measurement. First, it examines two systems for measuring teleworking time, namely based on the quantity of work produced or based on the time the employee is connected to the company's network. Then, it highlights the need for establishing objective mechanisms for measuring teleworking time. Finally, it analyses the provision of telecommuting outside of formal working hours, which is very common in the digital era and confuses working periods with rest periods. Our conclusions focus firstly on the need for legislative regulation, which will posit and specify the methods of measuring telework time and secondly on the imperative need to safeguard the rights of employees in terms of the protection of privacy and personal data.*

KEYWORDS: telework, working time, court of justice, rest period, working time directive, employees' privacy, employees' surveillance

INTRODUCTION

The use of digital tools in most fields of employment have brought many economic and social benefits and advantages to both employers and employees such as increased flexibility and autonomy, and the potential to improve work-life balance and reduce physical risks. Because of these changes, the formal constants of the dependent labor relationship, i.e. the fixed workplace and time schedule, become relative concepts. In the digital age, there are no spatial and temporal commitments and flexible forms of employment seem to dominate in the labor market.

Teleworking is the preeminent form of flexible employment, which, over the past decade, with rapid advances in Information and communications technologies (ICT), has been established as a working routine in many companies and has become an integral component of the digital economy (Framework Agreement, 2002). The social partners see telework both as a way for companies and public service organizations to modernize work organization, and as a way for workers to reconcile work and social

life by giving them greater autonomy in the accomplishment of their tasks. Employees are not bound to the employer's premises as a fixed workplace, but rather are able to perform work related tasks at any place and any time (Eurofound, 2017). Workplaces are reduced in physical size and mainly transported to a virtual reality that anyone can enter and produce work. With the continuous development and improvement of cloud technologies, it is now particularly easy to transport almost all the necessary tools to the employee's place of residence, while various companies supply the means for teleconferences or videoconferences. Consequently, employees, with all of these applications, have the same level of access to the employer's network, systems and resources as they would in the workplace.

The provisions on working time limits apply in their entirety to telecommuters, as well. However, ascertaining the actual duration of working time and adherence to the schedule is not easy in teleworking. The teleworker provides his work outside the employer's premises using digital media and thus it is not easy to determine the starting time and termination of his work, the exceeding of the legal and agreed working hours, working on exceptional days etc. On the contrary, there is place for abusive practices, either, on behalf of the employer by imposing illegal excesses or on behalf of the employee by invoking unrealized excesses.

In our paper, we will deal with the problem of quantifying teleworking time, the methods discussed in theory, the dangers arising concerning teleworking in rest and the proposals that are realistic and legally accepted.

The measurement of teleworking time in relation to the quantity of work

The connection of working time with the quantity of work is not a modern debate, but on the contrary has a very long tradition, going back to the end of the 19th century, when with the industrialization of production and the introduction of the division of labor it became possible to assign to the worker a specific production quota. Nowadays, institutionalized pay systems determine the amount of the salary based on the measured production of the employees. In this way of measuring production, the time element also enters. After calculating how much time the average employee needs under normal conditions to produce one unit of work, then specific duration of work is linked to specific production units.

With regard to telecommuting, the expected workload for the telecommuter can be calculated by reference to the comparable employee at the premises of the company. After all, as it is accepted in the European Framework Agreement on the telework, the workload and performance standards of the teleworker are equivalent to those of comparable workers at the employer's premises (Framework Agreement, 2002).

Obviously, the measurement of teleworking time in relation to the quantity of work assumes that the particular work is measurable in terms of quality and quantity. Therefore, the teleworking contract shall specify the tasks to be accomplished, expected results, deadlines and the teleworking schedule. It suites professionals in knowledge-based companies like finance, software, or journalism.

However, this measurement system is not easy to identify precisely the time the work is provided. In particular, it cannot be identified whether the employee also worked overtime or worked on Saturday, Sunday or at night. Yet, this information is crucial for the employee. It entails an increase in his salary and raises the issue of exceeding the daily and weekly working limits in terms of health and safety protection. Eurofound data show that teleworkers are twice as likely to exceed the 48-hour working time limit, take insufficient rest and work in their free time, with knock-on effects on their physical and mental health (Eurofound, 2021). In addition, the quantity of work is not an appropriate criterion for measuring working time, as it measures the result of the work and not the work as such. Lastly, the time to complete a task is subject to subjective parameters, with the consequence that there may be a difference in the time required for a task between the teleworker and the comparable worker (Dimarellis, 2022, Liksouriotis, 2021). For these reasons, working agreements that focus primarily on the outcome of the work fit into project contracts or independent service contracts rather than dependent employment contracts. Anyway, despite the above weaknesses, the quantity of the work seems to be the most appropriate criterion for working time measurement in the case of off-line telecommuting.

The measurement of teleworking in relation to the time point of connection and disconnection

The most reliable criterion for measuring working time itself is the time point of connection and disconnection of the teleworker to the information system maintained by the employer, where the working hours of the teleworker are accurately recorded (Ladas, 2018). This system is rather suitable in on-line telecommuting. In this case, the employee is connected to the internet and can interact in real time with the employer, other employees or customers, he is at the direct disposal of the company, can receive orders and can be controlled using technological media and applications. The employee has an accurate schedule with a start and end time as if he were working in the physical premises of the company. Online telecommuting therefore preserves to a considerable extent (and of course not completely) the characteristics of dependent work.

In the on-line telecommuting, the main disadvantage is the employer's inability to control the quantity or even quality of work. Working time does not reflect the intensity or efficiency of time spent on work (ILO, 2008). For this reason, a large number of

employers use automated systems to monitor, supervise and control the telework performed by employees to ensure the quantity and quality of work. The surveillance of teleworkers is an important issue in the field of labor law. Employee monitoring software is a system that can track and analyze employees' activity on their computers. This system acts as an invisible all-seeing supervisor. From keystrokes to visited websites, it gathers information about almost everything a person does on the computer during working hours. More advanced employee monitoring software goes far beyond simply collecting the data. They provide ready-to-go reports on each employee's productivity and payroll calculations. The most overt purpose of this kind of software is to monitor employees' productivity. These technologies are widely available, by third parties such as cloud computing service providers (Clever Control, 2022).

However, electronic employee surveillance applications using artificial intelligence software create a suffocating work environment and lead to stressful situations with devastating consequences for the employee's physical and mental health. At the same time, taking into account that there is processing of personal data, the employer - controller must apply the legal bases and principles of lawful processing, as defined in the GDPR (Fairweather, 1999). For this purpose, there must be severe consideration of the principle of proportionality, which implies a balance between the legitimate interest of an organization and the fundamental right of an individual to privacy (Fairweather, 1999). This proportionality test examines whether data are necessary, whether the processing outweighs the data protection rights and what kind of measures should be taken to ensure the right to a private life and the right to secrecy of communications (Ogriseg, 2017).

In addition, the European Court of Human Rights has ruled that the monitoring of an employee's electronic communications (email) by his employer constitutes a violation of his right to privacy and correspondence (Bărbulescu v. Romania, 2017). It is clear from the Court's case law that communications from business premises as well as from the home may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 of the European Convention on Human Rights (Copland v. the United Kingdom, 2007, Halford v. the United Kingdom, 1997). The case law highlights the care that employers should take in managing employees' expectations for privacy and in ensuring that relative policies are applied fairly in practice.

Furthermore, the employee as data subject should have the right not to be subject to a decision, which may include a measure, evaluating personal aspects relating to him, which is based solely on automated processing and which produces legal effects. Such case is the automated processing of personal data evaluating the data subject's performance at work (Douka, 2020). Article 22 of General Data Protection Regulation

(EU) 2016/679 sets a strict framework for automated individual decision-making. The data controller is obliged to implement suitable measures to safeguard the data subject's rights, freedoms, and legitimate interests, even if the processing is based on a labor contract or the explicit employee's consent. So, all these automated applications must be judged on a case-by-case basis for compatibility with the general principles of the protection of the employees' personality, the safeguarding of their physical and mental health and the protection of personal data and their private lives (Arroyo-Abad, 2021).

Working time recording systems

Teleworking is normally subject to working time provisions. The telecommuter, like any employee, needs the delimitation of his work in certain periods. Working time determines the period of time during which the employee is at the disposal of the employer, subject to his orders and instructions. Therefore, working time limits determine the minimum limits of his physical and mental strain, beyond which the provision of work may be dangerous for his physical and mental health and safety, due to fatigue or irregular or increased work rates.

In addition, working time limits are necessary to ensure the necessary non-working time, so that it is possible for the employee to participate in other (non-working) activities (such as family life, private life, social relations or simply rest). The reconciliation of professional and private life is a central issue in the quality of life of the modern worker, which is negatively affected by conditions of prolonged, variable, or messy working hours. Therefore, meeting the working time limits is of fundamental importance for the employee.

At the European Level, the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods constitutes a rule of EU social law of particular importance. The provisions of Directive 2003/88, in particular Articles 3, 5 and 6, give specific form to that fundamental right by ensuring that all workers are entitled to minimum rest periods — particularly daily and weekly — as well as adequate breaks, and by providing for a ceiling on the duration of the working week (Commission v United Kingdom, paragraph 37).

However, the provisions on the organization of working time do not provide for a system of recording the actual daily working time for employees. In particular, Articles 3 and 5, as well as Article 6, point b′, of Directive 2003/88 do not define the specific way in which the Member States must ensure the implementation of the rights provided for in them. As is clear from their wording, these provisions leave the Member States to adopt those arrangements, by taking the 'measures necessary' to that effect (BECTU, paragraph 55).

The obligation to record and control compliance with working hours was recognized by the CJEU in its judgement of 14-5-2019 (case C-55/18). Specifically, the CJEU was asked to examine whether and to what extent the establishment of a system for measuring the daily working time of each employee is necessary for the effective observance of the maximum weekly working hours and the minimum daily and weekly rest periods. The Court came to the judgment that in the absence of a system for measuring daily working time, it is impossible to establish, in an objective and reliable manner, the number of working hours of the employee, as well as their time distribution, or the working hours carried out in excess of regular working hours, as overtime. Therefore, the national legislation of the member states must impose on employers the obligation to implement a reliable and objective system of measuring the daily working time of each employee (Commission v United Kingdom, paragraph 50, 51).

Since there is no system enabling working time to be measured, a worker may rely on other sources of evidence, such as, inter alia, witness statements, the production of emails or the consultation of mobile telephones or computers, in order to provide indications of a breach of working time limits. However, such sources of evidence do not enable the number of hours the worker worked each day and each week to be objectively and reliably established (Commission v United Kingdom, paragraph 53-58).

A time card could be an appropriate tool to record the hours worked by employees. The use of time card includes recording the start and end times for each shift, calculating the total hours worked, and ensuring that all information is accurate and up-to-date. Nowadays, time card systems are more digitized and can be accessed online, employees can clock in and out using a computer or mobile device, and managers can view and approve time cards remotely. The use of the digital card in telecommuting could be a reliable tool for measuring teleworking time. However, this possibility can only exist with the appropriate institutional framework, which will define how the data of the communications between the employer and the teleworker will be processed.

Teleworking in rest time

The necessity of safeguarding working time limits is more than ever imperative in the digital age. The development of technology has contributed to the spread of affordable ICT devices that enable internet connection and personal mail anytime and from anywhere. The expectation that employees will be available at almost any time for online or mobile communication has become a reality in many workplaces. The employer easily communicates with the employee during non-working time with an email or an SMS or a chat message, interrupting the employee's rest for "*a simple arrangement that does not require more than a few minutes*". The distinction between

"*office working hours*" and work-related communication outside of the workplace has continued to blur. On the other hand, the employee finds it difficult to ignore the electronic notifications of his employer, for the fear of disfavor, especially at a time when job insecurity is intensifying and labor market is highly competitive. The worker ends up in constant digital readiness, available at any time to interrupt the relaxation of a meal or a walk or a family afternoon to send an email, talk to a client or clarify issues of his morning work.

Out-of-shift telework obviously confuses work periods with rest periods. While apparently the employee is in rest, he is not resting, but is called upon to perform his work duties for an unspecified period, which can last from a few minutes to a few hours. Small-scale tasks concerning e.g. arrangements for the next day's schedule or standard procedural actions (forwarding an email) cannot normally be considered work and do not interrupt rest. On the other hand, if these short-term tasks are continuous and repeated on a non-negligible basis after the end of the shift, the worker cannot achieve complete alienation from the work environment. In this case, there is actual work, which must be determined in duration and paid accordingly.

The European Court, with cases like Simap, Matzak and Radiotelevizija Slovenija, has developed a very interesting jurisprudence on the concept of working time, in its attempt to interpret standby periods, whereas an employee must be available to start or resume work, at short notice (Kountouris, 2020). In particular, it revisited the case law based on the criterion of presence at the workplace and stipulated a more nuanced approach (Hießl, 2021, Maiso Fontecha, 2022). The concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the rest time and pursue his own interests (Radiotelevizija Slovenija, paragraph 38, Stadt Offenbach am Main, paragraph 38). Moreover, one of the criteria set by the Court for the evaluation of working time is the average frequency of the activities that the worker is actually called upon to undertake over the course of standby period (Radiotelevizija Slovenija, paragraph 46). Thus, if the worker is, on average, called upon to act on numerous occasions during a period of standby, he has less scope freely to manage his time during those periods of inactivity, given that they are frequently interrupted. That is even truer where the activity required of the worker, during a period of standby, is of a non-negligible duration. It follows that, if the worker is, on average, frequently called upon to provide services during his periods of stand-by time and, as a general rule, those services are not of a short duration, the entirety of those periods constitutes, in principle, 'working time' within the meaning of Directive 2003/88 (Georgiadou, 2023). This

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jurisprudence for standby employees can be applied similarly to telecommuters in order to evaluate short-term or frequent tasks during non-working time.

Recognizing that technology and communications created this "always on" reality, interfering with work-life balance and employee health and wellbeing, European and national jurisdictions have begun enacting the "*right to disconnect*" regulation. The right to disconnect allows employees to disconnect from work outside of agreed working hours (Lerouge, 2022). This is a self-evident right of the employee arising from common labor legislation and in particular, from the working time laws, as well as the fundamental employers' obligation to observe time schedule, in order to ensure daily, and weekly work time limits. After all, a correct balance between work and private life is essential to allow digital transformation to have a positive effect on workers' quality of life and wellbeing (Secunda, 2019).

CONCLUSION

The measurement of working time is of central importance for the telecommuter. This task, however, presents difficulties, as the employer does not exercise physical control over the work and cannot have a direct and own perception of the work provided. Work time calculation systems are based either on the quantity of work or on the time that the employee is connected to the company's network. The weaknesses of each one of these systems are the strengths of the other and ultimately the choice is at the discretion of the employer. At this point, the institutional intervention of the national legislator of each EU member country is required, who, implementing the Directive 2003/88, must institutionalize and impose digital working time measurement systems on every employer. Towards this direction, in June 2021, the Council of the European Union invited Member States to establish '*national action plans or national strategies addressing the opportunities and risks related to telework*'. They should consider '*amending their policies regulating telework or issuing guidance where appropriate'*, with regard to such considerations as health and safety, the organization and monitoring of working time, effective checks by labor inspectorates etc. (Council of the European Union, 2021).

Besides, electronic interaction makes it imperative to have guarantees for the protection of personal data and employee privacy, especially when the employer chooses the telecommuting system. Finally, the small tasks during the rest time can, if repeated at continuous intervals, essentially constitute work time that must be calculated and paid for.

The issue of working time proves to be complex in the case of telework. The traditional tools of labor law are not sufficient to meet the challenges and peculiarities of remote work by digital means (Bence Lukács et al., 2022). Traditional ways of controlling

workers and measuring working time by simple physical observation are not suitable in teleworking situations. The regulatory framework should introduce digital control mechanisms that, coexisting with the right to privacy, can be truly effective and accurate in measuring teleworking time.

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