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# The New Regulation of Telework and Remote Work in Portugal: Considerations and Prospects

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## Abstract

COVID-19 led to an extraordinary increase in both telework and remote work, exposing some of the fragilities and loopholes of the Portuguese applicable regulation and leading the Portuguese Parliament to approve a new law on teleworking in the form of an amendment to the Labour Code aimed at extending the protection of teleworkers. This paper intends to analyse this new regulation implemented by Law No. 83/2021 of 6 December regarding its concept and scope of application; the telework agreement and the principle of volunteering; teleworkers' rights and employers' duties related to equipment, tools and teleworking-related expenses; employers' duty to abstain from any contact during rest periods; privacy and data protection; health, safety and work-related accidents; and the right to telework, namely for work-life balance reasons. The final objective is to provide a critical overview of the legal regulation, assessing its strengths and weaknesses.

*Keywords:* Telework; Remote work; Work-life balance; Duty not to connect; Portugal; Gender equality.

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## 1. Brief Introduction: The Context

On 5 November 2021, the Portuguese Parliament approved a new law on teleworking, amending both the Labour Code<sup>1</sup> and Law No. 98/2009 of 4 December, which regulate compensation for accidents at work and occupational illnesses<sup>2</sup>. This amendment was passed hastily, before the dissolution of Parliament, after the 2022 state budget was rejected<sup>3</sup>. Nevertheless, the reform of telework regulation had been under discussion since March 2021, because of the problems raised by the massive use of remote work due to the COVID-19 pandemic<sup>4</sup>.

Portugal was the first member state to enact legislation to implement the European Framework Agreement on Telework of 16 July 2002 negotiated by the social partners at the European level. That was done through a provision contained in the 2003 Labour Code<sup>5</sup> (articles 233-243), which was later on modified by the 2009 Labour Code (articles 165-171). The wording of the national legislation followed almost verbatim the text of the European Framework Agreement, which was in some way surprising, since this is mainly a policy document<sup>6</sup>, and it proved inadequate to cope

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<sup>1</sup> Approved by Law No. 7/2009, of 12 February. Portuguese legislation can be consulted at: [www.dre.pt](http://www.dre.pt). An updated version of the Portuguese Labour Code is available at: [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1156&tabela=leis](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1156&tabela=leis).

<sup>2</sup> An updated version is available at: [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1156&tabela=leis](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1156&tabela=leis).

<sup>3</sup> The dissolution of Parliament was announced by the President after the rejection of the State budget for 2022 on 27 October 2021, although Parliament did not know exactly when it would take place, which justified the urge to approve all pending legislation. Dissolution occurred on 5 December 2021 (approved by Presidential Decree No. 91/2021) in order to give time for the approval of emergency legislation regarding the Covid-19 pandemic. See <https://www.parlamento.pt/Paginas/2021/novembro/atividade-parlamentar-periodo-dissolucao.aspx?n=12>.

<sup>4</sup> In the French context, M. Babin, *Télétravail et santé: le risque à distance*, in *La Semaine Juridique – Édition Sociale* 2020, No. 38, 27, also has no doubts that “this exceptional period will produce research and practices (and perhaps also litigation) in terms of the legal organization of telework”.

<sup>5</sup> Approved by Law No. 99/2003, of 27 August, available at: [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=441&tabela=lei\\_velhas&nversao=6&so\\_miolo=](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=441&tabela=lei_velhas&nversao=6&so_miolo=).

<sup>6</sup> See M. R. Redinha, *Teletrabalho. Anotação aos artigos 233.º a 243.º do Código do Trabalho de 2003*, 1, available at <http://www.cije.up.pt/download-file/216> (accessed May 20, 2022); M. I. Gomes, *O teletrabalho e as condições de trabalho: desafios e problemas*, in M. M. Carvalho (ed.), *E.Tec Yearbook 2020 AI & Robotics*, JusGov – Research Centre for Justice and Governance and University of Minho (School of Law), Braga, 2020, 146, available at:

with the new issues arising from remote work when performed during the pandemic<sup>7</sup>.

In reality, although Portugal has regulated telework since 2003, there is no relevant case law<sup>8</sup>, which can be easily understood if we take into account the statistics on the number of teleworkers in the country. In 2014, there were 805 teleworkers in absolute terms, 0.05% of the total number of employment contracts<sup>9</sup>. In 2018, this percentage went down to 0.03%, showing a downward trend<sup>10</sup>. Yet, these numbers contrast with the ones identified during the COVID-19 pandemic. In the second quarter of 2020, the employed population engaged in some form of remote work was estimated at 1,094.4 thousand people, that is 23.1% of the total employed population<sup>11</sup>. Telework and other forms of remote work became massive and, so new risks and challenges became evident, namely in terms of safety and health conditions, working time and rest periods, work-life balance, privacy, and isolation<sup>12</sup>. As a result, emergency legislation regarding telework and remote work was enacted and continually amended according to the pandemic evolution, often moving away from

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<https://www.jusgov.uminho.pt/pt-pt/publicacoes/anuario-etec-2020-2/> (accessed May 20, 2022).

<sup>7</sup> M. I. Gomes, *op. cit.*, 147, 168, *passim*; J. M. V. Gomes, *O teletrabalho obrigatório em tempos de COVID-19 e algumas insuficiências do regime jurídico português*, in M. R. Palma Ramalho/J. N. Vicente/ C. de O. Carvalho (eds.), *Work in a digital era: legal challenges*, AAFDL, Lisboa, 2022, 183-205, *passim*.

<sup>8</sup> In this sense, M. R. Redinha, *O teletrabalho*, in A. Moreira (ed.), *II Congresso nacional de direito do trabalho – Memórias*, Almedina, Coimbra, 1999, 102, refers to telework as “much ado about nothing”. Similarly, in Italy, B. Caruso, *Tra lasciti and rovine of the pandemic: più o meno smartworking?*, in *Rivista Italiana di Diritto del Lavoro* 2020-I, 221-222, states that “agile work” has been practically absent from case-law, as well as its historical precedent, telework, in relation to which the author claims to know only three decisions over twenty years.

<sup>9</sup> See Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre as relações laborais 2016*, Lisboa, 2016, 177-178, available at <https://www.portugal.gov.pt/pt/gc21/comunicacao/documento?i=20170322-mtsss-livro-verde> (accessed May 20, 2022).

<sup>10</sup> Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, Lisboa, March 2022, 61, available at: [http://www.gep.mtsss.gov.pt/documents/10182/55245/livro\\_verde\\_do\\_trabalho\\_2021.pdf/daa7a646-868a-4cdb-9651-08aa8b065e45](http://www.gep.mtsss.gov.pt/documents/10182/55245/livro_verde_do_trabalho_2021.pdf/daa7a646-868a-4cdb-9651-08aa8b065e45) (accessed May 20, 2022).

<sup>11</sup> Statistics Portugal (INE), available at: [https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine\\_destaques&DESTAQUESdest\\_boui=445841978&DESTAQUESmodo=2](https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=445841978&DESTAQUESmodo=2) (accessed May 20, 2022).

<sup>12</sup> See Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, *cit.*, 59 and 60.

the principle of ‘voluntariness’<sup>13</sup>. With the stabilization of the pandemic situation, this legislation was no longer in force, but there are surveys that point to a significant increase in companies’ willingness to resort to teleworking<sup>14</sup>. According to a survey by CIP/ISCTE<sup>15</sup>, 48% of the companies surveyed expect to continue to make use of this work arrangement in the future. Reduction of costs and employees’ motivation are the main advantages of teleworking mentioned by employers, while the overlap with domestic and family tasks and the lack of communication between teams are pointed out as the main disadvantages thereof<sup>16</sup>. From the perspective of workers who spent a period on remote work during the pandemic, a significant number (43%) was more or much more dissatisfied compared to working onsite, while 37% claimed to be more or much more satisfied, and 21% were not interested in this comparison<sup>17</sup>. In this context, in May 2021, the Portuguese Parliament began to discuss a number of bills presented by the different political parties to increase the protection of teleworkers provided for in the Labour Code. Law No. 83/2021 was issued on 6 November 2021 and entered into force on 1 January 2022. The President enacted this piece of legislation, although stating that, in the future, these subjects should be discussed through social dialogue, and drawing attention to the fact that the law also provided implementation details<sup>18</sup>.

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<sup>13</sup> Regarding the Portuguese temporary and exceptional regulation of telework and remote work, see D. A. Sousa, *Breve viagem pelo regime de teletrabalho na “legislação COVID”*, in M. R. Palma Ramalho/ T. Moreira, *Covid-19 e Trabalho: o Dia Seguinte*, AAFDL, Lisboa, 2020, 49 ff.; T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, in *Revista Internacional de Direito do Trabalho*, 2021, No. 1, 1305 ff., available at: [www.ridt.pt](http://www.ridt.pt) (accessed May 30, 2022).

<sup>14</sup> Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, cit., 63.

<sup>15</sup> Confederação Empresarial de Portugal (CIP)/ Marketing FutureCast Lab of ISCTE (University Institute of Lisboa), *Sinais vitais – Teletrabalho*, 2020, presentation available at: <https://fronteirasxxi.pt/wp-content/uploads/2020/06/2020-06-01-CIP-SinaisVitais-Teletrabalho.pdf> (accessed May 20, 2022).

<sup>16</sup> Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, cit., 63.

<sup>17</sup> P. A. Silva, R. M. Carmo, F. Cantante, C. Cruz, P. Estêvão, L. Manso, T. S. Pereira, *Trabalho e desigualdades no grande confinamento (ii): desemprego, layoff e adaptação ao teletrabalho*, Estudos CoLABOR, No. 3/2020, CoLABOR, Lisboa, June 2020, 17, available at: <https://colabor.pt/wp-content/uploads/2020/06/Trabalho-e-Desigualdades-no-Grande-Confinamento-II.pdf> (accessed May 20, 2022).

<sup>18</sup> See <https://www.presidencia.pt/atualidade/toda-a-atualidade/2021/11/presidente-da-republica-promulga-decreto-da-assembleia-da-republica-162056/> (accessed May 20, 2022).



## 2. Definition and Scope

According to the current definition, telework means the provision of work in the form of legal subordination of the employee to an employer, in a place not determined by the latter, using information and communication technologies (article 165 of the Labour Code).

Law No. 83/2021 introduced some minor changes to this definition, without amending its main aspects: work was performed outside the employer's premises through information and communication technologies<sup>19</sup>, thus excluding forms of remote work that do not involve their intensive use<sup>20</sup>. Consequently, not all remote work is legally considered telework.

Still, the new legislation has a more limited scope of application, since it refers to a place of work not determined by the employer, whereas in the past mention was made of work usually carried out outside the employer's company. Therefore, currently, it excludes, for instance, call centres. At the same time, in a somewhat contradictory way, the telework agreement must specify the regular place of work (article 166(4)(b) of the Labour Code)<sup>21</sup>. In fact, if the place of work is defined contractually, formally it is determined by both parties, including the employer, and it significantly reduces the employee's flexibility intended by this employment contract.

On the other hand, the new regulation extends the scope of some of its provisions, insofar as they are compatible to remote work beyond the employment contract when there is no legal subordination, but only economic dependence (article 165(2) of the Labour Code). The telework regulation is applicable *mutatis mutandis* to public employment (article 5 of Law No. 83/2021).

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<sup>19</sup> See J. L. Amado, *Contrato de trabalho. Noções básicas*, 3<sup>rd</sup> ed., Almedina, Coimbra, 2019, 132-133; M. R. Palma Ramalho, *Tratado de direito do trabalho. Parte IV – Contratos e regimes especiais*, Almedina, Coimbra, 2019, 171-172, 177-178; J. N. Vicente, *Modalidades de contrato de trabalho*, in J. L. Amado et al., *Direito do trabalho – Relação individual*, Almedina, Coimbra, 2019, 483; L. Mella Méndez, *La configuración del teletrabajo en el Derecho Portugués: algunas reflexiones al hilo del ordenamiento español*, in L. Mella Méndez/ L. Serrani (eds.), *Los actuales cambios sociales y laborales: nuevos retos para el mundo del trabajo*, Vol. I, Peter Lang, Bern, 2017, 297.

<sup>20</sup> M. R. Palma Ramalho, *Tratado de direito do trabalho. Parte IV*, cit., 179.

<sup>21</sup> The place of work provided for in the telework agreement can be changed by the employee but only if the employer's consent is sought in writing (article 166(8) of the Labour Code).

### 3. The Telework Agreement and the Principle of Voluntariness

As stated in the European Framework Agreement on Telework, this way of working should be entered into voluntarily by the parties.

Therefore, according to article 166 of the Labour Code, performing telework rests on an agreement between employee and employer, which must be in writing (*ad probationem* requirement), despite some exceptions where the employee has the right to telework when this is compatible with the activity performed (see point 8). Furthermore, there is a probation period that allows either party to terminate the telework agreement during the first 30 days of its execution (article 167(4) of the Labour Code)<sup>22</sup>.

With the recent legal reform, the principle of voluntariness is limited regarding the employer. When the activity performed is compatible with teleworking, the agreement entered into by the employee can only be refused by the employer in writing, stating the reasons for it (article 166(7) of the Labour Code)<sup>23</sup>. In contrast, corroborating the aim of the amendment (teleworkers' protection), if the proposal for a telework agreement comes from the employer, the employee's refusal does not have to be substantiated and does not constitute a cause for dismissal or the application of sanctions (article 166(6) of the Labour Code). On the other hand, now the written agreement has to include the place of work, as explained above, and the work schedule, besides maximum (daily and weekly) working time limits (article 166(4) of the Labour Code). Although the objective is the protection of the employee, it can backfire on them, limiting their working flexibility and affecting some of the advantages traditionally recognized to telework, as illustrated below. That may be the reason why there is no administrative sanction for the employer who does not comply with this regulation, so the Labour Inspectorate cannot support the employee.

Moreover, if the telework agreement is a permanent, either party can terminate it by giving the other party 60-day written notice<sup>24</sup>. In this case, the employee resumes the activity onsite, without prejudice to their

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<sup>22</sup> Before the 2021 reform of the Labour Code, this possibility was only recognized to onsite workers. The new wording of the legal provision provides a wider scope. See L. Mella Méndez, *op. cit.*, 305.

<sup>23</sup> The employer can use an internal regulation to identify the specific activities and conditions in which telework is admissible (article 166(9) of the Labour Code).

<sup>24</sup> In the case of a fixed-term contract, a maximum period of six months is established, although automatically renewable for an equal period if not ended, in writing, 15 days prior to its termination, by either party (article 167(2) of the Labour Code).

category, seniority and any other rights recognized to standard employees with identical tasks and working time (article 167(3)(5) of the Labour Code). It is not clear if these provisions are applicable also to employees who were hired as teleworkers from the beginning. If this is the case, this regulation can seriously affect the traditional powers of employers to direct and organize the labour force, making this contract less appealing.

#### 4. Equipment, Tools, and Teleworking-related Expenses

The responsibility for providing the equipment and tools necessary to carry out work was one of the concerns raised during the pandemic crisis, along with the reimbursement of telework-related expenses<sup>25</sup>. Thus, the regulation of these issues by the new law is not surprising. The aim should be to make telework neutral in terms of costs for both parties, otherwise they will avoid it and its use will be limited, as before the COVID-19 pandemic.

The written agreement shall establish the ownership of the equipment, as well as the person in charge of their installation and maintenance (article 166(4)(g) of the Labour Code), a provision already existent in the previous regulation.

Yet article 168 of the Labour Code now specifies that the employer is responsible for providing all the equipment necessary to carry out work and communicate with the employer. The written agreement shall determine if these are provided directly or purchased by the employee (with the employer giving consent on their characteristics and prices).

Furthermore, all additional expenses that are proven to have been incurred by the employee because of teleworking, e.g. increased energy and internet costs, as well as the respective maintenance costs, shall be paid by the employer<sup>26</sup>.

How can the employee prove this correlation? The law clarifies that the additional expenses are the ones corresponding to the purchase or acquisition of goods and services which the employee did not previously own or benefit from, as well as those determined by comparison with the employee's expenditures in the same month of the previous calendar year. However, this criterion can raise some problems whenever the employee

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<sup>25</sup> See M. I. Gomes, *op. cit.*, 161, footnote 57.

<sup>26</sup> The compensation paid to the employee for the additional expenses related to the telework is deemed, for tax purposes, as a company cost and is not considered employees' income. This means that these amounts will not be subject to Personal Income Tax, nor social security contributions.

was already teleworking in the same month of the previous calendar year, namely due to the temporary and exceptional legislation which, during the lockdowns, enforced telework for all employees whose jobs were compatible with this way of working. Other practical problems can result from having several members of the family teleworking for different employers in the same household.

Collective bargaining can be a useful instrument to deal with legal loopholes<sup>27</sup>, which seems to have been considered by the new law when it establishes that collective agreements shall regulate teleworking (article 492(2)(i) of the Labour Code), thus adding a new topic to the previous list of subjects that must be addressed thereby. However, the new regulation also added that collective agreements can be given priority over legal regulations governing telework only if they establish more favourable conditions (article 3(3)(k) of the Labour Code)<sup>28</sup>.

Surprisingly, also in this situation, there is no administrative sanction for the employer who does not comply with this regulation, so once again the Labour Inspectorate can do nothing about it.

### 5. Employers' Duties: The Duty of the Employer not to Connect

In 2018, a survey showed that 78% of Portuguese employees work outside their working schedule, while 66% admitted to answering work calls any day of the week, and 85% considered having “responsibilities that require them to be reachable”<sup>29</sup>.

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<sup>27</sup> J. L. Amado, *Teletrabalho: o “novo normal” dos tempos pós-pandémicos e a sua nova lei*, in *Observatório Alameda*, 29 December 2021, available at: <https://observatorio.alameda.net/index.php/2021/12/29/teletrabalho-o-novo-normal-dos-tempos-pos-pandemicos-e-a-sua-nova-lei/> (accessed May 10, 2022). Less optimism regarding the role of collective agreements is shown by J. M. V. Gomes, *op. cit.*, 192-194.

<sup>28</sup> The 2003 Portuguese Labour Code adopted new provisions on the relation between the law and collective agreements, allowing for the latter, as a rule, to establish less favourable conditions than those prescribed by the law (it was the end of the traditional *favor laboratoris* principle set as a rule). Nevertheless, there are many exceptions to the new rule (mostly mentioned in article 3(3) of the Labour Code) where collective agreements are only allowed to set aside the legal regulation when establishing a more favourable treatment to employees. After the entry into force of Law No. 83/2021, telework is part of such exceptions.

<sup>29</sup> We refer to the survey carried out in 13 European countries by the consulting firm Michael Page, reported by the Portuguese newspaper *Público* (K. Pequenino, *Telemóvel e computador da empresa fazem portugueses levar trabalho para casa*, in *Jornal Público online*, 19 November 2018), available at:

This empirical perception of an “ever-connected” or “always on” culture<sup>30</sup> had led, in 2017, to the presentation of several bills, by the different parliamentary representatives, aiming to regulate an employee’s right or an employer’s duty to disconnect<sup>31</sup>, although none was successfully approved. The need for this regulation also gave rise to different views in legal research. Some authors considered it necessary<sup>32</sup>, others saw it as a redundant revival of the employees’ right to rest<sup>33</sup>, already protected by the Portuguese Constitution (article 59(1)(d)) and the Labour Code (article 199). “Hyperconnectivity”, or “infoxication”<sup>34</sup>, became more critical during the pandemic, considering the intensive use of remote work<sup>35</sup>. Still, the Portuguese annual report on the evolution of collective agreements states that the regulation of telework and the right to disconnect is contained in only seven collective agreements (as compared to 12 in the previous year)<sup>36</sup>. This reduction was, however, attributed to the general

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<https://www.publico.pt/2018/11/19/tecnologia/noticia/portugal-segundo-pais-leva-trabalho-casa-1851592> (accessed May 10, 2022).

<sup>30</sup> As T. C. Moreira, *Direito do trabalho na era digital*, Almedina, Coimbra, 2021, 106-107, puts it, “the anytime-anyplace opportunity cannot become always and everywhere”, signalling the increasing confusion between what is urgent and what is important, which can lead to burnout syndrome, FOMO – Fear of missing out, and FOBT – Fear of being fired.

<sup>31</sup> These bills are described by D. A. Pereira, *Há vida para além do trabalho: notas sobre o direito ao repouso e a desconexão profissional*, in *Questões Laborais*, 2018, No. 53, 138-140; and T. C. Moreira, *Direito do trabalho na era digital*, cit., 121-124.

<sup>32</sup> For example, J. L. Amado, *Tempo de trabalho e tempo de vida: sobre o direito à desconexão profissional*, in M. Roxo (ed.), *Trabalho sem fronteiras – O papel da regulação*, Almedina, Coimbra, 2017, 127.

<sup>33</sup> Opinion of M. R. Palma Ramalho expressed in M. Deus, *Direito à desconexão*, in *Boletim da Ordem dos Advogados*, September 2019, 26, available at: [https://portal.oa.pt/media/130361/boletim\\_ordem-dos-advogados\\_setembro\\_2019.pdf](https://portal.oa.pt/media/130361/boletim_ordem-dos-advogados_setembro_2019.pdf) (accessed May 30, 2022). A similar debate is mentioned, in the Spanish context, by, *inter alios*, M. R. Vallecillo Gámez, *El derecho a la desconexión ¿“Novedad digital” o esnobismo del “viejo” derecho al descanso?*, in *Estudios financieros. Revista de trabajo y seguridad social*, 2017, No. 408, 167 ff., and in the Italian context, by E. Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell’esperienza comparata*, in *Diritto delle Relazioni Industriali*, 2017, No. 4, 1033.

<sup>34</sup> F. Alemán Paez, *El derecho de desconexión digital: una aproximación conceptual, crítica y contextualizadora al hilo de la “Loi Travail N° 2016-1088”*, in *Trabajo y Derecho*, 2017, No. 30 (electronic version).

<sup>35</sup> Centro de Relações Laborais, *Relatório anual sobre a evolução da negociação coletiva em 2020*, Ministério do Trabalho, Solidariedade e Segurança Social, Lisboa, 2021, 206. Available at: <https://www.crlaborais.pt/documents/10182/477060/Relat+Neg+Col+2020+pdf/6a3f2d40-b57b-4362-93b7-8d97e7a7a8b9> (accessed May 10, 2022).

<sup>36</sup> See Centro de Relações Laborais, *Relatório anual sobre a evolução da negociação coletiva em 2020*, cit., 206-208. Also, Centro de Relações Laborais, *Negociação coletiva em números 2015*

decrease in collective bargaining during 2020 as a result of the pandemic<sup>37</sup>. After France<sup>38</sup>, Italy<sup>39</sup>, Belgium<sup>40</sup> and Spain<sup>41</sup> regulated the right to disconnect, in 2021<sup>42</sup>, a new provision entitled “duty to refrain from contact the employee” was introduced in the Portuguese Labour Code (article 199-A). The new article 199-A expressly states that the employer shall refrain from contacting the employee during rest periods, save for situations of *force majeure*. Furthermore, the law determines that any

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– 2020, Ministério do Trabalho, Solidariedade e Segurança Social, Lisboa, 2022, 79-81, available at: [https://www.crlaborais.pt/documents/10182/13332/NC\\_N%C3%BAmeros\\_2015\\_2020\\_pdf/07e48743-9958-46b6-bfca-b457452dbcc5](https://www.crlaborais.pt/documents/10182/13332/NC_N%C3%BAmeros_2015_2020_pdf/07e48743-9958-46b6-bfca-b457452dbcc5) (accessed May 10, 2022). In Spain, the UGT trade union confederation laments that teleworking was gradually set aside and points out that few collective agreements on teleworking were signed in 2021: just 123 for Spain. See <https://www.ugt.es/solo-123-acuerdos-colectivos-de-teletrabajo-en-2021> (accessed May 22, 2022). Regarding Italian collective bargaining, see E. Dagnino, *Il diritto alla disconnessione nell'esperienza contrattuale-collettiva italiana*, in *Lavoro Diritti Europa*, 2021, No. 4, 2-13.

<sup>37</sup> In 2020, there was a drop of 30% in collective bargaining compared to the previous year (there were only 169 collective agreements published), similar to what happened in 2011. See Centro de Relações Laborais, *Relatório anual sobre a evolução da negociação coletiva em 2020*, cit., 99.

<sup>38</sup> Articles L2242-17 and L3121-64 of the French Labour Code. See, *inter alios*, J.-E. Ray, *Grande accélération et droit à la déconnexion*, in *Droit Social*, 2016, No. 11, 912-920; C. Mathieu, *Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l'employeur)*, in *Revue de Droit du Travail*, 2016, No. 10, 592-595; M. Péretié, A. Picault, *Le droit à la déconnexion répond à un besoin de régulation*, in *Revue de Droit du Travail*, 2016, No. 10, 595-598.

<sup>39</sup> In the context of “smart working – lavoro agile” regulation, introduced by Law No. 81/2017, of May 22<sup>nd</sup> (article 19), although not qualifying disconnection as a right. See, *inter alios*, E. Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, cit., 1024-1040; E. Dagnino, ‘Working anytime, anywhere’ and working time provisions. *Insights from the Italian regulation of smart working and the right to disconnect*, in *E-Journal of International and Comparative Labour Studies*, 2020, Vol. 9, No. 3, 1-19; C. Timellini, *Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale*, in *Lavoro Diritti Europa*, 2021, No. 4, 1-13, also developing its regulation in emergency legislation (Law No. 61/2021, of March 13<sup>th</sup>).

<sup>40</sup> Articles 15-17 of *Loi du 26 mars 2018 relative au renforcement de la croissance économique et de la cohésion sociale*.

<sup>41</sup> Article 88 of *Ley Orgánica No. 3/2018 de Protección de datos personales y garantía de los derechos digitales* (on the Protection of personal data and the guarantee of digital rights), of 5 December 2018, and article 18 of *Real Decreto-ley No. 28/2020 de trabajo a distancia* (on remote work), of 22 September 2020, See, *inter alios*, F. Trujillo Pons, *La “desconexión digital” en el ámbito laboral*, 2<sup>nd</sup> ed., Tirant lo Blanch, Valencia, 2021, 129 ff. and 171 ff.; A. B. Muñoz Ruiz, *El derecho a la desconexión digital en el teletrabajo*, in *Trabajo y Derecho* (Monográfico), 2020, No. 12 (electronic version).

<sup>42</sup> Law No. 83/2021 was published on 6 November 2021 and entered into force on 1 January 2022.

unfavourable treatment of employees due to the exercise of their right not to be contacted, related for instance to career progression or working conditions, will be considered a discriminatory practice. The breach of this duty of the employer to refrain from contact is considered a serious administrative offense, thus calling for the intervention of the Labour Inspectorate.

This new provision was in some way unexpected, since it was introduced by the above-mentioned Law No. 83/2021 in the context of the reform of telework regulation. Although it contains another provision addressing the duty of the employer to avoid contacting teleworkers (article 169-B(1)(b) of the Labour Code), the latter refers to the new general legal rule (article 199-A)<sup>43</sup>, which is applicable to all employees and not only to teleworkers. On the other hand, this new article does not mention explicitly a right to disconnect, nor does it address the use of digital media to establish such connection<sup>44</sup>. Nevertheless, the legislative preparatory work points towards digital connection as *ratio legis*<sup>45</sup>. The option to regard disconnection as a duty of the employer (an employer's "do not disturb period"<sup>46</sup>), rather than an employee's right, seeks to increase the efficiency of this protection<sup>47</sup>. Moreover, it remains unclear whether disconnection should be considered a "right" by itself, a sort of "new generation right"<sup>48</sup>. The rights involved are the right to rest and leisure, the right to a maximum limit of working hours, the right to work-life balance, etc.<sup>49</sup>

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<sup>43</sup> A similar articulation can be found in Spain (article 18 of the remote work regulation refers to the general rule of article 88 of *Ley Orgánica No. 3/2018*. See footnote 42.

<sup>44</sup> E. Dagnino, *Il diritto alla disconnessione nell'esperienza contrattuale-collettiva italiana*, cit., 3, footnote 9, seems to exclude Portugal from the EU countries regulating the right to disconnect, namely because "Si tratta, infatti, di un intervento che non prende in considerazione le diverse fonti e modalità di connessione del lavoratore alle proprie strumentazioni tecnologiche, agendo secondo una logica meramente preclusiva e non di attivazione di misure prevenzionistiche".

<sup>45</sup> See *Boletim da Assembleia da República Comunicar*, June 2021, available at <https://app.parlamento.pt/comunicar/V1/202106/74/artigos/art3.html> (accessed May 10, 2022), containing links to the several bills presented at Parliament and their respective explanatory statements.

<sup>46</sup> J. L. Amado, *Desconexão profissional: direito ou dever?*, in M. R. Palma Ramalho/J. N. Vicente/ C. de O. Carvalho (eds.), *Work in a digital era: legal challenges*, AAFDL, Lisboa, 2022, 477.

<sup>47</sup> The question of addressing disconnection as a duty of the employer is also debated in the legal literature of other countries. See, for instance, C. Mathieu, *op. cit.*, 592-595; and E. Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, cit., 1035.

<sup>48</sup> Regarding the definition of this right, see Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, cit., 1030 ff.

<sup>49</sup> J. L. Amado, *Desconexão profissional: direito ou dever?*, cit., 476.

Thus, the Portuguese legislator has moved away from other comparable legal regulations that require either (1) collective agreements or, at least, some sort of collective negotiation (e.g. France, Belgium, Spain<sup>50</sup>), or (2) individual agreements between the employer and the employee, such as the ones regarding the so-called smart working (*lavoro agile*) in Italy<sup>51</sup>. It is still early to assess whether this approach can be more effective in the promotion of employees' health, safety and privacy, as well as their rights to rest and to a work-life balance.

Nonetheless, the interpretation of this provision is open to discussion. Firstly, it does not specify what should be considered as a contact (e.g. does sending an email fall under the scope of application of the rule? Could it be sent with a disclaimer "no immediate answer is required"?). Secondly, the scope of the exceptions (situations of *force majeure*) seems rather limited, if we take into account the civil law definition of this legal concept (recalling the idea of inevitability or unforeseeable circumstances, often linked to natural phenomena such as fires or floods) and the total absence of a labour law approach to this concept from the legal literature or case-law<sup>52</sup>. Thirdly, what is the personal scope of this provision? Literally, it only mentions the employer<sup>53</sup> but, to be effective, shouldn't it include, for instance, co-workers? Additionally, bringing into play the concept of "rest period" (defined as any period which is not working

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<sup>50</sup> A recent Spanish court decision from *Sala de Audiencia Nacional* of 22 March 2022 (available at: <https://www.poderjudicial.es/search/documento/AN/9915176/Real%20Decreto%20al%20sanitaria%20Covid-19/20220404> - accessed May 10, 2022) declared a clause included in a telework agreement, which waived the right to disconnect in "exceptional circumstances" null and void. These were "circumstances of justified urgency in situations that may imply a business damage or business whose temporal urgency requires an immediate response or attention on the part of the employee". The court considered that "the limits to the right to digital disconnection in teleworking cannot be established unilaterally by the employer, but rather, as indicated by article 88 of the LOPD, by collective bargaining or, failing that, to what is agreed between the company and the workers' representatives".

<sup>51</sup> See the above-mentioned legal regulations and references regarding these countries.

<sup>52</sup> Some legal literature advocates a broad interpretation of the *force majeure* concept used in this article in order to include all the situations in which immediate contact proves to be necessary to prevent or repair serious damage to the company or its viability, calling into the interpretation the analogous regulation of overtime present in article 227(2) of the Labour Code. See J. L. Amado, *Teletrabalho: o "novo normal" dos tempos pós-pandémicos e a sua nova lei*, cit.

<sup>53</sup> Supervisors should be included, since they have delegated employer powers. See J. L. Amado, *Desconexão profissional: direito ou dever?*, cit., 482.



time, according to article 199 of the Labour Code<sup>54</sup>), it can pose major challenges<sup>55</sup>, due to the binary nature<sup>56</sup> of the definitions of working time and rest period within the meaning of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, which excludes intermediary categories of time<sup>57</sup>. Despite the recent nuances of the Court of Justice of the European Union (hereinafter, CJEU) case-law<sup>58</sup>, stand-by time when the employee is not required to be present at the place of work is classified as “rest time”, so not only the time linked to the actual provision of services must be regarded as “working time”<sup>59</sup>. Therefore, if the employer shall refrain from contacting the employee during rest periods, does this prohibition impact stand-by time? The duty to abstain from contact does not seem to be applicable to these situations, otherwise home stand-by time would be excluded from the Portuguese legal framework, which was clearly not intended by the legislator. Nevertheless, this means that, in those cases where the duty of the employer not to

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<sup>54</sup> Which follows the definition of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (article 2(2)).

<sup>55</sup> See E. Dagnino, *‘Working anytime, anywhere’ and working time provisions. Insights from the Italian regulation of smart working and the right to disconnect*, cit., 12 ff.

<sup>56</sup> See, *inter alios*, C. de O. Carvalho, *Reflexões sobre o conceito de tempo de trabalho no direito europeu e respetiva articulação com o direito nacional*, in B. Lobo Xavier et al. (eds.), *Estudos de direito do trabalho em homenagem ao Professor António Monteiro Fernandes*, Editor NovaCausa, V. N. Famalicão, 2017, 281 ff.; M. Véricel, *Distinction temps de travail et temps de repos en droit français et en droit de l’Union européenne*, in *Revue de Droit du Travail*, 2021, No. 4, 257.

<sup>57</sup> “Temps du troisième type”, as they were called by J.-E. Ray, *Les astreintes, un temps du troisième type: a propos de l’arrêt M. Taxis/Sté Brink’s, cass. soc. 9 décembre 1998*, in *Droit Social*, 1999, No. 3, 250.

<sup>58</sup> These variations started with the Matzak case (Case C-518/15), where the CJEU admitted that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes must be regarded as working time. Still, in the latest case-law (Cases Radiotelevizija Slovenija – C-344/19, RJ - C-580/19, and MG - C-214/20) the CJEU reframed the previous interpretation, introducing new criteria that can disqualify such periods as working time even when the employee has a very short period to respond to the call (e.g. the response time; the average frequency of the activities that the employee is actually called upon to undertake over the course of that period; the permission to carry out another professional activity). See, *inter alios*, M. Revuelta García, *Tiempo de trabajo y guardias en régimen de disponibilidad noprocesional. comentario a la reciente doctrina judicial europea y su reflejo en la realidad española*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2021, No. 59, 817 ff.; Marc Véricel, *op. cit.*, 258 ff.

<sup>59</sup> E.g. cases Simap (C-303/98), Jaeger (C-151/02), Dellas (C- 14/04), Grigore (C-258/10).

connect could have the most sensible impact<sup>60</sup>, determining some minimum periods of real and total disconnection of the employee, the new regulation will not apply. A similar problem can be raised regarding employees who are exempted from working hours, which can be the case of teleworkers under article 218(1)(c) of the Labour Code, since a specific framework is not established for such situations. Moreover, according to article 166(4)(d) of the Labour Code, the work schedule shall be defined on the written telework agreement. This new mandatory content of the telework agreement simplifies the operation of the employer's duty not to connect during rest periods. However, it is hardly applicable to the previously mentioned situations where there is exemption of working schedule and, once again, it significantly reduces the employee's flexibility aimed by this employment contract. Maybe that is why the Portuguese legislator, once again, did not provide for an administrative sanction applicable to the employer who does not comply with this mandatory content of the telework agreement, reducing the possibility of infringement control.

## 6. Privacy and Data Protection

The right to privacy and data protection is reinforced with the new telework legislation, aiming at the limitation of the employer's powers, particularly enhanced due to technological innovation. One of the characteristics of telework is that work equipment can also serve as a

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<sup>60</sup> In this regard, there are divergent opinions in the EU and in the Council of Europe. According to the European Committee of Social Rights (Council of Europe), the assimilation of on-call periods to rest periods "constitutes a violation of the right to reasonable working time provided in Article 2§1 of the European Social Charter". Although on-call periods do not constitute effective working time, they cannot be regarded as a rest period, since "the absence of effective work, determined *a posteriori* for a period of time that the employee *a priori* did not have at his or her disposal, cannot (...) constitute an adequate criterion for regarding such a period as a rest period". Decisions on the merits of 7 December 2004 in Complaint No. 22/2003 Confédération générale du travail (CGT) v. France, and of 23 June 2010 in Complaint No. 55/2009, CGT v. France (available at: <https://hudoc.esc.coe.int>). For further developments, see J.-F. Akandji-Kombé, *Réflexions sur l'efficacité de la Charte sociale européenne à propos de la décision du Comité européen des droits sociaux du 23 juin 2010*, in *Revue de Droit du Travail*, 2011, No. 4, 235 ff.; C. de O. Carvalho, *Reflexões sobre o conceito de tempo de trabalho no direito europeu e respetiva articulação com o direito nacional*, cit., 303 ff.

monitoring tool, which allows for a constant supervision of teleworkers and the data they produce<sup>61</sup>.

According to article 170(1) of the Labour Code, teleworkers are entitled to privacy, ensuring compliance with their working hours, rest time and family time.

The use of images, sound, writing and browser/computer history is forbidden, as well as other control mechanisms that collide with the employee's privacy (article 170(5) of the Labour Code). Ideally, work should be monitored by means of communication and information equipment and systems allocated to the employee's activity, following procedures that the employee is aware of and that are compatible with the respect for privacy (article 169-A(4) of the Labour Code). It is now expressly forbidden to demand permanent connection either through images or sounds, and all forms of control must abide by the principles of proportionality, transparency and information (article 169-A(5) of the Labour Code).

These new rules are inspired by the guidelines on remote control under teleworking issued, on 17 April 2020, by the Portuguese Agency on Data Protection (*Comissão Nacional de Proteção de Dados – CNPD*)<sup>62</sup> in order to guarantee the conformity of the processing of employees' personal data with the regulation on data protection and to minimize their impact on teleworkers' privacy. Following the pandemic and the subsequent adoption of measures of confinement and social isolation, the use of telework became widespread. It was in this context that the Portuguese Agency on Data Protection received several complaints and requests for clarification concerning employers' control instruments, related to either the recording of working time<sup>63</sup> or the monitoring of the teleworking

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<sup>61</sup> See B. Torres García, *Spain's Law No. 10/2021 on teleworking: strengths and weaknesses*, in *E-Journal of International and Comparative Labour Studies*, 2021, Vol. 10, No. 2, 54; T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, cit., 1310 ff.

<sup>62</sup> Comissão Nacional de Proteção de Dados (CNPD), *Orientações sobre o controlo à distância em regime de teletrabalho*, 17 April 2020, available at: [https://www.cnpd.pt/media/zkhkxlp/orientacoes\\_controlo\\_a\\_distancia\\_em\\_regime\\_d\\_e\\_teletrabalho.pdf](https://www.cnpd.pt/media/zkhkxlp/orientacoes_controlo_a_distancia_em_regime_d_e_teletrabalho.pdf). (accessed May 10, 2022). Regarding this issue, see also T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, cit., 1313-1320.

<sup>63</sup> According to the Portuguese Agency on Data Protection, it is legal to record working time, which can be carried out remotely using specific technological tools. Nevertheless, this control shall be limited to reproducing the records made when work is performed on the employer's premises, not collecting more information than necessary for that purpose. This interpretation is in line with the CJEU case law (case *Federación de Servicios de Comisiones Obreras – C-55/18*) where the Court concluded that Member States must implement appropriate mechanisms enabling the objective and reliable

activity. According to these guidelines, the general rule forbidding the use of means of remote surveillance with the aim of monitoring employees' performance (article 20 of the Labour Code) is applicable to telework, considering that the use of these means involves an excessive limitation of employees' privacy in the light of the principles of proportionality and data minimisation<sup>64</sup>. The fact that work is provided from home does not justify an amplification of employers' control powers when compared to what can be legally carried out at their premises. Consequently, technological tools (software) that record the websites visited and the location of the terminal in real time, the use of peripheral devices that capture desktop images and start recording when access to an application begins, or control the document the employee is working on and record the time spent on each task (e.g. TimeDoctor, Hubstaff, Timing, ManicTime, TimeCamp, Toggl, Harvest), are banned. At the same time, the Portuguese Agency on Data Protection argues that it is not allowed to require permanent video camera connection or the recording of teleconferences between employer (and their representatives) and employees. Thus, it seems that the new law goes one step further, prohibiting permanent connection through sound.

In relation to possible visits from the employer to the telework location whenever it takes place at the employee's home, article 170(2)(3) of the Labour Code requires both a 24-hour warning and the agreement of the employee<sup>65</sup>. The aim of this visit must be strictly related to the control of the work performance, as well as of the use of the working instruments. Additionally, it must be carried out in the employee's presence, and within the agreed working schedule<sup>66</sup>.

## 7. Health, Safety, and Work-related Accidents

The risks that telework poses to employees' health and safety, including psychological risks, seem to be of major importance and widely

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determination of the number of hours worked each day and each week, namely to demonstrate that the maximum working hours have not been exceeded. See T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, cit., 1321-1323.

<sup>64</sup> See article 5(1)c) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

<sup>65</sup> The consequence of the absence of the employee's consent is not determined by law.

<sup>66</sup> Once again there is no reference to the possibility of exemption of working schedule.

recognized<sup>67</sup>. Telework may not only intensify general risks, but also create new ones<sup>68</sup>. Many of these new risks can result from the employee's "(personal and professional) characteristics, the workplace, the equipment used, the distribution of working time and the management of the workload"<sup>69</sup>. At the same time, the execution of the employment contract outside the employer's premises challenges the application of the traditional legislation regarding health and safety<sup>70</sup>, and can cause additional difficulties to the implementation of health and safety rules<sup>71</sup>. Thus, a specific regulation is justified. That was taken into account by the new Portuguese law on telework, unlike the previous regulation, which merely recognized this right and the equality of treatment of teleworkers and onsite employees, without further developments.

According to article 170(1) of the Labour Code, it is up to the employer to promote good working conditions for teleworkers, both from a physical and a psychological standpoint. So, the primary responsibility for teleworkers' health and safety belongs to the employer, despite possible surveillance difficulties.

This general principle is developed in the new provision of article 170-A of the Labour Code. First, telework is prohibited in activities that involve the use of or contact with substances and materials that are hazardous to the health or physical integrity of the employee, unless it is carried out in facilities certified for this purpose. Second, the employer shall organize "in specific and appropriate ways" the means necessary to fulfil their responsibilities in terms of occupational health and safety, namely regarding display screen equipment, and always respecting the privacy of the teleworker. For that purpose, the employer carries out occupational health exams before the implementation of telework and, subsequently,

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<sup>67</sup> See, inter alia, A. C. R. Costa, *Retos de la transformación digital del trabajo por el Derecho a la salud y la seguridad en el trabajo portugués – Sera que “en casa del herrero, cuchillo de palo”?*, in C. Molina Navarrete and M. R. Valecillo Gámez (dir.), E. González Cobaleda (ed.), *De la economía digital a la sociedad del *ework*. decente: condiciones sociolaborales para una industria 4.0 justa e inclusiva*, Thomson Reuters Aranzadi, 2022, 386 ff.; L. Mitrus, *The major risks to health and safety in employment relations in the information age*, in M. R. Palma Ramalho/ J. N. Vicente/ C. de O. Carvalho (eds.), *Work in a digital era: legal challenges*, AAFDL, Lisboa, 2022, 213 ff.

<sup>68</sup> S. Rodríguez González, *Teletrabajo y riesgos psicosociales*, in L. Mella Méndez/ L. Serrani (eds.), *Los actuales cambios sociales y laborales: nuevos retos para el mundo del trabajo*, Vol. I, Peter Lang, Bern, 2017, 335 ff.; J. Gomes, *op. cit.*, 187 ff.; M. Babin, *op. cit.*, 30 ff.

<sup>69</sup> B. Torres García, *op. cit.*, 58.

<sup>70</sup> S. Bruurs/ S. Huybrechts, *Telework in Belgium: a patchwork of legal regimes*, in *E-Journal of International and Comparative Labour Studies*, 2021, Vol. 10, No. 2, 27; J. Gomes, *op. cit.*, 183.

<sup>71</sup> B. S. Bruurs/ S. Huybrechts, *op. cit.*, 28; J. M. V. Gomes, *op. cit.*, 183, 190.

annually, to assess teleworkers' physical and psychological aptitude, the impact of telework on their health, as well as the appropriate preventive measures. This means that, besides information and training duties, the employer has the obligation to evaluate risk factors inherent to this way of working, which might not be detected in traditional prevention systems<sup>72</sup>. Additionally, health and safety professionals appointed by the employer can visit the workplace to assess the application of the health and safety conditions. This visit must be arranged in advance and can only take place within the work schedule, between 9 a.m. and 7 p.m. Contrary to what was mentioned in the previous point regarding the employer's visit to the workplace, it seems that the employee cannot refuse this visit. In such case, although no specific consequence is legally determined, the employer should not be held responsible<sup>73</sup>.

Compliance can also be controlled by the Labour Inspectorate<sup>74</sup>. However, visits to the employee's home require at least a 48-hour advance-notice and must be accepted by the employee (article 171 of the Labour Code).

Furthermore, to reduce psychological risks associated with telework, the employer must take appropriate measures to avoid social isolation. Thus, face-to-face contacts with the management and colleagues shall be promoted by the employer according to the periodicity established in the telework agreement, which cannot exceed two months (articles 166(4)(h) and 169-B(1)c) of the Labour Code).

Besides, the teleworker has the right to participate in in-person meetings held at the company's premises, summoned up by employees' representatives, and may also participate in such meetings remotely, using the information and communication technologies related to the work performance<sup>75</sup> (article 169(1)(b) and (2) of the Labour Code). In turn, employees' representatives can use these technologies to communicate with teleworkers (articles 169(3) of the Labour Code).

Prior to the enforcement of Law No. 83/2021, the Labour Code already recognized the inclusion of teleworkers within the scope of Law No.

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<sup>72</sup> J. M. V. Gomes, *op. cit.*, 190-191.

<sup>73</sup> Applying this solution to Belgium's structural telework, B S. Bruurs/ S. Huybrechts, *op. cit.*, 29.

<sup>74</sup> All employers' infringements to the health and safety provisions are considered very serious offenses.

<sup>75</sup> The so-called "right to technological sociability", i.e. communication via electronic means – see M. R. G. Redinha, *O teletrabalho*, 24, available at: <https://repositorio-aberto.up.pt/bitstream/10216/18672/2/49720.pdf> (accessed May 13, 2022).

98/2009 of 4 December regulating compensation for accidents at work<sup>76</sup> and occupational illnesses under the principle of equal treatment<sup>77</sup>. However, legal literature considered such reference insufficient, and advocated for specific regulation<sup>78</sup>. The new law addresses this problem, amending both Law No. 98/2009 (article 8) and the Labour Code (articles 169(1) and 170-A(5)). It states that the legal regime for the compensation of accidents at work and occupational diseases applies to telework situations, the workplace being considered the one defined as such in the written telework agreement, and the working time being all the time during which teleworkers are performing work for their employer. Once again, the focus is the place of work identified as such in the written telework agreement, which can be “an excessively rigid solution in many situations”<sup>79</sup>.

## 8. The Right to Telework to Ensure the Work-life Balance

Even before the entry into force of the new provisions of the Labour Code regarding telework, the ‘voluntariness’ principle mentioned above featured some exceptions, which were even increased by the new legislation and partially implemented Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers<sup>80</sup>.

Provided that telework is compatible with the activity performed, employees are entitled to telework in the following situations (article 166-A of the Labour Code): *i*) Employees who are victims of domestic violence<sup>81</sup>; *ii*) Employees with children up to 3 years of age, as long as the

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<sup>76</sup> The Portuguese system of compensation concerning work-related accidents is based on a mandatory insurance contract, which remains a central aspect of the reparation system, as the public fund has a residual and subsidiary function.

<sup>77</sup> See M. R. G. Redinha, *Anotação ao artigo 239.º do Código do Trabalho de 2003*, in *Teletrabalho – Anotação aos artigos 233º a 243º do Código do Trabalho de 2003*, available at: <https://cije.up.pt/download-file/216> (accessed May 13, 2022).

<sup>78</sup> J. M. V. Gomes, *op. cit.*, 194-195.

<sup>79</sup> J. M. V. Gomes, *op. cit.*, 201-202.

<sup>80</sup> This new Directive builds on the rules laid down in the previous Council Directive (EU) 2010/18 of 8 March implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive (EC) 96/34.

<sup>81</sup> Provided that a criminal complaint has been filed and the employee has left the family home, which are much-debated conditions in legal literature. See C. de O. Carvalho, *Protección social de las víctimas de violencia doméstica en Portugal*, in *Revista Internacional y*

employer can provide the necessary means to make that organisational change possible; *iii*) Employees with children up to 8 years of age provided that some requirements are met (see below); *iv*) Employees with recognized, non-primary informal caregiver status<sup>82</sup> for a period of up to 4 years, either continuous or interpolated, as long as the company has the necessary material resources.

These last two cases were included through Law No. 83/2021 to partially implement Directive (EU) 2019/1158. Yet their requirements differ, and some doubts can be raised regarding the adequacy of the Directive's implementation<sup>83</sup>. In both cases, no period of work qualification or length of service is needed.

According to article 3(f) of Directive 2019/1158, “flexible working arrangements” refer to “the possibility for workers to adjust their working patterns, including using remote working arrangements (...)”. Moreover, article 9 of the EU legal act attributes the right to request flexible working arrangements for caring purposes to employees “with children up to a specified age, which shall be at least eight years, and carers<sup>84</sup>”. Thus, Law No. 83/2021 widened the scope of telework in order to include employees with children up to 8 years of age and carers.

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*Comparada de Relaciones Laborales y Derecho del Empleo*, 2013, Vol. 1, No. 4, 12-14, 18 *passim*, and L. Mella Méndez, *op. cit.*, 310 ff.

<sup>82</sup> Portugal approved a new provision applicable to informal caregivers in 2019 (*Estatuto do cuidador informal* – Law No. 100/2019 of 6 September, available at <https://dre.pt/application/conteudo/124500714>), but the employment implications of this role for the “non-primary informal caregiver” (since the “primary informal caregiver” cannot have a paid professional activity) were left to the following regulations. Meanwhile – while identifying the legislative measures necessary to strengthen the labour protection of non-primary informal caregivers and the corresponding approval – article 13 of *Portaria* No. 2/2020 was temporarily applicable “to holders of parenting rights to whom the status of non-primary informal caregiver is recognized” the parenting rights provided for in the Labour Code. However, this general reference is rather ambiguous and does not seem to add any further protection. This last piece of legislation was recently revoked by *Decreto Regulamentar* No. 1/2022, of January 10, which aims to reinforce the labour status of the “non-primary informal caregiver”, in particular, through a system of leave and flexible working time arrangements, under the terms to be defined in specific legislation (article 43).

<sup>83</sup> For further information, see C.de O. Carvalho, *Concilier vie professionnelle et vie familiale pour promouvoir l'égalité femmes-hommes au Portugal: perspectives à la lumière de la Directive 2019/1158*, in *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, 2020, No. 3, 82-93.

<sup>84</sup> Carer is defined in article 3(1)(d) of the Directive as “a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State”.



Nevertheless, regarding the first category (employees with children up to 8 years of age), some additional requirements must be met. To begin with, some common conditions are applicable: telework must be compatible with the activity performed, and the company must have the necessary material resources. As pointed out by some legal scholars<sup>85</sup>, it is not complicated for the employer to claim that they cannot provide the necessary means to make that change possible in order to refuse it. The additional requirements demand that whenever both parents meet the conditions for teleworking, this right shall be exercised by both in successive periods of equal duration within a maximum period of 12 months. This can only be avoided in the case of single-parent families and in situations in which only one parent meets the conditions to carry out telework. Furthermore, this right is not applicable when the company has less than 10 employees. When these requirements are met, employers cannot refuse employees' request to telework.

The first additional requirement aims to promote gender equality. In fact, mandatory telework during the pandemic has proved that it can worsen gender inequalities<sup>86</sup>. As K. Arabadjieva<sup>87</sup> puts it, "The pandemic has acted as a magnifying glass, making the cracks in current economic and social models so obvious that they can no longer be ignored". In this sense, a Portuguese survey by Colabor<sup>88</sup> confirms that the pandemic "ends up reproducing old gender asymmetries in terms of the distribution of

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<sup>85</sup> M. R. Palma Ramalho, *Tempo de trabalho e conciliação entre a vida profissional e a vida familiar – Algumas notas*, in M. R. Palma Ramalho/ T. C. Moreira (eds.), *Tempo de trabalho e tempos de não trabalho: o regime nacional de tempo de trabalho à luz do Direito europeu e internacional*, AAFDL, Lisboa, 2018, 116.

<sup>86</sup> A. de las Heras Garcia, *Análisis de la nueva regulación del trabajo a distancia*, in *Revista de Trabajo y Seguridad Social, CEF*, No. 452, 2020, 180, pointed out the risk of women being increasingly "relegated" to the status of teleworkers. See also M. B. Fernández Collados, *¿Es el teletrabajo una fórmula de conciliación de la vida personal, familiar y laboral?*, in *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 2022, Vol. 10, No. 1, 204-205 and *passim*; E. Rodríguez Rodríguez, *La conciliación a la corresponsabilidad en el tiempo de trabajo: un cambio de paradigma imprescindible para conseguir el trabajo decente*, in *Lex Social: Revista De Derechos Sociales*, 2021, Vol. 11, No. 1, 52 ff. and *passim*.

<sup>87</sup> K. Arabadjieva, *Reshaping the Work-Life Balance Directive with Covid-19 lessons in mind*, Working Paper 2022.01, ETUI, Brussels, 2022, 35, available at: <https://www.etui.org/publications/reshaping-work-life-balance-directive-covid-19-lessons-mind> (accessed May 25, 2022).

<sup>88</sup> P. A. Silva *et al.*, *Trabalho e desigualdades no grande confinamento: perdas de rendimento e transição para o teletrabalho*, Estudos Colabor, No. 2/2020, CoLABOR, April 2020, available at <https://colabor.pt/wp-content/uploads/2020/04/Estudos-CoLABOR-2.pdf> (accessed May 20, 2022).

domestic work and childcare. Among men and women in households without children, the proportion that considers they have the necessary conditions for teleworking in terms of equipment and space, as well as time management, is higher than that reported for the sample. However, the difference in the case of women in households with children is far higher. The answers to the open questions are a further confirmation of this situation: “*Actually, we feel that we have failed as professionals, and as mothers. I don’t work all the time I want or need to, and I end up neglecting my daughter in everything other than the basic aspects (cleaning and food)*”. This problem has been there for well before the discussion about telework. However:

one of the risks of the sudden and unprepared transition to telework in the context of a pandemic is the damage to the professional career of those who have sons and daughters – and, within these, of women – that can result from the adoption of forms of work organization and performance evaluation that are inappropriate to their reality and needs<sup>89</sup>.

The problem is not limited to Portugal. There are several national<sup>90</sup> and international<sup>91</sup> studies and surveys showing that the pandemic has

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<sup>89</sup> Ibid., 5.

<sup>90</sup> At national level, there are also several studies that point in the same direction. For example, in Italy, the results of a survey carried out by the *Confederazione Generale Italiana del Lavoro* (CGIL) together with the Fondazione Di Vittorio on *Smart working (Quando lavorare da casa è... SMART?)*, available at <https://www.bollettinoadapt.it/quando-lavorare-da-casa-e-smart/>, accessed May 18, 2022) revealed gender disparities in the impact of teleworking, which is more alienating and stressful for women. In the UK, a study by the University of Sussex focused on the British experience in families with young children concluded that inequality in the sharing of parental tasks worsened during the period of confinement to the point that one of the researchers, Alison Lacey, states that, for many women, “[British] Society has regressed to a 1950s way of living”. The proportion of women responsible for 90% to 100% of childcare increased from 27% to 45%. She adds that 72% of mothers claimed to be the default parent during the entire period of confinement and 70% responded that they were exclusively or almost exclusively responsible for their children’s school attendance. Female employment was found to be disproportionately more vulnerable to the impact of COVID-19, with 73% of women telecommuting and with children in their first cycle classifying working from home as “difficult” or “very difficult”, leading to frequent feelings of exhaustion. A similar disproportion was identified in the distribution of domestic work. This study is reported by *The Guardian*, 18 June 2020, “UK society regressing back to 1950s for many women, warn experts”, available at <https://www.theguardian.com/inequality/2020/jun/18/uk-society-regressing-back-to-1950s-for-many-women-warn-experts-worsening-inequality-lockdown-childcare> (accessed May 25, 2022).

disproportionately affected women, threatening to reverse progress towards gender equality. During the pandemic, Portuguese emergency legislation allowed for employees with children under 12 years old that had to stay home due to the closing of schools to stop working to take care of them, being granted the right to a special social security allowance for that purpose<sup>92</sup>. The government's information regarding the payment of this special assistance allowance indicated that it had been paid mostly to women (82%)<sup>93</sup>. According to Palma Ramalho, “this lack of

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<sup>91</sup> For instance, the Eurofound e-survey *Living, working and COVID-19*, Publications Office of the European Union, Luxembourg, 2020, available at: [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef20059en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20059en.pdf) (accessed May 10, 2022), highlights “that respondents – especially women with children under 12 – were struggling to balance their work and personal life. Indeed, although teleworking was a key factor in ensuring business continuity, it has led to a rise in the number of people working from home, resulting in difficulties in managing work-life conflicts and an increase in the incidence of overtime” (21). “The pandemic has eroded the work-life balance of women more than men (...) Women are more widely affected by the pandemic in terms of health risks, pre-existing employment inequalities and care responsibilities” (59). “The COVID-19 crisis presents a serious risk of rolling back decades of gains achieved in gender equality. The unintended consequences of measures put in place by governments in spring 2020 in an attempt to control the spread of the pandemic has been to increase considerably women’s share of unpaid work. In this regard, telework has also proved to be burdensome for many working mothers as they juggle work, home-schooling and care, all in the same pocket of space” (4). The same understanding is shared by J. Rubery/I. Tavora, *The Covid-19 crisis and gender equality: risks and opportunities. Social Policy in the EU*, in B. Vanhercke, S. Spasova and B. Fronteddu (eds.), *Social policy in the European Union: state of play 2020. Facing the pandemic*, Brussels, European Trade Union Institute (ETUI) and European Social Observatory (OSE), 2021, 92 (available at: <https://www.etui.org/sites/default/files/2021-01/06-Chapter4-The%20Covid%E2%80%9119%20crisis%20and%20gender%20equality.pdf> (accessed May 25, 2022)): “New forms of gender segregation could emerge if women are not only expected to telework but in fact remain home-based workers while men return to the office”.

<sup>92</sup> At first, this allowance was not paid if the employee could work remotely from home, aggravating hugely the challenges of work-life balance. This situation was only modified before the last lockdown (Decree-Law No. 14-B/2021, of 22 February). This new piece of legislation recognized teleworkers and remote workers in general the right to receive an allowance (equivalent to 2/3 of a worker’s base salary, with minimum and maximum limits). However, this financial support could reach 100% of the base salary (with the aforementioned limits) in some cases, namely when both parents requested and benefited from this allowance, alternately, on a weekly basis.

<sup>93</sup> M. R. Palma-Ramalho, *Work-Life balance in times of COVID-19*, European network of legal experts in gender equality and non-discrimination FLASH REPORT – Portugal, 29

proportionality may arise from the gender pay gap (as women earn less than men, the financial family loss is lower if the member of the couple that stops working is the woman), but it also demonstrates that even during this crisis women tend to take the lead in caring their children”<sup>94</sup>. Consequently, despite recognizing that the growth in flexible working from home can improve work opportunities for women with care responsibilities, legislators should be aware that “these arrangements may also strengthen traditional gender roles in households, increasing women’s unpaid care and housework if care services are not enhanced, and reducing their visibility and career perspectives in the labour market”<sup>95</sup>. That is the reasoning behind the additional requirement demanding that, whenever both parents meet the conditions for teleworking, this right be exercised by both in successive periods of equal duration, increasing incentives for men to take up parental entitlements. Although this requirement is not mentioned in Directive (EU) 2019/1158, which could raise doubts on the adequacy of the Portuguese implementation, it seems to be in line with the aim of the Directive to promote gender equality and the work-life balance. A more balanced participation of men and women in family life is a pre-requisite to achieve gender equality at work. A second requirement excludes micro-sized enterprises from the scope of application of this new right to telework (recognized to employees with children up to 8 years of age) because of their limited financial, technical, and human resources. Again, although this exclusion is not mentioned in Directive (EU) 2019/1158, recital 48 states that:

In implementing this Directive, Member States should strive to avoid imposing administrative, financial or legal constraints in a manner which would amount to a disincentive to the creation and development of SMEs or an excessive burden to employers. Member States are therefore invited to thoroughly assess the impact of their implementing measures on SMEs in order to ensure the equal treatment of all workers, that SMEs are not disproportionately affected by the measures, with

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June 2020, available at <https://www.equalitylaw.eu/downloads/5166-portugal-work-life-balance-in-times-of-covid-19-80-kb> (accessed May 20, 2022).

<sup>94</sup> Ibid.

<sup>95</sup> M. Samek Lodovici *et al.*, *The impact of teleworking and digital work on workers and society*, Publication for the Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2021, 67, available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL\\_STU\(2021\)662904\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf) (accessed May 25, 2022). See also E. Rodríguez Rodríguez, *op. cit.*, 62 and *passim*.

particular focus on microenterprises, and that any unnecessary administrative burden is avoided.

Still, one can have some reservations regarding the admissibility of a total exclusion of microenterprises from the scope of this right. The measures mentioned in recital 48 refer to the need to avoid any unnecessary administrative burden, and to the provision of “incentives, guidance and advice to SMEs to assist them in complying with their obligations pursuant to this Directive”.

Regarding carers, the right to telework is acknowledged to employees with recognized non-primary informal caregiver status for a period of up to 4 years – either continuously or not – if the previously mentioned common conditions are met. Notwithstanding, and unlike employees with children up to 8 years of age, the employer can refuse the worker’s request, but only on the grounds of compelling operational reasons or the impossibility of replacing the employee. Moreover, this justification has to be considered valid by the entity in charge of promoting equal opportunities between men and women (Commission for Equality in Labour and Employment – CITE<sup>96</sup>). If the CITE does not agree, the employer must challenge the decision before the court in order to obtain a ruling recognizing the justification for the refusal of the employee’s request (article 57 of the Labour Code).

Finally, in both situations, this employee’s right is limited to a narrow concept of telework, which, as explained above, does not include all forms of remote working arrangements. Thus, the scope of Directive (EU) 2019/1158 is not respected.

## 9. Concluding Remarks

In general, it can be considered that the new Portuguese legal framework for teleworking improves employees’ rights, addresses some of the problems raised during the lockdowns, and occasionally formulates some original responses, as in the case of the disconnection approach<sup>97</sup>, as well as in the promotion of work-life balance through telework, encouraging a cultural shift towards an equal distribution of care work between men and women<sup>98</sup>.

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<sup>96</sup> *Comissão para a Igualdade no Trabalho e no Emprego* – <https://cite.gov.pt>.

<sup>97</sup> J. L. Amado, *Teletrabalho: o “novo normal” dos tempos pós-pandémicos e a sua nova lei*, cit.

<sup>98</sup> See K. Arabadjieva, *op. cit.* The author points out the important gender equality dimension of the regulation of telework and suggests revisiting the work-life balance

Still, this law is far from perfect. On the one hand, it goes into regulatory details of complex application in practice, and it does not always strive for clarity, which may increase litigation. On the other hand, the employee's protection is fostered at the expenses of flexibility (e.g. the written telework agreement must determine the work schedule and the place of work). Therefore, if the employee does not enjoy flexibility, that can eliminate some of the advantages attributed to teleworking<sup>99</sup> and reduce employees' interest in this way of working. The legislative perception of this limitation may even justify the surprising absence of administrative offenses in many provisions of the new regulation, thus preventing the intervention of the Labour Inspectorate.

Moreover, the impact of teleworking in terms of expenses should be neutral, which is not clear in the light of the recent regulation, otherwise employers and/or employees will avoid it. In addition, the role of collective bargaining is limited, since it can only deviate from the law in a manner more favourable to employees, which is not always easy to evaluate in practice. Hence, the role of collective agreements in the clarification of some doubts concerning the legal framework can be compromised and lead to judicial litigation.

Lastly, the new legal framework is shaped by the problems raised by the pandemic crisis, which can be open to criticism, since there was no global evaluation of the Portuguese labour market, nor "of the challenges companies will be facing in the near future". For instance, the Portuguese telework regulation is distinctly designed on the premise that the work will be executed at the employee's home, thus failing to provide legal arrangements for situations in which the work is not rendered in a single space or even in a single jurisdiction<sup>100</sup>.

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Directive 2019/1158 in the aftermath of the pandemic to strengthen various aspects of the framework with the main objective of promoting gender equality in a more effective and transformative way.

<sup>99</sup> See A. Nunes de Carvalho, *O COVID 19 (des)organizou o tempo de trabalho?*, in M. R. Palma Ramalho/ T. Coelho Moreira (eds.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisboa, 2020, 148-149 and *passim*.

<sup>100</sup> H. M. Braz/ T. L. Fernandez (IR Global), *TELEWORK: Portugal decides to change the statutory regulation on telework during a pandemic crisis*, available at <https://www.irglobal.com/article/telework-portugal-decides-to-change-the-statutory-regulation-on-telework-during-a-pandemic-crisis/> (accessed May 20, 2022).

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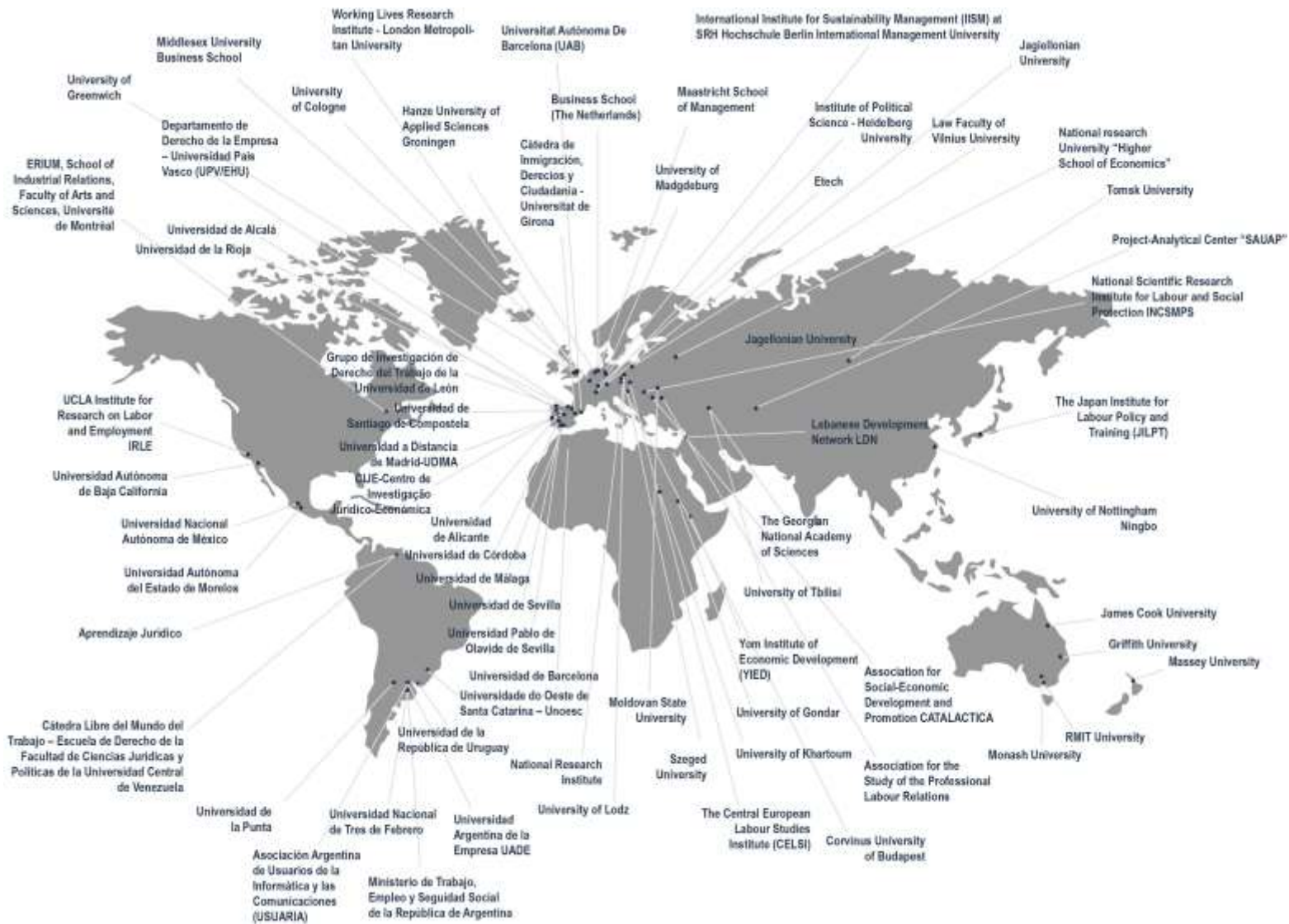
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