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ARTICLE

A holistic approach to remote digital work: from the inconveniences suffered by employees to a comprehensive 'fair compensation'

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Abstract

The unprecedented surge of employees working remotely in Europe during the COVID-19 crisis, shone a spotlight on some related disadvantages. Focusing on employees of the private sector, the most relevant of these include additional professional costs, informal overtime, and psychosocial risks. Their significant impact on employees seems to contrast with the EU model of digital transition and encourages us to look for possible remedies. In light of this, the author suggests adopting a holistic perspective. He proposes, thus, a vision of 'fair compensation' aimed at thoroughly neutralizing the negative impact of remote digital work on employees. Moving from a comparative analysis of the legal framework of France, Italy, and Spain – three EU medium/large economies which most used remote digital work during the pandemic – the contribution provides a definition of fair compensation, identifies some of its current highest standards and provides some insight into its possible practical implications.

Keywords

telework; holistic approach; COVID-19; informal overtime; psychosocial risks; fair compensation

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Un enfoque holístico del teletrabajo: desde los inconvenientes sufridos por los empleados hasta una «compensación justa» integral

Resumen

El aumento sin precedentes del número de empleados que teletrabajan en Europa, durante la crisis de la COVID-19, puso de relieve algunos inconvenientes relacionados con este. Centrándonos en los empleados del sector privado, entre los más relevantes se encuentran los costes profesionales adicionales, las horas extras y los riesgos psicosociales. Su impacto significativo en los empleados parece contrastar con el modelo de transición digital de la UE y nos anima a buscar posibles soluciones. En este sentido, el autor sugiere adoptar una perspectiva holística. Por lo tanto, propone una visión de «remuneración justa» destinada a neutralizar completamente el impacto negativo del teletrabajo en los empleados. Tras un análisis comparativo del marco legal de Francia, Italia y España, las tres economías medianas/grandes de la UE que más utilizaron el trabajo a distancia durante la pandemia, la propuesta proporciona una definición de compensación justa, identifica algunas de sus normas más restrictivas en la actualidad y proporciona algunas pistas sobre sus posibles implicaciones prácticas.

Palabras clave

teletrabajo; enfoque holístico; COVID-19; horas extras; riesgos psicosociales; compensación justa

1. Remote digital work, the autonomy paradox and fair compensation

Remote digital work[1] has been present in EU countries for more than 20 years, and until recently, it was an option mostly for a small number of well-educated people (OECD, 2021, 315).

This scenario radically changed with the COVID-19 pandemic. While before 2020, only around 19% of European workers had arrangements to work remotely (Eurofound, 2020a, 7-9), data collected by Eurofound through the e-survey Living, working and COVID-19 show that this rate increased to 48% in the summer of 2020.

Even after vaccines succeeded in containing the worst effects of COVID-19, for most of these workers, remote digital work seems to be "here to stay", assuming a hybrid form involving some days spent in the office each week (Sostero *et al*., 2020, pp. 53-55). From a labour law perspective, the increasing number of people working remotely makes the analysis of the pros and cons of remote digital work more important.

Limiting the study to employees, remote digital work is generally presented as a solution in their interest, allowing them to enjoy increased autonomy and flexibility, a better work-life balance, and greater job satisfaction (Eurofound, ILO, 2017, p. 9). Nonetheless, in pre-Covid literature, some negative aspects had already emerged. Reference is made, in particular, to studies on the 'autonomy paradox'. This label covers the undesired effects that flexibility and greater autonomy may have on employees working remotely, such as increased work intensification, longer and more irregular working hours, and higher stress levels (among others, Mazmanian *et al*., 2013, pp. 1350-1351).

Research conducted during the pandemic further investigated the negative impact of remote digital work (among others, ILO, 2020) – in particular if intensive – on the financial and personal situation of employees. The primary areas of distress, not exclusively due to pandemic circumstances, were: 1) additional professional costs; 2) informal overtime; and 3) psychosocial risks (Lodovici, 2021, p. 41).

Additional professional costs are usually linked with the need to set up a home office and to the more expensive utility bills resulting from longer periods spent working from home (ILO, 2020, p. 9 and p. 23).

Informal overtime is related to the increased work activity undertaken outside normal working hours in order to complete tasks or reach professional objectives (Eurofound, 2020b, p. 33). In the economic field, it leads to a discrepancy between hours worked and wages, since (many of) these additional hours are not paid or not registered.

As for health and wellbeing, informal overtime is a cause, together with increased isolation and work intensity, of the third disadvantage addressed in this contribution: high exposure to psychosocial risks. That is, high levels of stress and anxiety that may favour workaholism, depression and burnout (Eurofound, 2018).

This situation seems to contrast with the EU model of digital transition, that "should have a positive impact on workers and working conditions" (European Parliament, 2021, point C), and protect the "principles underpinning [...] European social market economy", which include "minimum requirements on working time, health and safety at work" (European Commission, 2021, p. 1).

This contribution, thus, aims to address possible remedies for this issue by adopting a holistic perspective. Starting from the disadvantages described above, it attempts to provide a systematic and dynamic vision of fair compensation. That is, one aimed at thoroughly neutralizing the negative impact of remote digital work on the working conditions of employees of the private sector.[2]

1. The term *Remote digital work* refers to "any type of work arrangement where workers work remotely, away from an employer's premises or fixed location, using digital technologies such as networks, laptops, mobile phones and the internet" (Eurofound, 2020a). Telework, unless otherwise specified and for the solely purposes to ease the comparative analysis, is intended as a subset of remote digital work, consisting of remote digital work carried out on a regular basis by employees.
2. The space available for this study allows to examine only employees with defined work schedules. The study will not address, hence, those limited cases of remote digital employees effectively free to determine allocation and duration of their working time, like *forfait-jours* in France (Florès, 2016, pp. 898-902) and 'agile employees' with their performance organized per phases, cycles and objectives in Italy (Leccese, 2020, pp. 437-443).

The study will rely on a comparative legal analysis of regulations for remote digital work in France, Italy, and Spain (Section 2), chosen as the medium/large-sized EU economies that most relied on this form of work during the pandemic (Eurofound, 2020b, p. 33) and where the relevant regulatory framework was already highly developed before the COVID-19 crisis (Eurofound, 2020c, pp. 41-54).

Based on the outcomes of said analysis, the contribution will:

1) verify if it is possible to provide a comprehensive and unitary definition of fair compensation; and
2) identify some of its current highest standards of employee protection.

2. Three national regulatory schemes in the EU framework (Italy, France, Spain): looking for common patterns for fair compensation

In Europe, national regulations regarding remote digital work among employees of the private sector found a first impulse in the European Framework Agreement on Telework (EFAT) executed in 2002 by the major European social partners. EFAT is considered a milestone for the European social dialogue, as the first collective agreement executed in the framework of Article 155 (2) TFEU and implemented autonomously by EU social partners.

EFAT introduced a common European definition of telework (Clause 2), and basic principles relevant to the aforementioned inconveniences suffered by remote digital employees, such as those regarding professional costs (Clause 7); prevention of isolation in teleworkers (Clause 8); and workload and professional standards (Clause 9).

Furthermore, the implementation of EFAT (Ramos Marti, Visser, 2008, pp. 519-523) left in the national legal frameworks of most EU countries similar regulatory models for telework or inspired further regulations concerning remote digital work. This created a favourable environment for the circulation of such a theory as fair compensation, elaborated in this contribution through a comparison of French, Italian and Spanish national regulations, all inspired, directly or indirectly, by EFAT.

A further relevant development in the EU social dialogue occurred almost 20 years after EFAT. The Framework Agreement on Digitalisation of 13 June 2020 (FAD), executed by EU social partners and always in the framework of Article 155 (2) TFEU, broaches the more general topic of the digitalization of work, which already includes remote digital work.

The prevalent methodological approach, and the early stages of FAD's implementation, make its impact on national regulations, for the moment, just prospective. Here, then, it seems sufficient to refer to specific literature for further details (among others, Sepulveda Gómez, 2021), remembering that, in any case, the FAD might play an important future role in re-defining labour rules in the light of the digitalization of work.

Based on this European perspective, the following paragraphs will detail the current legal frameworks of France, Italy and Spain. This will involve investigating the regulation of the most widespread forms of remote digital work in these countries, looking for regulatory patterns that may help lay the foundations of a definition of fair compensation.

2.1. France

In France, the most common form of remote digital work is telework, also extensively used during the pandemic (Service-public.fr, 2022).

Telework is currently regulated by a flexible mosaic of sources. The Labour Code (Code du Travail, hereinafter C. Trav; Articles L.1222-9, L.1222-10, and L.1222-11) is integrated by two Cross-industry national agreements (*Accord National Interprofessionnel*, ANI) executed by the major social partners, covering most of sectors and extended nationwide by the government: the ANI of 2005, which first implemented the EFAT in France, and the ANI of 26 November 2020, which mainly introduced best practices (Ray, 2020, 238).

According to Article L.1222-9 I (1) C. Trav., telework embraces work which might be carried out on the employer's premises, but is concretely carried out elsewhere using IT technologies. It concerns employees working from home regularly or occasionally (Geniaut, 2020, pp. 608-609).

As per Article L.1222-9 I (3-4) C. Trav., telework can be implemented at a company level by various means: a collective agreement, a charter unilaterally issued by the employer after confrontation with the employees' firm-level representative body, or an amendment to

individual employment agreements. The switch from face-to-face work to telework normally requires the consent of the employer and employee. Only in exceptional situations, when telework becomes a resource for protecting employees and continuing business operations, does Article L.1222-11 C. Trav. enable the employer to act unilaterally, as happened during the Covid-19 pandemic (Ministère du Travail, 2021, p. 366).

In line with Clause 4 of EFAT, Article L.1222-9 III C. Trav. establishes that, in principle, a teleworker is entitled to be treated in the same way as a normal employee (for a critical opinion, Ray, 2018, 55), and the ANI of 2020 specifies that this equality of treatment also includes legal limits on working hours (Article 3.1.2).

Moving onto fair compensation issues, the employers' obligation to reimburse teleworkers' additional professional costs is established by the ANIs – that is, through collective bargaining – while until 2017, it was integrated in Article L.1222-10 C. Trav. (Article 21, Ordonnance no. 2017-1387 of 22 September). The employer shall provide teleworkers with the equipment necessary to work and take on teleworkers' additional professional costs supported "to carry out the job and in the interest of the company" (Article 3.1.5, ANI 2020; Article 7, ANI 2005). The employers' obligation, thus, seems to refer to costs directly generated by remote work, above all those for communications expressly mentioned by the ANI of 2005. From a practical perspective, there is an increasing number of company collective agreements setting specific criteria for reimbursements: in most cases, consisting of a lump-sum allowance (Ministère du Travail, 2021, p. 369). An additional allowance for 'occupying' the employee's house for job-related purposes is finally due only when a workstation is not available on the employer's premises (among others, *Cour de Cassation, chambre Sociale* [Labour division of the Supreme Court], March 27, 2019, no. 17-21.014, ECLI:FR:CCASS:2019:SO000534).

Employee protection against informal overtime and work during rest periods relies, first and foremost, on the right to disconnect. Although not defined by French law, in general, this corresponds to the "worker's right to be able to disengage from work and refrain from engaging in work-related electronic communications [...] during non-work hours" (Eurofound, 2019). Article L.1222-9 II (4) C. Trav. establishes that the collective agreement or charter issued by the employer for implementing telework shall regulate the right to disconnect, specifying the time slots in which the employer is allowed to contact the teleworker. Periodical collective bargaining sessions to regulate the right to disconnect for all employees – not just teleworkers – are, finally, mandatory for companies with fifty employees or more (Article L.2242-17 C. Trav.). In this domain, thus, the C. Trav. does not introduce default solutions. It only sets a framework that helps to determine the most suitable solution on a case-by-case basis.

A generalized obligation to register teleworkers' working time, conversely, is absent in France. Employers are, in fact, required to choose between "modalities of control of working time" – that may include registration – or "modalities to regulate workload", like a regular confrontation with employees, held individually or collectively (Article L.1222-9 II (3); ANACT, 2020). In any case, this gap seems offset by procedural rules set by Article L.3171-4 (1-2) C. Trav: in the event of disputes over unpaid extra hours, the employee is requested only to provide factual elements to support their claim, against which the employer must justify the hours they pretend the employee actually worked (Miné, 2019, p. 493). This provision is strengthened by recent French case-law, which softened the criteria to scrutinize factual elements provided by employees – admitting, for instance, low-detailed counting hours – increasing the cases when employers shall reply by providing objective elements concerning hours worked by employees, such as a record of them (among others, *Cour de Cassation, chambre Sociale*, January 27, 2021, no. 17-31.046, ECLI:FR:CCASS:2021:SO000138). This partial reversal of the burden of proof, despite some doubts about its thorough compliance with pro-labour requirements set by CJEU case-law,[3] seems to encourage employers to adopt effec-

3. The Court of Justice of the European Union (CJEU), in a judgment of 2019, established that national legislation introducing an "obligation, consisting of setting up an objective, reliable and accessible system enabling the duration of time worked each day to be measured, is necessary more generally for all workers in order to ensure the effectiveness of Directive 2003/88 [...]" and of Directive 89/391/EEC; see Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE - CJEU (Grand Chamber), May 14th, 2019 (no. C-55/18 - ECLI:EU:C:2019:402), par. 65. Member States are requested, hence, to update their internal legislation to comply with the judgment. For doubts about compliance of France, Auzero *et al*., 2021, p. 1036.

tive mechanisms to control working time, restricting the scope for abusive conducts exploiting teleworkers.

The employer's obligation to organize a yearly interview with each teleworker to analyse workload and working conditions (Article L.1222-10 C. Trav.) is, finally, another contribution to contrast informal overtime.

Regarding psychosocial risks, besides measures against informal overtime, employers must protect teleworkers according to general health and safety rules. This encompasses, as per Articles L.4121-1ff C. Trav., the obligation to protect employees' physical and mental health through training, information, and the adoption of an adequate work organization as well as measures to prevent occupational hazards. Burnout and other ailments linked to psychosocial risks do not feature on the list of presumed occupational illnesses (Richevaux, 2021, 9ff.). Because of this, the burden of proof of suffering from such an ailment recognized as an occupational illness is a heavy one. The employee must demonstrate that the illness is directly and essentially caused by the work activity and that they have been permanently incapacitated at a rate no lower than 25% (Kessler, 2020, p. 326). These high requirements make it difficult to access social security treatments. This has led some affected employees to explore alternative solutions, such as attempting to have psychosocial illnesses recognized as work-related accidents (Kessler, 2020, pp. 311-312).

2.2. Italy

Italy, unlike France, did not make 'traditional' telework their main response to the pandemic, opting instead for a widespread application of the more common regulatory framework of agile work (*lavoro agile*; Albi, 2020, pp. 783-790).

Although telework has already been regulated for private employees through the National cross-sectoral agreement (*Accordo Interconfederale*) of 9 June 2004, which transposed EFAT, occupational health and safety issues, together with employer and employee scepticism, prevented it from becoming mainstream (for all these aspects, Alessi, 2018, p. 817). In a further effort to promote the digitalization of work, parliament intervened in 2017, introducing a new regulatory scheme for remote work performances: agile work.

Agile work is regulated by Articles 18-24 of Law 22 May 2017 no. 81 integrated, with little added, by a Trilateral agreement of 7 December 2021 (*Protocollo nazionale sul lavoro in modalità agile*), that has a widespread application since signed by major social partners, together with the government (Ichino, 2021).

Agile work concerns only employees and is defined as a way to carry work out partially on employers' premises and partially elsewhere, with no fixed workstation (Article 18 of Law 81/2017). Despite the nominal issue, the structural differences between agile work and telework are not particularly significant. Agile work, in essence, is a more flexible form of Italian telework, allowing employees to work away from employers' premises and in a non-regular pattern (Tiraboschi, 2017, p. 944).

With regard to regulatory content, agile work does not formally consist of a national implementation of EFAT, although it shares some of the underlying principles of telework. The equality of treatment between agile employees and employees working in person, established by Article 20 of Law 81/2017, recalls the similar principle for telework of Article 4 of the National cross-sectoral agreement of 2004. In addition, agile work (Article 19 of Law 81/2017) and telework (Article 3 of the National cross-sectoral agreement of 2004) have both a voluntary nature.

Employer and employee must normally execute a written agreement to access the agile work scheme (Article 19 of Law 81/2017). A unilateral switch from face-to-face work to agile work was exceptionally allowed only during the pandemic, when the Italian legislator made this option available for employers. (Prime Minister's Decree of 1 March 2020, art. 4 (1), lett. a). These provisions temporarily allowed employers to adopt full-time remote agile work in order to comply with public health measures aimed at containing the pandemic (Brollo, 2020, pp. 180-181).

Furthermore, agile work regulations are relevant in the field of fair compensation.

Professional costs sustained by agile employees are not directly addressed by Law 81/2017. According to Article 5 (1) of the Trilateral agreement of 2021, it is the employer who "normally provides the technological and IT instruments" needed to work remotely and who ensures their maintenance. Furthermore, as per Article 5 (2), "if the parties agree to utilize IT instruments belonging to the employee", it also falls to them to establish (or not) an allowance for employees' additional professional costs.

These allowances, thus, are anyway eventual. The Trilateral agreement, finally, does not indicate further criteria for determining their amount, and this aspect seems to have been delegated to lower bargaining levels or to individual agile work agreements.

With regard to informal overtime and work during rest periods, agile employees normally are subject to legal limits relating to maximum working hours. Furthermore, overtime is usually forbidden by collective agreements or only allowed upon an employer's authorization (Avogaro, 2018, p. 13).

Disconnection is recognized as a right of agile employees (Article 19 of Law 81/2017 and Article 2 of Decree-Law 13 March 2021, no. 30; Dagnino, Menegotto, 2021). In this view, Article 3 of the Trilateral agreement provides a broad definition of disconnection, which includes employees' right (i) not to work during rest periods, even offline, and (ii) to disable communication devices while absent on leave. In any case, the implementation of measures for disconnection is delegated by Article 19 (2) of Law 81/2017 to individual agreements between employers and employees, regardless of the weaker bargaining power of the latter. Meanwhile, collective agreements that could address this issue usually establish mere prohibitions on contacting agile employees during normal rest periods or outside specific time slots, without further details (for instance, FCA agreement of 12 March 2018; ING bank agreement of 4 August 2020). The right to disconnect, therefore, risks remaining 'on paper', mostly in smaller companies where trade unions are usually not present.

Furthermore, Italy has not yet implemented the obligation to register working time through objective, reliable, and accessible instruments, as requested by judgment C-55/18 CJEU (*supra*, footnote no. 3). According to Article 5 of Legislative Decree of 8 April 2003 no. 66 and Article 39 (2) of Decree-Law 25 June 2008 no. 112, employers must only report (not punctually register), daily, the working hours of each employee and, separately, overtime. Nevertheless, the use of reliable instruments to ensure transparency of these data and of their collection process is not requested. In addition, civil procedural rules do not set a protective framework for agile employees, unlike in France. In Italy, in fact, case law has repeatedly affirmed that the burden of proof of overtime hours lies completely with employees (*Cassazione Civile* [Supreme Court], 16 February 2009, no. 3714, ECLI:IT:CASS:2009:3714:CIV). This context seems to make it easier to conceal cases of unpaid work.

Finally, Law 81/2017 does not directly tackle psychosocial risks. In any case, they seem to be included in the employers' information duties regarding risks associated with agile work (Article 22 of Law 81/2017). Moreover, Article 3 (10) of Legislative Decree 9 April 2008 no. 81 extends to agile work the occupational health and safety obligations for employees operating through display screens. These include employers' duties to carry out a specific job-related risk assessment – also aimed at preventing isolation among agile employees – to inform and train employees according to the results of this assessment, and to monitor their health (Pelusi, 2017, par. 3). However, health problems resulting from mental fatigue, anxiety and workaholism do not feature on the list of ailments considered by law to be occupational illnesses (Decree of Ministry of Labour, 9 April 2008). Affected employees may therefore access the specific measures for the victims of occupational ailments only by assuming the (difficult) burden of proof concerning the link between the illness and their work activity (Cinelli, 2020, 515-521).

2.3. Spain

In Spain, remote work and telework have traditionally shared the same regulatory framework, which has been also used to help manage the pandemic (Álvarez Cuesta, 2020, pp. 192-194).

The most recent regulation for remote work/telework was introduced in 2020 by the Royal Decree-Law no. 28 of 22 September, and confirmed by Parliament through Law 9 July 2021 no. 10. The new systematization reflects the contents of a pre-agreement reached by the main social partners with the government (Vicente Gómez, 2020), and it seems of eminent importance since it sets the standard for the post-COVID-19 era.

Law 10/2021 has a domain limited to employees. Articles 1-2 define remote work as any work undertaken regularly – that is, for a period of time corresponding to at least 30% of working time calculated in a reference period of 3 months, or the corresponding proportional percentage on the basis of the duration of the employment agreement (in this sense, and for further critical observations about the reference period, Thibault Aranda, 2021, pp. 108-110) – from home or from a place other than an employer's premises. Telework, as defined by Article 2, is a subset of remote work encompassing work carried out using IT devices. Normally, there is no relevant difference in the

rules introduced by the reform of 2020-21 for remote work and telework, although in some cases – including the right to disconnect (Article 18) – the legislator specifies that in the implementation of Law 10/2021 the condition of teleworkers shall be 'especially' considered.

Having re-affirmed the equality of treatment between remote employees and those working in person (Article 4) – that includes application to teleworkers of legal limits about maximum working time and rest periods – Law 10/2021 points out the 'voluntary principle': access to the remote work scheme is always subject to an individual written agreement between employer and employee (Article 5).

Like in France and in Italy, Spanish regulation also contains some measures relevant to fair compensation. In terms of additional professional costs, Law 10/2021 seems to be in line with EFAT. According to Article 11, the employer has an obligation to provide – and maintain – the equipment needed by employees to work remotely. Article 12 adds an employer's obligation to sustain/reimburse additional professional costs supported by teleworkers, but only when directly linked to the aforementioned equipment, functional to the remote work – for instance, those for electricity or internet connection (Aguilera Izquierdo, 2021, pp. 279-281; for a critical perspective, concerning in particular Bring Your Own Device policies, Cremades Chueca, 2020, pp. 132-140). The determination of said costs and the mode of reimbursement, however, is delegated by Article 12 (2) to collective bargaining. Regarding this aspect, an analysis of 230 collective agreements addressing telework negotiated in 2011-2020 showed that only 21% of them see the employer ensuring reimbursement or taking charge of some additional professional costs (see, for instance, Article 9.7 of collective agreement Europcars IB S.A.). Moreover, just 4% of the agreements go beyond the reimbursements of expenses for internet connection, such as Telefonica On the Spot Services S.A.U. (for the overall analysis, Pérez del Prado, 2022, pp. 129-138). The scope for improvement following the introduction of Law 10/2021, therefore, seems significant, while a key challenge appears to involve ensuring that the recently-introduced provisions are effectively implemented.

To contrast informal overtime and unpaid work during rest periods, Law 10/2021 relies on the obligation to register working time and on the right to disconnect.

The current obligation to register working time was introduced, for all employees, by the Royal Decree-Law 8 March 2019 no. 8. It is regulated by Article 34 (9) of the Spanish Workers' Statute (Royal Legislative Decree of 23 October 2015 no. 2) and recalled, for remote employees, by Article 14 of Law 10/2021. It requires employers to keep, through reliable instruments, records of the working hours of each employee, including the actual daily start and end times. The introduction of this 'transparent' register appears to render Spain compliant with the requirements of judgment C-55/18 of the CJEU (*supra*, footnote no. 3). The burden of proof concerning undue overtime normally lies instead with the claimant-employee (Article 217 (2) Law 1/2000 of 7 January), who can rely on the aforementioned register. In this view, part of the doctrine (González Gónzalez, 2020, par. I.1-I.3), leveraging former case law regarding specific employers' duties to keep a register, argues that the burden of proof should shift on the defendant-employer in the event of a breach of the obligation to register working time.

The right to disconnect was introduced in Spain by Article 88 of the Organic Law 5 December 2018 no. 3. Article 18 of Law 10/2021 recalls it, interpreting the right to disconnect for remote employees and teleworkers in a more extensive way. That is, as a position of guarantee of employers (Trujillo Pons, 2020, 59; *amplius*, also relating the effectiveness issue, Cremades Chueca, 2020, 132ff.), with the latter required to ensure that employees do not receive requests and that they are not expected to work offline during rest periods.

Both the obligation to register working time and the right to disconnect can be implemented through a unilateral regulation issued by the employer following a confrontation with employees' representatives.

Implementation through collective bargaining, conversely, is encouraged by law but not mandatory (Tascón Lopez, 2018, 45ff.). Notwithstanding, collective agreements seem intended to play a crucial role, including as the place to address further important issues relating to working time. This includes availability periods that, especially when involving real-time intervention, if too frequent and/or extended, may present a risk to the health of remote employees, in addition to preventing them from actually benefitting from a flexible schedule (Article 13, Law 10/2021). For these reasons, part of the doctrine advocates for an intervention of collective bargaining to further limit the number and duration of teleworkers' availability periods during the day, as well as for enhanced monitoring through the implementation of a dedicated section for availability periods in the register of working time (Arrieta Idiakez, 2021, 274ff.).

Psychosocial risks, as well as ergonomic and organizational ones, must undergo – according to Article 16 of Law 10/2021 – an enhanced examination during the mandatory assessment of job-related risks relating to remote work/telework that the employer must conduct (Alegre Nueno, 2021). With regard to this, some concerns have been expressed (see, also for other related issues, Mella Méndez, 2021, pp. 192-198) as to the possibility, introduced by Article 16 (2), of conducting the risk assessment concerning the remote workplace through employee self-evaluation, in the event that they had a valid reason to refuse an external visit, in particular when the workplace coincides with their domicile. This is, in essence, because the employee might not have the adequate skills to carry out a comprehensive evaluation, although Law 10/2021 already incorporates some remedies, such as the employer's obligation to ensure that the company's occupational risk prevention service assists teleworkers in this process. Furthermore, this framework is integrated by the employer's duty to inform and train employees about job-related risks, to monitor their health conditions and to take consequential measures (Articles 18-19 and 22 of Law 31/1995 of 8 November, and Article 4 of Royal Decree 488/1997 of 14 April). Nonetheless, phenomena like stress and burnout are not yet included on the list of proper occupational illnesses (Royal Decree 1299/2006 of 10 November). Consequently, affected teleworkers and remote employees may access allowances and reimbursement provided by the Spanish social security system only by demonstrating the direct and exclusive link between the illness and their work activity (Ginès i Fabrellas, 2021, pp. 116-121): a difficult burden of proof when dealing with illnesses with potentially hybrid causes, such as those resulting from psychosocial risks.

3. Defining fair compensation and its highest standards of protection for remote digital employees

The principal purpose of this study is to verify the possibility of providing a comprehensive definition of fair compensation for the inconveniences due to remote digital work – especially if intensive – and concerning employees of the private sector. That is, regular teleworkers and employees working remotely frequently, although in a non-regular pattern, as can happen for Italian 'agile' employees. In this sense, the comparative legal analysis conducted in Section 2 provided useful outcomes.

First, some 20 years after the implementation of EFAT, in all the addressed countries the regulatory framework still establishes a right for remote digital employees to a treatment equal to/not worse than those working in person (see Article L.1222-9 III C. Trav. for France, Article 20 (1) Law 81/2017 for Italy, Article 4 Law 10/2021 for Spain).

The analysis of national measures implementing this principle in the areas of distress addressed in this article (additional professional costs, informal overtime, and psychosocial risks) emphasizes that the recent trend is to intend this equality of treatment as substantial, not just formal, and that it can be ensured through customized – quantitative and/or qualitative – measures.

For instance, quantitative measures include those that compensate additional professional costs incurred by remote digital employees. In this case, remote digital employees receive consideration of the same kind as employees working in person (monetary wage and reimbursements/allowances), whose amount can be increased in order to cope with additional costs affecting employees working remotely, such as those for internet bills.

A qualitative dimension is more often linked to solutions addressing informal overtime and the prevention of psychosocial risks. Fair compensation aimed at equality of treatment, in these contexts, may consist of additional and/or different prerogatives from those of employees working in person, designed accounting for the inconveniences typical of remote digital work. This is the case, in Italy, for the right to disconnect, or, in France, for the right to periodical employer/employee meetings to adjust workload. Conversely, when the prerogatives of remote digital employees are the same as those working in person – such as the right to the prevention of occupational risks – the qualitative difference lies in the content of the performance required of the party who must guarantee this right (generally, the employer). For instance, the risk assessment for remote digital employees shall give more relevance to psychosocial job-related hazards, especially linked to isolation, than that for people working in person.

Finally, in terms of regulatory policy, these quantitative and qualitative measures are all included in statutory regulations for remote digital work, or in collective agreements, company practices and individual agreements implementing the law.

Based on these concepts, it seems possible to attempt to provide a definition of a global approach to the causes of distress linked with remote digital work. This umbrella concept, termed fair compensation, corresponds to: "The integrated set of measures to ensure to remote digital employees a substantial working and financial treatment at least equal to the one of comparable employees working in presence, levelling all the inconveniences due to working remotely in a given company, with the relevant measures that can be adopted through law, by means of collective or individual agreements, and/or through company practices, and may have a qualitative and/or quantitative nature".

A concept that could become the basis for specific legislation or collective bargaining sessions, aimed at systematically addressing the inconveniences characterizing remote digital work in a specific context. Harmonically structuring compensatory measures to ensure that these employees receive treatment actually equal to that of comparable people working in person.

Having provided a definition of fair compensation, the outcomes of the comparative legal analysis carried out in Section 2 also enable us to try to determine its current highest standards of protection for the three areas of distress addressed by this contribution.

This exercise can be useful in providing benchmarks for other EU countries, given that these highest standards of protection are based on measures already adopted in France, Italy and Spain. That is, the EU Member States with the greatest experience in remote work during the pandemic, and that prior to the health crisis had already developed advanced legislation to compensate for the disadvantages of remote digital work. Workers' organizations, EU and national institutions may also use these highest standards for fair compensation as a 'litmus test' to determine which EU countries are actually ensuring adequate working conditions for remote digital employees, preventing the negative impact of digitalization.

As for professional costs, Articles 11-12 of Spanish Law 10/2021 seem to provide the best treatment, establishing in law that the employer shall provide employees with the equipment to work remotely and the right to reimbursement of additional costs, albeit only when directly linked to the aforementioned equipment, functional to work duties. France ensures a similar treatment, but through the ANIs of 2005-2020 which, unlike the law, may be derogated by further collective bargaining, after the reforms of 2016-2017 which overturned the favourability principle formerly rooted in the French industrial relations system (Rehfeldt, Vincent, 2018, pp. 11-14). Part of French doctrine (Bernard, 2021, pp. 52-55) argues that the right to reimbursement should result from a general principle established by case law, not directly concerning telework (*Cour de Cassation, chambre Sociale*, February 25, 1998, no. 95-44096). Nonetheless, in this latter case, the possibility of reimbursement seems less straightforward, requiring the intervention of a judge and being subject to possible fluctuations in case law. In Italy, finally, allowances for any undue cost are not mandatory.

France and Spain can be considered benchmarks in the prevention of informal overtime and work during rest periods, albeit through different measures. Both countries recognize the right of remote digital employees to disconnect, which, in France, is also assisted by firm-level mandatory bargaining sessions for medium/large companies.

Spain integrates the right to disconnect with an obligation to a 'transparent' registration of working time, inspired by case law of CJEU (Article 14 of Law 10/2021). According to part of the doctrine (González González, 2020, par. I.1-I.3), this obligation, read in the light of Spanish rules of civil procedure, should also shift onto the employer the burden of proof for unpaid extra hours when registration is missing.

In France, registration of working time for teleworkers is not mandatory. Nevertheless, the burden of proof for unpaid work is partially reversed, requiring the defendant-employer to justify that informal working hours did not take place, after the demandant-employee presented relevant elements of facts (Article L.3171-4 (1-2) C. Trav.). An exercise for which French case law inspired to CJEU judgment C-55/18 always more frequently seems requiring objective elements to the employer-defendant, such as a record of hours worked. Moreover, French teleworkers have the right to meet once a year with the employer to examine workload issues.

In the opinion of the author of this contribution, both countries adopted a rather solid protective system where

the right to disconnect is integrated by measures easing the proof of informal overtime, helping illegal conduct to emerge.

Italy, instead, appears lower still on the scale. The Trilateral agreement of December 2021 includes a broad version of the right to disconnect, encompassing both the right not to receive solicitations and the right not to work at all during rest periods. Nonetheless, the employers' duty to annotate working time is not assisted by transparency and reliability requirements, unlike in Spain. In addition, the burden of proof of informal overtime, according to settled case law, rests entirely with the employee.

Regarding psychosocial risks, the highest standard for fair compensation, aside from measures about working time, seems common to all the countries in questions, in accordance also with the coordination effect of Directives 89/391/EEC and 90/270/EEC on national regulations. This issue is included in the more general employers' duty to inform employees and to adopt measures to prevent occupational risks generated by remote digital work, which, as pointed out in Sections 1-2, are different from those of employees working in person, especially regarding the psychosocial, ergonomic, and organizational spheres.

Conclusions

Remote digital work seems, for many private employees in Europe, bound to become the new normal following the health crisis, alternating with some days per week spent in the workplace. It has great potential but, at the same time, may give rise to disadvantages for employees, especially if a significant part of the work duties are carried out remotely. The most common of these are additional professional costs, long working hours leading to informal overtime, and mental health issues due to increased psychosocial risks.

To prevent these (and other possible) disadvantages, the EFAT had already affirmed in 2002 that remote (tele-) workers should be treated like comparable employees working in person (Clause 4). The analysis conducted in this contribution of the current regulatory frameworks of France, Italy, and Spain has highlighted that today, this equality of treatment cannot be merely formal but rather should have a substantial nature and rely on customized qualitative and/or quantitative measures specific to remote digital employees.

In this view, an umbrella concept leading to a holistic approach to the various disadvantages of remote digital work might contribute to the achievement of substantial equality of treatment. Therefore, the proposal developed here attempts to address the solutions required for such inconveniences from a global point of view. This, by introducing the concept of fair compensation, intended as the integrated set of qualitative and/or quantitative measures to ensure that remote digital employees receive substantial working and financial treatment at least equal to that of comparable employees working in person, levelling all the inconveniences due to working remotely for a given company.

From a practical perspective, fair compensation may become a unique chapter for legislation and/or collective negotiations, favouring the development of regulations addressing the inconveniences suffered by remote digital employees from a holistic perspective to provide them with more systematic protection.

Some useful measures for integrating into a manifesto for fair compensation could be provided by the benchmarks identified by comparative legal analysis concerning France, Italy, and Spain, for the three areas of distress addressed by this study. These EU countries are deemed to be those with the current highest standards of protection for remote digital employees, and the related benchmarks may, thus, serve as a yardstick for measures adopted by other Member States dealing with the same issues (Section 3).

In addition, the broad concept of fair compensation is conceived to be flexible and open to evolution. It should, then, allow for the framing of multiple types of disadvantages suffered by remote digital employees, as a dimension of a whole. This might pave the way for further research that deals with new aspects: for instance, fair compensation for the scarce social learning of employees working mostly remotely. Alternatively, this could address, from a gender-based perspective, different psychosocial risks characterizing women and men due to the interaction of remote digital work with the unbalanced distribution of family and/or childcare duties.

Finally, the fair compensation approach was developed by looking at three legal frameworks for remote digital work, all inspired, directly or indirectly, by EFAT. This has also served as a reference for regulations adopted in most other EU countries. This common background could ease the circulation of the fair compensation approach, contributing to the implementation of the European Pillar of Social Rights, and in particular of its 5th, 9th and 10th principles, aimed, respectively, at providing European workers with secure and adaptable employment, work-life balance, and healthy, safe and well-adapted work environments.

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