

Is hard law the best way to promote telework?

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1. Introduction.

Telework was not invented because of the COVID-19 pandemic crisis. The progressive advance of the Information and Communication Technologies (ICT) let us work from everywhere, challenging the traditional view of a workplace. Nonetheless, the adoption of this way of working was far from being considered even a general alternative until a virus forced us to be confined at home. Suddenly, managers and employees were working from home, even though many companies did not allow telework some days before the outbreak¹. Although it is not easy to identify the actual impact of telework on economic activity during the pandemic, it is unquestionable that in those companies based on the knowledge economy, telework has been a fundamental tool for sustaining their activities in an extreme situation.

Why was it necessary to suffer a health crisis to demonstrate that telework was a valuable regime for companies?² Mostly, it is not possible to give a satisfactory and unique answer. Amongst all the factors that should be considered, corporate culture is hugely relevant. That seems to be the explanation of the lack of telework in Japan, even though it is one of the most technologically

¹ OECD, Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?, OECD Policy Responses to Coronavirus (COVID-19), 2020, <https://www.oecd.org/coronavirus/policy-responses/productivity-gains-from-teleworking-in-the-post-covid-19-era-a5d52e99/> (Cited 2022-11-24).

² The valuable aspects of telework have been proved through some experiments. One of the most interesting was conducted in a Chinese company of 16.000 employees, Ctrip. For further information, Vid. Bloom, N.; Liang, J.; Roberts, J.; Ying, Z.J.; Does working from home work? Evidence from a Chinese experiment, Stanford Graduate School of Business, 2013, <https://www.gsb.stanford.edu/faculty-research/working-papers/does-working-home-work-evidence-chinese-experiment> (Cited 2022-11-24)

advanced countries in the world³. Considering the EU telework ratio before 2019⁴, it is possible to identify a parallelism between Spain and Japan: before the COVID-19 crisis, their telework level was the lowest; after the telework explosion due to the outbreak, it does not seem that Japan⁵ or Spain⁶ has changed its tendency to on-site work.

But are there sound grounds to reject telework? It does not seem that the most productive countries in the EU, the Nordics, which also have a higher telework adoption ratio⁷, share the negative view on working from home. In fact, it is proven that it can be a good mechanism to promote life-work balance and mental health, among other positive side effects⁸.

Spain had lower ratio of telework in comparison with other EU countries⁹, but has enacted a telework law under the premise that because of COVID-19, remote work would become widespread. However, as noted above, telework in Spain is declining from its peaks. Therefore, this study seeks to answer whether a detailed regulation -hard law- is an obstacle to the development of telework. To reach an answer, this study will review the background of telework in Spain, the most relevant aspects of the current telework law and its controversial aspects. Finally, the effect of the law will be assessed to answer the question of whether the regulation is the best way to promote telework, considering that Japan has no law about remote work.

³ Ono, H.; Telework in a Land of Overwork: It's Not That Simple or Is It? 2022, American Behavioral Scientist, 0 (0). <https://doi.org/10.1177/00027642211066038> (cited 2022-11-24). The study offers a detailed review of the reasons for the low implementation of telework in Japan.

⁴ European Commission; Telework in the EU before and after the COVID-19: where we were, where we head to; Science for Policy Briefs, 2020, Figure 4. https://joint-research-centre.ec.europa.eu/system/files/2021-06/jrc120945_policy_brief_-_covid_and_telework_final.pdf (Cited 2022-11-24).

⁵ Yamamoto, I.; Why Japan still lags in work from home, even during the pandemic, Nippon.com, 2021-10-8, <https://www.nippon.com/en/in-depth/a07602/> (Cited 2022-11-24).

⁶ ¿Por qué sigue fracasando el teletrabajo en España? Cinco Días. 2022-01-31, https://cincodias.elpais.com/cincodias/2022/01/28/opinion/1643374766_420277.html (Cited 2022-11-24)

⁷ Eurofound (2022), Telework in the EU: Regulatory frameworks and recent updates, Publications Office of the European Union, Luxembourg, p. 61.

⁸ Blahopoulou, J.; Ortiz-Bonnin, S.; Montañez-Juan, M.; *et al.* Telework satisfaction, wellbeing and performance in the digital era. Lessons learned during COVID-19 lockdown in Spain. *Curr Psychol* 41, 2507–2520 (2022). <https://doi.org/10.1007/s12144-022-02873-x> (Cited 2023-01-26)

⁹ In 2019, 8,3% of employees worked from home (4,8% worked more than half of working days from home; 3,5% worked occasionally from home). Source: INE, El teletrabajo en España y la UE antes de la COVID-19, Boletín informativo 2020-02.

2. Background of telework in Spain and the outbreak of COVID-19.

At a supranational level, it is worth mentioning the existence of ILO Home Work Convention, 1996 (No. 177¹⁰), not ratified by Spain until 25 May 2022¹¹. Although the Convention will enter into force on 25 May 2023, it is not expected that it will cause any amendment to Spanish regulation since Law 10/2021 of July 9, 2021, on Remote working, already establishes the contents of the Convention.

Because of their relevance and influence, it should be highlighted that the EU Framework Agreement on Telework¹² (2002), which does not deploy mandatory effects as hard law does but has oriented the member's legal treatment of telework since 2002. Specifically, the Framework Agreement contains principles that have influence on Spanish and other States Member's regulation¹³: a voluntary nature of telework, regularity as a differentiating element from occasional teleworking, protection of the rights of teleworkers, and the compensation of costs by the employer.

Regarding Spain, before the COVID-19 outbreak, telework was regulated in Spain by article 13 of the Workers' Statute. It has been said that it is a minimal regulation and a poor legal treatment of remote work¹⁴, overtaken by the COVID-19 and the need to work massively¹⁵. Certainly, the scarcity of its text only allowed the establishment of a sort of general principles: the individual agreement between the employee and the company to allow telework regime or the rights of remote workers; they must have the equivalent salary, representation rights, access to training

¹⁰ Available at:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312322 (cited 2022-11-15).

¹¹ España ratifica el Convenio sobre el trabajo a domicilio y el Convenio sobre la violencia y el acoso. ILO. 2022-06-22. https://www.ilo.org/global/standards/WCMS_847845/lang-es/index.htm (Cited 2022-11-15).

¹² Available in English and other European languages at: <https://eur-lex.europa.eu/ES/legal-content/summary/teleworking.html> (Cited: 2022/11/10).

¹³ For a more in-depth examination at the regulation of telework in the EU Member States and its relationship to the Framework Agreement, vid. Eurofound (2022), Telework in the EU: Regulatory frameworks and recent updates, Publications Office of the European Union, Luxembourg.

¹⁴ Ron Latas, R.P.; Lousada Arochena, J.F. El trabajo a distancia en el Real Decreto-Ley 28/2020, de 22 de septiembre, Anuario da Facultade de Dereito da Universidade da Coruña, Vol. 25 (2021), pp. 265-303. Available at: <https://ruc.udc.es/dspace/handle/2183/30256> (Cited: 2022-11-24).

¹⁵ Rodríguez-Piñero Royo, M.; Todolí Signes, A. (Dir), Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, Thomson Reuters Aranzadi, 2021.

programs oriented to promotion, or labor risk prevention than an on-site employee. Nevertheless, it has been argued that the COVID-19 outbreak and the need to telework massively overtook the article 13 of the Worker's Statute.¹⁶

Because of the health crisis due to COVID-19, on 14 March 2020 Spain started its first alarm state until 21 June 2020. During this period, 49,7% of establishments used telework in contrast with the 14,8% before the alarm state¹⁷. The widespread use of telework during the confinement was not covered by article 13 of the Worker's Statute, but for a new type of telework regulated by the Royal Decree-Law 8/2020, of March 14, 2020¹⁸. Concretely, the article 5 settled a preference to telework. The main element was that telework was not voluntary, a noticeable contrast with the EU Telework Framework and the article 13 of the Worker's Statute. The requirements for telework were that "it was technical and reasonably possible" and "the adaptation effort is proportioned"¹⁹. Moreover, for those companies that did not have telework until that moment, the requirement of performing an evaluation of risk was fulfilled if the employees did a self-evaluation of the place where they teleworked²⁰.

Subsequently, the first specific regulation on telework in Spain was enacted. The Royal Decree-Law 28/2020, of September 22, 2020, on Remote Work, was the Spanish legislator's response to generalized telework, with the reasoning that the trend was going to continue and even increase in the coming years.

With the enforcement of the Royal Decree-Law 28/2020, of September 22, 2020, on Remote Working that was consolidated by the Law 10/2021 of July 9, 2021, on Remote working, the current text of article 13 of the Workers Statute only refers the regulation contained in the Law 10/2021.

¹⁷ INE, <https://www.ine.es/jaxi/Datos.htm?path=/COVID/ice/p01/l0/&file=01007.px#!tabs-tabla> (Cited 2022-11-22).

¹⁸ Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2020-3824#:~:text=El%20pasado%2010%20de%20marzo,incapacidad%20temporal%20por%20accidente%20laboral>. (Cited 2022-11-20)

¹⁹ Vid. Art. 5.2. Royal Decree-Law 8/2020, of March 14, 2020.

²⁰ Rodríguez Escanciano, S.; Teletrabajo asociado a la COVID-19: mantenimiento de las condiciones de trabajo, Revista de Jurisprudencia Laboral 5/2021, BOE. https://www.boe.es/biblioteca_juridica/anuarios_derecho/articulo.php?id=ANU-L-2021-00000001286 (Cited 2022-11-21).

As a prior comparison, the current telework law has 22 articles, a fact that shows the current importance of remote work for the Spanish legislator. However, it is possible to identify the influence of EU Framework and of the article 13 of Workers Statute.

3. The Law 10/2021 of July 9, 2021, on Remote working.

As mentioned above, the new regulation of telework in Spain has a length of twenty-two articles. For reasons of concreteness, only the main aspects of the Law will be presented so that the reader can understand how telework is regulated in Spain currently. Likewise, the minimal changes introduced in Royal Decree 28/2020 after its consolidation as Law 10/2021 allow us to focus on this last wording, currently in force.

- Formal and material aspects.

The first aspect to consider is that Law 10/2021 differentiates remote work from telework. Specifically, telework is a subtype of remote work. On the one hand, the law understands remote work as “the form of organization of work or performance of the work activity in accordance with which it is provided at the home of the worker in the place chosen by the latter, during all or part of the working day, on a regular basis”²¹. Telework, on the other hand, is “remote work carried out by means of the exclusive or prevalent use of computer, telematic and telecommunication means or systems”²². Alternatively, on-site work is that which is carried out in the workplace or in the place determined by the company²³.

Consequently, telework is linked to the use of ICT. However, the distinction between remote work and telework throughout the articles is limited to emphasize certain behaviors that should be carried out with greater caution in the case of teleworkers²⁴. Because of that, the mentions of remote work in this study applies moreover to telework.

The main aspect of the regulation is that it does not apply to all remote work, but only to “regular” remote working. Thus, Law 10/2021 regulates employment relationships that “are carried out at a distance on a regular basis”. On the other hand, it will be regular when at least 30% of the working day is performed remotely in a reference period of three months. Also, if the duration of the employment contract is different, the percentage will be adjusted proportionally²⁵. The Spanish legislator chooses a quantitative perspective based on a percentage of working time,

²¹ Cfr. Art. 2.a). Law 10/2021.

²² Cfr. Art. 2.b). Law 10/2021.

²³ Cfr. Art. 2.c). Law 10/2021

²⁴ Cfr. Art. 4.2;4.4; 11; 18. Law 10/2021.

²⁵ Cfr. Art. 1. Law 10/2021.

instead of considering the days worked remotely²⁶. Considering that percentage will be proportional in any case (30% of working time for full-time employee and 30% of working time for part-time employee is proportional), adjustment apply to fixed-term contracts that are shorter than three months (reference period for regular remote work).

By creating regularity, the law excludes occasional remote working from its scope of application, a decision of great importance for companies and workers who consider performing remote work, but do not wish to assume the regulatory obligations settled by Law 10/2021.

As stated by the previous article 13 of the Workers Statute and aligned with the European Framework Agreement on Telework, Law 10/2021 establishes the voluntariness of the parties as a necessary requirement for remote working. The employer may not unilaterally impose telework on the employee²⁷, and the employee may not demand it from the employer, although the Law allows to articulate telework as a right by law or by collective bargaining. This exception shows that the legislator is aware that telework is not yet widespread but foresees that it may become a normalized form of work in the future and may therefore be the subject of collective bargaining.

Linked to its voluntary nature, Law 10/2021 provides for the possibility of reversing teleworking at the request of the worker or the company and returning to on-site work. The exercise of this right will be determined in collective bargaining or, failing that, in the remote working agreement.

Regarding the formality, Law 10/2021 obliges the formalization of a remote work agreement in writing and before start working remotely, which in any case will be annexed to the employment contract²⁸. The need for written agreement is not a novelty as it was mandatory by the article 13 of the Workers Statute. However, the mandatory minimum content of the agreement is one of the major novelties of the regulation. Specifically, the agreement must regulate the following²⁹: (a) inventory of means, equipment and tools and the maximum period for their renewal; (b) enumeration of the worker's expenses caused by remote working and mandatory compensation

²⁶ The days parameter is settled in some EU State members. Vid. Eurofound (2022), Telework in the EU: Regulatory frameworks and recent updates, Publications Office of the European Union, Luxembourg, p. 20.

²⁷ The Article 41 of Workers Statute regulates the legal mechanism actioned by the employers to changes substantially the working conditions: working time, timetable, shift regime, wages, work system and performance, and tasks.

²⁸ Cfr. Art. 6. Law 10/2021.

²⁹ Cfr. Art. 7. Law 10/2021.

by the company; (c) working hours and rules of availability of the worker; (d) percentage of distribution between on-site work and remote working; (e) work center to which the worker is attached; f) place of remote working chosen by the employee; g) notice periods for reversing the remote working situation; h) means of company control of the employee's activity; i) in case of technical difficulties, the procedure to be followed; j) company instructions regarding data protection; k) company instructions regarding information security; l) duration of the remote working agreement.

Furthermore, the additional matters agreed upon in the collective bargaining agreements must be included in the individual agreement. The conditions of the individual agreement may be modified by agreement between the employee and the company at any time. On the other hand, the collective bargaining agreements may establish mechanisms or criteria by which the teleworker may switch to on-site work or vice versa, as well as the determination of aspects such as promotion, training, or the concurrence of certain personal or family circumstances, among others³⁰.

- Rights and obligations concerning teleworkers and their employers.

Regarding the rights of remote workers, Law 10/2021 contains eleven articles that enumerate and develop these rights, in a clear expansion of what were previously paragraphs 3, 4 and 5 of Article 13 of the Workers' Statute.

As regards training, companies must guarantee that teleworkers have access to training actions in the same way as their on-site counterparts, with special attention to the particularities of remote work³¹. While the remote work lasts, the company will have an obligation to provide the necessary training when remote work starts, as well as when changes occur in the means or technologies used³². Regarding professional promotion, the teleworker will have the same rights as the on-site worker, incorporating the obligation for the companies to inform the teleworkers in writing of the possibilities of promotions that occur, regardless of whether the job will be developed on-site or remotely.

³⁰ Cfr. Art. 8. Law 10/2021.

³¹ Cfr. Art. 9.1. Law 10/2021.

³² Cfr. Art. 9.2. Law 10/2021.

Regarding the means to carry out telework, the workers the right to receive it from their employer, who must provide and are also responsible for their maintenance, all this as it has been configured in the individual agreement or as provided in the collective bargaining of application³³. Regarding payment and expenses, the Law establishes that remote working must be paid or compensated by the company. The collective bargaining agreements may establish the mechanism for its determination. In any case, the employee shall not face expenses related to the equipment, tools, and means related to work³⁴.

As regards working time, the employee may enjoy flexibility in his working hours as provided for in the remote working agreement and collective bargaining. In any case, the company must respect the mandatory availability times and the limits of working and resting time³⁵. Likewise, the Law stresses that remote workers are contained in the obligation to record the daily working day incorporated into the Workers' Statute in 2019, "without prejudice to flexible working hours"³⁶.

Regarding the prevention of occupational risks, Law 10/2021 states that telecommuters are entitled to adequate protection in terms of occupational health and safety, following Spanish legislation about the matter³⁷. The Law particularly develops the risk assessment, pointing out the need to consider the particularities of this modality of work and that this assessment encompasses only the place from which services are provided, as is logical, without having to assess other areas of the home or workplace chosen by the worker³⁸. The logistical and legal issues involved in the evaluation of the workplace when it is the worker's home have led the Law to provide a noticeable exception if the worker does not give permission to evaluate his home or that of a third person: it will be understood that the company complies with its obligation when

³³ Cfr. Art. 11. Law 10/2021.

³⁴ Cfr. Art. 12. Law 10/2021.

³⁵ Cfr. Art. 13. Law 10/2021.

³⁶ Cfr. Art. 14. Law 10/2021.

³⁷ Cfr. Art. 15. Law 10/2021. The main Labor Risk Prevention rule in Spain is the Law 31/1995, of November 8, 1995.

³⁸ Cfr. Art. 16.1. Law 10/2021. Between the most common risk, the Law indicates psychosocial factors, ergonomic workplace, and organizational issues. Also, it indicates worktime distribution, availability and enough rest and disconnections during the workday.

it determines the risks of the workplace under the information provided by the worker himself, according to the instructions of the prevention service³⁹.

Regarding the use of digital media, the company may not force the worker to use his own devices or to install programs or applications on them; in any case, it must guarantee the worker's right to privacy and data protection in accordance with the law⁴⁰. An often-controversial aspect, the private use of the devices granted by the company is subject to the criteria developed by the company, and to the provisions of collective bargaining agreements⁴¹.

One of the rights recently introduced in Spanish labor law is the right to digital disconnection⁴². Considering that the Law determines the use of devices and IT as indispensable to telework, it is not surprising that Law 10/2021 states that “people who work remotely, particularly in teleworking, have the right to digital disconnection outside their working hours”⁴³. In relation to this right, it is established that the company must develop a policy defining how the digital disconnection will be carried out, as well as training and awareness on the reasonable use of technological tools to avoid computer fatigue. In addition, collective bargaining agreements may define measures to protect the right to disconnect⁴⁴.

Finally, as already existed in Article 13 of the Workers' Statute but more detailed, Law 10/2021 recognizes the right of remote workers to exercise their rights of a collective nature⁴⁵.

Regarding the faculties of the companies to control teleworker's activity, Law 10/2021 establishes that telecommuters must comply with the company's instructions on data protection and information security⁴⁶. Likewise, they have the duty to comply with the instructions for the use and conservation of the devices delivered by the company⁴⁷. Finally, Law 10/2021 provides for the adoption of the measures it deems necessary for monitoring and control to verify that the

³⁹ Cfr Art. 16.2. Law 10/2021.

⁴⁰ Organic Law 3/2018, of December 5, of Private Data Protection and Digital Rights Warranty.

⁴¹ Cfr. 17. Law 10/2021

⁴² Cfr. Right to disconnect was introduced by the article 88 of Organic Law 3/2018, of December 5, of Private Data Protection and Digital Rights Warranty.

⁴³ Cfr. Art. 18.1. Law 10/2021.

⁴⁴ Cfr. Art. 18.2. Law 10/2021.

⁴⁵ Cfr. Art. 19. Law 10/2021.

⁴⁶ Cfr. Art. 20. Law 10/2021.

⁴⁷ Cfr. Art. 21. Law 10/2021.

remote worker complies with his obligations, with “due consideration for his dignity and taking into account, where appropriate, his personal circumstances, such as the presence of a disability”.

4. Regulatory impact: controversial aspects.

Despite the objectives the Spanish legislator sought to achieve with the regulation⁴⁸, much of its content lacks innovation. Although the law has extensive wording, the protection of teleworkers' rights could have been similarly channeled through the preceding legislation⁴⁹. In this regard, the numerous references to collective bargaining make it impossible to know exactly the effects of the Act, which will depend to a large extent on the content of collective agreements.

However, the new law has introduced new obligations that are negative for the generalization of telework in Spain. Mainly because, far from promoting telework, it imposes obstacles to its implementation, both formal and material.

The first of these obstacles is the compensation for expenses. It was contained in the EU Framework -soft law-, but its introduction as hard law is a vast source of issues. The problem does not lie in the fact that the company must provide the material means (computer, mobile phone, etc.) necessary to work outside the office, but rather the broad wording of the obligation introduces the debate as to whether the employer must pay other expenses of the employee, such as the electricity or internet bill, under the reasoning that both are necessary services for working from home.

The Spanish legislator reasons that remote working, adopted in a generalized manner as a response to the health crisis generated by the pandemic, has generated an imbalance between the rights and obligations of the worker and the company that must be redirected to the protective nature of labor law⁵⁰. It is in this effort that the obligation of employers to compensate for expenses is framed.

⁴⁸ Law 10/2021, Explanatory memorandum, IV: "The objective is to provide a sufficient, cross-cutting and integrated regulation in a single substantive rule that provides answers to diverse needs, balancing the use single substantive standard that responds to diverse needs, balancing the use of these new forms of these new forms of provision of subordinate labor."

⁴⁹ Vid. Goerlich Peset, J.M.; La regulación del trabajo a distancia. Una reflexión general, en Rodríguez-Piñero Royo, M et al. (Dir.) Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, Thomson Reuters Aranzadi, 2021, p. 29-53

⁵⁰ Law 10/2021, Explanatory memorandum, I: "Telework has been installed in our country as a response to the restrictions and containment measures of the pandemic still in force, in a legal context characterized by the almost total absence of specific regulation. The generalization of telework in Spain, which brings its cause in the measures

At this point, it should be remembered that telework in Spain was lower before the pandemic than average EU, a trend currently being followed in the wake of the health crisis. The law was enacted with an urgent and extreme necessity in the context of the health crisis with the idea that telework will be generalized after COVID-19. Therefore, the law does not correspond to a context in which telework is scarce and its responsible promotion should be sought as a measure of conciliation, cost, and time saving (for example, commuting⁵¹) or depopulation of rural areas.

Far from that, the way the law establishes the compensation of expenses is a disincentive for Spanish companies. In this sense, it is remarkable how the First and the Third Transitional Provisions of Law 10/2021 establish a temporary exception regime for telework⁵². The mere existence of two mechanisms to postpone the effects of Law 10/2021 proves that the new regulation far from being an incentive for employers arises as an obstacle to telework adoption.

Secondly, the obsession with regulating telework has resulted in twelve items of minimum content in the agreement between workers and employers. Considering that teleworking is a form of service provision to be implemented according to the activity developed by the company, the establishment of such an extensive minimum content is a limitation of the autonomy of the will of the parties involved.

Article 13 of the Workers' Statute already required the execution of a written agreement, as a contractual annex. If the objective is to regulate teleworking, the balance between rights and obligations should be paramount instead of detailing every aspect of the agreement, leaving the drafting of the individual work agreement to the will of the parties' will. In this sense, it has been argued that if the goal were to add the compensation of expenses and the provision of means for

adopted by the competent authorities to contain and curb the spread of the pandemic, has resulted in a kind of imbalance of rights and obligations between companies and workers, at least. A regulation is required to help the employer and worker parties to transfer the protective nature of labor law to the new reality that has accelerated exponentially, as a result of exogenous and unforeseeable circumstances for unions, employers, companies, workers and for the Government itself."."

⁵¹ Estimated commuting time savings are 100 minutes in Japan and 63 minutes in Spain. Vid. Giray Aksoy, C., Barrero, J.M., Bloom, N., Davis, S.J., Dolls, M., Zarate, P., Time Savings When Working from Home, IZA Institute of Labor Economics, 2023, p. 8 <https://docs.iza.org/dp15870.pdf> (Cited 2023-01-27)

⁵² The application of Law 10/2021 differs depending on when and how telework was performed, resulting in three situations: (i) teleworkers as a consequence of COVID-19 will continue with the previous regulation (art. 13 of the Workers' Statute) although the Company must provide the means and collective bargaining may regulate the compensation of expenses; (ii) teleworkers by individual agreement must subscribe the telework individual agreement of Law 10/2021 within three months; (iii) teleworkers by collective bargaining agreement, when these are no longer in force or within a maximum period of three years.

telework to the traditional principles of voluntariness and non-discrimination of teleworkers concerning their face-to-face counterparts; it would be sufficient to articulate legal referrals, without stipulating an extensive list of minimum content for teleworking agreements⁵³.

Finally, the distinction between occasional telework and regular telework based on the percentage of the workday performed is questionable. Considering the lack of implementation of teleworking in Spain without the pandemic crisis, a large majority of companies may opt for remote work of 29% to avoid the application of the regulations⁵⁴.

Not only are there no incentives for companies to introduce teleworking in their production model, but there is also a way out of the application of Law 10/2021 that is already producing a greater adoption of occasional teleworking to the detriment of regular teleworking⁵⁵.

⁵³ Conde-Ruiz, J.I.; Jansen, M.; Lahera Forteza, J.; ¿Cómo regular el teletrabajo? Fedea. 2022, p.9 <https://fedea.net/como-habria-que-regular-el-teletrabajo/> (Cited 2022-11-26).

⁵⁴ Conde-Ruiz, J.I.; Jansen, M.; Lahera Forteza, J.; ¿Cómo regular el teletrabajo? Fedea. 2022, p.6 <https://fedea.net/como-habria-que-regular-el-teletrabajo/> (Cited 2022-11-26).

⁵⁵ El teletrabajo ocasional gana terreno al habitual dos años después de su regulación. El Diario de Sevilla. 2022-09-20. https://www.diariodesevilla.es/economia/teletrabajo-ocasional-terreno-habitual-regulacion_0_1722129739.html Cited (2022-11-26)

5. Future trends in Spain and recommendations to Japan.

Even though Law 10/2021 has created an obstacle to access to remote work, there are no expected amendments to telework regulation in the short term. Changes will exist depending on the sector of activity or the company's particular terms, given the prominence that Law 10/2021 has given to collective bargaining. Moreover, court judgments will outline and interpret the issues generated by the regulation.⁵⁶

Bringing back to the central question of this study, the answer is negative. Law 10/2021 is not helping the development of regular telework in Spain. In fact, it is encouraging companies to opt for an occasional telework model, which is excluded from the regulation. This trend should have been anticipated by the Spanish legislator since Law 10/2021 is the legislative culmination of an agreement between employers and the most representative trade unions. Regarding the negotiation, it has been said that leaving occasional telework outside the effects of the law was a demand of the employers to reach an agreement⁵⁷. The explanation to that will is simple: Law 10/2021's telework is more expensive than occasional -deregulated- telework.

One aspect that the Spanish legislator has not considered is that the explosion of telework during the pandemic was not a structural change, but a conjunctural context due to the health crisis. Returning to normality, the former majority preference for on-site work relegates telework to a residual level, affecting the modernization of the economy and the transition to new work models based on ICT.

The arrival of the pandemic crisis was a sort of macro-experiment that has proven telework as a viable alternative to on-site work, but it should not be forgotten that this compulsory and urgent telework due to COVID-19. Each company must find the telework model that best suits its production and organizational needs, in harmony with the individual situations of each employee. To achieve this objective, it would have been more effective to maintain Article 13 of the

⁵⁶ The National High Court establishes that companies must pay the cost of any expense related to telework and declare illegal the clause of the telework agreement that established: "both parties consider that the worker will not cause any additional expenses due to telework, and in case expenses are generated, it should be considered compensated because of saving derivate by telework" (National High Court's Judgment n° 144/2022. 2022-11-10).

⁵⁷ Goerlich Peset, J.M.; La regulación del trabajo a distancia. Una reflexión general, en Rodríguez-Piñero Royo, M et al. (Dir.) Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, Thomson Reuters Aranzadi, 2021, p. 29-53.

Workers' Statute, with simple modifications regarding the delivery of equipment and compensation of expenses but maintaining the autonomy of the parties as the guiding thread of telework in Spain⁵⁸.

Unfortunately, telework in Spain is far from being structural, and for this reason, the law must support and encourage the adoption of telework as a form of service provision complementary to on-site work. Only by providing a scenario free of obstacles, both formal and economic, will it be possible to adopt telework progressively.

As mentioned about, the European countries that have the highest telework ratio are the Nordic countries, without the need for hard law implementation⁵⁹. Comparatively, it is a good example of how corporate mindset affects the promotion of telework.

Should Japan enact a telework regulation? The Spanish case is a good example of how regulation can negatively affect its promotion. However, there are aspects of the Spanish regulation that are should be standardized. For example, the equality of rights between workers and teleworkers, the specific occupational hazards of telecommuting or the need to protect the teleworker's rest times.

If a regulation is adopted, it would be advisable for Japan not to distinguish between casual and regular work using a percentage. Instead, establishing a system of total and hybrid telework, regardless of the number of days or hours teleworked. That would prevent the law from becoming a negative incentive to telework. Thus, it will be up to the companies to choose one model or the other, depending on their activity. In addition, companies that want a hybrid model with on-site work and telework will not be disadvantaged or benefited depending on whether they telework.

Likewise, the law should promote the figure of the individual agreement between the worker and the company, since not all workers have the same circumstances, but without requiring a mandatory minimum content in such agreements. Collective agreements are useful to establish a framework of internal rules, but it should be up to each employee to evaluate with the company

⁵⁸ Conde-Ruiz, J.I.; Jansen, M.; Lahera Forteza, J.; ¿Cómo regular el teletrabajo? Fedea. 2022, p.12 <https://fedea.net/como-habria-que-regular-el-teletrabajo/> (Cited 2022-11-26).

⁵⁹ Eurofound (2022), Telework in the EU: Regulatory frameworks and recent updates, Publications Office of the European Union, Luxembourg, p. 61.

-mainly through the manager- when and how to telework. Since telework is mainly done from home, the employee's personal circumstances must be considered.

Gradually, there will be a generational renewal in the workforce that will expand telework. Due to COVID-19, Japanese university students were able to attend lessons during the health crisis through ICT. When these young people enter the labor market, the use of ICT, they will introduce their previous experience with remote university and their view on work will be more positive.

However, the prevailing “membership-based”⁶⁰ employment model in Japan is slowing down the process. The importance of seniority in labor relations will need to be countered with policies that encourage a change in work style. To achieve this, it will be necessary to design a system of incentives, either through regulation -hard law- or through intense promotion of telework benefits.

Although the Japanese government has tried to promote telework to improve productivity, rural depopulation or the reconciliation of family life, the trend after COVID-19 is decreasing⁶¹, as is happening in Spain. Because of these similarities, the Spanish case may be useful when deciding whether to legislate as a way to promote telework, and if so, to identify which aspects may have the opposite effect to the desired one. A later study will analyze the incentives that can be adopted in Japan to increase telework. A later study will review the mechanisms that can be adopted in Japan to increase telework.

⁶⁰ Hamaguchi, K.; Addressing the problems with Japan's peculiar employment system, Nippon.com, 2013-07-24, <https://www.nippon.com/en/currents/d00088/> (Cited 2022-11-27).

⁶¹ Ono, H.; Telework in a Land of Overwork: It's Not That Simple or Is It? 2022, American Behavioral Scientist, 0 (0). <https://doi.org/10.1177/00027642211066038> (Cited 2022-11-24).

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