

Remote work regulation during and after the pandemic in Greece and Germany: comparative legal frameworks and challenges for the future of work

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Abstract

The contribution focuses on telework and remote work legislative transformations during the corona pandemic based on the experiences of two countries, Greece and Germany. Greece has introduced in 2021 a reform of teleworking regime both in the private and public sectors. Germany has only addressed the increased teleworking needs *ad hoc* with less profound changes in the existing teleworking regime. The teleworking/remote working national legal frameworks of these two countries are compared and the transitions to a flexible virtual workplace are contextualized. The paper demonstrates how these transitions addressed only partially the labour and social fundamental rights of employees.

Keywords: Telework; Remote Work; Regulation; Greece; Germany; Comparative Review.

1. Introduction.

The corona health crisis has brought tremendous changes in the everyday life of people globally. At the same time, it became evident how many countries have not been flexible and innovative enough in finding appropriate solutions to such an emergency.¹ Measures introduced in the management of this health crisis as a means of containment of the spread

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¹ For a systematic and informative overview on the measures set out by lawmakers and/or social partners in a number of countries of the world to address the impact on the Covid-19 emergency on working conditions and business operations, see ILLeJ, *Special Issue: Covid-19 and Labour Law. A Global Review*, in *Italian Labour Law e-Journal*, 13, 1S, 2020, available at <https://illej.unibo.it/issue/view/868>.

of the virus, such as moving restrictions, lockdowns, and limitations to the free movement of persons both within and across national borders, had serious implications for several areas of work activities. While the restrictions within borders seem to have a national and narrower dimension, the case of limitations to the free movement of persons across borders encompasses a wider multi-national perspective.

Due to the restrictions of physical movement, remote work or telework was (re)introduced in several countries and in the sectors/professional activities where its use could be possible.² The introduction of this type of work was seen as necessary for several reasons. For example, the restriction of physical movement of persons could contribute to the reduction of social contacts and, therefore, help the containment of the rapid spreading of the COVID-19 virus. In addition, it was a way to protect the health and safety of workers, especially during the first waves of the pandemic when vaccination against the virus had not been developed. Everyone has witnessed how - from one day to the other - work, school, or other activities “migrated” to a completely virtual environment. This was not an easy transition, especially due to the urgent and extraordinary character of these unanticipated changes in the everyday lives of many people.

Before the outbreak of the COVID-19 virus in the first months of 2020, the use of telework and remote work was not that broad and common because of the dominating character of the culture of on-site or physical presence at work. Such a culture has been developed and based on the architecture of the standard employment relationship (full-time open-ended contract with the performance of work in the premises of the employer). Nevertheless, during the past years, we encountered a progressively increasing need for flexibility, both for the employer and employee. In that context, new forms of employment emerged and spread quickly across Europe. These new forms of employment have been classified into two distinct groups: (i) new models of employment relationships between the employer and employee or the client and worker, and (ii) new work patterns, i.e. different ways of performing work.³ The significance and relevance of these new forms of employment have been gradually increasing as they became the drivers for the labour market transformation. This transformation has been further facilitated by the digitalization of work and processes in several spheres. The use of digital tools makes remote working possible, i.e. performing work outside the employer’s premises in a non-conventional workplace under teleworking or mobile working arrangements falling under the second group category of new forms of employment. Therefore, the discussions from the flexible working taxonomy

² Sectors that prevail in terms of use of telework/remote work in the EU are information and communication, financial services, real estate, personal and scientific activities, public administration and extraterritorial activities. These sectors were identified in 2015 by the European Working Conditions Survey (EWCS) performed by Eurofound. See Eurofound, *Telework and ICT-based mobile work: Flexible working in the digital age, in New forms of employment series*, Publications Office of the European Union, Luxembourg, 2020, 9, available at <https://www.eurofound.europa.eu/publications/report/2020/telework-and-ict-based-mobile-work-flexible-working-in-the-digital-age#tab-01>, accessed 1 November 2022.

³ In accordance with the classification followed in Mandl I., *Overview of New Forms of Employment*, in Blanpain R., Hendrickx F. and Waas B. (eds), *New Forms of Employment in Europe*, Bulletin of Comparative Labour Relations, Kluwer Law International, 94, 2016, 8.

moved towards the hybridization of work with the emergence of new flexible working approaches, such as digital nomadism.⁴

2. COVID-19 driven legal transitions towards the hybrid workplace.

Since the outbreak of the pandemic, the introduction of remote work or telework was seen as an appropriate (or even in certain cases as a one-way) solution to serve the needs of this extraordinary situation. Although remote work was not the rule in many countries, it became the main way of performing work within a very short time, almost overnight. Some countries were able to adopt extensive legislative regulations to facilitate this transition to remote work, create an extent of legal certainty and protect the employees' rights at work. Other countries followed a less restrictive approach allowing a certain leeway to the labour market to find the appropriate solutions and arrangements for the implementation of remote work or telework during the peaks and waves of the pandemic.

Although this extraordinary situation led to a *de facto* transformation of the modus operandi of numerous businesses with heavy and abrupt disruptions in the world of everyday life and work, the decision-making and legislative processes during the pandemic have been able to address the implications for labour rights of the employees only partially. The underlying reasons were multidimensional: the diversity of the composition of committees advising national governments, the structure of the states, the lack of coordination instruments in place, the role of social partners and civil society in policy, and direct rulemaking through industrial relations practices, etc. One of the most affected categories of citizens were employees who switched to remote work during the pandemic as an emergency measure of public health. Apart from learning new skills within the digital collaborative work context, these employees had to deal with increased work-life balance issues and a new demanding reality at work which had as a prerequisite advanced digital skills and competencies.

In the aftermath of the peak of the pandemic during which remote work was used extensively, a turn in the culture of presence at work is observed. After many months of working from home and still considering the potential waves of high infections with corona, the work culture had to be adjusted to the needs of the new normal. For example, regulations on teleworking foresee increased numbers of possible teleworking days compared to the situation before the pandemic. Moreover, the "stigmatization" of teleworkers has been overcome due to the corona teleworking regime exercise during the past years.

The management of this crisis, like the management of the economic and financial crisis, focused primarily on economic efficiency – a market-centered approach - and did not take into full consideration the essential and practical needs of individuals. Of course, there were measures targeting the income support of affected individuals which, however, could not

⁴ Orel M., Dvouletý O., Ratten V., *The Flexible Workplace: Coworking and Other Modern Workplace Transformations*, Springer Cham, 2021, <https://doi.org/10.1007/978-3-030-62167-4>.

reach everyone in need. This is why a more human-centered is needed in managing such crises as well as in the recovery process.

Against this background, the present paper investigates the possibilities of digitalization of work and opportunities for mobile/telework during the pandemic and their legal framework in two countries: Greece (part 3) and Germany (part 4). After mapping the legal rules that emerged through the pandemic in each country, the paper identifies the main changes in work patterns that were retained and those that were abolished in the aftermath of the health crisis. The comparison of the two approaches highlights the diverse challenges for labour protection, fundamental rights at work, new risk factors that jeopardize the well-being at work, such as the emergence of new psychosocial risks, and inequalities or opportunities emerging from the switch to remote work (part 5). This south-north discussion aims to inspire further dialogue at the EU level and contribute to the existing debates on the future of (digital) sustainable work. A Conclusion will close this essay (part 6).

3. The Greek regulatory teleworking regime before and after the corona pandemic.

Greece is a country that was hardly hit by the economic crisis of 2008 it is still in the process of recovery in several economic and social sectors. At the same time, digitalization, and interventions of new technologies at work were less evident because the legacies of the economic crisis dominated in the legal, policy, and academic discussions on fundamental rights at work. More urgent issues of labour and social protection had to be tackled then even though new forms of work due to digitalization were making their appearance. The focus of the discussions at the given time was primarily on other resources-related issues, i.e. those on austerity policies and cuts in public spending and their impact on fundamental rights at work.

Although it is argued that the economy has recovered after the successful exit from the financial assistance programs and the complete repayment of the debt to the IMF,⁵ the impact of the long-year crisis is still evident. In the aftermath of the crisis, the judicial contestation of austerity revealed the weaknesses of the adopted measures because high court decisions have restored pension and wage cuts adopted during the economic crisis⁶ and the government has paid back only partially - due to the fiscal impact of this measure - pension and wage cuts as a follow-up of the massive litigation. Despite the downgrading of social and labour rights, now - 10 years after – the courts reacted in an escalating manner to the massive litigation as a result of the social mobilization against austerity.⁷

⁵ See International Monetary Fund, *Greece: Staff Concluding Statement of the 2022 Article IV Consultation Mission*, 31 March 2022, available at: <https://www.imf.org/en/News/Articles/2022/03/31/greece-staff-concluding-statement-of-the-2022-article-iv-consultation-mission>, accessed 1 November 2022.

⁶ Decisions Council of State 1439-1443/2020.

⁷ Three periods to the Greek judiciary's response have been identified: i) the period of self-restrain (2010-2012), ii) the period of moderate contestation (2013-2014), and iii) the period of activism (2015-2018). See Kaidatzis A., *Socio-economic rights enforcement and resource allocation in times of austerity: The case of Greece*, in *Populist Constitutionalism Working Papers*, 2, 2020, available at <https://www.popcon.gr/post/socio-economic-rights-enforcement-and-resource-allocation-in-times-of-austerity-the-case-of-greece>, accessed 1 November 2022.

The corona health crisis brought into light the weaknesses of the Greek labour relations system regarding the digitalization of work. Although Greece went through an extraordinary situation during and in the aftermath of the economic crisis, no effective crisis management strategies and frameworks for future crises were developed. The corona pandemic, of course, has a global dimension and it is not a country-specific problem. Greece – like most of its counterparts in the European Union – followed a rather conservative statutory approach taking measures step by step depending on the ongoing developments of the pandemic. The Greek government made use of an extraordinary procedure of a fast-track legislative process enabling the executive power to legislate in cases of emergency without prior consultation with the parliament.⁸ The measures were adopted upon consultation with a team of experts.

One of the emergency measures for containing the spread of the virus included the mandatory use of telework or remote work in both the public and the private sectors. These measures aimed at limiting the personal contacts of the working people as much as possible and reducing the risk of exposure to and contagion with the virus. In the Act of Legislative Content from 11 March 2020 which adopted measures for containing the spread of the Coronavirus, the Greek legislator used the broader term remote or distance work – and not only telework. This temporary and extraordinary measure was part of the measures which were introduced at the outbreak of and during the pandemic and aimed at providing a certain level of flexibility to companies or enterprises whose activities were not suspended but affected by the pandemic, to continue their operation under different circumstances, i.e. through telework/remote work. This measure was initially introduced until 10 April 2020 and was prolonged several times through Ministerial Decisions. It allowed the employer to introduce *unilaterally* remote work. Employees who perform work under this arrangement were entitled to the corresponding salary. The legislator has also given the possibility to companies to combine the measure of remote work organization with other temporary and extraordinary measures, such as the imposition of suspension of contracts and operation with security staff or short-time work. These measures demonstrate how the State adopted a less human-centred approach, focusing primarily on the interests of business continuity and less on the protection of labour rights of the employees.

Remote work during the pandemic could be imposed unilaterally by the employer in the context of his or her managerial prerogative.⁹ A prior agreement between the employer and the employee was not necessary. As this was a temporary measure, the requirement of a prior agreement between employer and employee for the conversion of a regular employment contract to a remote work arrangement is restored in the aftermath of the emergency caused by the pandemic. As far as the rest of the legal rules about telework, these continued to apply in a similar way to this arrangement of temporary transition from regular on-site work to remote work without the prior existence of an agreement between the parties.

⁸ This procedure is provided for in Article 44 paragraph 1 of the Greek Constitution. The first three Acts of Legislative Content that have been adopted through this procedure, are now ratified by Law No 4682/2020 – Government Gazette 46/A/3 April 2020.

⁹ Mandatory telework was imposed for the prefecture of Attiki during the several waves of the corona pandemic (Article 235 of the Law 4727/2020).

The employer was also obligated to cover the costs of telecommunications and provide the necessary equipment for the performance of remote work as well as technical support.¹⁰ During the several waves of the pandemic, these measures were extended or repeated to various degrees depending on the development of the pandemic and the eventual pressure on the fragile Greek public health system.

Greece was unprepared for such a transition to telework or remote work. The regulatory framework that existed at the beginning of the pandemic was outdated and inappropriate for meeting the needs of the new reality and the exceptional circumstances. With the concept of telework having evolved from the category of home workers,¹¹ telework was rather rarely introduced and used in the Greek labour market, including the employees in the public sector. Then, unexpectedly the urgent measures encouraged many companies to change unilaterally the working pattern of their employees, partially or fully, to remote working, usually at the employee's home. During the pandemic, telework or remote work was used extensively in Greece. Before the COVID-19 pandemic, the rate of telework in Greece was very low while after the outbreak of the coronavirus, this rate reached "unusual" levels for the Greek labour market situation. Especially, during the second wave of infections, remote work became mandatory for 50% and in some cases for 60% of the workforce in a company if the nature of the work permitted it.

The compulsory remote work framework as an urgent measure to contain the spread of the coronavirus became even stricter with the introduction of a requirement for prior submission of a report regarding the "necessary personnel" in each company at the information system ERGANI of the Ministry of Labour and Social Affairs. This measure was enforced by the Labour Inspection Authority (S.E.P.E.) which is the competent authority to conduct controls and impose fines in case of non-compliance with labour law legislation.

Nevertheless, no comprehensive regulatory framework for such a transition existed which could facilitate and support effectively the needs of the new "normal" working situation. Several crucial issues should be stressed at this point: lack of equipment (office space, technical equipment, internet connection) necessary for the performance of remote work, limited or no training to meet the requirements of this new form of work organization from distance, working time arrangements, privacy and health and safety at work, the right to disconnect and work-life balance.

The urgent measures dealing with the corona health crisis were adopted based on an extraordinary procedure of a fast-track legislative process enabling the executive power to legislate in cases of emergency without prior consultation with the parliament assisted by a team of (medical) experts. Few of the provisions in these legislative acts regulate minimally the performance of remote work or telework. Under these circumstances, neither the Greek

¹⁰ More information on the practical implementation of this measure, see Galanaki E., *Pandemic and digital adaptation to human resources management: telework and distance education*, in *Report of the Human Resource Management Laboratory*, Athens, 2021.

¹¹ Home workers are those persons performing work in their own home and not necessarily by using new technologies.

state nor the companies were prepared for such a transition to telework on such a large scale.¹²

After many months of implementing the legal framework dated from 2010 on telework,¹³ an attempt to fill the regulatory gaps took place with the modernization of the labour law in 2021.¹⁴ A provision of this law replaced the previous version of the respective provision of the Law from 2010,¹⁵ introducing some changes in the regulation of telework. In the chapter on the new forms of employment of the law, the definition of telework is added:

“Telework is the provision of the employee's dependent work at a distance and with the use of technology, within the framework of a full-time, part-time, intermittent, or another form of an employment relationship, which could also be provided at the employer's premises.”

This definition is like the definition used in the European Framework Agreement on telework. It should be noted that it is not clear by this definition whether this law covers only home-based telework or mobile work in general, but it is certain from the wording in paragraph 6 last sentence of Article 67 of Law 4808/2021¹⁶ that alternating telework, i.e. combination of telework and work at the premises of the employer/desk sharing, is covered. The definition mentions the performance of work “with the use of technology”, implying new technologies and more specifically digital means.

Moreover, this law regulates telework only within the framework of dependent work and it does not cover work provided under a service contract. Nevertheless, it covers multiple forms of dependent work, such as full-time, part-time work, or other forms of employment relationships. If the employee wishes to raise claims based on Article 67 of Law 4808/2021, then he or she must allege the dependent character of the employment relationship based on the traditional criteria of subordination or personal independence used by the courts in Greece. However, given the increased level of *autonomy* of teleworkers regarding working place and time, the qualification of the relationship as an employment one may not be always easy and certain.

The character of telework in Greece is voluntary for both the employer and the employee under regular circumstances and it is introduced by consensus. The telework agreement is an integral part of the employment relationship and does not constitute a separate employment

¹² For an interesting example of how the obligation of the employer to cover the costs for telework, was applied in practice, see Galanaki E., nt. (9).

¹³ Law 3846/2010.

¹⁴ Law 4808/2021 For the Protection of Labour Establishment of an Independent Authority "Labour Inspectorate" Ratification of ILO Convention 190 on the Elimination of Violence and Harassment in the World of Work Ratification of ILO Convention 187 on the Framework for the Promotion of Safety and Health at Work Incorporation of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance, other provisions of the Ministry of Labour and Social Affairs and other urgent regulations.

¹⁵ More specifically Article 5 of Law 3846/2010.

¹⁶ “Teleworking may be provided on a full-time, part-time or rotational basis, exclusively or in combination with employment at the employer's premises.”

contract.¹⁷ In cases of public health protection situations, telework may be introduced unilaterally by the employer's decision or upon the employee's application.¹⁸ Other cases that the employee can claim and has a right to telework are when he/she suffers from a health condition,¹⁹ is a parent²⁰ or caregiver²¹ or as a protective measure in cases of harassment.²² An additional legal basis for the employee to claim telework is found in Article 5 of Law 4443/2016 which transposed Article 5 of Directive 2000/78/EC regarding the reasonable adjustments for people with a disability or chronic condition in conjunction with Article 27 paragraph 1 of the UNCRPD. In cases of short-term hindrances (e.g. strikes in public transportation or bad weather conditions), it is not clear whether the provisions of this law apply.

Within the framework of the general obligation of the employer to inform the employee of the substantial working conditions, the employer has the additional obligation to inform the employee by any appropriate means (including an email) of the special (individual or general) conditions which are enumerated in the legal provision due to teleworking within eight days from the commencement of telework.²³ The agreement on teleworking between the employer and the employee shall not be necessarily in writing.

The principle of equal treatment between teleworkers and workers performing work at the premises of the employer is provided for explicitly in the Law with the reservation that some derogation may be permitted if differentiations are due to the nature of telework.²⁴

Other important provisions include the explicit right to disconnect,²⁵ the right to privacy and protection of personal data,²⁶ health and safety, and occupational accidents, and provision of equipment, maintenance thereof, and coverage of teleworking costs by the employer.²⁷

An additional law for the working arrangements in the public sector also provided for the performance of work from a distance under normal and extraordinary circumstances.²⁸ This law sets out a very detailed and extended regulatory framework for telework in the public sector, specifying the notion and basic principles of telework, determining the working time,

¹⁷ Article 67 paragraph 2 of Law 4808/2021.

¹⁸ Article 67 paragraph 3(a) of Law 4808/2021.

¹⁹ Article 67 paragraph 3(b) of Law 4808/2021.

²⁰ Article 31 of Law 4808/2021.

²¹ Article 26(6) in combination with Article 31 of Law 4808/2021.

²² Article 19 paragraph 3(d) of Law 4808/2021.

²³ Article 67 paragraph 5 of Law 4808/2021.

²⁴ Article 67 paragraph 7 of Law 4808/2021.

²⁵ Article 67 paragraph 10 of Law 4808/2021: "A teleworker has the right to disconnect, which consists of the right to refrain completely from performing his/her work and, in particular, not to communicate digitally and not to respond to telephone calls, e-mails or any form of communication outside working hours and during his/her statutory leave. Any discrimination against a teleworker for having exercised the right to disconnect shall be prohibited. The technical and organizational means required to ensure that the teleworker is disconnected from the digital communication and work tools are mandatory terms of the telework contract and are agreed between the employer and the representatives of the employees in the undertaking or establishment. In the absence of agreement, the means referred to in the previous subparagraph shall be determined by the employer and communicated by the employer to all employees."

²⁶ Article 67 paragraph 8 of Law 4808/2021.

²⁷ Article 67 paragraph 5 of Law 4808/2021.

²⁸ Law 4807/2021 on the institutional framework for teleworking, provisions on human resources in the public sector and other urgent regulations.

application procedure and performance, commencing and ending of the arrangement, rights, and obligations, including the right to disconnect. Differentiation in the framework is made for telework under normal circumstances, which is optional, and for telework in case of an extraordinary situation or emergency, like the corona pandemic.

4. The German legislative initiatives on telework related to the corona pandemic.

In Germany, the discussion on digital transformation and the future of work has been ongoing for a longer time compared to the respective one in Greece. There is a broad consensus that digitalization is changing the workplace, but its concrete impact is still difficult to predict. There are numerous initiatives at the government, social partner level, and academia analyzing this impact and exploring new paths given the new working realities.²⁹ The speed of changes is not always followed by immediate legislative initiatives.

In 1983, the German Metal Workers' Trade Union (IG Metall) was initially opposed to the establishment of telework and mobile work as a form of work organization.³⁰ Interestingly, among the reasons behind this opposition were the risk of workers' social isolation and limitations to professional development opportunities, the danger of self-exploitation and blurring of the boundaries between work and family sphere, and being women with family obligations at greater risk of overburdening. These considerations seem to still reflect to a certain extent the discussions and fears of today.

Nowadays in general, telework is accepted and many companies offer their employees the opportunity to work from home also before the corona pandemic. Still, the predominant working culture in Germany is one of presence at the workplace. Telework is usually used for managerial staff and those in the services sector.³¹ Nevertheless, the culture of presence at work seems to be challenged and subject to change given the experiences from the COVID-19 pandemic on the work organization as it will be examined further.

A legal definition of telework exists in Germany since 2016. In Section 2 paragraph 7 of the Ordinance on Workplaces,³² the legislator lays down a rather narrow definition of telework within the context of the protection regulations for workplace equipment in teleworking workplaces. According to this provision,

“teleworking workplaces are monitor-based workplaces permanently installed by the employer in the employees' private/personal space, for which the employer has specified

²⁹ On the challenges and discussions regarding digital transformation and fundamental rights in labour law, see Bakirtzi E., *Technological changes and labour relations in Germany*, in Monereo Pérez J.L., Vila Tierno F., Esposito M. and Perán Quesada S. (eds), *Innovación tecnológica, cambio social y sistema de relaciones laborales: Nuevos paradigmas para comprender el derecho del trabajo del siglo XXI*, Editorial Comares, 2021, 1122 ff.

³⁰ Weiss M., Schmidt M., Hlava D., *Labour law and industrial relations in Germany*, Wolters Kluwer Law International, 2020, 68 ff.

³¹ Some indicative statistics on the use of telework in 2019 are mentioned in Bakirtzi E., nt. (28), 1136.

³² Workplace Ordinance, *Verordnung über Arbeitsstätten (Arbeitsstättenverordnung – ArbStättV)* from 12 August 2004 (BGBl. I S. 2179) which has been last modified by Article 4 of the Law from 22 December 2020 (BGBl. I S. 3334).

the weekly working time agreed with the employees and the duration of the installation. A teleworking workplace is only set up by the employer when the employer and the employee have stipulated the conditions for teleworking in an employment contract or within the framework of an agreement and the required equipment of the workplace with furniture, work equipment including communication facilities has been provided and installed by the employer or a person commissioned by him/her in the employees' private/personal space".

This definition has been characterized as too narrow because it may not cover cases where the employee uses his or her laptop, personal computer, or desk for the performance of work.³³ For these cases, the above provision does not apply. As a result, many existing home office workplaces are still not subject to the Workplace Ordinance. In practice, this form of telework has been termed a *home office*.³⁴

The integration in the employer's establishment does not always have to occur in local respect, but an operational or functional integration is sufficient. Therefore, teleworkers are employees in the sense of the Works Constitutions Act³⁵ because Section 5 of this Act has been adapted to the new activities which take place outside the fixed workplace structures with the use of information and communication technologies to include teleworkers in the collective labour law protection of this Act, that is within the context of works council representation at the workplace.³⁶ Teleworkers are entitled to vote for the works council³⁷ and to be elected thereto,³⁸ have the right to consultation with the works council,³⁹ participate in works council meetings⁴⁰ and make complaints.⁴¹ They are also included in the assessment of the size of the company so that this number can be eligible for the establishment of works councils.⁴² This is, however, just a clarification which in combination with the explanatory statement to this law, can lead to the suggestion that both home office activity of employees in the form of rotating telework and using pure telework - referred to in the legislative materials as "home-based telework" - are covered.⁴³ The main identified patterns of telework in Germany are rotating/alternating telework (*alternierende Telearbeit*), mobile work (*mobile Telearbeit* or Mobile Office), and pure telework (*ausschliessliche Telearbeit* or Home Office).

³³ Schucht C., *Compliance beim Einrichten und Betreiben von Arbeitsstätten – Das neue Arbeitsstättenrecht im Überblick*, in *Corporate Compliance Zeitschrift*, 2017, 123; Wiebauer B., *Die Novelle der Arbeitsstättenverordnung 2016*, in *Neue Zeitschrift für Arbeitsrecht*, 2017, 222.

³⁴ Däubler W., *Digitalisierung und Arbeitsrecht, Künstliche Intelligenz – Homeoffice – Arbeit 4.0*, Bund Verlag, Frankfurt, 2021, 409-10.

³⁵ Section 5 paragraph 1 thereof.

³⁶ The German representation system is dualistic in the sense that workers' interests are represented by trade unions and works councils. See Bakirtzi E., *The role of the German co-determination (Mitbestimmung) in balancing interests at the workplace*, in Perulli A. (ed.), *L'idea di diritto del lavoro oggi, in ricordo di Giorgio Ghezzi*, Wolters Kluwer, CEDAM, 2016, 525 ff.

³⁷ Section 7 of the Works Constitution Act.

³⁸ Section 8 of the Works Constitution Act.

³⁹ Section 39 of the Works Constitution Act.

⁴⁰ Sections 42 ff of the Works Constitution Act.

⁴¹ Section 84 of the Works Constitution Act.

⁴² Section 1(1) of the Works Constitution Act.

⁴³ Müller S., *Homeoffice in der arbeitsrechtlichen Praxis*, 2nd edition, 2020, para 532.

Telework can also be encountered in relationships other than the employment one, such as on a self-employment basis as a contract of service / for work which is similar to the situation in Greece, or the special case of homeworking. The classification of teleworkers as employees occurs on the basic criteria of Section 611a paragraph 1 of the German Civil Code.⁴⁴ If the teleworker qualifies as an employee, the individual and collective labour law provisions apply. The implementation of telework is not regulated in detail, but usually, an agreement between the employer and the employee makes the arrangements of telework or mobile work concrete, including the matters of establishing the workplace, working time, data protection and secrecy, right to access and control and termination of home office arrangements.

Under normal conditions, a (unilateral) transfer to the home office cannot occur either in the form of telework or mobile work because this would be contrary to the reasonably exercised discretion of the employer regarding the determination of working conditions.⁴⁵ It is always necessary to have the consent of the employee for the transfer and vice versa. Changing the place of work by introducing telework or mobile work, modifies the basis of the employment relationship, especially when the employee performs work with his or her work equipment (space & furniture). A notice of dismissal pending a change of contract (*Änderungskündigung*)⁴⁶ is not appropriate for introducing telework because the employer cannot force the employee to set up a home office in his or her private home. This would constitute an unjustified encroachment on the right to inviolability of the home as protected in Article 13 of the German Basic Law having an indirect third-party effect (*Drittirkung*) in labour law.⁴⁷

At the beginning of the corona pandemic, there were only suggestions and appeals to employers and employees to make use of telework where and if possible, to limit contacts and hinder the spreading of the virus (*light* right to a home office). However, there was a health and safety public law provision applying to all employees in the private and public sectors, including employee-like persons, for a temporary obligation to use the home office to contain the spread of the virus.⁴⁸ The Federal Ministry of Labour and Social Affairs was authorized to release special legal ordinances for a limited period without the consent of the

⁴⁴ Waas B., *The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same?*, in *Italian Labour Law e-Journal*, 12, 1, 2019, <https://doi.org/10.6092/issn.1561-8048/9695>, accessed 1 November 2022.

⁴⁵ For an analysis of the legal reasoning regarding the limitations of the employer's right to direct, see Schulze M.O. and Simon A., *Anspruch auf Homeoffice*, in *ArbRAktuell*, 2021, 119.

⁴⁶ According to Section 2 of the Dismissal Protection Act (*Kündigungsschutzgesetz – KSchG*), if the employer terminates the employment relationship and, in connection with the termination, offers the employee the continuation of the employment relationship under modified working conditions, the employee may accept this offer subject to the *proviso* that the change in working conditions is not socially unjustified. The employee must declare this reservation to the employer within the notice period, but at the latest within three weeks of receipt of the notice of termination.

⁴⁷ Müller S., nt. (43), para 118.

⁴⁸ Section 28b paragraph 7 of the Infectious Diseases Protection Act (*Infektionsschutzgesetz*): ‘in the case of office work or comparable activities, the employer shall offer the employees the opportunity to carry out these activities in their homes if there are no compelling operational reasons to the contrary. The employees shall accept this offer unless there are compelling reasons for them not to do so. The competent authorities for the enforcement of the provisions of the first and second sentence shall be determined by the Federal States following Section 54 sentence 1 (of the present Act).’

Bundesrat and this regulation has been in force because of the exceptional epidemiological situation. As a matter of fact, since November 2020 employers in Germany have been obliged to offer employees the opportunity to work from home - unless there are operational reasons for not doing so.

Until March 2022 this *light* right to the home office was in force which, however, was not legally enforceable.⁴⁹ It applied to all employees, including employee-like persons (*arbeitnehmerähnliche Personen*), civil servants, judges, and soldiers, and all employers, both in the private and public sectors.⁵⁰ As this was a public law provision that established the obligation for telework given the epidemiological situation, an amendment of the employment contract was not necessary. As a self-executing provision from a civil law perspective, it excluded the application of contrary individual and collective labour law provisions.⁵¹ In addition, this norm excluded mobile work, as its wording refers to the employee's home and not another place. On the one hand, the (temporary) obligation to work from home interferes with the employee's basic right of inviolability of his or her home under Article 13 of the German Basic Law (Constitution). On the other hand, this measure is justified for combating an epidemic threat. The obligation to work from home cannot apply if there are compelling company reasons to work at the company's premises, for example, when business operations would be significantly restricted or could not be maintained due to the introduction of telework.⁵² On the employee's part, compelling reasons not to accept the teleworking offer are spatial constraints, disturbances by third parties during working hours, or inadequate technical equipment in case the employer does not provide equipment.⁵³ The notion of compelling reasons is open to interpretation and grants flexibility to the employer. In this case, economic efficiency prevails, rather than human needs.

Within this context, there is no room for co-determination by the works council under Section 87 paragraph 1 number 7 of the Works Constitution Act (arrangements for the prevention of accidents at work and occupational diseases and the protection of health based on legislation or safety regulations). As the employee is obliged by law to perform work from home, the right to refuse consent of the works council⁵⁴ cannot be relevant in this situation because the element of transfer (i.e. to home as a place of work) is missing. Only a works council's right to information about the employee's place of work comes into consideration⁵⁵ and the works council can control the compliance with the rules and, if necessary, intervene for their implementation.⁵⁶ The employees have the right to make complaints to the works council regarding the implementation of this provision.⁵⁷

⁴⁹ Section 2(4) of the *SARS-CoV-2-Arbeitsschutzverordnung (Corona-ArbSchV)*. See further Schulze M.O. and Simon A., nt. (45), 122.

⁵⁰ Sagan A. and Witschen S., *Homeoffice im Infektionsschutzgesetz: Der neue §28 b VII IfSG*, in *Neue Zeitschrift für Arbeitsrecht*, 2021, 594.

⁵¹ *Ibidem*, 594.

⁵² BT-Drs. 119/28732, 20.

⁵³ BT-Drs. 119/28732, 21.

⁵⁴ Under Section 99(1) of the Works Constitution Act.

⁵⁵ According to Section 80(2) of the Works Constitution Act.

⁵⁶ Sections 80(1) and 89(1) of the Works Constitution Act.

⁵⁷ Sections 84 ff of the Works Constitution Act.

If telework or mobile work is to be provided more than occasionally and not within the context of the corona pandemic, then the issue of whether the employee has a right to the home office arises. In principle, there is no statutory right to telework in Germany⁵⁸ as there is also no obligation of the employee to accept to work in another place than the company's premises. If the place of work is not determined in the employment contract, a unilateral order by the employer is ineffective as it does not comply with the requirement of Section 106 of the Trade, Commerce, and Industry Regulation Act (*Gewerbeordnung – GewO*) regarding the transfer of the employee to another place of work.

Home office and mobile work are possible in most cases only with the employer's or employee's *consent*. The employer and the employee may agree at any time mutually on the place of work. In doing so, they can also regulate fully or partially mobile work. Certain conditions need to be regulated as well, such as the time during which telework or mobile work is performed or under which circumstances the employer can require that the employee works exceptionally from the company premises during a regular home office day because there is an important meeting with an external business partner.⁵⁹ Furthermore, a right to establish or maintain a home office can be derived -in limited individual cases- from the duty of consideration (*Rücksichtnahmepflicht*) enshrined in Section 241 paragraph 2 of the German Civil Code. This provision serves to protect and promote the contractual objective and it can result in the introduction of measures to safeguard performance. The employer's obligation under Section 241 paragraph 2 of the German Civil Code consists in the creation of the conditions for the performance of the contract, prevention of obstacles to performance from arising, or elimination thereof, in cooperation with the employee.⁶⁰ The entitlement to mobile work can also arise from the legal institution of the company practice. However, the requirements regarding the conditions and time factors are strict. The occurrence of a company practice requires uniform and repeated behavior of the employer towards the employee from which the employee could conclude that the employer intends to commit to the performance also for the future.⁶¹ In addition, according to the principle of equal treatment under labor law, if the employer offers even to only a small number of employees the possibility of mobile work, it is likely that other employees will also have a right to the home office. In such a case, an employee can only be denied mobile work if there are objective reasons for unequal treatment.⁶²

Moreover, the Act on Equality between Women and Men in the Federal Administration and Federal Enterprises and Courts (Federal Act on Gender Equality)⁶³ lays down the possibility to offer telework and mobile work to employees who have family or care obligations⁶⁴ and therefrom can result in a claim to an error-free discretionary decision

⁵⁸ Schulze M.O. and Simon A., nt. (45), 121.

⁵⁹ See Däubler W., nt. (34), 412.

⁶⁰ Müller S., nt. (43), para 95.

⁶¹ Müller S., nt. (43), para 113.

⁶² For an analysis of the equal treatment principle in home office, see Müller S., nt. (43), paras 107-112.

⁶³ *Gesetz für die Gleichstellung von Frauen und Männern in der Bundesverwaltung und in den Unternehmen und Gerichten des Bundes (Bundesgleichstellungsgesetz - BGleG)* from 24 April 2015 (BGBl. I S. 642, 643), which has been last modified by Article 3 of the Act from 23 December 2016 (BGBl. I S. 3191).

⁶⁴ Section 16(1) second paragraph of the Federal Act on Gender Equality.

regarding the introduction of telework.⁶⁵ For persons with severe disabilities, a right to a home office can result from the provisions of the Ninth Book of the Social Code (SGB IX) according to which the employer is obliged to provide employment that is suitable for disability.⁶⁶ Finally, in civil service law, the employer can withdraw the arrangement of telework or mobile work based on his or her discretion.⁶⁷

A right to work from home – an entitlement that could be enforceable - has been discussed several times before and during the COVID-19 pandemic, but no regulation is adopted so far. In October 2020 there was draft legislation where the right to 24 days of home office activity per year was to be introduced. Due to the strong critique by social partners and employers, a new referee draft of the Mobile Work Act in November 2020 was presented. In this draft, instead of a legal right to mobile work, the legislator proposed the amendment of the provisions of the Trade, Commerce, and Industry Regulation Act (*Gewerbeordnung – GewO*). More specifically, in Sections 111 et seq of this Act, mobile work would have been regulated on an individual negotiation basis between employers and employees.⁶⁸

According to previous case law, the statutory occupational insurance did not cover cases when accidents happen at home while teleworking because these cases were characterized as own economic activity.⁶⁹ The Seventh Book of the Social Code (SGB VII) regarding statutory accident insurance has been amended in May 2021 to cover all work-related activities during mobile work in this insurance. In Section 8 thereof it is provided that “if the insured activity is carried out in the insured person's household or at another location, insurance coverage is provided to the same extent as if the activity were carried out at the place of business” and “insured activities also include traveling the direct route to and from the place where children of insured persons under point 2(a) are entrusted to the care of others, if the insured activity is carried out at the place of the joint household”. Such an amendment came to cover gaps of protection that emerged from the extended use of the home office during the pandemic.⁷⁰

The dualistic German workers' representation system, at the trade union and works council level, has faced a few challenges due to virtual collaboration and digitalization of work. Digital tools and technological devices at the workplace by which the behavior and performance of employees could be monitored, could only be introduced in close collaboration with the works council and its consensus is necessary on how these will be used.⁷¹ In June 2021 the Act on the modernization of works councils added co-determination right for the arrangement of mobile work performed using information and communication

⁶⁵ See Decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) from 31 January 2008, Aktenzeichen 2 C 31/06, BVerwGE 130, 201.

⁶⁶ Section 164(4) SGB IX.

⁶⁷ Däubler W., nt. (34), 413.

⁶⁸ *Referentenentwurf des Bundesministeriums für Arbeit und Soziales, Entwurf eines Gesetzes zur mobilen Arbeit (Mobile Arbeit-Gesetz – MAG)*, 14 January 2021.

⁶⁹ *Ibidem*, 418.

⁷⁰ See the decision of the Federal Social Court (*Bundessozialgericht*) from 02.12.2021, Az.: B 2 U 4/21 R which recognised an accident during home office as an occupational one and paved the way to the amendment of the relevant legal provisions.

⁷¹ Section 87 paragraph 1 number 6 of the Works Constitution Act.

technologies.⁷² The Works Constitution Act (*BetrVG*) has been amended and a new right of co-determination in the design of mobile work was introduced. This provision aimed at the promotion of mobile work and ensuring uniform and binding framework conditions for employees.⁷³ A right to a home office can be stipulated in a works agreement where numerous issues (including working time, health, and safety) can be dealt with and mobile work or home office can be regulated coherently.⁷⁴

In addition, the right to disconnect has not been introduced in a legal act, but it has been regulated in certain cases at the company level within the framework of work agreements. Moreover, whether there is an explicit right to training and life-long learning in the form of granting free time and covering the costs, especially considering the new digital skills that may be necessary for telework or remote work, is debatable. However, important steps are taken regarding the subsidization of such training by the state.⁷⁵

Finally, collective agreements on the home office can regulate the establishment of/and employment conditions at the home office. They usually nominate the overall conditions and modes of implementation of the home office, including the requirements for working from home, the necessary equipment, working time, end of a home office, data protection and secrecy, liability, rights of access and control, and bearing the costs.⁷⁶ In 2018, the IG Metall Baden Württemberg concluded an overarching sectoral collective agreement on mobile work (excluding telework).⁷⁷ The parties can agree on mobile working through a voluntary company agreement (Section 3.1 of the collective agreement). In addition, the employees have the right of not to be available outside the agreed working hours (Section 3.4 of the collective agreement). The shape and structure of telework and mobile work are argued to be essentially a task for the regulation of a works agreement between the employer and the works council due to the proximity to the needs of the individual companies.⁷⁸ There are several works agreements, especially in large companies, regulating telework and mobile work. However, only very few works agreements are available to the public.⁷⁹

⁷² Section 87 paragraph 1 number 14 of the Works Constitutions Act as inserted by the Act on the modernization of works councils (*Betriebsrätemodernisierungsgesetz*).

⁷³ In view of the new Section 87(1) No. 14 of the Works Constitution Act in accordance with Act *Gesetz zur Förderung der Betriebsratswahlen und der Betriebsratsarbeit in einer digitalen Arbeitswelt* (*Betriebsrätemodernisierungsgesetz*) from 28 May 2021.

⁷⁴ More elements of the Works councils' involvement in the implementation of telework are examined in Bakirtzi E., nt. (29), 1146-7.

⁷⁵ For example, the Work For Tomorrow Act, *Gesetz zur Förderung der beruflichen Weiterbildung im Strukturwandel und zur Weiterentwicklung der Ausbildungsförderung* (*Arbeit-von-morgen-Gesetz AvmG*).

⁷⁶ Müller S., nt. (43), para 83.

⁷⁷ *Tarifvertrag zum Mobilien Arbeiten* 2018.

⁷⁸ Weiss M., Schmidt M. and Hlava D., nt. (30), 71.

⁷⁹ See Hans Böckler Stiftung, *Arbeiten 4.0 – Diskurs und Praxis in Betriebsvereinbarungen*, 2015 and 2018.

5. Comparative overview of the teleworking regimes' transition before and after COVID-19.

Some statistical information illustrates how extensive telework was used during the pandemic by comparing them with the previous situation. In the period before the pandemic, remote work or telework was not the rule in the two countries under investigation. In 2019 the employed persons working from home as a percentage of the total employment was 1,9% in Greece, 5,2% in Germany and 5,4% in the EU. In 2021 the respective percentage has risen in Greece to 6,7% (more than tripled in comparison to the period before the outbreak of covid), in Germany to 17% (similarly more than tripled compared to the period before the pandemic) and in EU 27 to 13,4% (less than triple). These increases indicate a turn in the culture of presence at work. The data have been retrieved from Eurostat – European Union Labour Force Survey. Self-employed persons are not counted as employed persons in this survey. The percentage of self-employed is much higher in the teleworking/work-from-home regime and the change due to the pandemic was not that high. Moreover, official data for the public sector in particular are not easy to retrieve and compare.

As for the management of the health crisis, Greece and Germany followed a rather conservative approach. The extraordinary measures were adopted ad hoc and on a case-by-case basis depending on the ongoing development of the pandemic. This similar approach was also based on similar emergency legislative procedures, with the adoption of ordinances (in Germany) and acts of legislative content (in Greece) without the involvement of the *Bundesrat* and parliament respectively. The adoption of the measures was influenced by groups of experts advising the Greek government with no involvement of the social partners in this process.

Beyond the management of the health crisis, Greece made a step further and adopted a reform of the legislative framework on the teleworking regime in the private and public sectors in 2021. This was part of broader changes brought to the labour law legal framework in Greece.⁸⁰ Germany introduced certain changes in the Works Constitutions Act while draft legislative initiatives, such as the Mobile Work Act or a right to the home office, were not adopted despite the extensive and still ongoing discussion on these issues.

The personal scope of labour protection for teleworkers in both countries is similar. The protective provisions apply to employees, both in the private and public sectors. Dependent employment is, thus, a requirement for the application of the relevant individual and collective labour law provisions. Nevertheless, during the pandemic and based on the extraordinary legislation/ordinances adopted because of the exceptional epidemiological situation, in Germany employee-like persons were also included in the temporary obligation to use the home office.

In addition, the definition of telework as an extraordinary measure in view of the waves of the pandemic was broadly defined in Greece, as it encompassed remote or distance work in general. On the contrary, the German legislator narrowed the application of the extraordinary measures to the home office, meaning only working from home. In the

⁸⁰ Law 4808/2021.

aftermath of the pandemic and upon restoration of the teleworking regime in both countries, telework includes also remote work with all variations of the teleworking patterns that have been identified so far (rotating telework, mobile work at home or elsewhere, pure telework). In the Greek new legal framework adopted in 2021, telework cannot include homeworking with conventional means, such as the production of furniture using castors or the production of clothing using a sewing machine. It is necessary that work is performed with ICT tools.

Greece has introduced a right to disconnect for both employees in the private and the public sector. The new laws adopted in 2021 foresee an explicit right to disconnect which can be regarded as a positive development. Nevertheless, the implementation and enforcement of this right is depending on the interpretation of the several aspects of this provision the practical applicability of which is broad and ambiguous.⁸¹ In Germany, only discussions took place on the possibility to legislate a right to disconnect. Practices at the company level demonstrate some examples of how such a right is enforced, but this is only a limited field.

No provisions exist for training, upskilling or life-long learning for teleworkers in both countries. That was also a great weakness when telework and remote work were so abruptly introduced during the outbreak of the pandemic. The employees were requested to adapt to the new reality of the virtual workplace overnight and without the proper means to cope with such a change effectively at such short notice. Moreover, some costs related to teleworking to be covered by the employer are recognized in the Greek legal framework the monetary value of which amounts to 28 Euros per month at the time of the writing of the present paper.

6. Concluding remarks.

A systemization of the teleworking or remote working regime regulations is missing in both countries. Greece has replaced a legal provision from 2010 with a more advanced one with the new law in 2021 regarding employees in the private sector. As for the public sector, a separate law was adopted with detailed regulations on all aspects of telework. The fragmentation of applicable regulations and reliance on the individual or collective agreements between the employer and the employee in Germany may not be enough to establish a sufficiently protective, predictable and certain legal framework for employees safeguarding the full spectrum of their labour and social fundamental rights.

Regulation of working patterns does not always require state intervention in Germany as there are many possibilities at the company level and/or with the participation of social partners to introduce and regulate telework or remote work. However, as highlighted throughout the paper, legislative initiatives to regulate telework or mobile work consistently and replace the existing fragmented regulations for more legal certainty could not be adopted. Despite several proposals and numerous discussions, resistance from the social partners and

⁸¹ Goulas D., *Telework after Law 4808/2021*, in *Greek Labour Law Review (Επιθεώρησης Εργατικού Δικαίου)*, 81, 6, 2022, 652 ff.

the employers is faced. The national elections in September 2021 and now the priorities due to the geopolitical tensions in Ukraine seem to have weakened the discussions so far. The experiences from teleworking during the COVID-19 pandemic should be taken into serious consideration when adopting a new legal framework for telework. In practice, the strong role that works councils play in Germany and the regulation of mobile work or telework at the company level seem to have filled the regulatory gap so far. Nevertheless, the developments because of the digitalization of work may be swift and the legislator might need to be better prepared for the future, not only for platform work but also for the more “usual” form of digital work, telework, or remote work.

In Greece, there is a recent legal framework regulating different aspects of telework, but this framework may prove less efficient in practice. Although it can guide some aspects of remote or mobile work, it cannot comprise all possible cases and, thus, leave unprotected certain groups of teleworkers or remote workers. These regulations can partially address the current challenges. There are no provisions for training teleworkers who have to acquire specialized digital skills to fulfil their work obligations. In addition, the Greek labour market comprises predominately small and medium-sized companies which cannot introduce and maintain a teleworking regime compared to large enterprises which have the resources and knowledge, therefore. The Greek legislator would need to consider this factor and introduce measures that could facilitate the transition to the telework regime for small companies by providing incentives. Moreover, the discussions in Greece on artificial intelligence in peoples’ analytics, modern surveillance mechanisms, digital tools, or the use of workplace nudges are in the initial phase. In conclusion, a more human-centered approach as proposed by the social partners could promote less economic inequalities and uncertainties given the rash developments of digitalization at work. For this reason, their involvement in the complete legislative procedure should be stronger.

The golden ratio may be found somewhere in the middle. State intervention to protect the rights of employees is not a panacea as the parties involved may find ways to circumvent stringent regulations. On the other hand, it should not be left exclusively to one or the other party to determine the working conditions and rights, and obligations. A human-centered, as opposed to a resources-centered, approach, and the balancing of interests in the context of digital sustainable work with the active involvement of social partners, maybe challenge the experiences of these two countries as complementary to one another and serve as the basis of further discussions and considerations.

COVID-19 may not be the only reason why restrictions will be imposed on the free movement of persons in the future. Climate change has also shown how extreme phenomena or natural disasters can have a potential impact on living and working conditions. The free movement can be restricted or hindered due to extreme weather phenomena or on other occasions and remote work or telework may be a one-way solution to ensure continuity and normality under extraordinary circumstances. How will the teleworking regime be further impacted in the future, is a statutory and collective challenge anticipated. How ready the current framework is for similar to the corona pandemic emergency situations, is still to be tested. The experimentation with telework and remote work during the health crisis brought experiences that could be helpful in the future. Employers and employees were obliged to a

fast transition to hybrid and remote work without the appropriate preparation for this. Now that the business model of telework has been tested and the lessons learned are available, the institution of telework should be framed in a manner that is closer to human needs, rather than resources.

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