

Position Paper

June 2024

Telework and the right to disconnect

On 30 April 2024 the European Commission initiated a first-phase consultation of social partners under Article 154 TFEU on possible EU action in the area of telework and workers' right to disconnect. The German digital association Bitkom (although not a social partner) would like to underline its key positions for the upcoming legislative procedure:

Summary

- Remote work and working from home have become standard in many companies, at least since the COVID-19 pandemic. Bitkom is convinced that **companies will continue to rely on hybrid working models on a voluntary basis** in the future in order to be perceived as attractive employers.
- The issue of **cross-border telework within the European Union** has not sufficiently been addressed in the consultation document. Key areas of EU action should include employment law, social security and tax law as well as employers' reporting obligations under the Posting of Workers Directive.
- The **definition of "telework"** and corresponding regulation in statutory legislation or in collective agreements may vary in different Member States. The EU should take a **differentiated view depending on the scope of telework**, i.e. whether or not it takes place on a voluntary basis; whether it exclusively takes place in a fixed workplace at the employee's home; whether it takes place during the entire working time or on a regular or only on an occasional basis. In case the employer instructs the employee to telework, regulation may be more comprehensive.
- **EU action should refrain from regulating work arrangements in detail. Practice shows that collective agreements at sectoral or organisational level as well as individual work agreements are the most appropriate to lay down work arrangements on telework and a right to disconnect.**

In detail

Opportunities and challenges related to telework and the right to disconnect (Question I)

Remote work and working from home have become standard in many companies, at least since the COVID-19 pandemic. According to the latest Bitkom survey results¹, 64 per cent of companies in Germany offer their employees the option to work - at least partially - from home. 68 per cent of employees who are given this opportunity work completely or partially from home.

Flexible working models enable a better work-life balance, lead to more self-determination and have a positive impact on the health and job satisfaction of employees. Bitkom is convinced that companies will continue to rely on hybrid working models on a voluntary basis in the future in order to be perceived as attractive employers. Employer attractiveness is key in times of talent shortage.

Cross-border telework within the EU

The issue of cross-border telework within the European Union has not sufficiently been addressed in the consultation document. The EU is predestined to take action and put in place supporting measures to facilitate cross-border telework and ensure legal certainty for employees and employers alike. Key areas of action should include employment law, social security and tax law as well as employers' reporting obligations under the Posting of Workers Directive.

Employment law

The Rome I Regulation (Regulation (EC) No. 593/2008) of the European Union helps to determine the applicable employment law in case of cross-border telework.

Art. 9 para. 1 of the Rome I Regulation stipulates that some legal provisions of the host country (so-called overriding mandatory provisions) are mandatory, even if, according to Art. 8 of the Rome I Regulation, a different national law is actually applicable to the employment relationship. For certain aspects the employment law of the country in which the employee is located must also be taken into account in addition to the applicable national employment law. This includes *inter alia* regulations on technical and medical occupational health and safety at the actual place of work performance, which must be observed regardless of the applicable employment law.

The employer must therefore consider, for example, how the workplace in the host country can be set up safely.

¹ [Kaffeeküche statt Küchentisch: Die Büros füllen sich wieder | Presseinformation | Bitkom e.V.](#)

For the sake of legal certainty, it would be desirable to set a time limit within which the overriding mandatory provisions do not apply to a temporary work stay taking place at the employee's request.

Furthermore, when determining the legal provisions to be complied with for remote work within the EU, the Posting of Workers Directive 96/71/EC in the revised version 2018/957/EU and its respective national implementation in EU Member States must also be kept in mind. This is because the Posting of Workers Directive contains special provisions for EU Member States to determine the applicable law. Even without an employer-initiated posting, the provisions of the Posting of Workers Directive can become relevant not only in the case of a long-term assignment abroad, but also in the case of temporary remote work from abroad.

In order to limit an extension of the scope of protection of the Posting of Workers Directive by national legislators, it should be legally clarified that, in terms of the Posting of Workers Directive, the additional working conditions after 12 or 18 months only apply if the employer posts the employee abroad to fulfil a contract with a service recipient or within the group, and not if the work is carried out remotely from abroad for a limited period of time at the employee's request.

Social security

The legal framework for remote work in other EU countries is defined by the regulations on the coordination of social security systems (Regulation (EC) No. 883/2004 and 987/2009). In addition, interested Member States have concluded a multilateral Framework Agreement in relation to habitual cross-border telework.

Nevertheless, it would be helpful to reduce bureaucracy in the use of the so-called A1 certificates. The A1 certificate confirms that the employee is covered by social security in his/her home country whilst working abroad. The certificate is needed from the first day of work abroad, even for a one-day business trip. Issuing the certificate for each individual employee on a case-by-case basis poses a significant administrative burden both on HR-departments and the employees themselves.

With view to reduce this administrative burden it is essential to introduce a European electronic real-time register for social security coordination and accelerate efforts to put the planned European Social Security Pass (ESSPASS)² in practice.

Until the real-time register and ESSPASS are fully operational, a transitional scheme should be put in place, whereby issuing the A1 certificate is only required for work stays abroad of at least one week. For work stays less than a week abroad within the EU, a rebuttable presumption should apply that the employee is covered by social security in his/her home country.

² The intention is for ESSPASS to include three administrative procedures from the social security sector – the A1 posting certificate, the European health insurance card and the PDP 1 application for a summary of pension decisions – all will be digitally accessible in the future.
[European Social Security Pass - Employment, Social Affairs & Inclusion - European Commission \(europa.eu\)](https://european-social-security-pass-employment-social-affairs-inclusion-european-commission.europa.eu)

Tax law

Cross-border telework can have implications regarding income tax of legal entities and/or of individuals. On the one hand, a permanent establishment of the employer may be established abroad, so that tax obligations for legal entities could arise in the respective country. On the other hand, it needs to be determined, in which country income tax is to be paid for employees working remotely abroad.

Income tax (legal entities)

Even without a fixed place of business, a permanent establishment may be established abroad as a so-called “representative’s permanent establishment”. This requires that a person has a power of attorney to conclude contracts and he/she usually exercises this power.

In 2017 as part of the BEPS initiative, the requirements for establishing a representative’s permanent establishment were tightened. Accordingly, a representative’s permanent establishment may not only be established by the conclusion of contracts in abroad. It is sufficient if contracts are regularly negotiated abroad by a person, and they are regularly concluded without any changes in the national territory.

In the interest of legal certainty clear and common criteria should be defined at EU level (or even at OECD level) in order to determine in which cases cross-border remote work does not establish a permanent establishment or in which cases a permanent establishment is considered to be established.

Income tax (individuals)

According to the 183-day rule, salary payments can only be taxed in the country in which employees have their residence, i.e. their domicile or habitual residence (so-called place of residence principle). However, if employees carry out their work in another country, the OECD-MA generally assigns the right of taxation to the country in which the work is carried out (so-called place of work principle). This only applies - in addition to other requirements - if employees spend a total of 183 days in the host country within a period of twelve months.

With view to adapt to the requirements of the digital world of work and to facilitate cross-border telework double taxation agreements need to be adjusted. **When it comes to the determination of the residence of individuals for tax purposes a *de minimis* rule should be established in double taxation agreements, so that a certain number of telework days spent abroad, can be considered as working days spent in the contracting country in which employees would otherwise have carried out their work.**

Employers' reporting obligations under the Posting of Workers Directive

The EU Posting of Workers Directive requires employers to comply with certain reporting obligations in individual Member States – regardless of whether the posting from another Member State for a limited period of time takes place on the instructions of the employer or at the employee’s request.

The exact scope of the reporting obligations may vary, depending on the Member State to which the employee is posted. In most cases information must be given on the exact number of posted workers, the identity of the service provider, the contact person, the expected duration with the planned start and end date of the posting, the address of the workplace and the type of services justifying the posting. In most cases, it is sufficient to provide this information in the form of a simple declaration to the competent national authority. Some Member States, however, require employers to complete additional forms and make them available to the authorities for inspection, which may also have to be provided in the language of the country of employment.

These reporting obligations create a high administrative burden for companies, especially for SMEs. **In order to reduce this administrative burden, it is key to introduce a completely standardised, electronic procedure in all Member States.**

Need for EU action (Question II)

Definition of telework

The consultation document refers to telework as “a work arrangement, which involves the use of ICT and can be carried out in several alternative workplaces in addition to the employer’s premises.” Bitkom would like to point out that **the definition of “telework” and corresponding regulation in statutory legislation or in collective agreements may vary in different Member States.** For example, in Germany whereas “Tearbeit” is precisely defined and strictly regulated in the Workplace Ordinance³, there is no legal definition for the more commonly used “mobile Arbeit”. With “Tearbeit” on the one hand, work is carried out at a permanent workstation installed and fully equipped by the employer in the workers' private sphere, for which the employer and the worker have stipulated weekly working hours in an agreement. With the much more flexible “mobile Arbeit”, on the other hand, the work is carried out irrespective of a fixed workplace at any location: from home or from a customer's premises, from a hotel during a business trip, from the private home of a third party, from public transport, from a co-working space or a local community centre, from a café or a park, etc. “Mobile Arbeit” may also include the so-called “workation”, i.e. the combination of “work” and “vacation”, where work can be carried out in a holiday flat, holiday resort, a boat or a camper van, etc. Workation is often, but not necessarily, carried out from abroad. With “mobile Arbeit” employees are essentially free to decide where and when to perform their work.

³ The definition in Section 2 (7) Workplace Ordinance reads as follows: “Tele workstations are DSE workstations installed permanently by the employer in the workers' private sphere, for which the employer has stipulated weekly working hours — agreed with the worker — and the duration of the installation. A tele workstation is not set up by the employer until the employer and the worker have stipulated the conditions for teleworking in a contract of employment or in the framework of an agreement and the necessary fitting out of the workstation with furniture, work tools including communications equipment has been provided and installed in the worker's private sphere by the employer or a person commissioned by him.”
[Ordinance on Workplaces \(Workplace Ordinance - ArbStättV\) \(gesetze-im-internet.de\)](https://www.gesetze-im-internet.de/arbstaettv/)

The EU should take a **differentiated view depending on the scope of telework**, i.e. whether or not it takes place on a voluntary basis; whether it exclusively takes place in a fixed workplace at the employee's home; whether it takes place during the entire working time or on a regular or only on an occasional basis. In case the employer instructs the employee to telework, regulation may be more comprehensive.

In terms of working conditions EU action should refrain from regulating work arrangements in detail. Practice shows that collective agreements at sectoral or organisational level as well as individual work agreements are the most appropriate to lay down telework arrangements. As outlined above, EU action would bring added value when it comes to facilitating cross-border telework within the EU.

Potential areas for EU action (Question III)

Establishing the right to disconnect

Establishing a right to disconnect is closely linked to the definition of "working time". The Working Time Directive (2003/88/EC) defines "working time" as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. The consultation document rightly points out that there are specific rules concerning "on-call" and "standby" work arrangements. If arrangements for "on-call" and "standby" do not apply, employees must only be reachable and available for work during their working time.

EU action should refrain from regulating work arrangements in detail regarding the right to disconnect. For example, employers should not be obliged to organise special training or take technical measures (e.g. shutting down servers). Work arrangements on a right to disconnect and telework can be best laid down in collective agreements at sectoral or organisational level as well as in individual employment contracts or in internal company guidelines. This can ensure lean and pragmatic procedures for implementation and enforcement.

The current legal framework in the field of employment law already provides for appropriate procedures and safeguards for employees to enforce their rights regarding working arrangements. There is no need to introduce additional enforcement structures specifically designed for telework and the right to disconnect (see also section "Ensuring enforcement").

Ensuring decent employment and working conditions for teleworkers

Right to request telework – the voluntary principle

As mentioned above telework (“mobile Arbeit”) has become standard in many companies. Bitkom is convinced that companies will continue to rely on hybrid working models and offer the option to work remotely on a voluntary basis in the future in order to be perceived as attractive employers. Telework should be incentivised through tax incentives rather than a statutory right to request telework. Established company practices show that telework arrangements are concluded and successfully implemented without a statutory right to request telework or an obligation to give reasons in writing in the event of a refusal.

Telework arrangements should remain voluntary for both sides in order not to hinder their prevalence. In addition, companies must be responsible, within their entrepreneurial freedom, for creating a corporate culture in which working arrangements for remote and/or on-site work at the employer’s premises are laid down.

Equipment and compensation for the costs of telework

Employers are responsible for the provision of necessary work equipment. However, a distinction must be made as to whether telework takes place on a voluntary basis or on the instructions of the employer.

EU action should refrain from regulating work arrangements on equipment and compensation for the costs of telework in detail. A one-size-fits-all approach is not practicable. Naturally the general framework for occupational health and safety also applies in the context of telework, with responsibilities of employers for working conditions. (See also section “Protecting teleworkers’ health and safety at work”.) Practice shows that collective agreements at sectoral or organisational level as well as individual work agreements are the most appropriate to define telework arrangements.

Equal treatment and non-discrimination

The general principle of equal treatment effectively applies also in the context of telework. Consequently, teleworkers have the same rights and obligations, e.g. regarding access to information or to training, as comparable workers at the employer’s premises.

Privacy and monitoring performance

The General Data Protection Regulation adequately regulates data protection issues in the field of employment and provides for a comprehensive protection of employees’ personal data also in the context of telework.

Protecting teleworkers' health and safety at work

The ongoing and necessary review of the Display Screen Equipment Directive (Directive 90/270/EEC) and the Workplaces Directive (Directive 89/654/EEC) aims to adapt occupational health and safety provisions to a digitalised world of work. **At the same time there are already existing measures in place to protect employees' health and safety at telework.**

The European Framework Directive on Safety and Health at Work (Directive 89/391 EEC) introduces the principle of risk assessment and defines its main elements. Accordingly, in Germany employers are obliged to carry out a risk assessment of the working conditions in accordance with Section 5 of the Occupational Health and Safety Act⁴. This applies regardless of the place of work, i.e. also for telework ("mobile Arbeit"). The assessment focuses on the protection of employees from hazards in the workplace and the minimisation of behaviour patterns of employees that are harmful to health.

Supporting instruments are already available online: the Institute for Work and Health of the German Social Accident Insurance has published a checklist for carrying out the risk assessment for working from home⁵ and also a survey software for carrying out a self-assessment⁶ is available. These checklists provide workers with specific recommendations on how to set up their workstation at home and can also be used by employers to assist the assessment of working conditions.

Addressing collective information and consultation rights

Existing national legal frameworks and practices for collective information and consultation rights already provide for appropriate procedures for the involvement of workers' representatives regarding telework arrangements.

In Germany, the works council's right of co-determination in the case of telework ("mobile Arbeit") is already adequately regulated in the Works Constitution Act⁷ (BetrVG).

For example, the right of co-determination regarding the organisation of telework is specifically mentioned in Section 87 (1) No. 14 BetrVG. Furthermore, arrangements on telework regularly include rules on working hours (Section 87 (1) No. 2 BetrVG), the use of IT tools (Section 87 (1) No. 6 BetrVG) and health protection at the workplace (Section 87 (1) No. 7 BetrVG) and thus trigger several additional co-determination rights.

⁴ Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (Arbeitsschutzgesetz, ArbSchG) ([gesetze-im-internet.de](https://www.gesetze-im-internet.de))

⁵ [Work from home CHECKLIST- long version | DGUV Publikationen](#)

⁶ [Use our HomeOffice-Check.de assessment for Hybrid Work now! \(hub4you.eu\)](#)

⁷ Works Constitution Act (Betriebsverfassungsgesetz - BetrVG) ([gesetze-im-internet.de](https://www.gesetze-im-internet.de))

If the employer plans to introduce telework, it must timely inform the works council in accordance with Section 80 (2) BetrVG. The works council also monitors compliance with laws and regulations in accordance with Section 80 (1) No. 1 BetrVG - including in the case of telework.

Providing information to workers

National legislation transposing Directive 2019/1152 on transparent and predictable working conditions in the European Union require employers to inform workers of the essential aspects of the employment relationship. The information must be provided in writing and includes specifications *inter alia* concerning the place of work and the applicable working time. Consequently, telework arrangements must also be communicated to employees in a transparent manner. In Germany teleworking arrangements are based on collective agreements at sectoral or organisational level or on individual employment contracts. If there is no works council and employees are only to be given the option of telework ("mobile Arbeit"), the framework conditions can be set out in an internal company guideline. This can ensure that the same conditions apply to all employees. **Bitkom is in favour of employers having to provide transparent information about the applicable teleworking arrangements. The way in which they fulfil this obligation must, however be left to the companies themselves.**

Promoting the role of social partners

Bitkom acknowledges the key role of collective representation in social market economies. Through the two-stage consultation process under Article 154 (2) TFEU social partners are adequately involved into the legislative process on telework and the right to disconnect. **The implementation of EU action should respect the autonomy of social partners. Defining the appropriate level and means of implementation of EU action should be left to Member States, social partners and companies themselves.**

Ensuring enforcement

The current legal framework in the field of employment law already provides for appropriate procedures and safeguards for employees to enforce their rights regarding working arrangements, also for telework. Companies have set up reporting channels and complaints offices or an ombudsman for whistleblowing; there are equal opportunities officers in place; mediation as a method of out-of-court conflict resolution can be used; the national authorities for safety and health at work exercise their supervisory powers and of course there is the possibility to bring actions before courts.

There is no need to introduce additional structures specifically designed for telework and the right to disconnect.

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

Published by

Bitkom e.V.

Albrechtstr. 10 | 10117 Berlin

Contact person

Adél Holdampf-Wendel | Head of Employment Law & Future of Work

T 030 27576-202 | a.holdampf@bitkom.org

Responsible Bitkom committees

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