

OPEN ACCESS

ISSN 2280-4056

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 10, No. 2/2021



**ADAPT**  
www.adapt.it  
**UNIVERSITY PRESS**

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**@ 2021 ADAPT University Press**

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Online Publication of the ADAPT Series  
Registration No. 1609, 11 November 2001, Court of Modena  
*www.adaptbulletin.eu*

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# Telework in Belgium: a Patchwork of Legal Regimes

Stan Bruurs, Sara Huybrechts\*

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## Abstract

*The regulation of remote work in Belgium entails four different arrangements. The regime on homework in the Employment Contract Act is distinguished from the one for structural teleworkers in CLA no. 85 by the use of information and communication technologies. In order to create a framework for non-regular telework, the Workable and Agile Work Act provided in 2017 specific provisions for occasional telework. The COVID-19 pandemic led to the revival of old discussions on the distinction between the different regimes and the various rights associated with them. Moreover, a new CLA no. 149 regarding telework due to the pandemic, added another unclear regime for telework. This contribution provides a critical overview of the cluttered Belgian legal framework for remote work by examining the specific provisions and differences regarding the principle of non-discrimination, the work accident, the well-being, the work-life balance, the working time, the employer's authority and the costs.*

*Keywords:* Telework; Homework; COVID-19 telework; Belgium; Structural telework; Occasional telework; well-being; work-life balance, working time; authority; costs

## 1. Introduction

The regulation of telework in Belgium has followed a long trajectory, resulting in four teleworking arrangements. In the 19<sup>th</sup> century, homework was already popular in Belgium and in 1986 involved 15% of the active

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working population operating away from the company's office.<sup>1</sup> The fourth industrial revolution ushered in the digital era, enabling workers to work from home by means of ICT.<sup>2</sup> Belgium was no exception: smart devices and easy access to Internet facilitated telework. The physical presence of workers at the employer's premises is no longer necessary due to a number of innovations. New technologies enable employees to connect with the workplace, allowing them to work anytime, anywhere. Both employers and employees strive for more flexibility and autonomy in work organisation.<sup>3</sup> Furthermore, telework is claimed to be part of the solution for the numerous traffic jams in Belgium and to provide a better work-life balance.<sup>4</sup>

A maze of legal approaches and regulations characterises telework in Belgium. The first provision regulating homework in this country was the Law on Domestic Labour of 6 December 1996, through which a new title to the Employment Contract Act (hereafter: ECA) was added regarding homework. Working from home – or away from the employer's premises, more generally – has been a widespread phenomenon in Belgium.<sup>5</sup> Nevertheless, it took the legislator until 2005 to finalise specific legislation regarding structural telework, namely Collective Labour Agreement (hereafter: CLA) no. 85.<sup>6</sup> This regulation did not envisage occasional telework. For that reason, the Workable and Agile Work Act (hereafter: WAW) of 2017 laid down specific measures for this form of telework. More recently, the National Labour Council promulgated a fourth piece of legislation concerning telework – i.e. CLA no. 149 – recommending or obliging people to engage in telework because of COVID-19. It was a necessary move, taking into account that more than 50% of the total workforce in Belgium is currently teleworking.<sup>7</sup>

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<sup>1</sup> K. GOOSSENS, “Werken op pantoffels voor het scherm? Vergelijking van de rechtstoestand van de telewerkende werknemer met die van de buitenshuiswerkende werknemers en de telewerkende zelfstandige”, *Or.* 2004, no. 10, (253) 253.

<sup>2</sup> F. ROBERT, *Le télétravail à domicile*, Limal, Anthemis, 2020, 15.

<sup>3</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 2.

<sup>4</sup> *Ibid.*, 1-2.

<sup>5</sup> F. ROBERT, *Le télétravail à domicile*, Limal, Anthemis, 2020, 17.

<sup>6</sup> M. WOUTERS, “Nieuwe vormen van arbeid” in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, part I, Brugge, die Keure, 2020, (355) 365.

<sup>7</sup> EUROFOUND, *Living, working and COVID-19*, Luxembourg, Publications Office of the European Union, 2020, 33.



Since the beginning of 2020, the virus has spread significantly across the European Union. The same happened in Belgium, which has reported a significant number of fatalities due to COVID-19.<sup>8</sup> The pandemic has had an unprecedented impact on the labour market. On the 23<sup>rd</sup> of March 2020, the National Security Council announced several extraordinary measures to limit the spread of COVID-19, e.g. school closures and travel restrictions.<sup>9</sup> In the context of labour law, the Group of 10<sup>10</sup> released a joint statement stating that workers had to carry on working from home as much as possible<sup>11</sup>, though there were some who argued in favour of going to the workplace in these uncertain times.<sup>12</sup> Nevertheless, telework has been made compulsory for non-essential businesses, when compatible with working task and regardless of company size.<sup>13</sup> If telework is not possible for specific staff, they should respect social distancing, otherwise the business must close.<sup>14</sup> Besides, telework is recommended for crucial sectors and essential services, such as colleges and universities.<sup>15</sup>

The immediate and involuntary transition to telework has posed many challenges. It soon became apparent that the Belgian legal framework governing telework was not suitable to deal with this new state of affairs.

<sup>8</sup> A. SCHAUS and V. LETELLIER, “Les droits et libertés à l’épreuve de la crise sanitaire (Covid-19) Comment gérer la sortie du confinement?” in Y. MOREAU (ed.), *Déconfinement sociétal. Rapport d’expertises académiques*, 2020, (78) 80.

<sup>9</sup> Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus COVID-19, O.G. 23 March 2020; EU FUNDAMENTAL RIGHTS AGENCY, *Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications, Country Report: Belgium*, 23 March 2020, [https://fra.europa.eu/sites/default/files/fra\\_uploads/belgium-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-covid-19-april-2020_en.pdf), 3.

<sup>10</sup> This group consists of the Belgian trade unions, employers and the Federation of Belgian Enterprises.

<sup>11</sup> EU FUNDAMENTAL RIGHTS AGENCY, *Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications, Country Report: Belgium*, 23 March 2020, [https://fra.europa.eu/sites/default/files/fra\\_uploads/belgium-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-covid-19-april-2020_en.pdf), 8.

<sup>12</sup> F. LAMBOTTE and L. TASKIN, “Stratégie de déconfinement: le cas des télétravailleurs” in Y. MOREAU (ed.), *Déconfinement sociétal. Rapport d’expertises académiques*, 2020, (142) 143.

<sup>13</sup> Art. 2 and 3 of Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus COVID-19 and the other consecutive ministerial decrees.

<sup>14</sup> J. GILMAN, V. GUTMER, F. LAMBINET and J.-F. NEVEN, “Covid-19 et télétravail obligatoire: réflexions autour d’un paradoxe”, *JIT* 2020, no. 11, (215) 217.

<sup>15</sup> Art. 2 and 3 of Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus COVID-19 and the consecutive ministerial decrees.



This situation revived long-standing debates on the distinction between homework and telework and the rights these forms of employment entail. Even though telework has a voluntary character, the employer can now unilaterally impose telework upon his employees because of the pandemic.<sup>16</sup> Consequently, employees who have no experience with telework are compelled to work from home. Furthermore, other practical issues arose, e.g. the presence of children at home during work due to the closure of schools and the lack of appropriate equipment.<sup>17</sup>

This contribution aims to provide a critical overview of Belgium's cluttered legal framework governing telework, consisting of four different regulations dealing with homework, 'structural' telework – i.e. work performed at regular times in a place other than the standard workplace – occasional telework and 'tele-homework' during COVID-19. This analysis is limited to the private sector and does not examine the legal framework of homework and telework for self-employed workers. Consequently, this paper does not look into the telework legislation applicable to the public sector<sup>18</sup>. It is argued that Belgium needs a comprehensive and sustainable legal framework for teleworkers, as the overlaps between the applicability of these provisions make this topic a complex matter.

## 2. The Regulation of Telework in Belgium

The first part of this contribution examines the different provisions governing telework in Belgian legislation: homework, structural and occasional telework and compulsory tele-homework following the pandemic. Each section provides the definition, the context and the regulatory framework for each of the working arrangements referred to before.

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<sup>16</sup> J. GILMAN, et al., "Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe", *JIT* 2020, no. 11, (215) 216.

<sup>17</sup> *Ibid.*, (215) 215.

<sup>18</sup> In short, this legislation can be summarised as follows. Royal decree of 22 November 2006 regarding telework and satellite work in the federal administrative public office applies to the staff of the federal government services. This decree entails a legal framework both for regular as well as occasional telework. The Flemish government, the Brussels Capital Region, the French Community and the Walloon government established their own modalities for implementing telework in the public sector. See: L. HELLEMANS and E. KARREMAN, *Telewerk en thuisarbeid*, Mechelen, Kluwer, 2018, 11 and following.

## 2.1. Homework

### 2.1.1. Definition and Context

CONTEXT – Homework is the oldest form of telework in Belgian legislation. Homeworkers were manual workers, mainly from the textile industry, who worked from home in the 19<sup>th</sup> century.<sup>19</sup> From the very beginning, discussions took place on the legal status of homeworkers and whether they were subject to labour laws.<sup>20</sup> As early as 1934, provisions concerning minimum wages and employment conditions were laid down for homeworkers.<sup>21</sup> With the introduction of the new version of the ECA<sup>22</sup> in 1978, the discussion on the applicability of general labour provisions gained fresh momentum. The Court of Cassation settled the discussion in 1992 by ruling that, although homeworkers were employees, the general version of the ECA did not apply to their specific situation.<sup>23</sup> Therefore, the Belgian legislator in 1996 added a specific title to this provision aimed at regulating homework.<sup>24</sup> Title VI of the ECA is still in force and defines the specific rules that apply to homework.

DEFINITION – Article 119.1 of the ECA defines the employment contract of homeworkers as a contract under which the employee is committed to performing work under the employer’s authority, in exchange for remuneration, at the employee’s house or at any other place chosen by the employee and without the employer’s supervision and direct control. Significantly, and contrary to what the name might suggest, homework is not necessarily performed at home.<sup>25</sup> The only situation that does not fall under this broad definition is work carried out in a satellite office, as the

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<sup>19</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 14.

<sup>20</sup> K. GOOSSENS, “Werken op pantoffels voor het scherm? Vergelijking van de rechtstoestand van de telewerkende werknemer met die van de buitenshuiswerkende werknemer en de telewerkende zelfstandige”, *Or.* 2004, (253) 253.

<sup>21</sup> Law of 10 February 1934 regulating homework in terms of wages and hygiene, *O.G.* 25 March 1934.

<sup>22</sup> Employment Contract Act of 3 July 1978, *O.G.* 22 August 1978.

<sup>23</sup> Cass. 30 November 1992, *Soc.Kron.* 1993, 115.

<sup>24</sup> Implemented by Law on Domestic Labour of 6 December 1996, *O.G.* 24 December 1996.

<sup>25</sup> O. RIJCKAERT, “‘Loin des yeux, loin du compteur?’ – Essai de clarification du temps de travail des travailleurs à domicile, des télétravailleurs et des travailleurs nomades” in L. DEAR and S. GILSON (eds.), *La loi sur le travail. 40 ans de la loi du 16 mars 1971*, Limal, Anthemis, 2011, (309) 311.

employee does not choose this location.<sup>26</sup> Besides, Articles 119.3 to 119.12 of the ECA do not apply to workers covered by the CLA governing telework.<sup>27</sup>

### 2.1.2. The Regulatory Framework

RULES APPLICABLE TO HOMEWORKERS – Article 119.2 of the ECA provides that the specific rules applicable to homeworkers are listed under Title VI of this act. In the absence of a specific rule under Title VI, the general legal framework for regular employees will apply. When an employee works partly from home and partly from the employer's premises under the same employment contract, this employee will be subject to the specific rules for homework when he works from home and to the general rules of the ECA when he is at the company's premises.<sup>28</sup>

TITLE VI – Title VI of the ECA lays down specific rules applying to homeworkers. First of all, the employer and the employee must conclude a specific employment contract in writing before starting to work.<sup>29</sup> This document must detail:

- 1° the personal information of the employer and the employee;
- 2° the wage;
- 3° the reimbursement of the costs related to homework;
- 4° the place(s) chosen by the homeworker to perform work;
- 5° a short description of the work to be performed, the agreed working arrangement, the work schedule, or the agreed minimum amount of work; and
- 6° the relevant joint committee.<sup>30</sup>

If no agreement is in force, the employee can terminate employment without providing notice or a termination fee.<sup>31</sup> The employment agreement is presumed to be of an indefinite duration. Besides, the employer must provide proper equipment, unless the circumstances

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<sup>26</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 15.

<sup>27</sup> Art. 119.1, §2 ECA.

<sup>28</sup> Art. 119.2, §2 ECA.

<sup>29</sup> Art. 119.4, §1 ECA.

<sup>30</sup> Art. 119.4, §2, 1°-8° ECA.

<sup>31</sup> Art. 119.5 ECA.

require to act differently or a provision stating otherwise is in place.<sup>32</sup> In addition, Title VI of the ECA envisages an exception to rules concerning the suspension of the employment contract of homeworkers and their daily wage, making provisions for homeworkers who are unable to perform work. However, the provisions under Title VI of the ECA are neither comprehensive nor detailed. Consequently, this title might not apply to occasional homework.<sup>33</sup>

## 2.2. Structural Telework

### 2.2.1. Definition and Context

CONTEXT – Though outdated, the working arrangement discussed above is clear and straightforward. The confusion started when other working schemes were implemented. In 2002, the European Framework Agreement on Telework stood out as the first agreement negotiated by the social partners at the European level.<sup>34</sup> The agreement laid down the essential principles for the implementation of telework. It was implemented in Belgian legislation in 2005 by CLA no. 85 (later further amended by CLA no. 85bis) and only concerned the private sector.<sup>35</sup> This CLA created a set of rules similar to those governing homeworkers and is declared universally applicable through Royal Decree of 13<sup>th</sup> June 2006.

DEFINITION – A lot of confusion arises when using the term ‘telework’ in relation to the concept of homework. Besides, the teleworker who works at home is referred to as ‘home-based telework’ or ‘telehomework’. This terminology generates turmoil as even the legislator uses these terms inconsistently to indicate homework or telework.<sup>36</sup> In general, telework is defined as “*working in a geographically flexible manner, outside of the company’s premises, by using information and communication technology*”.<sup>37</sup> Article 2 of CLA no. 85 supplies a more detailed definition of ‘telework’, which replicates the definition included in the European Framework Agreement: “*a form of*

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<sup>32</sup> Art. 119.3, 1° ECA.

<sup>33</sup> F. HENDRICKX and S. TAES, “Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie”, *ArbeidJ* 2020, no. 12.

<sup>34</sup> European Framework Agreement on Telework of 16 July 2002.

<sup>35</sup> F. ROBERT, *Le télétravail à domicile*, Limal, Anthemis, 2020, 50-51.

<sup>36</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 9-10.

<sup>37</sup> P. MAERTEN, “Telewerken: juridische aspecten van een virtuele arbeidsorganisatie”, *Or.* 2000, (173) 173.

*organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises regularly*". Two elements stand out and should be emphasised. Firstly, there are information and communication technologies which indisputably characterise telework and distinguish it from homework. Secondly, the definition of CLA no. 85 emphasises that work should be performed outside those premises *regularly*, and thus neither incidentally nor occasionally. For this reason, this type of telework is called 'structural telework' in Belgian legal discourse, as opposed to 'occasional telework', which will be discussed later.

TELEWORK AND HOMEWORK – It is clear that telework and homework are closely related and associated almost spontaneously, given that their definitions are rather similar. The only element that distinguishes these forms of work is that telework requires an additional condition, namely the use of technology. Telework can therefore be a form of homework, but homework is not necessarily comparable to telework.<sup>38</sup> The scope of application of CLA extends to telework, including work performed at home or at any other location chosen by the employee.<sup>39</sup> CLA no. 85 explicitly excludes work performed in a satellite office and 'mobile teleworkers', e.g. sales representatives.<sup>40</sup> The employee should decide the work location, which is a condition common to telework and homework. Working in a satellite office or in a telecentre organised by the employer will neither qualify as homework nor as telework, whereas working in a co-working space can be qualified as homework and telework.<sup>41</sup> Homework cannot only be performed at home, and telework can also be performed at home, creating an overlap between the two concepts.<sup>42</sup>

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<sup>38</sup> K. GOOSSENS, "Werken op pantoffels voor het scherm? Vergelijking van de rechtstoestand van de telewerkende werknemer met die van de buitenshuiswerkende werknemer en de telewerkende zelfstandige", *Or.* 2004, (253) 255.

<sup>39</sup> Art. 4 CLA no. 85.

<sup>40</sup> Art. 2 and 4 CLA no. 85.

<sup>41</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 9 and 15.

<sup>42</sup> *Ibid.*

### 2.2.2. The Regulatory Framework

TELEWORK VS. HOMEWORK – The determination of the applicable regulatory framework for structural teleworkers is closely related to the definitions of telework and homework. This distinction is relevant because different rules apply. Although the National Labour Council has stated that telework may not be viewed as a form of homework, the legislator did not share this view.<sup>43</sup> A specific provision was added to Article 119.1, §2 of the ECA, stating that workers who fall under the scope of CLA no. 85 are excluded from certain provisions of Title VI of the ECA regarding homework. This stance confirms the position of many legal scholars that telework is a specific form of homework.<sup>44</sup> The conflicting views of the National Labour Council and the legislator have made this regulatory puzzle even more confusing. Ultimately, the legislator had his final say: teleworkers are regarded as a particular category of homeworkers, whose rights are provided by CLA no. 85.

APPLICABLE RULES – CLA no. 85 includes the essential principles of the European Framework Agreement on Telework. The fundamental principles concern the voluntary character of telework<sup>45</sup> and the equal treatment between teleworkers and regular workers. Moreover, the employer must inform and consult with the employee representatives when implementing telework.<sup>46</sup> In addition, some formal steps need to be complied with. First of all, a separate written agreement must be concluded for each teleworker before engaging in work.<sup>47</sup> This document must provide the following information:

- 1° the frequency of telework and the days on which the worker will be at the employer's premises;
- 2° the hours during which the teleworker is on-call;
- 3° the hours when the teleworker can call technical support;
- 4° the reimbursement policy concerning a number of items;

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<sup>43</sup> NATIONAL LABOUR COUNCIL, *Advies omtrent de uitvoering van het Europese vrijwillige kaderakkoord van 16 juli 2002 over telewerk*, 9 november 2002, no. 1.528, <http://www.cnt-nar.be/ADVIES/advies-1528.pdf>, 4.

<sup>44</sup> NATIONAL LABOUR COUNCIL, *Advies omtrent de uitvoering van het Europese vrijwillige kaderakkoord van 16 juli 2002 over telewerk*, 9 november 2002, no. 1.528, <http://www.cnt-nar.be/ADVIES/advies-1528.pdf>, 4.

<sup>45</sup> Art. 5 CLA no. 85.

<sup>46</sup> Art. 17 section 2 CLA no. 85.

<sup>47</sup> Art. 6, §1 CLA no. 85.

- 5° the policy regarding the return to the employer's premises; and
- 6° the place(s) chosen by the teleworker to perform work.<sup>48</sup>

The only sanction in case of non-compliance with this formal aspects is that the teleworker can return to work at the employer's premises.<sup>49</sup> Nevertheless, the written agreement prescribed by Article 6, §1 of CLA no. 85 for structural telework is not required.<sup>50</sup> The teleworker must be informed, amongst others, of his applicable working conditions, the tasks to be performed and the policy regarding the reporting.<sup>51</sup> Furthermore, the employer must ensure the necessary equipment, as well as its installation, maintenance<sup>52</sup> and technical support.<sup>53</sup> The teleworker has to use the equipment carefully, and the information collected shall not be disseminated for reasons other than those detailed in the job description.<sup>54</sup> Moreover, the teleworker must inform the employer immediately of any defect to the equipment or any force majeure event that prevents him from working.<sup>55</sup> All the rules and principles established in CLA no. 85 can be clarified or adapted by collective agreements at a sectoral level, an aspect which might affect consistency.

### 2.3. Occasional Telework

#### 2.3.1. Definition and Context

CONTEXT – As discussed above, CLA no. 85 only regulates the work of those operating remotely on a regular basis, consequently excluding individuals performing remote work now and then. Therefore, occasional teleworkers do not fall within the scope of homework<sup>56</sup> regulation, leaving a legal gap and creating uncertainty. Before laying down ad-hoc legislation, employers allowed their employees to work from home on an occasional basis as it provided them with more flexibility and a better work-life

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<sup>48</sup> Art. 6, §2, 1°-6° CLA no. 85.

<sup>49</sup> Art. 6, §3 CLA no. 85.

<sup>50</sup> Cass. 5 October 2020, AR S.19.008.N., juridat.be.

<sup>51</sup> Art. 7 CLA no. 85.

<sup>52</sup> Art. 9 CLA no. 85.

<sup>53</sup> Art. 10 CLA no. 85.

<sup>54</sup> Art. 12 CLA no. 85.

<sup>55</sup> Art. 13 CLA no. 85.

<sup>56</sup> Labour Court of Brussel, 12 November 2008, *Soc.Kron.* 2010, afl. 1, 34.



balance.<sup>57</sup> Starting from 2017, Section 2 of the much-discussed WAW regulates occasional telework by adding specific provisions without affecting existing working conditions.<sup>58</sup> The number of occasional teleworkers also expanded from 8.2% in 2008 to 16.1% in 2018.<sup>59</sup> Besides, occasional telework is also the most flexible and the easiest-to-implement form of telework.<sup>60</sup>

DEFINITION – Article 23 1° of the WAW defines occasional telework as “*a form of organisation and/or execution of work in the context of an employment contract through which, with the utilisation of information technology, activities that can also be performed at the employer’s premises are carried out outside these premises on an incidental and a non-regular basis*”. The place where the teleworker performs work can be his residence or any other place chosen by him.<sup>61</sup> Besides, work must be in line with telework, which means that many employees – e.g. receptionists – cannot engage in occasional telework.<sup>62</sup> This definition is almost identical to that of structural telework, as the only difference lies in the frequency work is performed away from the office.<sup>63</sup> Consequently, to be qualified as occasional telework, this shall not take place on a regular basis but be exceptional. The line between what is considered regular and non-regular is blurred, so the legislator should clarify this point.<sup>64</sup>

<sup>57</sup> Explanatory memorandum regarding the draft of the act on agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 20; S. DE GROOF, “Wetsontwerp werkbaar en wendbaar werk: een leeswijzer”, *ArbeidJ* 2016, no. 2, (4) 4-5; S. RAETS, “Kostenvergoedingen voor thuiswerk: onderscheid tussen huisarbeid en telewerk” in I. VERHELST (ed.), *Arbeidsovereenkomstenwet na 40 jaar... opnieuw anders bekeken*, Morsel, Intersentia, 2018, (303) 306.

<sup>58</sup> Act of 5 March 2017 regarding agile work, *O.G.* 15 March 2017.

<sup>59</sup> M. WOUTERS, “Nieuwe vormen van arbeid” in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, part I, Brugge, die Keure, 2020, (355) 365.

<sup>60</sup> F. HENDRICKX, S. TAES and M. WOUTERS, “Corona en het arbeidsrecht: een Q&A”, *ArbeidJ* 2020, 52; C. PERSYN, “Telethuiswerk: wetgever maak uw huiswerk!”, <https://sentral.kluwer.be/NewsView.aspx?id=VS300764416&contentdomains=SentralNEWSS&lang=nl>, SenTRAL, Kluwer, 18 mei 2020.

<sup>61</sup> Art. 24 WAW.

<sup>62</sup> J. DE MAERE, “De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?”, *Or.* 2017, no. 6, (2) 9.

<sup>63</sup> J. CLESSE, A. FARCY and R. LINGUELET, “Quelques nouveautés législatives en droit du travail” in J. CLESSE and H. MORMONT (eds.), *Actualités et innovations en droit social*, Limal, Anthemis, 2018, (221) 248.

<sup>64</sup> M. WOUTERS, “Nieuwe vormen van arbeid” in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, part I, Brugge, die Keure, 2020, (355) 366.

EMPLOYMENT CONTRACT ACT – The specific characteristics of occasional telework justify the separate regulation contained in the WAW. Because the employment contract binds the parties during the period in which occasional telework is implemented, the ECA still applies. However, unclarity remains regarding the applicability of Title VI of the ECA because Article 119.1, §2 is not adapted to the new WAW. The problematic consequences of this state of affairs are discussed below.

### 2.3.2. The Regulatory Framework

WAW – Section 2 of the WAW provides a legal framework for occasional teleworkers, laying down some specific requirements. This section concerns the private sector only<sup>65</sup>, and applies retroactively to working schemes concluded before 1<sup>s</sup> February 2017.<sup>66</sup> It states that occasional telework is justified only in two situations.<sup>67</sup> The first is a force-majeure event, i.e. a situation in which the employee cannot perform at the place he usually works for reasons outside his control, for example because of troubles with his car or an unexpected train strike.<sup>68</sup> The situation must be unforeseeable and happen independently of the employee's will.<sup>69</sup> The second situation that may justify occasional telework concerns personal reasons. The legislative text did not provide a description or interpretation of 'personal reasons' deliberately, given that they intended to cover various situations.<sup>70</sup> For the same reason, it is not recommended for employers to present an exhaustive list of accepted personal reasons.<sup>71</sup> However, the text does provide several examples, such as a dentist appointment or the visit of a technician.<sup>72</sup> Even though the WAW uses

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<sup>65</sup> Art. 22 WAW.

<sup>66</sup> Art. 28 WAW.

<sup>67</sup> C. SCHREURS, "De nieuwe wet werkbaar en wendbaar werk – een overzicht", *Soc.Weg*, 2017, Vol. 13, no. 1, (8) 8.

<sup>68</sup> Art. 26, §1 WAW.

<sup>69</sup> J. CLESSE, A. FARCY and R. LINGUELET, "Quelques nouveautés législatives en droit du travail" in J. CLESSE and H. MORMONT (eds.), *Actualités et innovations en droit social*, Limal, Anthemis, 2018, (221) 249.

<sup>70</sup> L. BALLARIN, M. DE GOLS, M. KOWALSKA, B. LANTIN, J. ROOBAERT, A. VAN DE GEUCHTE, C. VANDERSNICKT and C. VANLAERE, *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk*, Mechelen, Kluwer, 2017, 148.

<sup>71</sup> J. DE MAERE, "De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?", *Or*: 2017, no. 6, (2) 8; J. GILMAN, et al., "Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe", *JIT* 2020, no. 11, (215) 223.

<sup>72</sup> Explanatory memorandum regarding the draft of the law on workable and agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 22.

the notion of ‘force majeure’ and ‘personal reasons’, it fails to provide their definition or clarification.<sup>73</sup>

**PRIOR REQUIREMENTS** – The employee who wants to use occasional telework must priorly inform the employer and submit a request within a reasonable timeframe, mentioning the specific reasons therefor.<sup>74</sup> Unfortunately, the WAW does not clarify the length of the ‘reasonable timeframe’. In case of a force-majeure event, the reasonable timeframe can be understood as a very short one. On the contrary, if the employee wishes to engage in occasional telework for personal reasons, he can inform the employer way in advance.<sup>75</sup> A reasonable timeframe can thus be interpreted differently, depending on the context.<sup>76</sup> No other formal requirements regarding the request need to be fulfilled.<sup>77</sup> The request can occur in writing or electronically,<sup>78</sup> and the approval of occasional telework must be explicit.<sup>79</sup> Thus, tacit consent is not allowed.

**HOMEWORK ALARM** – Although the notion of an ‘homework alarm’ might be confusing, this alarm is intended for occasional teleworkers. This system entails a warning to notify the risk of unfavourable weather conditions because that can be considered as a force-majeure event.<sup>80</sup> This alarm encourages both the employer and the employee to resort to occasional telework to avoid traffic and other risks related to bad weather. The procedures concerning prior requests and approvals are time consuming and counterproductive, considering the number of workers

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<sup>73</sup> L. BALLARIN, et al., *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk*, Mechelen, Kluwer, 2017, 148.

<sup>74</sup> Art. 26, §2 WAW.

<sup>75</sup> Explanatory memorandum regarding the draft of the law on agile work, *Parl. Act. Chamber 2016-17*, no. 2247/001, (7) 22; A. BRIES, S. HAMAEEKERS, N. MERTENS, K. VERVLOES and I. VERDONCK, “Werkbaar en wendbaar werk: focus op maatregelen buiten arbeidsduur”, *Soc.Weg.* 2017, Vol. 13, no. 3, (2) 6.

<sup>76</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 30.

<sup>77</sup> J. DE MAERE, “De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?”, *Or.* 2017, no. 6, (2) 9.

<sup>78</sup> A. BRIES, et al., “Werkbaar en wendbaar werk: focus op maatregelen buiten arbeidsduur”, *Soc.Weg.* 2017, Vol. 13, no. 3, (2) 6.

<sup>79</sup> L. BALLARIN, et al., *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk*, Mechelen, Kluwer, 2017, 150.

<sup>80</sup> M. HEMELEERS, “Thuiswerkalarm bij slecht weer: bent u er klaar voor?”, *Soc.Weg.* 2018, Vol. 14, no. 21, (7) 7.

concerned.<sup>81</sup> A written document – e.g. a company CLA, internal company rules or some relevant policies – can simplify this process. Nevertheless, legal uncertainty remains when the warning sign is produced in the province where the employee lives and not in the one where the employer’s company is located, or vice versa. It is unclear whether the employee can implement occasional telework in that case.

NO ABSOLUTE RIGHT – Just like structural telework, occasional telework is based on the principle of voluntariness. Neither the employer nor the employee has an absolute right to occasional telework.<sup>82</sup> Consequently, the employer cannot oblige the employee to occasional telework, and he can refuse the employee’s request. Examples of a justified refusal are the necessary physical presence of the employee in the workplace or the improper use of this way of working by the employee, e.g. numerous requests of occasional telework.<sup>83</sup> Although the legislative text mentions as a justification ‘business operations’, it is debatable what it actually means.<sup>84</sup> Overall, it is unclear which reasons the employer can wield to refuse the request.<sup>85</sup> The refusal must be accompanied by the reasons in writing, which are shared with the employee as soon as possible.<sup>86</sup> This form is an additional administrative burden for the employer, while the WAW is explicitly intended not to increase these burdens.<sup>87</sup> Conversely, if the employer accepts the request, an oral agreement is sufficient.<sup>88</sup> Nevertheless, the WAW does not provide any sanction for the employer in case he does not provide the refusal in writing.<sup>89</sup>

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<sup>81</sup> *Ibid.*

<sup>82</sup> A. BRIES, et al., “Werkbaar en wendbaar werk: focus op maatregelen buiten arbeidsduur”, *Soc.Weg*, 2017, Vol. 13, no. 3, (2) 6.

<sup>83</sup> S. DE GROOF, “Wetsontwerp werkbaar en wendbaar werk: een leeswijzer”, *ArbeidJ* 2016, no. 2, (4) 5.

<sup>84</sup> Explanatory memorandum regarding the draft of the law on workable and agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 22.

<sup>85</sup> *Ibid.*

<sup>86</sup> Art. 26, §2, section 2 WAW.

<sup>87</sup> Explanatory Memorandum Regarding the Draft of the Law on agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 20; NATIONAL LABOUR COUNCIL, *Advies omtrent Rondetafel “Werkbaar werk” – Voorontwerp van wet betreffende werkbaar en wendbaar werk*, 7 december 2016, no. 2.008, <http://www.cnt-nar.be/ADVIES/advies-2008.pdf>, 12.

<sup>88</sup> J. CLESSE, A. FARCY and R. LINGUELET, “Quelques nouveautés législatives en droit du travail” in J. CLESSE and H. MORMONT (eds.), *Actualités et innovations en droit social*, Limal, Anthemis, 2018, (221) 250.

<sup>89</sup> L. BALLARIN, et al., *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk*, Mechelen, Kluwer, 2017, 150.

ARRANGEMENTS – If the employer accepts the request of the employee, certain written or oral<sup>90</sup> arrangements must be made according to Article 26, §3 of the WAW for the regulations of several practical elements of occasional telework, including:

- 1° the equipment and technical support required for occasional telework which the employer made available;
- 2° the time the employee might be contacted when engaged in occasional telework, which the employer might require;
- 3° the possible reimbursement by the employer of the costs deriving from occasional telework (for example, if the employee uses his laptop and Internet connection).

The WAW does not provide any sanction if no arrangements are made. It must be emphasised that Article 26, §3 of the WAW does not include an obligation for the employer to provide the occasional teleworker with equipment and technical support.<sup>91</sup> For example, the arrangements might stipulate that none of them will be provided.<sup>92</sup> This does not happen in the event of structural telework, where the employer must reimburse certain costs and provide the employee with the equipment needed.<sup>93</sup>

PRIOR ARRANGEMENTS – In case of force majeure, it might not always be possible to make prior arrangements. To counter this situation, the employer and the employee can agree upon certain aspects featuring occasional telework. Article 27 of the WAW allows the employer to lay down a particular framework for occasional telework via CLA or a corporate policy document.<sup>94</sup> This framework must refer to the elements of Article 26, §3 of the WAW and the functions and or activities within

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<sup>90</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 32.

<sup>91</sup> K. REYNIERS, “Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse” in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 99.

<sup>92</sup> This does not contradict art. 20 1° of the ECA, which obliges the employer to provide the equipment necessary to perform work, because that provision allows a derogation by mutual agreement. See: L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 42.

<sup>93</sup> Art. 9 CLA no. 85.

<sup>94</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 32.

the company that can be performed through occasional telework and the procedure to request and grant occasional telework.<sup>95</sup> This allows the employees to refer to the applicable framework in each case.<sup>96</sup> The inclusion of these elements in a company's policy document is disputable because this might not be considered an agreement between the employer and the employee. This provision thus eliminates the possible arbitrariness of the employer regarding occasional telework.

## 2.4. Telehomework during COVID-19

### 2.4.1. Context

COVID-19 PANDEMIC – The federal government had to take several measures to limit the spread of COVID-19. For example, the Ministerial Decree of 1 November 2020 imposes telework on companies, associations and services for staff members, unless this is impossible due to the nature or the continuity of the business, the activities or the provision of services.<sup>97</sup> Thus, the government obliges the workers of non-essential sectors to telework. Additionally, essential sectors are encouraged to telework as much as possible. On 26 January 2021, Belgian social partners agreed upon a new version of CLA no. 149 regarding telework implemented because of the pandemic. The intervention of the National Labour Council was necessary given that almost 50% of the companies did not provide guidance for telework when the pandemic started. Even though the ministerial decrees use the notion of 'telehomework', this concept cannot be found in CLA no. 149. Consequently, it is unclear what 'telehomework' actually means.

APPLICABILITY – CLA no. 149 applies to all workers and their employers for whom telework is compulsory or recommended to counter the spread of COVID-19,<sup>98</sup> though this obligation clearly goes against its voluntary

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<sup>95</sup> Art. 27, section 2, 1°-2° WAW.

<sup>96</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 49.

<sup>97</sup> Art. 2 of Ministerial Decree of 1 November 2020 amending Ministerial Decree of 28 October 2020 regarding urgent measures to limit the spread of the coronavirus, O.G. 1 November 2020.

<sup>98</sup> Art. 1 and 2 CLA no. 149.

character.<sup>99</sup> Nevertheless, HENDRICKX and TAES argue that because of COVID-19, a new contractual situation arises. In their view, the voluntariness of telework is neither a condition for its existence nor its application, as it features the contractual freedom of the parties.<sup>100</sup> Thus, this CLA obliges companies which as of 1 January 2021 did not have a teleworking policy under CLA no. 85 or the WAW to establish one.<sup>101</sup> Consequently, the CLA does not apply to agreements which already existed at that date, including CLAs, individual agreements or teleworking policies,<sup>102</sup> indicating the supplementary character of this provision. CLAs established on company level, labour regulations, individual agreements or shared teleworking policies can provide specific rules regarding the application of CLA no. 149.<sup>103</sup> Lastly, this CLA is temporary as, starting from 31 December 2021, this provision no longer applies.<sup>104</sup>

#### 2.4.2. The Regulatory Framework

CLA NO. 149 – The goal of the new legal framework provided by CLA no. 149 is twofold. On the one hand, it offers some principles and a reference framework to clarify certain aspects to safeguard legal certainty and ensure a smooth introduction of telework, both when is recommended or required by public authorities to counter the spread of COVID-19. On the other hand, it aims to provide some guidelines regarding occupational well-being in the event of telework.<sup>105</sup> Compared to CLA no. 85, the requirements of CLA no. 149 are easier to meet, as no supplementary annexes are needed to the individual employment contract. Furthermore, the agreement to perform telework under CLA no. 149 can be outlined in a company CLA, a labour regulation, an individual agreement or a teleworking policy.

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<sup>99</sup> Labour Court of Brussel, 18 December 2012, no. 2011/AB/1116; F. HENDRICKX and S. TAES, “Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie”, *ArbeidJ* 2020, no. 30.

<sup>100</sup> F. HENDRICKX and S. TAES, “Telewerk tijdens en na de pandemie: kwalificatie van een uitdagende arbeidsrelatie”, *ArbeidJ* 2020, no. 26-31.

<sup>101</sup> Art. 3 CLA no. 149.

<sup>102</sup> Art. 3 CLA no. 149.

<sup>103</sup> Art. 4 CLA no. 149.

<sup>104</sup> NATIONAL LABOUR COUNCIL, *Advies ommille van de Covid-19-crisis verplicht gemaakt telewerk – ad hoc kader*, 26 januari 2021, no. 2.195, <http://www.cnt-nar.be/ADVIES/advies-2195.pdf>, 5.

<sup>105</sup> Art. 5 CLA no. 149.



CONTENT – The CLA lays down provisions which are similar to those set out in CLA no. 85. It also comprises a specific regulation for occupational well-being, which summarises the existing rules supplemented with some elements specific to the context of the pandemic, such as psychosocial risks. In addition, the employer must inform the teleworkers and, if necessary, provide them with training regarding the particulars of telework.<sup>106</sup> Several specific agreements must be entered into regarding the timetable if necessary<sup>107</sup>, the control on the results to be achieved and/or the assessment criteria<sup>108</sup> and the (un)reachability of the teleworker.<sup>109</sup> Furthermore, the employer takes appropriate measures to ensure the interaction between the teleworkers and their colleagues and prevent isolation, by organising some meetings in line with anti-COVID-19 measures.<sup>110</sup>

### 2.4.3. Homework, Structural or Occasional Telework?

UNCLARITY – Both the ministerial decrees and CLA no. 149 fail to clarify which type of telework was compulsory or recommended during COVID-19. Nevertheless, applying the correct legal framework is of the utmost importance, considering the differences and consequences set out above. Hereafter, the different teleworking arrangements will be examined in order to assess their suitability to deal with COVID-19, though structural or occasional telework appears to be the best option.<sup>111</sup>

HOMEWORK – Because homework does not rely on information and telecommunication technology, it is not the appropriate regulatory framework for telehomework during COVID-19. Besides, the mandatory nature of the teleworking schemes used during COVID-19 contradicts the voluntary character of homework. Moreover, homework requires the conclusion of a contract, and in the absence thereof, the employer can terminate the contract without notice or compensation, which is not in

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<sup>106</sup> Art. 16 CLA no. 149.

<sup>107</sup> Art. 11, §1 CLA no. 149. Lacking this agreement, the teleworker follows the timetable he would have followed at the employer's premises.

<sup>108</sup> Art. 11, §2 CLA no. 149.

<sup>109</sup> Art. 11, §3 CLA no. 149.

<sup>110</sup> Art. 15 CLA no. 149.

<sup>111</sup> F. HENDRICKX and S. TAES, "Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie", *ArbeidJ* 2020, no. 23.

line with this way of working used during COVID-19.<sup>112</sup> Finally, occasionally working from home does not make the employee a homeworker, as this shall take place on a regular basis.<sup>113</sup>

STRUCTURAL TELEWORK – CLA no. 85 regarding structural telework is not fully appropriate either in the current pandemic, because the type of telework implemented during COVID-19 arises from an occasional and not a routine situation. Besides, working away from the office has been imposed on employees and does not provide them with any choice. Qualifying those who telework during COVID-19 as structural teleworkers is contradictory, because those workers are most likely to return to their employer's premises at the end of the emergency.

OCCASIONAL TELEWORK – Legal research seems inclined to accept occasional telework as the legal basis for telework implemented during COVID-19.<sup>114</sup> This pandemic qualifies as a force-majeure event, but the requirement of temporariness does not mean that it cannot cover a more extended period.<sup>115</sup> Thus, because the COVID-19 pandemic has persisted for quite some time, it is not an obstacle for occasional telework to apply to telework implemented during the pandemic. Nevertheless, for the employment contracts concluded during or after 2020, it is difficult to prove the existence of an unforeseeable situation. The COVID-19 pandemic as such does not necessarily or always constitute a force majeure situation anymore.<sup>116</sup> The specific circumstances must be considered, and qualification will always depend on facts. For example, if the government obliges the company to pursue their activities while taking

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<sup>112</sup> J. GILMAN, et al., “Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe”, *JIT* 2020, no. 11, (215) 222.

<sup>113</sup> *Ibid.*

<sup>114</sup> E. VAN GRUNDERBEEK, “Telewerk tijdens en na de coronacrisis”, *Soc.Weg*, 2020, Vol. 16, no. 19, (6) 6; F. HENDRICKX and S. TAES, “Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie”, *ArbeidJ* 2020, no. 33-35 and 42. Nevertheless, K. REYNIERS emphasises that incidental can be understood as ‘now and then’, and thus aims at a shorter time frame. This reasoning is backed up by the governmental website regarding occasional telework. See: K. REYNIERS, “Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse” in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 100.

<sup>115</sup> F. HENDRICKX and S. TAES, Telewerk tijdens en na de pandemie: kwalificatie van een uitdagende arbeidsrelatie, *ArbeidJ* 2020.

<sup>116</sup> A. HOET and S. VOET, “Overmacht door corona in contractuele relaties”, *RW* 2020-21, no. 6, (203) 212.

into account the measures, but these measures cannot be implemented in that specific sector or company, then a force majeure situation arises.<sup>117</sup> However, if a company can continue their activities (with some adjustments, e.g. telework), they cannot rely on a force majeure situation because reasonable alternatives exist. The choice of the company to close temporarily – not out of necessity – does not constitute a force majeure situation and then telework qualifies as structural telework. The employer concludes separate and written agreements for each structural teleworker.<sup>118</sup> This transition to structural telework after a certain period of time might be recommended.<sup>119</sup> Finally, once the measures are repealed, the occasional teleworker can no longer rely on provisions governing occasional telework.<sup>120</sup> Consequently, occasional telework is the most suitable legal framework to regulate telework due to COVID-19. According to the general rules applicable to structural telework, occasional telework can be converted to structural telework.

### 3. Particularities, Overlaps and Gaps of the Provisions governing Remote Work

PART TWO – The first part of this contribution has provided an overview of the different types of teleworking arrangements in the Belgian legal system. Arguably, the regulations of homework and telework overlap, even though they have some specific rules. This second part of this paper is devoted to the particularities, overlaps and gaps marking these regulations. The pandemic made them more evident, though many of the issues that will be outlined already existed before.

#### 3.1. Non-discrimination

EQUAL TREATMENT AND NON-DISCRIMINATION – Article 4 of the ILO's Convention no. 177 was ratified by Belgium and aims to ensure equal treatment between homeworkers, teleworkers and other wage earners. This means that teleworkers enjoy the same rights and obligations as onsite workers in terms of labour conditions. The principle of equal treatment and non-discrimination of teleworkers can also be found in the

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<sup>117</sup> *Ibid.*

<sup>118</sup> Art. 6 CLA no. 85.

<sup>119</sup> F. HENDRICKX, S. TAES and M. WOUTERS, "Corona en het arbeidsrecht: een Q&A", *ArbeidJ* 2020, no. 44

<sup>120</sup> *Ibid.*, no. 43.

Belgian Constitution.<sup>121</sup> The same holds true for structural teleworkers.<sup>122</sup> Furthermore, additional agreements can be entered into taking into account the specific characteristics of telework.<sup>123</sup> For occasional teleworkers, Article 25, §1 of the WAW lays down the principle of non-discrimination, so they feature the same working conditions, performance standards and work pressure as comparable onsite workers.<sup>124</sup> Therefore, there can be no difference regarding the rights and obligations of the employees working at the employer's premises and those who telework. As for telework implemented during COVID-19, the equal treatment principle is included in Article 6, §1 of CLA no. 149. However, the teleworker must be informed of the specific or additional labour conditions, especially when they are distinct from those of workers performing work at the employer's premises<sup>125</sup>. Moreover, those who telework during the pandemic enjoy the same collective rights as onsite workers.<sup>126</sup>

### 3.2. Work-related Accidents

DEFINITION – In Belgium, an accident can only be qualified as a work-related one when it occurred during and because of the execution of the employment contract<sup>127</sup> or if the accident took place on the way to or when returning from work<sup>128</sup>. In the case of telework, it is hard, if not impossible, to prove that the accident took place during and because of the execution of the employment contract, since the teleworker does not work at the employer's premises.<sup>129</sup> Consequently, legal changes were made to the Work Accident Act (hereafter: WAA) to counter this uncertainty. However, a legal gap exists regarding work-related accidents for homeworkers, as the following rules do not cover them.<sup>130</sup>

<sup>121</sup> Art. 10 and 11 Belgian Constitution.

<sup>122</sup> Art. 7 CLA no. 85.

<sup>123</sup> Art. 7 CLA no. 85.

<sup>124</sup> This is also true for structural teleworkers. See: art. 8 CLA no. 85.

<sup>125</sup> Art. 6, §2 CLA no. 149.

<sup>126</sup> Art. 10 CLA no. 149.

<sup>127</sup> Art. 7, section 1 Work Accident Act of 10 April 1971, O.G. 24 April 1971.

<sup>128</sup> Art. 8, section 1 WAA.

<sup>129</sup> F. ROBERT, *Telewerk. Juridische aspecten en recente ontwikkelingen*, Brussel, Larcier, 2008, 101; W. VAN EECKHOUTTE, *Sociaal compendium. Arbeidsrecht 2018-2019 met fiscale noties, III*, Mechelen, Kluwer, 2018, 2934.

<sup>130</sup> M. DENIS and P. DION, "Telewerk of thuiswerk? Een praktische analyse", *Or.* 2020, no. 7, (244) 247.

LEGAL PRESUMPTION – Article 7, section 3 of WAA entails a rebuttable legal presumption, which considers the accident of the teleworker<sup>131</sup> to have happened during the execution of the employment contract if the episode took place at the place(s) referred to in writing as the place of work in a telework agreement or in any other document that allows telework.<sup>132</sup> Besides the place of work, the accident must have occurred on the days indicated in these documents as those on which work had to be performed. The written agreement can take the form of a company CLA, a labour regulation, a policy document or an annex to the individual employment contract applying to telework.<sup>133</sup> With this agreement, the teleworker can prove that the accident happened while executing the employment contract and under the employer's supervision.<sup>134</sup> The written agreement should also be entered into by structural teleworkers, who need to conclude a telework agreement prior to commencing work.<sup>135</sup> However, occasional teleworkers do not need to enter into an agreement in writing.<sup>136</sup> Consequently, if the places or days were not mentioned in a written agreement, then the presumption applies to the place where the teleworker resides or the place(s) where he regularly teleworks<sup>137</sup>, and only to the working hours which the teleworker would have performed if he had been employed at the employer's premises.<sup>138</sup> Thus, the level of protection of structural and occasional teleworkers is the same regarding the legal presumption according to which the accident took place during the execution of the employment contract. Nevertheless, in the latter case the presumption is rebuttable only for structural teleworkers, i.e. the work-related accident occurred because of the execution of the employment contract.<sup>139</sup> The National Labour Council emphasised that all

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<sup>131</sup> For structural telework: CLA no. 85bis of 2008. For occasional telework: Art. 21, 25 and 26 of the law of 21 December 2018 regarding various provisions of social affairs, O.G. 17 January 2019.

<sup>132</sup> Art. 7, section 4, 1° WAA.

<sup>133</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 73.

<sup>134</sup> Explanatory memorandum regarding the draft of the law on various provisions of social affairs, *Parl. Act.* Chamber 2018-19, no. 3355/001, (5) 52.

<sup>135</sup> *Ibid.*, (5) 53.

<sup>136</sup> *Ibid.*

<sup>137</sup> Implemented by art. 26 1° law of 21 December 2018 regarding various provisions of social affairs.

<sup>138</sup> Art. 7, section 4, 2° WAA.

<sup>139</sup> F. HENDRICKX, S. TAES and M. WOUTERS, "Corona en het arbeidsrecht: een Q&A", *ArbeidJ* 2020, no. 61.

accidents occurring while engaging in compulsory or recommended telework because of COVID-19 must be covered by the work-related accident legal system.<sup>140</sup> It is for the employer to inform his teleworkers of this aspect.<sup>141</sup>

TO AND FROM WORK – Article 8, §2, 1° and 12° of the WAA provides that the legal presumption also applies if the accident occurs on the way to and while returning from work. However, a teleworker is supposed to work at the location of his choice, most frequently his home, so there is no such a thing as ‘to and from work’.<sup>142</sup> Nevertheless, the WAA equates ‘to and from work’ with the way from the teleworker’s residence (if he teleworks there) to the place where he takes a meal or purchases one, and *vice versa*.<sup>143</sup> This also applies to the way from the residence of the teleworker to the school or day-care of their children and *vice versa* if the teleworker is at his place of residence.<sup>144</sup>

ACCIDENT DURING A BREAK – Depending on the sector, the general principle is that accidents which occurred during a rest break can qualify as work accidents. However, because diverse situations can arise during the break of the teleworker, only those similar to the situations which could have occurred at the employer’s premises should be taken into account.<sup>145</sup> Eventually, it is up to the court to decide whether the accident qualifies as a work-related one.<sup>146</sup>

### 3.3. Well-being

DEFINITION – Well-being is defined as the conditions in which work is performed, e.g. security, workers’ health protection, psychosocial aspects, ergonomics, labour hygiene, the embellishment of workplaces and actions

<sup>140</sup> NATIONAL LABOUR COUNCIL, *Advies ommille van de Covid-19-crisis verplicht gemaakt telewerk – ad hoc kader*, 26 januari 2021, no. 2.195, <http://www.cnt-nar.be/ADVIES/advies-2195.pdf>, 4.

<sup>141</sup> *Ibid.*, 5.

<sup>142</sup> Explanatory memorandum regarding the draft of the law on various provisions of social affairs, *Parl.Act.* Chamber 2018-19, no. 3355/001, (5) 50.

<sup>143</sup> Art. 8, §2, 1° Work Accident Act.

<sup>144</sup> Art. 8, §2, 12° Work Accident Act.

<sup>145</sup> Explanatory memorandum regarding the draft of the law on various provisions of social affairs, *Parl.Act.* Chamber 2018-19, no. 3355/001, (5) 51.

<sup>146</sup> *Ibid.*, (5) 52.

concerning the living environment.<sup>147</sup> Thus, well-being entails more than merely health and safety at work.<sup>148</sup> The Well-Being Act applies to employers and employees, including homeworkers, structural and occasional teleworkers.<sup>149</sup> Additionally, the Code of Well-Being at Work (hereafter: the Code) applies to the different types of remote work in place.<sup>150</sup> Unfortunately, these regulations are mostly concerned with large-sized companies in the private sector, while its implementation in SMEs is more complicated. Besides, the rules are neither meant for nor adapted to teleworkers.<sup>151</sup> Consequently, the specific situation of teleworkers executing their employment contract outside the employer's premises challenges the application of relevant legislation. Although the King can take into account the specific situation of teleworkers by issuing a royal decree, the attempts made so far were unsuccessful.<sup>152</sup> It is for the employer and the employee to ensure the well-being of all workers at the workplace, but it is the employer who bears ultimate responsibility for this aspect.<sup>153</sup> In this respect, the employer must use a dynamic risk assessment system, out of which preventive measures can be taken.<sup>154</sup> Thus, when telework is available at the company, the employer must take the specific

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<sup>147</sup> Art. 4, §1 Well-Being Act of 4 August 1996, O.G. 18 September 1996.

<sup>148</sup> K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 103.

<sup>149</sup> Art. 2, §1, section 1 Well-Being Act.

<sup>150</sup> K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 109.

<sup>151</sup> K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 110.

<sup>152</sup> Art. 4, §1 section 3 Well-Being Act; C. PERSYN, "Telethuiswerk: wetgever maak uw huiswerk!",

<https://sentral.kluwer.be/NewsView.aspx?id=VS300764416&contentdomains=SentralNEWSS&lang=nl>, SenTRAL, Kluwer, 18 mei 2020; K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 109.

<sup>153</sup> Art. 17, 4° ECA; art. 20, 2° ECA, art. 5, §1 section 1 Well-Being Act, art. 6 Well-Being Act; Art. I.2-13 Codex Well-Being at Work of 28 April 2017, O.G. 2 June 2017; Art. I.2-2 and art. 2.2-6 section 2 Codex Well-Being at Work.

<sup>154</sup> Art. I.2-2 and art. 2.2-6 section 2 Codex Well-Being at Work.



risks of telework into account during risk assessment and inform the teleworkers.<sup>155</sup>

APPLICABLE RULES – Teleworkers are subject to the Well-Being Act and the Code. Several books and chapters in these provisions target teleworkers. The employer must avoid any risk which might harm the well-being of workers.<sup>156</sup> For example, telework can be considered a strategy of the employer to avoid the spread of COVID-19. The Well-Being Act and the Code lay down rules regarding the prevention of, and protection against, professional and psychosocial risks, such as stress, burn-out and social isolation.<sup>157</sup> Furthermore, Book III, Title 1-3 of the Code comprises, amongst others, rules regarding equipment, lighting and temperatures. The employer cannot be held responsible for these issues regarding his employees who work in locations other than the employer's premises.<sup>158</sup> For example, at least every five years, the employer must undergo risk assessment for workers using displays, evaluating for each of them the dangers arising from the excessive time spent in front of the screen (e.g. physical strain and mental pressure).<sup>159</sup> The employer must also take measures to prevent or limit these issues.<sup>160</sup> Thus, the specificity of telework complicates the employer's effort to implement health and safety rules.

STRUCTURAL TELEWORK – CLA no. 85 only lays down few provisions regarding the well-being of teleworkers. Article 15 of CLA no. 85 compels the employer to inform the teleworker of the company's policies concerning health and safety, especially due to the use of display screens. The teleworker must implement these policies.<sup>161</sup> Additionally, health and safety officers can access the workplace to assess the application of the OHS policies. If the teleworker performs work in an inhabited place, then this visit must be arranged and approved in advance. If the employee

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<sup>155</sup> K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 110.

<sup>156</sup> Art. 5, §1 section 2, a Well-Being Act.

<sup>157</sup> Chapter Vbis of the Well-Being Act and Book I, Title 3 of the Codex.

<sup>158</sup> *Ibid.*, (93) 112.

<sup>159</sup> Art. VIII.2-3, §1 1° Codex Well-Being at Work.

<sup>160</sup> Art. VIII.2-3, §1 2° Codex Well-Being at Work.

<sup>161</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 71.

refuses to do so, the employer will not be held responsible.<sup>162</sup> Besides, the employer must avoid the social isolation of the teleworker, for example through meetings with colleagues.<sup>163</sup>

**OCCASIONAL TELEWORK** – The WAW does not contain specific provisions regarding the well-being of the occasional teleworker. Nevertheless, the occasional teleworker enjoys the same working conditions and is subject to the same pressure as onsite workers.<sup>164</sup> Even though no explicit provisions regarding occasional teleworkers are supplied, these workers are subject to the general Well-Being Law and the Code.

**TELEHOMEWORK DURING COVID-19** – Many companies complied with the ministerial decree making telework compulsory, while the Well-Being Act requires risk assessment or consultation of the employees before implementing telework.<sup>165</sup> The move to allow telework has led employees to face unfavourable working conditions, more stress and new risks.<sup>166</sup> Consequently, the aspects of article 4 of the Well-Being Act are not intended to safeguard teleworkers.<sup>167</sup> For example, around 40% of teleworkers did not have a decent office chair during COVID-19, and around 30% of them claimed not to own an area dedicated to work at home.<sup>168</sup> Moreover, teleworkers are often socially isolated.<sup>169</sup> In comparison with CLA no. 85 and the WAW, CLA no. 149 does contain provisions regarding the well-being of the teleworker. It provides a policy for well-being at work related to telework by thoroughly summarising existing OHS legislation.<sup>170</sup> For example, the teleworker must receive

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<sup>162</sup> K. REYNIERS, “Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse” in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 111.

<sup>163</sup> Art. 8, §3 CLA no. 85.

<sup>164</sup> Art. 25, §1 WAW.

<sup>165</sup> J. GILMAN, et al., “Covid-19 et télétravail obligatoire: réflexions autour d’un paradoxe”, *JIT* 2020, no. 11, (215) 221.

<sup>166</sup> *Ibid.*, (215) 225.

<sup>167</sup> K. REYNIERS, “Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse” in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 94.

<sup>168</sup> [www.vias.be/nl/newsroom/22-van-de-telewerkers-werkt-elke-dag-van-thuis/](http://www.vias.be/nl/newsroom/22-van-de-telewerkers-werkt-elke-dag-van-thuis/).

<sup>169</sup> K. REYNIERS, “Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse” in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 94.

<sup>170</sup> Art. 5 CLA no. 149.

information regarding the company's rules on well-being at work specifically targeting telework and about preventive measures, e.g. the proper use of displays.<sup>171</sup> The information, guidance and preventive measures should be based on a multidisciplinary risk assessment, which considers the psychosocial dimension and the health aspects inherent to telework, including the possibility of resorting to psychological support and an occupational doctor.<sup>172</sup> Besides, the teleworkers should be informed of the support offered by the direct supervisor, prevention advisors and occupational doctors, and their contact details.<sup>173</sup> Considering the current health crisis, the teleworkers can approach them via online platforms to propose adjustments to their workspaces.<sup>174</sup> Regarding the current COVID-19 pandemic, an inspection of those in charge of prevention is not appropriate. Furthermore, the employer should take appropriate measures to ensure the interaction between teleworkers and avoid social isolation.<sup>175</sup> For example, the employer can arrange in-person meetings or coffee breaks whenever possible. Therefore, particular attention must be paid to the most vulnerable teleworkers, namely those who have to deal with additional tensions due to their personal situation during telework. The Generic Guide, established during the pandemic, mentions the need for specific guidance regarding the ergonomic and psychosocial aspects of telework.<sup>176</sup>

### 3.4. Work-life Balance and Working Time

WORK-LIFE ELEMENTS – Working time and work-life balance are closely connected. According to DE GROOF, there are three key elements in working time regulation that severely impact the work-life balance: the amount of work, the organisation of working time, and the intensity of work.<sup>177</sup> Therefore, employees are expected to experience less work-life

<sup>171</sup> Art. 12, §1 CLA no. 149.

<sup>172</sup> Art. 12, §2 CLA no. 149.

<sup>173</sup> Art. 13 CLA no. 149.

<sup>174</sup> Art. 14, §2 CLA no. 149 and comment.

<sup>175</sup> Art. 15 CLA no. 149.

<sup>176</sup> SOCIAL PARTNERS OF THE HIGH COUNCIL FOR PREVENTION AND PROTECTION AT WORK AND FPS EMPLOYMENT, *Generic guide for combatting the spread of COVID-19 at work*, <https://employment.belgium.be/sites/default/files/content/documents/Coronavirus/Genericguide.pdf>, 2021, 24 and 39.

<sup>177</sup> S. DE GROOF, *Arbeidstijd en vrije tijd in het arbeidsrecht. Een juridisch onderzoek naar work-life balance*, Brugge, die Keure, 2017, 85 e.v.

conflict when their working time regulation includes, amongst others, provisions limiting working hours, the possibility to take longer breaks, regular and predictable timetables, little overtime and constraints regarding the workload or intensity of work.<sup>178</sup> Although telework is often presented as an instrument to enhance the work-life balance – i.e. it offers to organise work based on personal needs – it seems that teleworkers too experience conflicts between work and private life.<sup>179</sup> Working from home entails a greater risk of being engaged during leisure time because both activities occur in the same physical space, thereby blurring the boundaries between work and family life. Even before COVID-19, already 60% of workers were busy sending e-mails after their working hours, and the number of teleworkers increased because of the pandemic.<sup>180</sup> It should be noted that the work-life balance is not solely related to working time. There are also many personal factors to take into account when identifying boundaries and preferences regarding the separation or integration of work and private life.<sup>181</sup> The relation between teleworking arrangements and the applicability of working time regulation is complex.

HOMEWORK – The working time regulation laid down in the Labour Act does not apply to homeworkers.<sup>182</sup> Consequently, homeworkers can perform labour at night and on Sundays and are covered neither by rules concerning overtime nor by that governing the daily, weekly, minimum and maximum limits of working time.<sup>183</sup> Thus, homeworkers can work all day long, which might have a detrimental effect on their work-life balance. Besides, the employer risks facing criminal liability for non-compliance

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<sup>178</sup> S. DE GROOF, *Arbeidstijd en vrije tijd in het arbeidsrecht: een juridisch onderzoek naar work-life balance*, Brugge, die Keure, 2017, 93-109.

<sup>179</sup> H. DELAGRANGE, *Connectiviteit tijdens de lockdown*, SERV – Stichting Innovatie en Arbeid, [https://www.serv.be/sites/default/files/documenten/STIA\\_20200504\\_connectiviteit\\_tijdens\\_lockdown\\_artikel.pdf](https://www.serv.be/sites/default/files/documenten/STIA_20200504_connectiviteit_tijdens_lockdown_artikel.pdf), mei 2020, 2.

<sup>180</sup> *Ibid.*

<sup>181</sup> E. KOSSEK, B. LAUTSCH and S. EATON, "Telecommuting, control and boundary management: correlates of policy use and practice, job control and work-family effectiveness", *Journal of Vocational Behavior* 2006, (347) 362-363.

<sup>182</sup> Art. 3bis Labour Act of 16 March 1971, O.G. 30 March 1971

<sup>183</sup> L. SMETS and N. THOELLEN, "Thuiswerk en telewerk: nog ver van huis", *Or.* 2006, (83) 92; K. SALOMEZ, "Telewerk een bijzondere vorm van huisarbeid: naar geldend en komend recht?", *Soc.Kron.* 2006, (121) 127; M. WOUTERS, "Nieuwe vormen van arbeid" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, part I, Brugge, die Keure, 2020, (355) 370.

with working time regulation, whilst he has only limited control over the hours worked by the teleworker.<sup>184</sup>

STRUCTURAL TELEWORK – Another thorny issue that has already caused controversy is the applicability of working time regulations on structural teleworkers. According to the National Labour Council, the Labour Act fully applies to structural teleworkers because this way of working should not be regarded as homework.<sup>185</sup> Nevertheless, the previous amendments to the ECA by the legislator have shown that structural telework under CLA no. 85 should be equated to homework, so the working time regulation laid down in the Labour Act does not apply. Another relevant argument is the absence of a royal decree that states the contrary, namely the applicability of working time regulation.<sup>186</sup> Consequently, structural teleworkers are excluded from working time regulation, therefore ignoring the position of the social partners.

OCCASIONAL TELEWORK – As explained above, occasional telework is only allowed in a limited number of circumstances. Therefore, the occasional use of telework does not change the elements that influence the work-life balance. The task, the organisation of working time and the intensity of work will remain the same, even in this exceptional situation. Personal reasons, e.g. taking care of a sick child, allowing for the implementation of occasional telework may even contribute to a better work-life balance. The occasional teleworker must deal with these exceptional circumstances in addition to daily work commitments. Consequently, the effect of occasional telework on the teleworker's work-life balance is disputable. Furthermore, it is unclear whether the occasional teleworkers fall within the scope of the working time regulations laid down in Chapter III of the Labour Act, given that there is no specific provision on this matter. Many legal scholars as well as the Federal Public Service for Employment, Labour and Social Dialogue state that occasional teleworkers do not qualify as homeworkers because the

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<sup>184</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 60.

<sup>185</sup> NATIONAL LABOUR COUNCIL, *Advies omtrent de uitvoering van het Europese vrijwillige kaderakkoord van 16 juli 2002 over telewerk*, 9 november 2002, no. 1.528, <http://www.cnt-nar.be/ADVIES/advies-1528.pdf>, 4.

<sup>186</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 59.

regular character of this way of working is missing.<sup>187</sup> The WAW did not change Article 119.1, §2 of ECA and does not include any reference to occasional telework, implying that the legislator did not intend to consider occasional teleworkers as homeworkers. Besides, the legislator refrained from excluding occasional teleworkers from the scope of application of the Labour Act, thus the provisions regarding working time apply to occasional teleworkers.<sup>188</sup> The legislative text of the WAW clarifies that occasional teleworkers are not subject to the direct control of their employer and have significant autonomy regarding work organisation.<sup>189</sup> They must abide by the same working hours, but they do not have to follow the work schedule strictly.<sup>190</sup> Thus, they can work voluntarily outside standard working hours (without this time being considered overtime), yet respecting the maximum number of hours worked on a daily and weekly basis.<sup>191</sup> If teleworkers are considered homeworkers, then agreements regarding the disconnection should be concluded.<sup>192</sup>

TELEHOMEWORK DURING COVID-19 – Just like the occasional teleworker, those engaged in telework during COVID-19 organise their work autonomously within applicable working hours.<sup>193</sup> The workload and performance standards are the same as those faced by onsite workers<sup>194</sup>, and so are the elements contributing to a better work-life balance.

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<sup>187</sup> FPS EMPLOYMENT, LABOUR AND SOCIAL DIALOGUE, Advice of 6 November 2017, IAB/40110(2)/AO/SD; L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 13; K. REYNIERS, “Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse” in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 98 en 104. Nevertheless, DE MAERE argues that both occasional and structural teleworkers must be considered homeworkers. See: J. DE MAERE, “De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?”, *Or.* 2017, no. 6, (2) 8 and further.

<sup>188</sup> M. WOUTERS, “Nieuwe vormen van arbeid” in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, part I, Brugge, die Keure, 2020, (355) 365.

<sup>189</sup> F. HENDRICKX and S. TAES, “Telewerk tijdens en na pandemic: kwalificatie van een uitdagende arbeidsrelatie”, *ArbeidJf* 2020, no. 20.

<sup>190</sup> Art. 25, §2 WAW.

<sup>191</sup> S. DE GROOF, “Wetsontwerp werkbaar en wendbaar werk: een leeswijzer”, *ArbeidJf* 2016, no. 2, (4) 4.

<sup>192</sup> K. REYNIERS, “Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse” in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 120.

<sup>193</sup> Art. 8, §1 CLA no. 149.

<sup>194</sup> Art. 8, §3 CLA no. 149.

Contrary to CLA no. 85, arrangements must be made regarding the hours these teleworkers cannot be contacted by their employers.<sup>195</sup>

SUGGESTION – Disregarding occasional teleworkers can complement the exclusion from the ECA of structural teleworkers in order to prevent further complications.<sup>196</sup> Besides, an additional exception to be included in Article 3 of the Labour Act would be beneficial to explicitly exclude occasional teleworkers from working time regulation.

### 3.5. Employer Authority

SUBORDINATION – In Belgium, there are three elements characterising the employment contract: (1) work performed in return for (2) remuneration and under (3) the employer's authority.<sup>197</sup> The employer has the right to check and control the employee who performs his work under his supervision. However, teleworkers perform their work outside the employer's premises, raising questions regarding employer authority. During the pandemic, employers were repeatedly faced with this issue. Neither the employer nor the inspection services can enter the employee's private residence on their initiative.<sup>198</sup> However, the lack of direct control does not imply that the employee no longer works under the employer's supervision. Instead, indirect control is possible, for example by requiring the registration of working hours as specified in *CCOO/Deutsche Bank* case.<sup>199</sup> However, it is unclear how to reconcile this registration with the autonomous character of telework. Privacy and data protection should be taken into account when installing monitoring devices or software. If the employer's monitoring activities entail the processing of personal data, then the GDPR must be respected.<sup>200</sup> For that reason, employers consider using alternative ways to monitor their teleworkers, for example by asking

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<sup>195</sup> Art. 11, §3 CLA no. 149.

<sup>196</sup> J. DE MAERE, "De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?", *Or.* 2017, no. 6, (2) 8.

<sup>197</sup> Art. 2 and 3 ECA.

<sup>198</sup> The social inspection can only enter the residence as provided in art. 24, §1 Social penal law of 6 June 2010, O.G. 1 July 2010; L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 69.

<sup>199</sup> CoJ 14 May 2019, no. C-55/18, ECLI:EU:2019:402, *Federación de Servicios de Comisiones Oreras (CCOO) v Deutsche Bank SAE*.

<sup>200</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 63.



them to be on-call.<sup>201</sup> Besides, according to case law, the employer can use a detailed summary of the employee's calls made with the company phone.<sup>202</sup>

HOMEWORK AND TELEWORK – Article 119.1 of the ECA emphasises that the homeworker does not work under his employer's direct control or supervision. Consequently, this supervision or direct control would exclude the qualification of a homeworker. The employer can eventually execute indirect control on the homeworker. For structural and occasional teleworkers, specific agreements can be made to arrange the control by the employer, for example in the individual employment contract, the company rules or a labour policy.<sup>203</sup> This agreement must entail provisions regarding the reachability of the employee.<sup>204</sup> For instance, the employer and employee can agree upon a daily and weekly timeframe, in which they can have an online meeting to discuss work. Nevertheless, the WAW does not provide any obligation for the employee to report to the employer on his work that day. Thus, that obligation only exists if it is explicitly stated in one of the documents mentioned above. CLA no. 85 and the WAW provide the freedom of the employee to organise his work because the employer cannot directly control them.<sup>205</sup> Besides, the employer of structural teleworkers must take the necessary measures to safeguard the data used and processed by the teleworker for professional purposes.<sup>206</sup>

TELEHOMEWORK DURING COVID-19 – Under CLA no. 149, the employer of those engaged in telework during COVID-19 can exercise appropriate and proportional control on work-related outcomes, taking into account the private life of the teleworker and respecting the GDPR.<sup>207</sup> Control cannot be permanent, and the teleworker must be informed as to how this control takes place.<sup>208</sup>

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<sup>201</sup> *Ibid.*, 65.

<sup>202</sup> Labour court Gent 12 May 2014, no. 2013/AG/269.

<sup>203</sup> F. ROBERT and D. BERCKMANS, *Telewerk. Juridische aspecten en recente ontwikkelingen*, Brussel, Larcier, 2008, 118; L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 65.

<sup>204</sup> Art. 6 CLA no. 85 and art. 26, §3, 2° WAW.

<sup>205</sup> Art. 25, §2 WAW; art. 8, §1 CLA no. 85; Explanatory memorandum regarding the draft of the law on workable and agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 21.

<sup>206</sup> Art. 14 CLA no. 85.

<sup>207</sup> Art. 9, §2 CLA no. 149.

<sup>208</sup> Art. 9, §1 CLA no. 149.

### 3.6. Costs

ADDITIONAL COSTS – Telework is associated with additional expenses for both the employer and the teleworker. For example, the location where telework is performed requires an Internet connection, additional heating, water and office equipment.<sup>209</sup> It is up to the employer to partly reimburse the costs borne by the worker. The Department of Social Security and the tax authorities communicated the accepted amounts of money the employer shall pay to the employee to cover the additional costs inherent to telework, without subjecting them to tax or social contributions.<sup>210</sup>

HOMEWORK – The written agreement regarding homework should entail a provision on the reimbursement of the costs related to homework.<sup>211</sup> If no such agreement is made, and no collective labour agreement on this matter exists, then a forfeit of 10% of the wage of the homeworker shall be paid to meet the costs related to homework, unless the homeworker proves that the costs exceed this percentage.<sup>212</sup> This reimbursement is supposed to cover the costs inherent to homework, such as heating, water, electricity and gas.<sup>213</sup> In addition to those costs, the employer must provide the necessary equipment.<sup>214</sup> The reimbursement of the homeworker is only due if he does not qualify as a structural teleworker and is not subject to tax or social contributions.<sup>215</sup>

STRUCTURAL TELEWORK – CLA no. 85 provides many rules regarding the reimbursement or payment by the employer of the costs of structural telework. The employment contract must contain a written annex with further rules regarding the reimbursements. For example, the employer is obliged to reimburse or pay the connection and communication costs related to structural telework.<sup>216</sup> If the employee uses his own equipment, the employer must reimburse or pay the costs of the installation of

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<sup>209</sup> E. VAN GRUNDERBEEK, “Telewerk tijdens en na de coronacrisis”, *Soc.Weg.* 2020, Vol. 16, no. 19, (6) 7.

<sup>210</sup> S. SCARNA and J. NOËL, “Tussenkost door de werkgever voor kosten in verband met thuiswerk in het kader van de regeringsmaatregelen voor Covid-19”, *FISC.WEEK* 2020, no. 107, (2) 2.

<sup>211</sup> Art. 119.4, §1 and §2, 4° ECA.

<sup>212</sup> Art. 119.6 ECA

<sup>213</sup> F. ROBERT, *Le télétravail à domicile*, Limal, Anthemis, 2020, 118.

<sup>214</sup> *Ibid.*, 119.

<sup>215</sup> Cass. 5 October 2020, AR.S.19.008.N., *juridat.be*.

<sup>216</sup> Art. 9, section 1 CLA no. 85.

software, usage, maintenance and depreciation costs of the equipment.<sup>217</sup> The costs will be calculated before commencement of work on a pro-rata basis.<sup>218</sup> However, a general obligation to reimburse or pay other costs is not present.<sup>219</sup> Moreover, even if the equipment is lost or damaged because of telework, the employer has to pay these costs all the same.<sup>220</sup>

**OCCASIONAL TELEWORK** – The employer and the occasional teleworker must conclude a mutual agreement regarding the possible reimbursement by the employer of the costs related to occasional telework.<sup>221</sup> This provision only specifies that an agreement must be entered into and does not entail a legal obligation for the employer to genuinely reimburse the occasional teleworker.<sup>222</sup> The employer can nevertheless reimburse the current costs or use forfeits.<sup>223</sup>

**TELEHOMEWORK DURING COVID-19** – The sudden conversion to telework in light of the pandemic produced several costs. The Department of Social Security published the reimbursements the employer can provide which are not subject to social contributions, e.g. a monthly allowance of € 129 to buy a desk.<sup>224</sup> CLA no. 149 requires the parties to agree on the employer's payment to compensate the use of the teleworkers' own equipment and on the costs of installation of relevant software, usage, operating, maintenance and depreciation costs and additional connection costs.<sup>225</sup> This agreement considers the global framework of the total costs or compensation paid by the employer. The Service of Prior Decisions determined that the abovementioned forfeits and reimbursements can be granted to all employees working at least five days a month from home or from a place other than the employer's

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<sup>217</sup> Art. 9, section 2 CLA no. 85.

<sup>218</sup> Art. 9, section 3 CLA no. 85.

<sup>219</sup> K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 98.

<sup>220</sup> Art. 11 CLA no. 85.

<sup>221</sup> Art. 26, §3 WAW and art. 27, section 2, 5° WAW.

<sup>222</sup> F. HENDRICKX, S. TAES and M. WOUTERS, "Corona en het arbeidsrecht: een Q&A", *ArbeidJ* 2020, no. 57.

<sup>223</sup> L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 50.

<sup>224</sup> <https://www.rsz.fgov.be/nl/werkgevers-en-de-rsz/coronavirus-maatregelen-voor-werkgevers/vergoeding-voor-thuiswerk>.

<sup>225</sup> Art. 7 CLA no. 149.

premises due to COVID-19.<sup>226</sup> This temporary contribution does replace other allowances which were priorly assigned to the employee.<sup>227</sup> Nevertheless, the employer can stipulate that he is not going to pay any reimbursement due to COVID-19.

COMPARISON – Differences exists regarding the reimbursements of the costs. The structural teleworker enjoys more guarantees regarding the reimbursement than the occasional teleworker or those who engaged in telework during COVID-19, although the amount of money granted is never specified.<sup>228</sup> Additionally, the costs that are not included in the law or CLAs are subject to the parties' autonomy, who are free to conclude a separate agreement on this matter.<sup>229</sup>

#### 4. Conclusion

What began as a specific legal provision for homework slowly developed into three different ways of working from home in Belgian legislation, namely homework, structural telework and occasional telework. Each type of telework has its own legal framework, characteristics and conditions. This variety leads to legal uncertainty regarding the rights and obligations of both employer and employee and an unclear distinction between the applicability of each provision. For example, a clear separation cannot be made between homework and structural telework, on the one hand, and structural and occasional telework, on the other hand. The only distinguishing elements are the use of technology and the frequency of telework. The thin line between what is considered regular and non-regular telework adds further vagueness, so action is required on behalf of the legislator.

A key element of telework is the voluntary principle, which means that neither the employer nor the employee has an absolute right to telework. Besides, homeworkers and teleworkers enjoy equal treatment and non-discrimination, so they cannot be treated differently from onsite workers. Nevertheless, the equal treatment principle does not seem to apply when

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<sup>226</sup> S. SCARNA and J. NOËL, "Tussenkomst door de werkgever voor kosten in verband met thuiswerk in het kader van de regeringsmaatregelen voor Covid-19", *FISC.WEEK* 2020, no. 107, (2) 2.

<sup>227</sup> *Ibid.*, (2) 3.

<sup>228</sup> F. ROBERT, *Le télétravail à domicile*, Limal, Anthemis, 2020, 103.

<sup>229</sup> *Ibid.*, 105.

comparing homeworkers, structural and occasional teleworkers, e.g. in terms of working time or work-related accidents. Furthermore, a royal decree regulating the well-being of teleworkers would be useful to counter the shortcomings of the current Well-Being Act and Code. Besides, the provisions regarding the reimbursement and equipment present some differences as well.

Other ambiguities can be seen within the legal frameworks implemented. The WAW introduced a new provision for occasional telework, but it is unclear in which situations the parties can apply it, i.e. the WAW did not specify the meaning of ‘personal reasons’ and ‘force majeure’. In addition, the request for occasional telework by the employee must be made within a ‘reasonable timeframe’, but the employer can refuse it based on ‘business needs’. Clear definitions are not provided, blurring the boundaries between structural and occasional telework.

During the pandemic, telework became more popular than ever. The implementation of telework on a massive scale revealed several issues regarding the scope of the applicable legal framework. It is not contested that telework was necessary to limit the spread of COVID-19 and to safeguard economic needs. Yet the action taken by the National Labour Council during the pandemic, resulting in a fourth type of telework, caused more confusion than clarity. Arguably, the new version of CLA no. 149 is a missed opportunity to stress the distinction between the different types of telework and to indicate the provisions applicable to mandatory telehomework during the pandemic. Regrettably, the CLA provides no answers to the questions raised by telework during this pandemic, nor did it clarify how some practical issues should be solved, making legislation more confusing. It is hard to predict the aftermath of COVID-19 and the future of telework. Nevertheless, employees will likely request to telework more often in the years to come. Therefore, legislative intervention to unclutter this patchwork of legal regimes seems appropriate.

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