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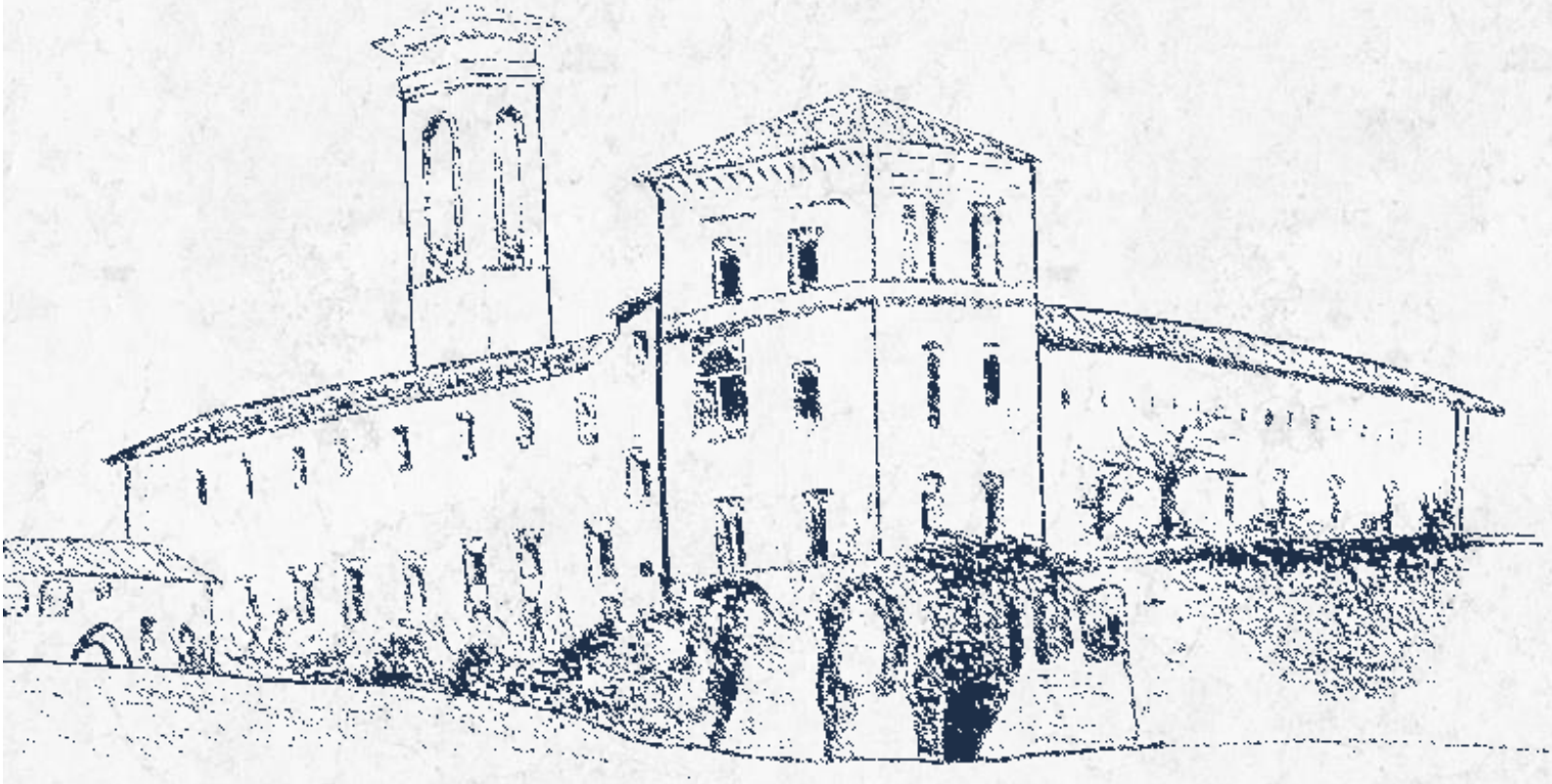

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Spain's Law No. 10/2021 on Teleworking: Strengths and Weaknesses

Bárbara Torres García*

Abstract

One of the effects of COVID-19 has been the increase in the number of people who telework. Against this background, the Spanish government, trade unions and employers´ association adopted a new provision regulating this way of working. Based on these considerations, this paper provides an overview of telework in Spain. To this end, Law No. 10/2021 will be analyzed, particularly its scope of application and teleworker´s rights. This analysis will be carried out to assess the legal value of this new piece of legislation.

Keywords: *Teleworker; Regulation; Rights.*

1. Introduction

The healthcare crisis resulted from COVID-19 has changed our lives. Among other things, the pandemic has also made the recourse to remote work – especially telework – more widespread. Prior to the healthcare emergency, the share of people working remotely in Spain was almost 4.8%. Following the lockdown – which began in March 2020 – this percentage tripled, reaching 16.2% in the second quarter of 2021[1]. Thus, this crisis caused the most disruptive and rapid organizational changes

* Predoctoral Research Fellow in Labour and Social Security Law, University of Santiago de Compostela (Spain). Email address: barbara.torres.garcia@usc.es.

[1] This information was removed from the Ministerio de Asuntos Económicos y Transformación Digital. Gobierno de España, *Dossier de indicadores de teletrabajo y trabajo en movilidad en España y la UE*, 2021. It is available at the following link: https://www.ontsi.red.es/es/dossier-de-indicadores pdf/indicadores_teletrabajo_trabajo_movilidad_2021.

ever occurred in the world of work[2]. The outbreak of COVID-19 produced a move away from the traditional ways of providing services, demonstrating that teleworking is an essential tool for the modernization of the employment relationship. In this way, teleworking has now become a fundamental feature of the digital economy in order to comply with the objectives laid down in the *2030 Agenda for Sustainable Development*[3].

Despite its modern character, teleworking is not a recent phenomenon. Since its first version – which was passed in 1980 – the Spanish Workers' Statute (hereinafter, WS[4]) has regulated the 'employment contract for homeworkers', through Article 13. Initially, it was conceived as a working arrangement targeting women with family responsibilities. More recently, in 2012, the serious economic situation affecting Spain made it necessary to rethink the national labour system. Consequently, and amid certain reluctance, Law No. 3/2012 of 6 July was approved (hereinafter, Law 3/2012) the aim of which was to "promote new forms of work". In this connection, telework was defined as "a form of work organisation that perfectly matched the production and economic model pursued". Therefore, the 'employment contract for homeworkers' was amended "to regulate remote work performed through the use of innovative technology" and to strike a balance between rights and duties"[5]. Since 2012, in the Spanish legal system the 'employment contract for homeworkers' has been replaced by remote and teleworking arrangements, though the rules governing them are practically the same[6].

The new version of Article 13 of the WS, resulting from major legislative changes, conceived remote work as the one in which work was carried out predominantly at the worker's house or at a location chosen by them. Thus, remote work is no longer intended as a contractual arrangement but as a form of work organization. In addition, the new provision reinforced

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[2] M. E. Casas Baamonde, *El derecho del trabajo, la digitalización del trabajo y el trabajo a distancia*, in *Derecho de las relaciones laborales*, n. 11, 2020, p. 1414.

[3] M. B. Fernández Collados, *El teletrabajo en España, antes, durante y después del confinamiento domiciliario*, in *Revista internacional y comparada de relaciones laborales y derecho del empleo*, vol. 9, n. 1, 2021, pp. 401-402.

[4] Here reference is made to the Workers' Statute approved by Royal Legislative Decree 2/2015 of 23 October.

[5] Section III of the explanatory memorandum of Law 3/2012.

[6] See, M. A. Purcalla Bonilla y C. H. Preciado Domènech, *Trabajo a distancia vs. teletrabajo: estado de la cuestión a propósito de la reforma laboral de 2012*, in *Actualidad laboral*, n. 2, 2013, pp. 1-12 (edition La ley digital). For a more detailed analysis, VV.AA. L. Mella Méndez (director), *Trabajo a distancia y teletrabajo. Estudios sobre su régimen jurídico en el derecho español y comparado*, Navarra, 2015, Aranzadi.

the principle of equality, for remote workers enjoyed the same rights as on-site employees, especially in relation to salary, training, professional development, risk prevention and representation rights.

Regrettably, legal scholars levelled criticisms against the reform, arguing that the new Article 13 of the WS presented shortcomings and failed to meet the needs of the labour market. On the one hand, Article 13 only made mention of the rights remote workers enjoyed due to their employment status, without supplying further information in relation to certain implementation aspects. On the other hand, this article did not expressly refer to telework, being the latter understood as a subtype of remote work and therefore falling within its definition. In this regard, some scholars in Spain argued that telework and remote work are two different working arrangements. This is so not so much because of the massive use of ICT in telework, but because they are seen as two different ways of organising work. They are regarded as two distinct concepts not necessarily linked to one another[7]. For this and other reasons, both scholars and the social partners have requested new and comprehensive rules for remote work (particularly telework), which should make up for the shortcomings of the 2012 reform.

Nevertheless, it was the health crisis caused by COVID-19 that brought to the fore the main issues characterizing the regulation of telework. The imposition of remote work[8] during the emergency situation evidenced the obsolescence of Article 13 of the WS[9], leading to the passing of a new provision. Royal Decree-Law 28/2020 of 22 September on remote work (hereinafter, RDL) was enacted, following considerable social dialogue between the government, trade unions and employers' associations. The RDL was ratified – with small changes in terms of content-, by Law 10/2021 of 9 July on remote work (hereinafter, LRW). More in detail, the preamble of this new regulation regards Article 13 of the WS as "insufficient to deal with the peculiarities of telework, which concerns not

[7] F. J. Fernández Orrico, *Trabajo a distancia: cuestiones pendientes y propuestas de mejora (RD-Ley 28/2020, de 22 de septiembre*), in *Revista General de Derecho del Trabajo y de la Seguridad Social*, n. 58, 2021, p. 223, in terms of H., Álvarez Cuesta, *Del recurso al teletrabajo como medida de emergencia al futuro del trabajo a distancia*, in *Lan Harremanak. Revista de relaciones laborales*, n. 43, 2020, p. 2.

[8] Article 5 of Royal Decree-Law 8/2020 of 17 March concerning extraordinary urgent measures to deal with the economic and social impact of COVID-19, imposes remote work in those cases in which it was technically and reasonably possible, in order to ensure business continuity.

[9] M. Rodríguez-Piñeiro Royo and F. J. Calvo Gallego, *Los derechos digitales de los trabajadores a distancia*, in *Derecho de las relaciones laborales*, n. 11, 2020, p. 1451.

only the task that is preferably carried out outside the employer's premises, but also the intensive use of new information and communication technologies". In this way, the regulation of remote work now is wider, as it consists of twenty-two articles, to which additional, transitory and final provisions shall be added.

According to the explanatory memorandum of this new piece of legislation, the objective is "to provide a sufficient, transversal and integrated regulation". For these purposes, lawmakers drew on the European Framework Agreement on Telework (hereinafter, EFAT) signed by the European social partners in July 2002 and revised in 2009, Convention No. 177 on home work and Recommendation No. 184 of the ILO. Although the ILO's Convention on home work was not ratified by Spain, some common features can be found when compared it to the LRW. Examples of this include: the definition of remote work; the promotion of the principle of equality and non-discrimination; the relevance of collective bargaining and the teleworker's right to health and safety[10].

In parallel, the LRW draws significantly on the EFAT, as it sets out the key areas in which it is necessary to take into account the peculiarities of telework. Like the LRW, the EFAT refers to the voluntary nature of telework and the principle of equal rights for teleworkers, mentioning the right to training, to a professional career, to the full exercise of collective rights, to the provision of equipment, to health and safety and to flexibility in the organization of work. One might think that the LRW[11] fully complies with the regulatory framework established by the EFAT, though a careful analysis of the new Spanish regulation allows us to conclude that it goes beyond the European provisions. One example of this state of affairs is that the LRW requires one to enter into an agreement to perform remote work in which its minimum contents are laid down, whereas the EFAT makes no reference to this obligation. In view of the above, this study comments on the elements of telework as regulated by the LRW, providing an analysis of its scope of application, the relevant agreement and the main rights recognized to workers engaged through this form of employment. The aim of this contribution is to

[10] N. P. García Piñeiro, *El trabajo a distancia en el contexto internacional: OIT y Unión Europea*, in VV.AA. F. Pérez de los Cobos Orihuel and X. Thibault Aranda (eds.), *El trabajo a distancia. Con particular análisis del Real Derecho-ley 28/2020, de 22 de septiembre*, Madrid, 2021, Wolters Kluwer, p. 88.

[11] On the content of the LRW, F. J. Gómez Abelleira, *La nueva regulación del trabajo a distancia*, Valencia, 2020, Tirant lo Blanch.

provide some objective and critical insights into the new Spanish regulation of remote work, which has been the subject of a lively debate among scholars at the national level[12]. One might speculate that the causes of the inaccuracies and contradictions marking this provision resulted from the urgency and improvisation in which lawmakers drafted it. As will be explained in the following sections, even though the LRW covers some aspects, it did not deal with pre-existing rules – e.g. the employer's costs and certain digital rights – the lack of concreteness and the constant reference to collective bargaining, which have produced unsatisfactory results.

2. Remote Work: Definition and Scope of Application

Article 2 of the LRW defines remote work as "a way of organizing work, with the latter being provided at the worker's house or at a place of their choice". Instead, telework is "remote work carried out through the exclusive or prevalent use of computers, or telecommunication means and systems". Given these definitions, the new LRW is similar to Article 13 of the WS, as telework is considered as a subcategory of remote work, therefore opposing the arguments of a number of scholars who regard these working schemes as different from one another.

The lack of a universally accepted, all-encompassing definition of telework moves the focus on the elements featuring this form of employment. A careful analysis of Article 2 of the LRW enables us to conclude that there are two aspects that are peculiar to telework. First, the relocation of workers to their house or to another place chosen by them, and, second, the intensive use of ICT. Regarding the first element, the LRW is not much different from the previous regulation. While now it is established that work "is provided at the house of the worker or at a place of their choice", the old regulation (Article 13 of the WS) provided that these services were performed "at the worker's house or in a place *freely* chosen by them" (emphasis added). The change in lawmakers' conception, expressed by deleting the word 'freely', may mean that in the new regulatory context, the choice of a different work location might also depend on collective bargaining or, ultimately, on the agreement entered

[12] G. García González, *La nueva regulación del trabajo a distancia y del teletrabajo: entre lo simbólico y lo impreciso*, in *Trabajo y Derecho: nueva revista de actualidad y relaciones laborales*, n. 72, 2020, p. 2 (La ley digital).

into to perform remote work[13]. The second aspect that characterizes telework is the use of ICT. In this respect, the intensive recourse to technology constitutes the essential feature of telework, insofar as it distinguishes it from remote work. However, not all workers who use these technological means are teleworkers, because, according to this provision, it is necessary that this use be "exclusive or prevalent". So, Article 2 of the LRW excludes those services in which their implementation is limited or optional[14].

Both in the previous regulation and in the new LRW, telework is seen as a new form of work organization, which questions the standards characterizing the traditional employment relationship. Consequently, it is now possible to enter into an agreement to perform telework in case of open-ended, temporary, or part-time contracts, or contracts entered into for training purposes, though in this latter case at least 50% of work should be performed onsite (Article 3 of the LRW)[15]. However, not all teleworking arrangements will be regulated by LRW, because for this to happen it is necessary that the teleworker meets two requirements. In effect, for the application of the LRW, a series of individual requirements must be fulfilled.

First, according to Article 1 of the LRW, the employment relationships to which the current regulation will apply are those meeting the conditions described in Article 1.1 of the WS. In this sense, the new Spanish regulations on telework will only concern salaried workers who voluntarily provide their services away from the company office in exchange for remuneration. Thus, self-employed workers or those enjoying other employment statuses – e.g. dependent self-employment – fall outside the scope of application of this piece of legislation. Furthermore, some doubts can be cast about its implementation in the event of special working schemes – e.g. senior management – for which the provision remains silent. In these cases, it can be implied that the new regulation will apply as long as these special relationships comply with the conditions laid down in Article 1.1 of the WS.

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[13] G. García González, *La nueva regulación del trabajo a distancia y del teletrabajo: entre lo simbólico y lo impreciso, op. cit.,* pp. 3-4.

[14] L. Mella Méndez, *Sobre una manera de trabajar: el teletrabajo*, in *Aranzadi social*, n. 5, 1998, p. 645.

[15] J. Lahera Forteza, *El acuerdo individual y los requisitos formales del trabajo a distancia regular y estructural*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (eds.), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente*, Navarra, 2021, Aranzadi, p. 66.

Secondly, Article 1 of the LRW establishes that remote work shall be carried out on a regular basis. Specifically, it should take place "over a period of three months and concern at least 30% of the working day, or an equivalent percentage, depending on the duration of the employment contract"[16]. Importantly, while Article 13 of the WS demanded that remote work be simply 'preponderant' in character, the new regulation supplies a clear definition of what should be understood as 'regular', ensuring greater certainty and legal security to the regulatory model. Consequently, we can agree with those arguing that the shortcomings of the previous regulations were due to certain vagueness about some aspects[17].

In this sense, workers who comply with Article 1.1 of the WS but do not work remotely for more than thirty percent of their working hours – this is known as 'occasional' telework – will not be subject to the provisions of the LRW, but the provisions of the WS. Really, these workers engaged in occasional telework find themselves in a 'legal limbo'[18], in which we do not known whether the WS is applied – without any specification – or this general legislation as interpreted by EFAT. Either way, the result is unsatisfactory, because occasional teleworkers do not enjoy the same rights as onsite ones. While in its explanatory memorandum the LRW defines itself as a "sufficient, transversal and balanced regulation", in practice a normative vacuum exists affecting workers engaged in occasional or transnational telework, which still needs to be properly addressed by lawmakers[19].

Finally, it should be noted that, although the entry into force of the new LRW - and more specifically of the RDL – took place during the healthcare emergency, it did not consider the telework implemented during the pandemic. Transitory Provision no. 3 establishes that the new regulation will not be applied "to remote work implemented exceptionally in application of Article 5 of Royal Decree-Law 8/2020 of 17 March, or as a consequence of the measures to tackle COVID-19".

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[16] The first Additional Provision of the LRW establishes that collective agreements or agreements may adjust this percentage and/or require a shorter reference period.

[17] . Todolí Signes, *La regulación del trabajo a distancia*, in *Derecho de las relaciones laborales*, n. 11, 2020, p. 1495.

[18] A. de las Heras García, *Análisis de la nueva regulación del trabajo a distancia*, in *Revista de Trabajo y Seguridad Social. CEF*, n. 452, 2020, p. 175.

[19] G. García González, *La nueva regulación del trabajo a distancia y del teletrabajo: entre lo simbólico y lo impreciso, op. cit.,* p. 2 and 6-7.

In this regard, some scholars have argued that the procedure for the adoption of the RDL was not justified. In relation to the RDL, Article 86 of the Spanish Constitution (hereinafter, SC), establishes that the government issues royal decree-laws to face an extraordinary and urgent situation. Under the present circumstances, there is no connection between the urgency – the spread of the pandemic – and the measures adopted, since the RDL - and now, the LRW- does not apply to telework implemented to deal with COVID-19. The government did not want to adopt a provisional regulation to meet the new needs derived from the significant amount of time spent teleworking due to the pandemic. Rather, the aim was to pass a provision which would deal once for all with the shortcomings of this way of working, which have long been pointed out by scholars. Arguably, the new Spanish regulation on telework would be properly implemented by approving the LRW directly, without adopting the RDL first, as no reasons exist that justify its legal validity.

Furthermore, the LRW is not immediately applicable to teleworking arrangements prior to the pandemic, especially when this form of employment has already been regulated by collective agreements. In this sense, a distinction should be made between: 1) teleworking schemes regulated by collective agreements or agreements with a specific period of validity, in which case the new LRW will be applied once the agreement loses its legal validity 2) remote work governed by collective agreements or agreements without a specific duration, with respect to which the new regulations will apply after one year from its publication in the *Boletín Oficial del Estado* (Spanish Official Bulletin), unless the signatories agree on a longer term – up to three years[20].

Finally, it should be added that the LRW is not applicable to public servants, who are subject to the provisions of Royal Decree-Law 29/2020, of 29 September on Urgent Measures Concerning Teleworking in Public Administration and Human Resources in the National Healthcare System to face the health crisis caused by COVID-19[21]. Consequently, it could be concluded that the LRW is not a unitary piece of legislation. This is

[20] First Transitory Provision of the LRW.

[21] For an analysis of the regulation on teleworking concerning Spanish Public Administration, see R. Jiménez Asensio, *El marco regulador del teletrabajo en la Administración Pública y en las entidades del sector público*, in *Revista vasca de gestión de personas y organizaciones públicas*, n. 4, 2021, pp. 18-39 and L. Mella Méndez, *El nuevo artículo 47 bis EBEP: La prevención de riesgos laborales en el teletrabajo del sector público*, in VV.AA. L. Mella Méndez and R. E. de Muñagorri (directors), *Globalización y Digitalización del mercado de trabajo: propuestas para un empleo sostenible y decente*, Navarra, 2021, Aranzadi, pp. 253-283.

because its application depends on the time one starts working remotely, the rules in force, employee status and the number of days spent working away from the employer's premises.

3. The Remote Work or Telework Agreement

Telework is configured as a way to provide a service voluntarily. In this regard, Article 5 of the LRW establishes that "remote work shall be voluntary for both the worker and the employer and will require the conclusion of a remote work agreement". This agreement is the first requirement to engage in telework, as it demonstrates the parties' consent. The effectiveness of the agreement requires a careful analysis of its form, content and effects, e.g. the worker's refusal to sign it.

3.1 Teleworkers' Will and its Relevance

Voluntariness is essential when engaging in this form of employment, as is the parties' agreement[22]. The same holds true when shifting from remote work to onsite work. Article 5.3 of the LRW provides that "this shift might take place in compliance with the terms established in collective bargaining or, absent that, with those laid down in the remote work agreement". The same can be said for the amendments of the conditions detailed in remote work agreements, since Article 8.1 of the LRW requires that a new agreement shall be entered into between the company and the worker. So, the will of the parties becomes extremely relevant[23] in this area, being required for any matter that affects the teleworking agreement. This requirement serves as a guarantee for the employee against the employer's unilateral decisions.

Although employee consent is generally important, this requirement should not be necessary in all amendments made to the conditions established in the remote work agreement. While it is advisable and understandable to include this requirement when changing some terms – e.g. the place of work – asking for employee consent when dealing with simple amendments appears to be unnecessary. For example, when the employer intends to modify the hours of an onsite worker, they do so

[22] M. A. Purcalla Bonilla y C. H. Preciado Domènech, *Trabajo a distancia vs. teletrabajo: estado de la cuestión a propósito de la reforma laboral de 2012, op. cit.*, p. 1.

[23] In a similar way, see J. M. Goerlich Peset, *La regulación del trabajo a distancia. Una reflexión general*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (eds.), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente*, *op. cit.*, pp. 45-47

unilaterally, unless changes are significant. Conversely, modifying teleworkers' schedules will require consent, which sometimes is refused[24]. Accordingly, one might agree with those arguing that the LRW affects business freedom[25], since it limits human resource management, discouraging employers from resorting to this way of working.

The preamble of the provision points out that the implementation of remote work constitutes "a voluntary option for both parties". The LRW draws on previous case law[26] and legislation, taking as a starting point Article 13 of the WS, which established the need to conclude the remote work agreement in writing, without however laying down the basic terms to be included. Article 5 of the LRW provides that telework may not be imposed unilaterally by the employer and the worker's refusal to work remotely does not constitute a ground for termination of employment[27]. In addition, this article specifies that neither "the shift from remote to onsite work nor the difficulties resulting from the transition from onsite to remote work" will justify a sanction by the employer.

In parallel, the worker cannot unilaterally demand to telework, as there are a number of situations in which the principle of voluntariness is not complied with. However, in these cases, the worker's right to telework is not automatically granted and it must be assessed considering the company's needs. In this regard, Article 34.8 of the WS establishes that every person "has the right to request changes to the duration and distribution of working time", including the implementation of remote work, "to strike a balance between work and family life". Furthermore, the third Final Provision of the LRW introduces two new cases in which the employee has the right to telework: when the worker "is regularly enrolled in an academic programme or a professional course" and when he or she suffers from sexual harassment.

[24] J. Thibault Aranda, *La modificación de las condiciones de trabajo en el trabajo a distancia*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (eds.), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, op. cit.,* pp.100-102.

[25] T. Sala Franco, *El Real Decreto-ley 28/2020, de 22 de septiembre, sobre el trabajo a distancia*, in VV.AA. T. Sala Franco (eds.), *El Teletrabajo*, Valencia, 2020, Tirant lo Blanch, p. 180.

[26] See, judgment of the Spanish Supreme Court of April 11, 2015, appeal number 143/2004.

[27] R. Poquet Catalá, *El teletrabajo: análisis del nuevo marco jurídico*, Navarra, 2020, Aranzadi, p. 57.

3.2 Formal Requirements and Content

According to Article 6 of the LRW, the remote work agreement must be concluded in writing and signed before starting to work. It should be clarified that the violation of these formal requirements will only give rise to an administrative sanction. A further obligation is that a copy of the agreement must be sent to the employment office and the workers' representatives, making this contractual arrangement similar to a proper employment contract[28]. The most significant novelty introduced by the LRW is not the need to conclude the agreement in writing, as this requirement was also provided for by Article 13 of the WS. The innovation lies in the mandatory terms this agreement must include[29], as detailed by Article 7 of the LRW[30]:

a) The means, equipment and tools required to carry out remote work, including consumables and furniture, and an indication of time after which they need to be replaced.
b) The costs the worker could bear for working remotely, as a way to quantify remuneration and the way work should be performed. This latter issue is detailed in the provision contained in the applicable collective agreement.
c) Working hours and rules governing the time spent on-call.
d) The share of remote work as compared to onsite work.
e) The premises to which the remote worker is assigned and where onsite work will be performed.
f) The location chosen by the remote worker.
g) The duration of notice periods to shift from remote work to onsite work and vice versa.
h) The employer's monitoring tools.
i) The procedures to follow in the event of technical difficulties affecting remote work.

[28] J. Lahera Forteza, *El acuerdo individual y los requisitos formales del trabajo a distancia regular y estructural, op. cit.,* p. 67.
[29] J. Lahera Forteza, *El acuerdo individual y los requisitos formales del trabajo a distancia regular y estructural, op. cit.,* p. 72.
[30] For a detailed analysis of the content of the remote work agreement, see A. Villalba Sánchez, *El acuerdo de trabajo a distancia tras la entrada en vigor del RD-Ley 28/2020, de 22 de septiembre*, in *Revista Derecho Social y Empresa*, n. 14, 2021, pp. 1-25.

j) The instructions issued by the company and shared with the worker's legal representative, regarding data protection in the event of remote work.
k) The instructions issued by the company and previously shared with the worker's legal representative, on information security in the event of remote work.
l) The duration of the remote work agreement.

This list is supplemented by the terms established in conventional regulations, as the first Transitory Provision of the LRW grants collective bargaining the ability to include "additional terms in the remote work agreement and other aspects which are in need of regulation". So, the content of this requirement is conditioned by collective autonomy.
Even so, and despite the precision used to define these minimum contents, a number of aspects are not dealt with properly. For example, Article 7 could have been clearer on occupational risk prevention policies, e.g. by imposing the obligation to illustrate how risk assessment and management are to be performed at the time of concluding the agreement. Another aspect, which is poorly regulated, refers to "the place of work". The lack of a relevant definition in Article 7 of the RLW of "the place of work" paves the way for agreements in which a number of places of work can be chosen. In reality, though this provision promotes greater flexibility, it might affect risk prevention strategies and the worker's insurance coverage in the event of an accident, making it difficult to determine its occupational nature. Therefore, it seems advisable that either collective bargaining or the remote work agreement addresses this issue, e.g. giving the opportunity to choose only one location where remote work can be performed.

4. Positive and Negative Aspects of the LRW. A Critical Reflection about Teleworkers' Rights

According to the provisions laid down in the LRW's explanatory memorandum, people who carry out remote work will benefit from the same rights as those granted to onsite workers performing the same tasks.
Chapter III of the LRW draws on the principle of equality and non-discrimination to recognize the rights of teleworkers. This new regulation replicates the criterion already established by Article 13.3 of the WS, although Article 4 of the LRW adds that "they (teleworkers) shall not be placed at a disadvantage in relation to working conditions, remuneration, job stability, working time, training and professional development".

Chapter III is the longest one – eleven articles divided into six sections – and concerns the regulation of different teleworkers' rights. In some cases, reference is made to all workers' general rights, which should be interpreted through the specifics of telework, e.g. the right to training and professional development, risk prevention, digital disconnection and collective rights. In some other cases, the specific rights only these workers are entitled to are detailed – e.g. the employer's obligation to meet the costs of work equipment. In this way, old and new rights coexist[31]. In any event, it can be argued that the innovative character of the LRW lies in the fact that it provides remote workers with legal status.
What follows is an overview of the novelties introduced by this new piece of legislation. Due to word-limit constraints, reference will be only made to the rights which require a more detailed analysis.

4.1 Rights concerning Equipment, its Maintenance and Costs

The new Spanish regulation refers to the economic rights of teleworkers. Article 11 of the LRW provides that teleworkers have "the right to receive work equipment and tools by the company". Article 12 of the LRW also recognizes a series of entitlements in relation to the costs derived from telework. In this respect, it is established that "the company shall cover the costs arising from working remotely, so the worker shall not meet the expenses linked to the equipment used while at work". Thus, the LRW imposes an obligation on the employer, who might be sued in case of a violation of the terms referred to above.
Once again, the ambiguous wording of the rule raises doubts in relation to the expenses that should be borne by the employer, e.g. it is not clear whether both direct costs and indirect ones are included. Direct costs are understood to derive from the purchase or maintenance of IT devices (e.g. computers, printers, microphones), furniture (e.g. chairs and tables) and stationery, whereas indirect costs include electricity, the Internet, telephone and heating bills and the rent. It seems unfair to ask the employer to meet all indirect costs, as most of them are not work-related ones. For this reason, collective bargaining - to which the LRW expressly refers for this matter - or the remote work agreement should set an amount of money which covers only a part of the indirect costs.

[31] M. Rodríguez-Piñeiro Royo and F. J. Calvo Gallego, *Los derechos digitales de los trabajadores a distancia, op. cit.,* pp. 1453-1454.

4.2 Rights Related to the Use of Digital Media

Another novelty introduced by the new regulation concerns workers' privacy and data protection, in order to limit the employer's powers, particularly as a result of technological advances. One of the characteristics of telework is that work equipment can also serve as a monitoring tool. This way, teleworkers, and the data they produce, will be supervised constantly[32].

Although the working tools belong to the employer, monitoring activities are limited in that the employer's right of property and entrepreneurial freedom cannot be given priority over workers' fundamental right to privacy[33]. Article 17.1 of the LRW establishes that "work supervision through automatic devices shall ensure the right to privacy and data protection", specifying that employer control must be adjusted "to the principles of suitability, necessity and proportionality of means". While introducing some innovations, this clause clearly draws on Consolidated Law No. 3/2018 of 5 December on the Protection of Personal Data and Digital Rights (hereinafter, OL 3/2018). Unlike what is established by Article 87, 89 and 90 OL 3/2018, this provision discriminates between privacy and data protection. Thus, Article 17.1 of the LRW makes advances in relation to the establishment of 'digital' labour law, laying down specific rights[34] which might affect the employment relationship. Despite this progress, this provision confirms the position of those[35] maintaining that the protection provided by the LRW should be broader and not limited to privacy and data protection. In other words, the right to privacy should also include other aspects (confidentiality and protection of reputation, among others).

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[32] J. R. Mercader Uguina, *Derechos fundamentales de los trabajadores y nuevas tecnologías ¿hacia una empresa panóptica?*, in *Relaciones laborales: revista crítica de teoría y práctica*, n. 1, 2001, pp. 1-18 (La ley digital).

[33] R. Poquet Catalá, *El teletrabajo: análisis del nuevo marco jurídico, op. cit.,* p. 172.

[34] In this sense, the LRW is in line with the position of the Spanish Constitutional Court (Judgment of November 30, 2000, No. 1463/2000). According to this ruling, "the function of the fundamental right to privacy in Article 18.1 of the SC is to protect against any invasion that may be carried out in that area of personal and family life (…) The fundamental right to data protection seeks to ensure that person the control over their personal data, its use and destination, in order to prevent its illicit traffic and any damage to their dignity (…)".

[35] F. J. Fernández Orrico, *Trabajo a distancia: cuestiones pendientes y propuestas de mejora (RD-Ley 28/2020, de 22 de septiembre*), *op. cit*., p. 247.

Thanks to this requirement, the principle of proportionality of the EFAT has entered Spanish legislation for the first time, so "if a surveillance tool is used, it must be proportionate to the objective" pursued. This means that the company, prior to installing a monitoring system, must adapt it to its purpose, respecting safety regulations, informing the teleworker and their representatives, and indicating its purpose, foundation and scope, as well as all aspects related to the collection, storage and use of information[36].

The second paragraph of Article 17 of the LRW establishes that the company "may neither require the installation of software or applications on devices owned by the worker, nor its use while working". This state of affairs translates into two vetoes: on the one hand, the company cannot force the teleworker to contribute to paying technological means if used in remote work; on the other hand, the worker cannot download work-related applications or software on personal devices. The aim is to prohibit the employer's unilateral requests to force the teleworker to do this, although no mention is made of a possible agreement to detail these issues. In effect, it would be possible that collective bargaining or the remote work agreement will agree to allow worker to financially contribute to their own tools[37]. This possibility is provided for by the LRW, though it seems more realistic to define this aspect in collective bargaining than in a remote work agreement. The asymmetric nature of the employment relationship does not ensure that consent is provided in a free and informed way[38].

In order to strike a balance between employees' and employers' rights, it is necessary to establish clear rules regarding the use of IT devices. These rules could be specified in collective agreements, although the adoption of codes of conduct is also welcome. What matters is that the employer's monitoring mechanisms and the way the company's IT tools can be used by the teleworker – e.g. for both business and personal use – should be clarified properly.

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[36] R. Poquet Catalá, *El teletrabajo: análisis del nuevo marco jurídico, op. cit.,* p. 183.

[37] See, A. Todolí Signes, *Derecho a la intimidad y a la desconexión digital en el teletrabajo*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (editors), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, op. cit.,* pp. 232-234.

[38] According to Article 6 of OL 3/2018, for the consent of the interested party to exist, their free, specific, informed and unequivocal will must be provided.

4.3 Rights related to Working Time

One of the aspects distinguishing telework from onsite work is the flexibility through which tasks can be organised[39]. This way of working best epitomizes workers' 'hyper-flexibility' in current digital markets, as they are provided with autonomy when arranging their work schedule. In this connection, Article 13 of the LRW recognizes that "as long as compliance with mandatory on-call and rest time is ensured, people working remotely enjoy flexibility when organizing their schedule". This way, not only does telework challenge the notion of 'a space of work', but also that of 'working time'. Unlike the past, when scholars were worried teleworkers did not work beyond standard hours, the focus now is on tackling the effects of: time flexibility, 'hyperconnectivity' or 'hyperconnection', the fact of being 'on-call' and other issues in terms of work-life balance.

While a number of advantages exist when the teleworker is given the opportunity to arrange their own working time, some negative aspects might arise, e.g. work is also carried out outside standard hours, which blur the boundaries between work and family life[40] and affect the health of teleworker. In fact, Article 16 of the LRW requires that risk assessment and the planning of preventive measures take into account "the distribution of the working day, on call time and the right to breaks and disconnections". Thus, the new LRW contains three provisions dealing with working time organisation, which are intended to avoid the negative effects of excessive flexibility. These provisions regulate 'conditional' flexible hours, the registration of working time and the right to disconnect.

In relation to the first aspect, Article 13 of the LRW allows for flexible hours, although this flexibility will depend on what is established in the remote work agreement and in collective bargaining. In this sense, Article 7 of the LRW establishes the need for the agreement to contain "workers' working hours and rules governing on-call time". This way, some guidelines are provided to the parties which, albeit flexible, can help distinguish between working time and rest periods.

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[39] J. Thibault Aranda, *La ordenación del tiempo de trabajo*, in *El teletrabajo. Análisis jurídico laboral*, Madrid, 2001, Consejo Económico y Social, pp. 67-69.

[40] See, Véase, Eurofound-ILO, *Trabajar en cualquier momento y en cualquier lugar: consecuencias en el ámbito laboral*, Genova, 2019. It is available at the following link: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712531.pdf.

Article 13 of the LRW specifies that the implementation of flexible hours should take into account "mandatory on-call time" and "work and rest periods". Consequently, the teleworker will only be able to manage the hours in which he must not be connected, respecting, in any case, the limits of the duration of working day -maximum of 9 hours- and statutory rest periods, i.e. 12 consecutive hours, plus a day off per week. The new Spanish regulation on telework limits both the freedom of the worker to self-manage working time and the power of the employer to make use of the worker's on-call time in order to prevent cases of "hyper-connection".
Furthermore, pursuant to Article 14 of the LRW, teleworkers are under the obligation to have their working time registered, as established by Article 39.4 of the WS[41]. In other words, the employer must "report the hours worked by the teleworker, by also taking into account flexible hours". In relation to this, one aspect that needs attention is that registration should take place electronically, particularly considering the nature of telework. However, not all IT registration tools have the same reliability, and in some cases, information can be manipulated. Consequently, choosing the proper registration system is relevant, as this decision will also affect workers' rights and obligations.
Finally, Article 18 of the LRW sets forth that "people who work remotely, particularly through telework, have the right to disconnect". This right is granted in Article of OL 3/2018, though the LRW specifies its application in the event of telework, as people working remotely are at particular risk. Unlike the generic wording of OL 3/2018, Article 18 of the LRW imposes "the employer's obligation to ensure disconnection from IT devices and work-related communication during nonworking hours". The way the provision is formulated regards disconnection as an employer's duty and not as a worker's choice – thus moving away from the approach of OL 3/2018. In this way, by putting this obligation in writing, the employer is responsible for ensuring the fulfillment of this right[42]. In all likelihood, lawmakers might have taken this stance as a result of the criticisms levelled by legal scholars against Article 88 of OL 3/2018[43].

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[41] Ministerio de Trabajo, Migraciones y Seguridad Social, *Guía sobre el registro de jornada*, 2019, available at the following link: https://www.mites.gob.es/ficheros/ministerio/GuiaRegistroJornada.pdf

[42] M. Rodríguez-Piñeiro Royo and F. J. Calvo Gallego, *Los derechos digitales de los trabajadores a distancia, op. cit.,* p.1466.

[43] Among other authors, see B. Torres García, *Sobre la regulación legal de la desconexión digital en España: valoración crítica*, in *Revista internacional y comparada de relaciones laborales y derecho del empleo*, vol. 8, n. 11, 2020, pp. 239-261.

4.4 The Right to Occupational Safety and Health

One of the most important sections of the LRW concerns the regulation of the right to health and occupational safety and health (hereinafter, OSH) of remote workers. Unlike Article 13.4 of the WS – which merely recognized this right – the new regulation details how remote workers' health and safety should be protected. Both pieces of legislation were based on the EFAT and the ILO's Convention no. 177, though in the most recent provision an attempt can be found to adapt general OSH rules to remote work. In this respect, Article 15 of the LRW sets forth that "people who work remotely have the right to adequate OSH protection, in accordance with Law No. 31/1995 of 8 November on Occupational Risk Prevention (hereinafter, LRPL). This provision replicates Article 13.4 of the WS, so it might not be useful in practical terms as it does not make specific reference to remote work. Consequently, it is Article 16 of the LRW and the terms therein which acquire relevance, in that they provide more details about the implementation of the duty of prevention.

The first section of Article 16 of the LRW states the need for both risk assessment and preventive planning to attend to "the 'risks' characteristic of this type of work, paying attention to psychosocial, ergonomic, organizational factors and accessibility. In particular, the distribution of working time, on-call hours and periods of breaks and disconnections must be taken into account". When engaging in telework, some new issues arise which do not affect onsite workers. Many of these new risks will be the result of the worker's (personal and professional) characteristics, the workplace, the equipment used, the distribution of working time and the management of the workload. Thus, the provisions of Article 16 of the LRW seem appropriate, since for the first time specific reference is made to the obligation to evaluate risk factors inherent to this way of working, which might not be detected through traditional prevention systems.

Furthermore, Article 16 of the LRW also establishes rules regarding the evaluation of the workplace. Thus, it provides that evaluation may only concern the "area where work takes place". And if an expert's check is necessary, a written report shall be issued explaining the reasons for this additional inspection, while the worker's consent shall be sought if their domicile is chosen as the main place of work. In reality, this provision promotes self-evaluation by the teleworker, by establishing in its final paragraph that "if consent is not granted, the assessment by the company may be carried out based on the determination of the risks derived from

the information collected from the worker according to the instructions issued by the prevention service".
Accordingly, risk self-assessment is prioritized over that which could be carried out by experts. In other words, the right to privacy is prioritized over the right to health. However, while ensuring privacy, it remains to be seen whether this approach might also safeguard workers' physical and moral integrity. In this sense, a report by the *Unión General de Trabajadores* (*UGT*) – which participated in the adoption of a previous agreement on which the current LRW is based – confirms that doubts exist about this option. According to the report, self-assessment is not effective, and this preference "raises problems of legal security in relation to the corporate responsibility derived from an inadequate preventive action based on this approach"[44].
One issue that the LRW disregards is to establish the formal requirements to be followed by a worker when they do not allow the expert to inspect the location chosen as a place of work. It is not known whether this refusal should be in writing and whether a reason is needed. It will be up to case law, legal opinion and in some cases, collective bargaining, to deal with these aspects. Given the existing legal void, if the request to enter the worker's house is denied, this refusal should be formalized in writing and motivated. In most cases, this refusal is justified by privacy issues, particularly when other family members live in the house elected as a place of work and the latter is not separated from other communal areas[45].
It should be noted that, once again, the misleading wording used by the LRW leads to uncertainty.

5. Conclusions and Unsolved Issues

The benefits brought about by the LRW are there for all to see, particularly because this provision has filled a legal vacuum concerning the regulation of remote work, especially telework. However, this piece of legislation presents a number of shortcomings and it is not very

[44] UGT Research Department, *La nueva regulación del teletrabajo: el Real Decreto Ley 28/2020, de 22 de septiembre, de trabajo a distancia. Entorno, exposición y análisis*, in *Estudios*, n. 6, 2020, p. 30. It is available in the following link: https://ugtficabcn.cat/calaix/documentacio/teletreball/La_nueva_regulacion_del_teletrabajo.pdf

[45] L. Mella Méndez, *Valoración crítica del RD-ley 28/2020, en especial sobre la protección de la salud en el trabajo a distancia,* in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (editors), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, op. cit.,* pp. 196-197.

innovative. One example of this is the section relative to the rights of teleworkers, which, on many occasions, replicates the rules laid down in the WS[46] and OL 3/2018.

According to the signatory parties, one significant innovation contained in the LRW concerns workers' economic rights (Article 11 and 12), as well as the set of prevention measures targeting telework (Article 15 and 16). As for this last right, authoritative scholars[47] point out that there are some aspects which are poorly regulated. Indeed, this legislation fails to properly address aspects like workers' involvement in risk assessment and prevention planning, the training needed to carry out this task – particularly self-assessment – and the legal classification of work-related accidents taking place at one's home. In reality, the generic reference of Article 15 LRW to the LRPL shows that basically the new regulation of telework draws on the legal framework safeguarding onsite workers rather than providing for an ad-hoc prevention system for teleworkers.

For all these reasons, one might agree with those[48] arguing that the LRW lacks a truly innovative character[49] and its implementation might give rise to some problems, which should be solved by collective bargaining.

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[46] See Article 9 and 10 on the right to training and career advancement; Article 14 concerning the right to register working time; Article 19 regarding workers' collective rights; Articles 20 to 22 about digital rights; and Article 18 dealing with digital disconnection.

[47] L. Mella Méndez, *Valoración crítica del RD-ley 28/2020, en especial sobre la protección de la salud en el trabajo a distancia, op. cit,* p. 199.

[48] J. M. Goerlich Peset, *La regulación del trabajo a distancia. Una reflexión general*, *op. cit*., p. 48-49.

[49] J. Thibault Aranda, *Toda crisis trae una oportunidad: el trabajo a distancia*, in *Trabajo y Derecho: nueva revista de actualidad y relaciones laborales* n. 12, 2020, p. 19 (La ley digital).

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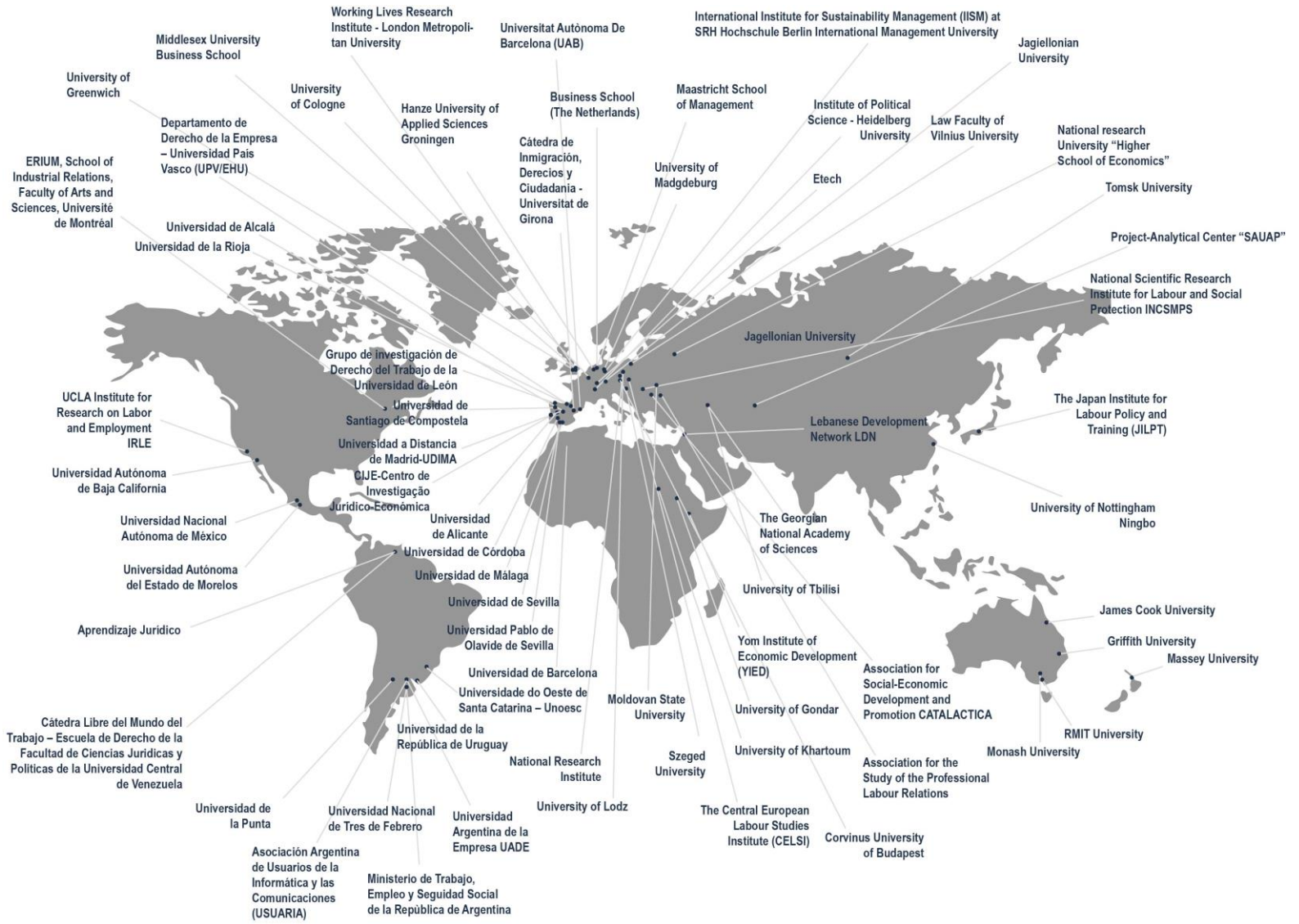

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