
The legal and contractual situation of teleworkers in the European Union

The law aspects including self-employed

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INTRODUCTION

Labour market changes

Telework forms an integral part of the fundamental changes, which characterise at present the labour markets of developed post-industrial societies. These changes are as dramatic as the shift, which took place last century, moving people from an agricultural to an industrial society, when agricultural labourers were pushed from the field and the barn to the enterprise as workers and dwellers of cities. Today, we are on our way to a network society, based on telecommunications and an information technology. In this network society, a lot of work will be done by people operating in various, be it short and consecutive, projects, in which they will perform in a rather independent way with for many, but not for all, a lot of room for initiative and creativity.

Networking

Indeed, we are leaving the industrial society, badly enough, but seemingly unavoidable, on a wave of a massive jobshift, as the classical jobs, pieces of work, hierarchical and taylorised, gradually disappear with an increasing speed. Work is progressively done, more and more away from the classical bureaucratic enterprise where a job is performed in subordination under the direction and control of an employer or his representative.

Work increasingly takes place in the frame of networking, where people contribute their added value as part of teams, on a basis of partnership, reporting to each other instead of to a boss. Workers may be part of more than one network, performing at any place. These workers, some of them teleworkers, may operate as independent contractors, working for a fee, instead as for a regular wage.

Telework

It is not yet clear how this newer world of work will look like and one can only guess and speculate about future developments on the basis of bits and pieces of evidence as developments take place. It is, however, clear that the labour market is becoming more and more diversified, decentralised, even atomised to its most individual expression, as certain forms of telework clearly demonstrate.

Newer forms of work include telework in various forms and conditions: home based typing; telebooking-sales and call centre functions; design from home; telecottages; telecentres; consultancy from home; special needs group (e.g. handicapped) integration; translators from home; maintenance via teleworking; mobile sales and a virtual telework organisation¹.

Methodology

In a study on telework in Britain, researchers from Newcastle University distinguish between five types of teleworking :

- electronic homeworking: the most common form of teleworker, connected to work from home through a modem and other modem communications equipment;
- telecottages and neighbourhood centers: shared multimedia facilities, close to houses, reducing costs, favoured by development agencies;
- mobile or nomadic working : teleworkers who operate both at home and on the road;
- group or team telework: made possible by advances in technology to facilitate a “virtual team” located at any distance from each other;
- call-centres and remote offices: companies which have begun production functions, creating electronic remote offices to handle mostly back office functions.

¹ Korte W.B., “Descriptions of typical teleworking situations”, 1995, 11 p. (mimeo).

Driving forces

There are many driving forces behind telework, a.o. : self-evidently the technological revolution in telecommunications, but also, the push for increased flexibility as well, partly at least, for the benefit of the employer-contractor as to the advantage of the teleworker regarding the place of work, working time, pay and the status of the teleworker, his social coverage included, possibly diminishing costs regarding office space, increased productivity, less travel, the growth of the potential for networking, even across boundaries and the like...

One of the obstacles to the development of telework seems to be middle management as it fears both loss of status and difficulties in controlling an absent workforce. In addition it seems, many employees prefer to work in traditional offices as this represents a social milieu as well as a workplace², as they have fears of social isolation.

Legal tools

One thing, however, is sure, namely that the traditional juridical tools which were developed over almost a century and contained in individual and collective labour law of the Member States of the European Union and of the Union itself, are not self-evidently appropriate to deal with the newer realities in the world of work and the question arises whether the labour norms, developed to deal with a Taylorised situation are adequate to cope with the problems, which go along with the present developments in the area of telework.

To put it bluntly: our labour law arsenal, with some nuances in a number of countries, divides the world of labour in two categories of people engaged in work : employees and self-employed. The question is whether that distinction is appropriate to deal with the newer realities and the challenges this entails?

Central questions

The question therefore is first, when examining the legal and contractual situation of teleworkers in the Member States of the European Union from the aspect of labour law and including the self-employed, to define telework, secondly, to see how important the phenomenon is already developed in the European Union and thirdly, how it is being dealt with from the labour law point of view. Finally, we want to examine the labour law questions, which go along with telework and to see how they are tackled today and what directions are envisaged for the future.

Central questions which emerge from the national reports relate mainly to:

1. the status of the teleworker : is he an employee or a self-employed ?
2. should there be a specific legal category of teleworker, like the one that existed in a number of countries for the homeworker or not ?
3. how to deal with the fusion/overlapping of home and workplace; of private life and work and of working time and free time ?

² 2F.T., June 15, 1995.

I. DEFINITION OF TELEWORK

Telework is, so most national reporters underline, not (yet) a *legal* category. This means that we are, as far as the subject of this general report is concerned, left with a functional definition only. That definition should be useful in relation to the problems (like social isolation) which go along with telework and eventually broad enough to embrace the various possibilities of telework, especially those where newer work situations emerge. It may at a given point be indicated to have varying definitions, especially as far as time spent on telework is concerned, in order to tackle the different problems which telework gives rise to.

In most definitions given, national reporters retain two elements, namely:

- 1 the place of work and self evidently
- 2 the technology used.

A. The location

The place of work is somewhere other than the traditional workplace of an employer. The workplace has thus to be another one than the employer's premises. Consequently, telework concerns working at a distance; away from the place where the result of the work is expected, as J.E. Ray (France) puts it or "out of the reach of the employer", according to A. Nunes de Carvalho (Portugal).

Working at the home of the teleworker is certainly covered. And as a matter of fact, the data available seem to indicate that this concerns the majority of teleworkers. Also meant is telework performed in an employer-independent tele-cottage or tele-centre.

Working at a satellite, organised by the employer, thus under the control of the employer, for obvious reasons, is not meant, since a satellite belongs to the premises of the employer. The same goes for forms of work like tele-disponibility³, tele-consultants or tele-actors⁴.

Telework also covers working in hotels, on planes...It is working away from the enterprise.

The question remains open whether that location should be the "main" place of work, like P. Davies suggests.

Obviously, one does not mean to cover in this study relating to specific labour law problems of teleworkers, employees or self-employed, who only work occasionally e.g. at home for a couple of hours a week on a Wednesday- or a Friday afternoon. This speaks for itself.

But surely, one should, it seems, include those places of work where an important part of the telework is done, e.g. 2 days a week for someone who is working full time.

Finally, the location is to be freely chosen by the teleworker or can be a condition of the individual (employment) contract to be concluded between parties and thus in a sense agreed upon between the parties.

B. The technology

The second element retained in the definition concerns the technology, used by the teleworker.

Teleworking involves the use of telecommunications : computer, fax, telephone, satellite, disks, CD Roms.

Teleworking involves most of the times transfer of bits, not of atoms⁵ according to the coined expression of N.

³ Employees, who can be reached by telecommunications (alpage, car phone, or at home for urgencies) (France).

⁴ Employees, who can be reached for consultation by clients, e.g. in banks, especially in the evenings and on Saturdays, giving additional flexibility regarding working time for the employer (France).

⁵ Negroponte N., *Being digital*, London, 1995, II.

Negroponte. We are thus talking about telecommunicated exchanges of words, designs and the like, not of manufactured goods like furniture, textiles or even books, as is the case in traditional manual homework.

The nature of the telework done varies enormously, ranging from work of a very low level and rather repetitive, like data-entry jobs to contributions of the highest/creative level and thus having the most added value, like in the case of research, development, consultancy, arts and so on.

Who owns the infrastructure, needed to engage in telework is, from the point of view of labour law, not really relevant as far as the definition of telework-is concerned The material may indeed be owned or rented by the teleworker or put at his disposal by the employer/contractor. In practice, however, it will be frequently so that the teleworker, who performs as an independent, will own the infrastructure and that, in case that the teleworker is an employee, the infrastructure will be provided for by the employer. One and another has self-evidently legal overtones as far as e.g. the exclusive use of the infrastructure is concerned, responsibility for the infrastructure and others.

C. The ILO and homework

In this context it is interesting to refer to the discussion concerning the definition of homework, which took place in the ILO, in the framework of the proposed draft convention on Homework (1995)⁶. “That debate reflected conflicting views as to how broad the definition should be and conflicting interpretations of what the application of the definition in practice would mean. There was some criticism that the definition did not sufficiently distinguish between homeworkers and independent or self-employed workers. In response to this, the Office considers that the definition must be read and interpreted as a cumulative series of criteria, all of which must be met before work is considered to be homework. Clause (a) of draft Article 1 first lists in sub-clauses (i) to (iii) criteria for homework and in the last three lines provides for distinguishing homework from independent work. The approach is to give a general definition, with criteria to guide authorities in Member States that are responsible for determining when a person is truly an independent worker rather than a homeworker. The original Office text provided that homeworkers who met the requirements in the core part of the definition of homework would be considered as homeworkers unless they had the degree of autonomy and fulfilled other conditions necessary to be considered independent workers under national laws, regulations or court decisions. The Committee adopted a formulation which took out the reference to other conditions (some believed that this would be used unfairly to classify homeworkers as independent workers) and replaced it with requirement for a degree of economic independence. Thus, a person who works at home for remuneration on work which results in a product or service specified by the employer can only be denied the status of homeworker if he or she has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions. There have been some attempts to prejudge who might or might not fall within the definition, but such determinations depend on the “degree of autonomy and economic independence required to be considered independent workers in particular national law and practice. While it might be argued philosophically that almost everyone is economically dependent, it is a legal determination to be made based on the definition, which does not refer to " any degree of" economic independence, but rather to “the degree of economic independence necessary” in the country concerned to be considered an independent worker. The definition ensures that persons are not put outside the definition of homework if they meet the criteria in (i) to (iii), unless there are additional factors based on autonomy and economic independence which show that they are independent workers. And, again, this determination is made under national law.

The phrase “of his or her own choice” in sub-clause (i) also restricts the definition. Among other criteria, a person is a homeworker because he or she works at home or in other premises chosen by him or her. This does not mean choice subject to the employer’s authorisation, otherwise the phrase would have no meaning. For example, an employee who may work away from the workplace of the employer is subject to the approval of the employer, whether approval is exercised or not. Thus, it cannot be said that a person who is in an employment relationship ” chooses ” to work at the workplace, at home or at other places away from the workplace, because the employer retains the authority to deny the “choice”. A homeworker, on the other hand, according to the definition, has this “choice”.

⁶ ILO, Homework, Report IV(I), Geneva, 1995, 3-4.

Out of this debate the following definition of homeworker is proposed :

“For the purposes of this Convention:

- a) the term ” homework ” means-work carried out-by a person, to-be referred to as a homeworker,
 - i. in his or her home or in other premises of his or her own choice, other than the workplace of the employer;
 - ii. for remuneration;
 - iii. which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used,
 as long as this person does not have the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions;
- b) the term “employer” means a person, natural or legal, who, either directly or through an intermediary, gives out homework”.

This means that the ILO definition of homeworker is

1⁰ limited to employees, and does not cover self-employed persons;

2⁰ to include as well teleworkers as other employees, working at a distance, also the traditional homeworkers

D. Concluding

Both elements, constituting telework, name the location of work and the use of the telecommunication/technology need to go together. Indeed, employees, who work exclusively or mainly on the premises of the employer, using telecommunication, are not looked upon as teleworkers. What we are basically concerned with has to do with an, at least partial, explosion of the enterprise, with the consequence that people rather work in networks, more between equals, eventually on their own, on other places than before.

One and another allows us to forward the following (functional) definition of telework:

Telework is the work performed by a teleworker (employee, self-employed, homeworker ...). mainly or for an important part, at (a) location(s) other than the traditional workplace for an employer or a client, involving the use of telecommunications.

II. NUMBERS AND EXPECTED GROWTH

Given the lack of a uniform definition and given the absence of systematic research and adequate statistics in most Member States, most national reporters have to indicate that there are either no or only very incomplete data available and trends discernible. This is not only so for telework in general but also regarding the summa divisio between teleworkers in particular, namely those who operate as employees on the one hand and those, who perform in the capacity of self-employed/entrepreneurs at the other hand.

Nevertheless, the impression prevails that telework, although seemingly still marginal in a number of Member States, seems to be growing and more important in other countries. Where figures are available⁷ and communicated in the national reports, they show a very diversified picture.

At present, 30,000 teleworkers are reported for Germany. According to M. Jürgen Rütthers, Minister for Research, Technology and Science, there is a potential for 3,000,000 teleworkers. According to the German Federation of Electronic Industries (ZVEI), Germany could easily have by the year 2,000, not less than 800,000 teleworkers from home, for which an investment of some 12 billion DM would be necessary to provide the infrastructure for each of those work posts⁸.

Roughly 8% (= 150,000) of Finnish employees do telework. Teleworkers in *Finland* are for the most part highly educated professionals with good income. Ca. 74% of them are wage-earners and ca. 23% are entrepreneurs. Ca. 3% work in agriculture. The majority of teleworkers are men, ca. 73%, the share of women thus being ca. 27%.

For France, the number was put at 16,000 of full-time teleworkers and a forecast made of 300,000 to 500,000 by the year 2,005 (Th. Breton report). Also in *France*, a Parliamentary Working Party, under the presidency of Mr. Martin LaIande (1993) came to the conclusion that 1) telework does not create jobs; 2) that the future of telework does not lie in telework at home, but in tele-centres and 3) that the main obstacle to the development of telework in *France* is the rather reserved attitude of Telecom company regarding the reduction of the costs its charges.

J.E. Ray underlines that there is not an outspoken concern regarding telework to be noted from the side of the social partners, but that enterprises, like IBM and Bull, which are confronted with the problem of collective redundancies, see possibilities to provide continued employment for some of their employees by way of telework at home; interest is also shown by those, which see a possible increased market share in the development of telework, like French Telecom. Also the public authorities, responsible for the territorial decentralisation in *France* have expressed a certain interest in promoting telework "à distance".

The *Italian* report contains an estimate of 2,000 to 3,000 teleworkers-employees: in mobile sites and maintenance/technical assistance works, some thousands; in research and software development, a hundred; in tele-sales and telemarketing, some hundred.

For the *Netherlands*, not less than 80,000 teleworkers were reported for 1994; this is 4% of the total number of office workers. The number is growing at a rate of 20% a year. According to the Dutch Organisation of Applied Natural Sciences, 25% of the active work population are apt to become teleworkers, this is 1.3 million individuals. Their work, it states, can for 20% be done by way of telework⁹.

In *Sweden*, more than 500,000 of a total of 2.1 million white collar workers are reported to be teleworkers (distant workers - in the broad sense) today and the average working time away from the regular workplace is

⁷ In the USA it seems, 7.5 million full time teleworkers perform from home; figure to which 9.2 million part-time teleworkers have to be added (J.P.P., "L'Allemagne se met au télétravail", *Le Figaro-Economique*, 6 August 1995, III). According to another study, the number of workers has been estimated at about 4.5% of the working population or approximately 5.5M people. However, on a more detailed analysis, only 16% telecommunicated 35 or more hours a week (C. Price, "Numbers stay limited", ET., June 15, 1995, XI).

⁸ J.P.P., o.c., *ibidem*

⁹ Tefewerken, Ministerie van Verkeer en Waterstaat, cited in: Bulletin VBO, Brussels, August 1995, 32.

11,5 hours a week. The typical teleworker is a male, aged 35-45 with a university *education*. Geographically, the teleworkers are rather evenly distributed over the country and 70% of them work from their homes. According to TCO, the Central Organisation of Salaried Employees, 29%, or almost one million, of 3.5 million employees in *Sweden* are so-called telecommuters, working at home at least an hour or two per month and 6% do it regularly. The survey includes all types of work and it was found that the type of work, which has been made possible due to new technology, still is rather uncommon in *Sweden*, at least in an organised way.

“A report by researchers at Newcastle University (UK), suggest that fewer than 250, 000 - less than one worker in a 100 - in the UK can be classified as teleworkers¹⁰”.

Recent studies organised by the E.U. estimate that about 5% of European organisations are involved in teleworking. The analysis was based on research in the UK, *France*, *Germany*, *Italy* and Spain, and estimated that the number of workers actively engaged in teleworking in the five countries stood at 1.1 million. The report calculates that this would give a total figure of 1.25M. Of the five countries the UK had the biggest number of teleworkers at 560,000. However the definition of teleworking was a broad one and included employees who worked from home electronically for only one day a week. The figure fell to 130,000 when considering just those workers who were employed electronically at home on a full-time basis. *France* in second place, had about half of the UK total, with the other countries about half as much¹¹.

Out of these rather scarce data it is hard to put precise figures forward and even more difficult to make any forecasts.

What one says, is that teleworkers are white-collar workers of all sorts, mainly working from home and that potential is there, probably greater for the category of self-employed than for the employees.

So, by and large, the overall impression seems to indicate that, at present, one still is talking about a relative small number of employees. This is even so in a country, like the (UK, in which teleworking seems to be relatively well developed compared to some other EC countries. But the potential is there and the numbers seem to be growing. It seems clear that there is considerable potential for its further expansion, partly because of technical developments which make its implementation easier and partly because it can help to address certain contemporary social needs, notably greater flexibility in working patterns for both employers and employees.

No need to say that additional data gathering, on basis of uniform criteria, is an absolute must.

¹⁰ Review of Telework in Britain: Implications for Public Policy, University of Newcastle, Newcastle, NE1 7RU, cited in : C. Price, “Numbers stay limited”, F.T., June 15, 1995, XI.

¹¹ Price, C., o.c.

III. SOURCES OF REGULATION

As far as sources of regulation are concerned we have to distinguish between employees and self-employed. For employees, the relation between the employer and the teleworker, labour law with its various sources will apply, providing for a variety of sources; for self-employed, the relation between the contractor and the teleworker will be governed by contractual law, this is mainly the individual agreement between contractor and teleworker.

A. Employees-homeworkers

1. Legislation

In general, one can say that there are no specific rules concerning telework to be found in the labour legislation of the Member States.

In some countries, specific regulations concerning homework prevail since decades, but they were mainly conceived for the social protection and integration of manual homeworkers, much of whom have disappeared in more recent times, although in some countries, like in the Netherlands manual homework seems to regain strength, especially amongst belonging to ethnic minorities.

This means that the general provisions of labour legislation do apply to teleworkers-employees, although, like Antoine Jacobs reports, it may be difficult to apply certain kinds of legislation, like those concerning health and safety, equal treatment and others to homework.

2. Collective agreements

The same can be said about collective agreements: few or no collective agreements, dealing specifically with telework, are reported. Again, more basic data gathering should be undertaken in this area.

In *France*, sectoral agreements do not cover telework, but enterprise agreements have been concluded in Bull (1994) and another one is envisaged for IBM in 1996. The Bull enterprise agreement, which is considered to be an experiment, lasting from six months, covers following points :

1. voluntarism;
2. equal treatment with other (office) employees;
3. a return clause;
4. exclusion of part time telework;
5. general employment security;
6. written individual agreements;
7. continued vocational training;
8. telework done from home;
9. autonomy of the teleworker; only calls in case of urgency; messages over fax or recorded phone;
10. presence of one day a week in the office in order to maintain (social) contact;
- 11 infrastructure; insurance;
12. costs;
13. information about telework to the employees' representatives; possibility for the representatives to contact the teleworkers;
14. follow-up commission, composed of representatives of the trade unions.

After a period of five months, the Bull experience would be evaluated and appropriate decisions taken where to go from there.

In Germany, an enterprise agreement has been concluded in IBM

Four enterprise agreements are reported for *Italy*, concluded in 1994-1995. In total, however, less 100 employees are covered by these collective labour agreements. They relate to office employees moving to part-time or full time telework, mainly in framework of the reorganisation of the enterprises concerned.

The *Swedish* branch of Siemens Nixdorf Information system AB, SNI, and the local department of the trade union SIF concluded a special local collective agreement regarding teleworkers (distant workers). The definition of distant work, used in the agreement reads as follows: “to perform work for a longer or shorter time from a location other than the regular principal workplace. By principal workplace is meant the location where the employee’s department is situated. The principal workplace is also considered to be the work site”.

In the *Danish* context, it is important to note that collective agreements constitute a binding frame for the individual contracts which cannot be derogated from to the detriment of the worker by way of an individual contract. Therefore, if the collective agreement is interpreted as prohibiting telework this becomes impossible.

In the Netherlands, the first collective agreement in which telework was part of the agenda, was at Akzo-Nobel in 1993. This resulted in an exploration of the possibilities of telework for the employees. In the public service, in 1994, instructions for telework were published, after having been discussed with trade unions.

3. Work rules and case law

In most Member States, work rules seem to be silent on telework. Again, in *Finland* and in *Italy*, the existence of some work rules related to telework are reported, but in the latter Member State they relate to teleworkers in the broad sense (this is including telework, also done on the premises of the employer). In the Netherlands, personal agreement manuals at the Rabobank Nederland and Digital Equipment Ltd. contain regulations for telework: standing order as well as a model for an individual telework contract employment. The drafts texts were discussed with the works’ council.

No important developments in case law nor informal practices have been reported. In some countries however, like in *Sweden*, individual teleworking contracts are mostly informal, verbal contracts between employees and their employers. Sometimes, however, the individual agreements have the form of written, detailed and signed agreements on how, when, and where teleworking is to be performed are not uncommon, but special collective agreements are so far very rare.

4. Individual agreements

As far as individual agreements are concerned, some cases relating to telework have been reported, namely in: *Belgium*, *Finland*, *Germany* and *Italy*.

In the Belgian ABB case (4 translators-employees working from home), the points dealt with in the individual employment contract relate to:

- working time;
- justified absences;
- incapacity to work;
- work accidents;
- an inventory of the material belonging to ABB;
- what in case of theft of material and insurance against theft ?;
- an exclusivity clause concerning the use of the material;
- expenses (electricity, heating . . .).
- separate telephone line;
- mobility: return to the office;
- quid in case of housemoving by the teleworker;

- health and safety regulations;
- social elections.

The following aspects were accounted for in the Finnish Tele case (involving 60 skilled professionals) in the individual employment contract:

- the object of the work/tasks;
- the duration of the contract; 1 working hours;
- remuneration and other terms of employment;
- expenses caused by the experiment;
- equipment, programs, disks and other material;
- a list of Tele's property;
- the use of the worker's own computer and remuneration;
- the use of Tele's equipment and the responsibility for it;
- the maintenance of Tele's equipment;
- the returning of the equipment after the experiment.

In France, the Bull agreement guarantees teleworkers maximum autonomy as far as working time and availability are concerned: no phone calls at home unless in case of urgency and messages (usually) to be sent through fax or E-mail. This situation, however, seems, according to the French reporter, to be an exception: many enterprises impose working time schedules with complete availability.

In IBM Germany, the option of working from home is written into the contracts of employment for all permanent staff resident in Germany. Any individual may apply to work in this way, but the company retains the right to decide whether the request will be met, and to determine the number of hours which may be spent working from home. The teleworkers retain their status as employees.

In *Italy* (Italtel case), following points were laid down in the individual employment contracts of the teleworkers (13 persons involved in the field of soft ware development):

- working time;
- meetings at company level; 1 work accidents;
- an inventory of the material belonging to the employer
- an exclusivity clause concerning the material;
- expenses (heating, electricity...);
- the payment system;
- a separate telephone line;
- mobility : return to the office;
- health and safety regulations;
- trade union rights;
- data protection and privacy.

In this context, self-evidently mention has to be made of the European Directive 91/533/EEC concerning the employer's obligation to inform employees of the conditions applicable to the contract of employment relationship.

This directive was adopted pursuant to point 9 of the Community Charter of Fundamental Social Rights for Workers, which states: “the conditions of employment of every worker of the European Community shall be stipulated in laws, a collective agreement or a contract of employment, according to arrangements applying in each country”. The development in the Member States”, the considerations to the Directive reads, “of new forms of work has led to an increase in the number of types of employment and made certain Member States to consider it necessary to subject employment relationships to formal requirements, designed to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market. This legislation of the Member States differs considerably on such fundamental points as the request to inform employees in writing of the main terms of the contract or employment relationship, which may have a direct effect on the operation of the Common Market. It is therefore necessary to establish at Community level the general requirement that every employee must be provided with a document containing information on the essential elements of his contract or employment relationship. This directive is without prejudice to national law and practice concerning: “the form of the contract or employment relationship, proof as regards the existence and content of a contract or employment relationship, and the relevant procedural rules” (Art. 6).

The Directive and the implementing national legislation is relevant whenever a teleworker operates as an employee according to the law in force in a Member State. Several national reports, like the *Danish*, *Dutch* and *the Luxembourg* ones, explicitly refer to the Directive in relation to telework.

B. Self-employed

For self-employed teleworkers contractual freedom prevails. No content of relevant individual agreements have been reported in the national studies.

IV. THE LEGAL STATUS OF THE TELEWORKER

To determine the legal status of the teleworker, we basically have to fall back on the mother-categories in labour law. This means that the teleworker, as indicated above is either an employee or a self-employed/entrepreneur.

A. Employees

Teleworkers can be full-fledged employees or self-employed,⁷ depending on whether the work performed is done in subordination or not. Subordination means that the work is performed under the command and control, thus the authority, of an employer. The general notion is the same and this does not take away that there are varying differences in the Member States. Even in the same country there may be slightly different notions of subordination, according to the applicable Act (e.g. *Belgium, Sweden*), or on the official instance, laying down the definition (e.g. Finland).

In Austria, a distinction is made between employees and employee-like persons. Employees do work in a state of personal dependence, meaning that work is done under control of the employer and with resources belonging to the employer. Employee-like persons are people who work for others in personal independence, but are economically dependent on them. These include homeworkers and teleworkers. Employee-like persons are only partly protected by labour law provisions.

In Germany, most teleworkers perform as employees, who work in “personal subordination”. The enterprise expects the individual to always be ready to accept new tasks; the individual is not free to refuse tasks offered by the enterprise, he is to a certain degree integrated in the organisational structure of the enterprise. The tendency by the courts is to enlarge the scope of labour law as far as possible. In case a teleworker is considered to be an employee, no contractual deviations are possible, because mandatory, imperative law is involved.

In *Italy*, an employee is defined as a worker, who operates under the direction and the control of the employer, “inside the space (and the organisation) of the enterprise and with an obligation of continuous relationship”.

In *Portugal*, in a contract of employment, work will be supplied to a certain in return for a remuneration “under authority and direction”, this is as a “subordinate”. In order to determine the qualification of an employment relation, Portuguese jurisprudence uses the multiple test method, namely the evaluation of the existence and real weight (importance) of certain facts that point out that there is subordination of autonomy. One of these factors is that the execution of the work takes place on the premises of the employer. This is however not the case in telework. Therefore the use of the multiple test method becomes more complex in the case of telework.

In *Sweden*, a wide meaning is giving to the notion of employees. There is, in *Sweden*, like in most Member States, a considerable amount of case law in this area and several criteria are used indicating that someone is employee, as N. Bruun & M. Johnson indicate:

1. the person should personally perform the work;
2. he has by himself, or virtually all by himself, actually performed the work;
3. his commitment includes his being available for upcoming tasks;
4. the relationship between the parties is of a more sustainable character;
5. he is prevented from performing the same kind of work of any significance for anybody
6. else;
7. he is submitted to certain directives or control, whether it concerns how, where or
8. when a task is performed;
9. equipment is provided by the other party;
10. his expenses are paid by the other party;

11 he works for remuneration;

12 he is economically and socially equal to an employee”.

In many countries, a mainly legal-judicial notion of “legal subordination” prevails, like in *Belgium, France, Greece, Luxembourg, Spain* and Greece, but one sees elements of a more economic nature gaining influence in another number of countries, like. developments in the UK illustrate.

In the UK, P. Davies reports, recently, and in response to the growing complexity of the tasks performed by workers, case law has moved away from control as the single and decisive test, and instead looks at a range of factors of which the control exercised by the alleged employer is only one. In looking at this range of factors one is attempting to assess whether the worker is integrated into the employer’s organisation (the ‘organisation’s test), integration being normally, though not wholly, assessed by looking at economic rather than social factors. This is in fact also the approach of the judges in the *Netherlands*.

One consequence of this approach has been to make the decisions of the courts much less predictable.

Another reported problem is that of mutuality i.e. the proposition that for a contract of employment to be founded there must at least be an obligation on the employee to do work for the employer and possibly also an obligation on the employer to offer work. This requirement puts in jeopardy the legal status as employees of casual workers even if they do in fact work only for a single employer.

There are, in the UK, no reported cases where the criteria mentioned above have been applied to teleworkers. Two cases relate to traditional homeworkers. These cases can be regarded as authoritative with regard to teleworkers working at home for a single employer. In both cases the workers in question were held to be employees. In both cases the employees were paid on a piece-work basis (in the former putting heels on shoes; in the latter, pockets in trousers); both worked only for a single employer; both had some weeks in each year when they did not work, either at their request or because demand for the employer’s products was low; and in both cases the employer treated the workers as self-employed for tax and national insurance purposes.

In both cases, the organisation test could be easily satisfied, for the workers were. economically dependent on the employer in question. More difficult was the argument based on lack of mutuality, especially in the second case, where the homemaker had much more control over the volume of her work than did the worker in the first case. It was permissible to find that well founded expectations of continuing homework [had] hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more, and [that] out-workers [had] thereby become employees under contracts of service like those doing similar work at the same rate in the factory”.

Two conclusions may be drawn from these cases. First, homeworkers or teleworkers are likely to be regarded where the only fact that distinguishes them from ordinary employees of the company is the fact that they work for the whole or a substantial part of their time away from the employer’s premises. If they are otherwise under the same obligations to the employer as ordinary workers even if the practical expression of those obligations is somewhat different, the courts and tribunals are not likely to regard the location of the work as putting the workers’ status as employees in jeopardy. It seems not to matter that the parties to the work relationship itself have characterised it as one of self-employment or even because the tax and social security authorities have accepted this characterisation

Second, on the other hand, if the physical distance from employer’s premises-coincides with a lower level of integration into the employer’s organisation, in particular by putting the worker in a position where he or she can choose how much work to do for the employer or, indeed, whether to work at all during particular periods, then the risk of the worker being found to be not an employee is a real one. In particular, to repeat, in this situation the *UK* has no special homemaker legislation which would operate so as to bring the non-employee worker back within the protection of the employment legislation.

In *Ireland* also, it is not so clear what constitutes an employee (a contract of service) and a self-employed person/independent contractor (a contract for services). Important are following criteria:

1⁰ the intention of the parties as stated in the contract, although the Courts can examine whether the realities of the relationship equate with the legal statements in the contract;

2⁰ control : directing the employee in the performance of his work, including where and how the work is to be done; the more detailed the level of control, the more the worker is likely to be an employee;

3⁰ the *integration* in the employer's business;

4⁰ *economic reality/entrepreneurial*; whether a worker is in business on his own account (profit/loss)

Teleworkers are less likely to be under direct control of their employers; they are probably less integrated and may be looked upon in *Ireland* as entrepreneurs/self-employed if they own the equipment. If the teleworker himself can subcontract work to a third party, he is likely to be seen as self-employed.

In this context attention should be paid to electronic monitoring, which allows for control of working time, its beginning and end, the speed of work, the amount of work done, the ascertaining of mistakes and the like.

This point is dealt with in the *UK* national study. On this issue, P. ,Davies reports as follows: "One of the hesitations which employers have about telework schemes is that it may be difficult to monitor the employee's performance if he or she is not based on the employer's premises. There is therefore an incentive for management to attempt to use the employee's computing equipment to monitor the work-rate. In the absence in the UK of general legal provisions protecting the privacy of individuals or of any specific labour law provisions in this area the law in the *UK* appears to permit the employer to undertake such measures, subject only to the registration and access protections contained in the Data Protection Act 1984 (which implements in *the UK* the Council of Europe Convention on Data Protection). However, the guidance note issued by the Health and Safety Executive under the Health and Safety (Display Screen) Regulations 1992 do recognise a potential health and safety dimension to the problem. Referring to 'performance monitoring facilities' generally, it is stated that quantitative or qualitative checking facilities built into the software can lead to stress if they have adverse results such as an over-emphasis on output speed. 'However, it is added that 'it is possible to design monitoring systems that avoid these drawbacks and provide information that is helpful to workers as well as managers. However, in all cases workers should be kept informed about the introduction and operation of such systems'. The BIFU guidelines suggest that the social partners are aware of the significance of the matter".

Attention to this matter is further paid under the heading of privacy (see: V, 9).

For the *UK* and *Ireland*, continuity of employment may be an element for an employee to qualify for certain benefits, like redundancy payment and the like, on the proviso that this would not amount to indirect discrimination on the basis of gender.

As a consequence of what has been developed above, notwithstanding some variations, basically and by and large, the same group of workers is covered in the Member States by the notion of subordination. As employees/teleworkers, they will, as a general rule, benefit from labour law provisions as well as social security protection prevalent for the other employees.

The teleworker/employee will, depending on the national various national legislation, where these distinctions are prevalent and given the kind of the work involved, either be a white-collar worker, eventually a commercial traveller or a temporary worker.

Teleworkers can be part-time or full-time, engaged with a contract for a fixed period or for an indefinite duration or even with a contract for replacement. Teleworkers can have one or more employers.

Teleworkers can be employees in relation to an employer and self-employed at the same time depending on the nature of the relationship with his contractor(s).

B. Homeworkers

In a number of Member States there is a specific category; called, homemaker: This category, which related mainly to manual workers as to the making of furniture, textiles and the like, had almost disappeared but is revived also in view of the developing telework, like in *Belgium*, where the Government introduced a bill before Parliament. Homework, as a legal category, is also retained in *Denmark, Finland, France, Germany, Greece* and *Spain*. But again, the same word hides enormous differences.

In *Austria* a homemaker is looked upon as an employee-like person.

In Belgium, the homemaker is either an employee or a self-employed. But as an employee he is not covered by the 1978 Act on individual employment contracts and only a few labour Acts apply (Working time, but not Sunday work, protection of wages, holidays). Homeworkers, are, however, counted in for a number of thresholds, including for social elections for works councils or for the closing of enterprises.

In Germany, the notion of homemaker is a restricted one, so that only specific forms of telework can be performed under that heading. A homemaker is anybody who works, be it alone or with the help of family members, for another person or institution at a place of his own choosing and who leaves the utilisation of the result of his work to that person or institution he is working for. The Act on homeworking (1951, regularly amended), also applies to individuals who, in a place of their choice, work with at most two people (non family members). These individuals are looked upon as employee-like persons and enjoy protection regarding wages, working time, safety regulations and a very fragmented protection in the case of dismissal.

In case they would work with more than two people they would, in principle, be looked upon as self-employed entrepreneurs.

In *Ireland* and in the *UK*, the concept of “homemaker” exists as a factual rather than as a legal category. Such workers are either employees or self-employed depending on the terms of contract under which they are working.

In *Italy*, Act 877 (1973) defined homework as a rather restricted category : it is only allowed when the worker is aided by his family, performs under the direction of an employer, who pays his remuneration. Whether telework could be performed on the basis of Act 877 is a point of debate. In *Italy*, the homemaker is a full fledged employee; the trade unions enjoy explicit rights regarding homework, such as the right to know the number and content of the jobs of the homeworkers.

In Portugal, there is a decree on homeworking, which applies if the activity takes place at home or in the premises belonging to the worker and if the latter is economically dependent on the employer, however without subordination (Nr. 440/91). According to the courts, there is economic dependence when the workers ‘activity’ “is addressed in an exclusive or almost exclusive way to one same subject”. The decree however excludes “intellectual work”. This concept however has, according to the Portuguese reporter, become obsolete, largely due to the technological innovation, so that the regime of homework could also be applied to certain types of telework.

In *Spain*, there are two conditions to qualify for homework : 1) the place of work, other than the premises of the employer and 2) the lack of direct control by the employer, which does not mean absence of subordination, which can be exerted through other means, like control on the way and the time of the work done.

Homeworkers are treated like comparable workers. Their contracts must be in writing and a copy forwarded to the Public Employment Office. The homemaker must receive a “control document” which must contain several elements : name, type and amount of work done; materials delivered; remuneration....Teleworkers can perform as homeworkers.

Full-time telework can be homework in *France* and in that case the teleworker is considered to be an employee, protected by labour law in the broadest sense. In case of homework, it was not necessary for the homemaker to prove that he was performing under legal subordination of an employer. This has changed in 1994. In order to favour telework and to shield the contractor from eventual labour law protection, the teleworker might benefit from, Parliament accepted an Act, whereby the homemaker/teleworker, whenever registered as a tradesman or as a commercial agent, will be considered as a self employed unless proof to the contrary is provided for by the teleworker. So, in France, a teleworker at home can fall under one of three legal categories : either as a full-fledged employee, when homework is only a modality of the organisation of work at the enterprise (e.g. a manager performing two weeks at home and the rest in the enterprise); as a homemaker in the real sense of the word or as an independent. These three statuses can apply at the same teleworker, depending on the various relations he has with his employer/contractors.

In Greece, telework can be performed as homework, but in most of the cases the homemaker, when he does not succeed in proving subordination on behalf of an employer, will be looked upon as an independent worker, without specific social protection.

As mentioned earlier, can homeworkers, under certain conditions, be looked upon as employees in the UK

This enumeration leads us to a very diversified picture as far as homework is concerned, of the notion homework itself, whether the homeworker is either an employee or a self - employed and which social protection the home-teleworker possibly enjoys.

C. Self-employed/entrepreneurs

Teleworkers, who are not performing as employees, will do so in the legal capacity of self-employed, be it as homeworkers or not. This will be the case, if the teleworker does not perform, either in subordination or in a (legally) dependent position, although teleworkers may be, for self evident reasons be economically dependent, this situation, differing from case to case. In countries where the subordination is a mainly legal criterion, economic dependency has no real important significance as far as the legal status of those involved is concerned.

In *Austria*, when a teleworker works for the market, this means for more than one contractor, he will not any longer be classified as an employee-like person, but as a self-employed. The same goes for Germany, when there is personal nor economic dependency.

In case of self-employment general rules relating to contracts prevail. In principle, labour law is not applicable.

In some countries, independent (workers) are referred to as entrepreneurs (*Sweden, Finland*), in others they can be either self employed or entrepreneur and in even others they can be “an autonomous worker”, an “entrepreneur” (of a SME) or in “semi-subordination” (*Italy*). Rules may vary, but as a general principle, labour law does not apply to self-employed teleworkers and this is sufficient for our purpose.

The dynamic, determining the legal Status of the teleworker, is self-evidently pointed versus self-employment. There are basic reasons for this development. The first is the fact that self-employment is much cheaper. Indeed, for an employee, e.g. in *Belgium*, social security contributions amount to 53,97% of wages (1 April 1995), of which the employer pays 40,90% and the employee the rest. In case of self-employment the contractor contributes 0% and the self-employed worker pays only 17%. Secondly, much more flexibility, as no protective labour standards apply and full contractual freedom prevails, which can be in the (economic) advantage of either party depending on their respective market strength

This development has been particularly encouraged by recent legislation (1994) in *France*, where teleworkers, if registered as a tradesman or as a commercial agent, are *de jure* looked upon as self-employed unless proof of the contrary is given, so that eventual contractors will not shy away from providing the teleworker with business out of fear of being confronted with labour-law-protection. J.E.Ray underlines that teleworkers, who are not registered as such, may not be chosen to perform as teleworkers and thus left idle so that the factual possibilities of suing eventual contractors in order to prove that they are *de jure* employees are rather slim and *de facto* non-existent, since teleworkers may fear for retaliation when trying to obtain new contracts. This movement towards the independisation of teleworkers in France is a remarkable feature and can be discerned in other Member-States. The same possibility of “independisation” is also reported for *Luxembourg*, where M. Feyereisen fears similar developments.

J. Koukiadis (*Greece*) fears that this tendency may undermine traditional labour law protection of (formerly) employed persons. In this line of thought he welcomes a new Act (1990) in Greece whereby collective agreements are also applicable to independent workers, whenever it is evident that they are economic and social dependent. Inter-industry agreements thus could provide conditions for eventual dependent teleworkers.

V. EMPLOYMENT CONDITIONS

A. Employees

1. Voluntarism

It is self-evident that an employer cannot unilaterally impose telework on an employee. Since the place of work and everything which goes along with telework, like possibly working at home, constitute essential conditions of the employment contract; these cannot be changed unilaterally: So, parties would have to agree on whether the employee will embark upon telework.

They could also include a clause in the individual employment contract that the employee has a right to return to the traditional workplace if he expresses the will to do so, but also such a clause is voluntary affair and an employer is not obliged to agree to it. In case such a clause would be inserted, the employer would selfevidently have to agree to the return of the employee.

Self-evidently, a practical view must be taken into account, namely that the employee may economically not be in a position to refuse a proposal by his employer to engage in telework, otherwise he may loose his employment or get no work/income whatsoever.

If a new employment contract is to be concluded, the employer or the candidate-employee could make telework a condition for the conclusion of the agreement.

These rules in genera! prevail in Member States, as the national reports which have addressed this question, demonstrate (Austria, Belgium, *Denmark, Finland, France, Germany, Luxembourg, Italy, Portugal, The Netherlands, Spain, Sweden and the UK*).

In *Denmark* also, voluntarism is the normal rule, provided a contract to conclude telework is possible according to the applicable collective labour agreement.

In *Finland*, a more unilateral decision by the employer might be justified if there are grounds for dismissal

In *Italy*, all the collective agreements referred to in the national report, consider telework to be an experiment which both workers and employers have the right to interrupt at any moment.

In *Portugal*, In, the place of work is an essential element of the agreement. In order to change the place a new agreement is necessary.

In *Sweden*, N. Bruun & M. Johnson report, the initiative to *teleworking* has in many cases been taken by the employees themselves. In most cases there is an informal agreement between employee and employer. Since the *Swedish* teleworker for the most part is called a telecommuter, he retains his desk at the principal workplace and can easily return there to work full time. When a person is employed under the condition that he will be a teleworker, he has no right to be transferred to the principal office. There always has to be an agreement, whether set in a previous contract or reached for the individual situation at hand.

Under certain conditions and within limits, the employer has the right, in a number of countries, to unilaterally change the place of work within the overall *jus variandi*. However, regarding telework much *more may* be involved than mere change in the place to work, if telework e.g. has to be done at home.

2. Form of the contract

A contract for telework does not necessarily have to be in writing. Indeed a labour contract can be concluded orally in a number of Member States, but it is more than wise to lay down a number of points in writing, as was done in the Belgian ABB case. The ABB teleworker has a normal written contract of employment for an indefinite period and an annex to the contract containing specific regulations relating to telework as well as an inventory of the equipment provided for his use by ABB.

In *Finland*, in the *Tele* case, a separate written additional contract was made of telework, stating a.o. the working time and the expenses brought about. Roughly one out of five teleworkers in *Finland* have a written contract on telework. The telework of the remaining four fifths is based on an oral or tacit agreement. In *Italy*, contracts can be oral, but in the four cases analysed in the national report, the contracts were done in writing,

so as to underline the idea of ‘voluntarism’ involved and to define specific conditions of the agreement between the parties in detail.

Teleworking contracts in *Sweden* are mostly informal, verbal contracts between an employee and his employer. Individual written contracts on how, when, and where teleworking is to be performed are not uncommon but special collective agreements are so far very rare. The teleworkers at Siemens Nixdorf have all individual employment contracts, but they are also covered by the regular collective agreement in use at the company, as well as by a special collective agreement on teleworking, approved and signed by the individual employee.

At the same time one has to recall that certain types of employment contracts or certain clauses in the employment contracts, in many Member States need to be in writing in order to be legally valid, such as employment contracts for a fixed period, a given task, temporary work, part time and the like. This differs from one Member State to another.

It is in this context again indicated to mention the EC Directive of 1991 on the duty of the employer to inform the employees on the applicable working conditions, as referred to above.

3. Job description and function

It is advisable that the employment contract or another document (e.g. a collective agreement) clearly describes the nature and the content of the work to be performed. This is what mostly happens in the collective or individual agreements, referred to in the national reports. It is equally advisable to clearly lay down to whom the teleworker has to report.

The same goes for measuring and evaluating the work done. For practical purposes, this should be agreed upon beforehand and if possible in writing. Some tasks can be evaluated in term of numbers (number of invoices), others may have to be defined in relation to normal enterprise work.

In the Italian report this point is nicely illustrated. The examined collective agreements and the individual employment contracts clearly describe the function, activities and the payment system. These usually refer to existing job definitions as telework in most cases concerns well defined and well known jobs. A particular problem relates to work control systems and to the fact that teleworking does not allow traditional hierarchical control, based on direct and usual control by management. As a consequence of this absence, all controls, based on working-hours and on worker’s presence, are considered as not effective nor useful.

Usually, Italian managers “look for a solution of the problem in adapting and extending control system in use. Nevertheless, the solution is easier in those cases in which control systems are based on objectives and on results or on project management methodologies. Thus in the Italtel case, were teleworkers worked in project teams, in which periods of individual work alternate with meetings and teamwork. In the case of mobile work for sales and maintenance, workers were controlled by programs and by milestones, which are control systems suited to evaluate telework”.

In the (Italian) Seat case, an average productivity was defined and workers were requested to observe normal working hours while in the Dan/Bradstreet case a new “piece-work system” was developed : teleworkers can decide when they will work but their payment is depending on the number of “pieces” done. These pieces were measured and constitute a basis for the calculation of pay.

4. Workplace

Parties may agree on the workplace or indicate that the employee is free to choose the workplace. If the workplace is to be considered as a part of the enterprise (in the broader definition), the employer may be responsible for its suitability for telework, also with due regard to the applicable health and safety legislation.

Parties may agree to the conditions under which the employer, or his representative can visit the workplace in order to effectuate necessary controls.

Parties may also confer over payment of expenses for the heating and the lighting of the workplace and for the maintenance/repair of the equipment. Another issue is whether the employer will intervene in the costs of the investment in the home/workplace.

Not much factual information is provided for in the national reports on these issues, which indicates again that there is further scope for additional research in the area of telework in order to collect basic data.

5. Infrastructure and equipment

Parties may also agree that equipment and infrastructure, relating to telework, will be provided by the employer. This is what happened in the *Belgian ABB* case. An inventory was drawn up by ABB while the teleworker accepted the obligation to ensure the highest possible care for the material and an arrangement was made for the payment of costs relating to the equipment and the infrastructure. The ABB contract also contains an exclusivity clause, saying that the equipment and infrastructure cannot be used for gainful activity which does not relate to ABB activities. However, use of the equipment for personal objectives is allowed.

ABB insures the equipment against theft and fire and paid the corresponding premiums

The ABB annex contains a clause according to which the employer pays only the initial installation costs (equipment and infrastructure). This means that if the employee decides to move to another home, he will have to bear those expenses himself,

In Finland, it is normally the employer's duty to provide the equipment and materials for the job. The employer and the employee can however agree otherwise.

In the model contract for Tele's (Finland) telework experiment, special attention is given to questions concerning equipment. Following provisions are retained :

- equipment, programs, disks and other material provided by Tele are primarily used for the work referred to in the contract. The use of other programs requires an approval/virus-check by the ADP-services;

“a list of Tele's property that has been taken home is included;

the use of the worker's own computer and remuneration: agreed on in a separate written agreement;

- the participant uses Tele's equipment so, that no unnecessary damage is caused to it. The participant must pay for the damage he causes to Tele's property on purpose or by his fault;

- Tele will replace and maintain its equipment. Possible flaws must be reported to the ADP-service group. The participants are not allowed to attempt fixing them by themselves or to give them to anyone else to be fixed without the permission of ADP-services;

- the participant himself is responsible for the functioning of the computer he uses. Problems, caused by so called computer viruses, must immediately be reported to the ADP-services;

- at the end of the experiment the participant, must return all equipment, programs, disk; and other material that he has received from Tele”.

In the four Italian case studies analysed, equipment and infrastructure were provided for by the employer. An inventory was drawn up by the companies while the teleworkers accepted to ensure the highest possible care for the material and an arrangement was made for the payment of expenses, relating to the equipment and the infrastructure. Usually, the contracts contain an exclusivity clause, saying that the equipment and infrastructure cannot be used for gainful activity which does not relate to the employer.

In *Sweden*, the Act on Work Environment (1977) is applicable to teleworking. This means that the safety of machinery and other equipment that has been handed out to the employee, to be used in the employee's home or elsewhere, is the employer's responsibility. It is also the employer's responsibility to make sure that safety measures are taken and that satisfactory information is given. This applies when the equipment is handed out but if the employee later makes changes, eliminates a safety measure for instance, the employer normally is not responsible for damages or injuries.

To avoid problems, N. Bruun & M. Johnson state, it is essential that the parties agree in detail on who is responsible for providing equipment and infrastructure for telework such as installations, electricity, telephone, insurance, safety measures, etc. It is also important to agree on how and for what purposes the provisions may be used. In an employment situation, the presumption is that the employer is responsible for providing all

necessary equipment. An exception to this assumption might be the use of electricity because of the difficulties in separating private and professional use.

In the UK, P. Davies reports, the matter is again largely a matter of freedom of contract. Certainly, there is an implied obligation in contracts of employment that employees will be reimbursed by their employer for expenditure incurred in the proper performance of their duties. However, the employer can control the extent of his liability in this respect by means of express instructions to the employee as to what expenses are to be incurred or by express provisions in the contract of employment governing the facilities for which the employer will pay.

The BIFU guidelines naturally seek to throw these costs on to the employer, including the costs of equipment, additional insurance, heating, lighting, and even seek from the employer a 'rent' for the rooms used by the teleworker. It seems to be common for employers to agree to provide specified equipment and to contribute to out-of-pocket expenses up to a defined amount; undertakings to pay 'rent' for the use of the employee's premises seem uncommon, even where the employer insists upon the employee having a work area within the house which is separate from the rest of the dwelling. These remarks are made in respect of teleworkers working, usually as employees, for a single employer. In the case of freelance teleworkers, of course, these costs would normally be allocated by contract to the worker.

6. Working time

Parties can agree upon working time and availability. In the Belgian ABB case, the contract between ABB and the teleworker provides that there are 3 days of telework a week to be performed at home and two days in the office. It is up to the employee to perform approximately 7 to 8 hours a day. In practice however, an agreement was made concerning the number of pages to be translated.

Parties can also agree upon the availability of the teleworker and the hours he can be reached.

In *Finland*, the Hours of Work Act does not apply to homework or to when the employee works at a place of his choice. When the employee for the most part or altogether works at home or some other place of his choice, the legal working time regulations do not apply to him. The amount of regular or overtime work is not limited and the regulations on higher pay for overtime do not apply either. The employer does not have to prepare a system of working hours or keep track of the hours worked.

In Tele's (*Finland*) telework experiment, the employer gave up the control of working hours and did not expect working overtime. Possible overtime work would be agreed on with a separate written agreement. The working time seemed to have increased though, because work was also done during evenings and weekends. The employees did not regard this as a problem and thought it was only a phenomenon connected to the initial phase of telework. The workers were happy with their "freedom" from the traditional work place, and time, and didn't keep track of their possible overtime work.

In *Italy*, agreements usually define a working time of 8 hours a day; however a teleworker is free to work when it suits him during the day or the night. In the agreements, examined in the Italian report, the contract provides that there are 2-4 hours a day when the teleworker is certainly available at his working place and when he can be reached by the employer or his colleagues. In general, overtime is forbidden. Contracts also provide for some days a month when the teleworker has to go in for meetings at the head office.

In *Spain*, self-evidently, general rules on maximum working time a day, a week or a year must be applied; also general rules on weekly rest and holidays (in this matter surely with more flexibility), annual vacation and the like.

In *Sweden*, work performed in the home of the employee is excluded in the Act on Working Time (1982). It is seen as impossible for the employer to control the actual time an employee spends working. Nor do working time regulations in collective agreements apply to home-based teleworking, such as regulated working hours and compensation for overtime. Therefore it is advisable to regulate this issue in a separate agreement regarding teleworkers. The agreement can provide exact rules on working hours and availability, and/or a certain quantity of work performed during a certain time period.

Like the Act on Working Time, the Act on Paid Holidays (1977) to some extent excludes teleworkers: an employee who works from home and therefore cannot be controlled, is entitled to a special payment of 12% of

his yearly income from the employment for holidays, but not to paid vacation per se. The law does not for example guarantee the teleworker a certain number of days off work, as it does for his colleagues working from the principal workplace. Considering the development of teleworking there might be reason to reconsider the construction of the Act and let teleworkers be fully covered by the Act.

In the Netherlands, the Act on Working Time of 1919 does certainly not apply to self-employed teleworkers.

The Act may however be applicable to teleworkers-employees. It will be the same with the new Act on Working Time, which will be effective from 1996 on.

7. Responsibility

This heading covers various issues. First, the responsibility for damages. In general, the employer is responsible for any damages his employee has inflicted on someone or something, no matter where the employee works from.

Normally, so N. Bruun & M. Johnson (Sweden) indicate, this rule does not cause any problems but applied on teleworkers there is reason for concern. The presumption is that the employee is under the control of his employer and that the latter also owns the equipment the employee uses. This, however, is not always the truth when it comes to teleworking. The employer does not have (always) access to his employee's home and therefore has eventually no control over the environment or over in what manner the employee performs his work. It is also rather common that the teleworker either owns or at least uses the equipment for private purposes. The question then is, who is to be responsible for insurance payments, burglary alarms, etc.?

The teleworker is possibly legally responsible for damages which occur to the employer or to third parties. According to the *Belgian 1978 Act on Employment Contracts*, the employee/teleworker is liable for his own wilful act or gross negligence. Negligence can be cause for breaching the contract.

There are obvious problems trying to achieve the same physical security in a home compared to an office building. A company can have a very sophisticated security system with personal entry cards and personal codes for access to the on-line computer system. This can only partially be accomplished in a private home. Sometimes the company has run personal checks on applicants before they are hired, and the employee has often signed contracts regarding secrecy matters. The contracts, however, are not extended to include family members or others who might have access to the home of the employee. To achieve the same kind of security in a person's home as in the office building is so far impossible. Who then is to be responsible for secrecy and what degree of safety is required? More questions than answers,

In the *UK* if, as a result of the employee's fault in carrying out work at home, third persons suffer damage, the employer would be vicariously liable for the tort (delict) of the employee, just as much as if the tort had been committed on the employer's premises, even though the employer might have less control over the working methods of a person working away from the employer's premises. However, this principle of the law of obligations applies only to teleworkers who are employees (rather than independent contractors).

Parties may need to guarantee the confidentiality and secrecy of the information which is processed, and thus regulate access to the data through secret passwords and other safety devices.

In *Portugal*, these duties are connected with the duty of loyalty and acquire special weight in teleworking. Regarding the duty of secrecy, the supply of technology means, telecommunications improved by the enterprise or instruments of that kind (private softwares, for example) to the worker implies (his duty) of not disclosing them or denying access to outsiders, which is especially important when the worker keeps those things at home.

Company secrecy is protected in the *Swedish Act on Trade Secrets (1990)* and in collective agreements. The *Act on Secrecy (1980)*, is applicable on public authorities and concerns the right of privacy of individuals.

A major, not uncommon, problem is that personal restricted files by mistake often are sent by telefax to the wrong recipient. This problem is not caused by teleworking but can be enhanced by it. The more frequent the use of fax machines, the greater the risk.

It can be difficult to determine which injuries are to be classified as work / occupational injuries and injuries incurred during a person's free time, when the work is performed in the home.

Regarding work accidents, the (Belgian) ABB adapted its insurance policy in order to cover the teleworkers 24 hours a day since telework can be done at any moment of the day/night. Only accidents which happen inside the home are covered.

In Italy, regarding work accidents, all the agreement examined, provide an insurance policy in order to cover the teleworkers 24 hours a day, since telework can be done at any moment of the day/night.

8. Remuneration and other conditions, promotion included

Parties have to agree on remuneration and benefits. The remuneration could be a fixed wage or per piece or page, depending on the case. In the *Belgian* ABB case, the employees continued to receive their normal remuneration and benefits. Normal promotion rules applied. The same goes for training. This is also the case in *Italy*.

In *Finland*, A. Heikkilä reports, the remuneration procedure for teleworkers does not, in principle or practice, differ from other wage-earners: Tele's teleworkers had normal employment contracts, in which the salary had been determined. Thus it was based on the terms of the collective and mutual agreements.

The statutes or company specific agreements in *Finland* do not mention training or the securing of career advances of teleworkers. According to research, part-time telework does not impair training or career prospects in a *Finnish* organisation. The good results and the possibility to concentrate on work and improve work methods apparently rather promote career advances.

In Portugal, when an employee becomes a teleworker, this normally implies a specific training, as the employer has to provide the workers with appropriate vocational training.

In *Sweden*, since teleworkers in the eyes of the law and in collective agreements do not constitute a separate group of workers, the same rules and regulations regarding remunerations and promotions apply to them as to other employees. This means that an employed teleworker normally receives a monthly *salary just* like his colleagues at the principal workplace. He is also entitled to be eligible for the same training and promotions. This is natural, since the typical *Swedish* teleworker really is a telecommuter, only partially absent from the principal workplace.

In *the Netherlands*, the legislation on minimum wages, minimum holiday allowances and holiday with pay is applicable to teleworkers if their agreement can be considered as an employment contract. On the contrary, these laws does not apply when they are to be considered as self-employed

9. Privacy, including the inviolability of the workers' home

In case of telework normal privacy rules apply, in addition to other protections.

a Privacy

Privacy is a fundamental human right, laid down in Art 8 of the European Convention for the Protection of Human Rights (1950). In a number of Member States, privacy is also a Constitutionally guaranteed right. This is the case in *Austria* and also in *Belgium* where Art. 22 of the *Belgian* Constitution reads: "Everyone has the right to respect for his private and family life, except in those cases and under such conditions as indicated by law".

The right to privacy in Belgium was already recognised in the Act of 8 December 1992 concerning the protection of privacy concerning the collection and manipulation of personal data. Prior to that (and still today) the right to privacy was mostly based on Art. 8 of the European Convention for the Protection of Human Rights (1950), concluded in the framework of the Council of Europe, in which the right to privacy is laid down. That Convention has been ratified by most Member States of the Council of Europe, and has a directly binding effect.

Article 22 was only very recently (1994) introduced in the Belgian Constitution, together with the other provisions for fundamental social rights, laid down in Art 23. Originally both the right to privacy and the social rights were part of the same proposal. They were separated in the course of their parliamentary approval as it was decided that the social rights would have no directly binding effect and would have to be implemented

by consequent Acts of the legislature. The right to privacy, on the contrary, was awarded a legal status of direct and immediate effect upon citizens

Like any other right, the right to privacy is a relative one and has to be balanced in relation to other rights. One is then talking about the appropriate equilibrium between the right to privacy and other rights and interests.

In a sense, however, privacy comes first. Respect for privacy means that everyone has the right to be himself, to develop a sphere of his own where others have to stay out and have no right of intervening. This means that privacy is a general rule and invasion of privacy the exception, the necessity of which has to be proven and justified.

In principle privacy can only be invaded when the aggrieved person agrees to it and consent is given on the basis of previous and adequate information.

Finally, it is self-evident that he who invades the privacy of others, has to respect their privacy. This respect is expressed in terms of professional secrecy and/or discretion. The obtained information cannot be divulged to others. In case those obligations are not respected, there is cause for compensation (discretion) and penal sanctions and possibly compensation (professional secrecy).

These general principles are valid when hiring employees as well as in the course of the ongoing employment relationship and thereafter.

The gathering and filing of information concerning employees through smart cards, cameras, computers and so on fall under the scope of the Act 1992 concerning the protection of privacy concerning the filing and manipulation of personal data. According to that Act personal information can only be stored and used for the realisation of a previously announced and clearly indicated just cause (the principle of transparency and finality).

At the same time, the possibility of persons concerned to control data about themselves is recognised. They have the right to be informed and the right to correct the collected information. A special public body has been created, which is supposed to exercise a real surveillance on the use of the data.

The employees are to be informed concerning:

- the kind of data which are stored;
- for what purpose;
- how long they are going to be kept;
- in what way (technology);
- who is the beneficiary.

One might imagine that the enterprise could register employees' phone calls in order to establish which communications are for the business and which are private, and also monitor the duration of phone calls concerning certain transactions and the like. But under Belgian law the content of the conversation cannot be registered without permission from the competent authorities. E-mail has to be dealt with in the same way.

Combating criminal activities have to be dealt with as determined in the privacy Act (1992), which basically means that the employer would need permission from the judicial authorities to conduct surveillance activities. The same goes for wire tapping and the installation of secret cameras which are installed in order to protect against theft.

All this is relevant for the teleworker. The same goes for computer aided supervision of work. It is self-evident that when such monitoring devices are installed that the employee should be informed and eventually agree on that form of supervision. There seems to be, at first sight, no compelling reasons to install cameras or other devices to control or protect teleworkers.

In Finland, teleworkers enjoy the same protection of privacy as other Finnish citizens. Section 8 of the Constitution Act of Finland provides that each individual's privacy, honour and domiciliary peace shall be protected. The section also provides that the protection of personal data shall be prescribed by law. Likewise, the section includes provisions on the violability of letters and telephone communications as well as of other

confidential communication. It is possible by law to prescribe necessary actions to be taken in order to protect to the sphere of domiciliary peace. It is further possible bylaw to prescribe necessary restrictions regarding the insolvability of communication in connection with the investigation, trial and safety inspection of crimes endangering individual or public security or domiciliary peace. Chapter 24 of the Penal Code includes provisions on the violation of the domiciliary peace and chapter 38 contains provisions on data and communication crimes. Chapter 5 of the CoerciveCriminal Investigation Means Act (450/87) includes provisions on the conducting of house searches, and chapter 5a (402195) contains provisions on teledetecting, telemonitoring and technical control. The Personal Data File Act (471/87) is the general act on data protection in Finland. It also applies to workers' privacy, regardless of where they actually perform their work. The Act includes provisions on file-keeping. The employer is entitled to collect and consider data on workers, which are necessary with regard to the management and administration of the employment relationship. For reasons of selection it is possible to collect data on a jobseeker applying for telework, which data primarily describe the jobseeker's aptitude and Occupational qualifications. For work done at home, data on working premises and their safety may also be applied.

The Personal Data File Act is also applied,when workers are being observed in different ways (camera telephone, e-mail, network systems etc.), provided that the data collected concerned the person who is to be recognized and that they are organized into a personal file, which may also be manual.

The independent activities of the file-keepers (incl. the employer) in compliance with good file-keeping practice constitute the basis for the Personal Data File Act. The Data Protection Ombudsman has a guiding and supervisory role, which is hampered by the paucity of resources. The worker has an independent right to check his own personal data.

The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome in November 1950, is also a law currently to be observed a ssuch in Finland. Article 8 of the said Convention includes provisions on the protection of privacy.

In Ireland, the Courts have recognised a personal right to privacy, but its application is limited regarding employment matters; at the same time, the European Convention on Human Rights (1950), although signed and ratified, cannot be relied upon before the Courts.

Also in *Italy* is the right to privacy a constitutional right. In case of employees, art 4 Act 300 (1970) prohibits explicitly for the employer to use audio-visual tools for controlling workers at a distance. In other words Act 300 only allows for direct control and supervision, but prohibits the use of control at a distance by such tools as telecameras. Regarding teleworkers, the interpretation has been accepted that an. 4 only concerns tools, which produce an analogue result as telecameras; so digital memories which can only register information in binary form are not covered. Two of the examined agreements explicitly state that teleworking does not fall under the prohibition of art. 4.

Privacy is also protected by art. 8 Act. 300, which prohibits any form of inquiry on workers opinions not connected with the content of the job (religion, social or political opinion).

The Portuguese reports throws in the different rights which have to balanced out against each other: the right of the employer to control and direct the performance of the work and thus the right of the employer to intervene in the workplace, this may be the home of the teleworker; on the other hand Fundamental Law recognises the inviolability of the home (Art. 24) and the safeguarding of the privacy of private and family life (Art. 26). There is also the safeguarding of the citizens against the use of information technology whenever it jeopardises their privacy or involves the creation of files containing personal data (Art. 35.) Finally, there is also the right of all workers to "the organisation of work in socially dignifying conditions, allowing personal fullfilment (Art. 59)". One another leads to the need of a delicate evaluation and balance and A. Nunes de Carvalho concludes that the intervention of the legislator' is "almost indispensable in 'this area. For the time being, he advises to consider as applicable the corresponding precepts of the regime of homeworking.

The same privacy rules apply to teleworkers as to any other *Swedish* citizen. According to chapter 2 art. 6 of *the Swedish Constitution*, a person is protected towards the public authorities against physical intrusion of body and home, search through correspondence, tapping of the telephone, etc. The Constitution also allows a person to keep his political and religious sympathies secret. Registration and manipulation of personal data has to be

done in accordance with the law and with a person's integrity in focus. The right to privacy can be restricted by law, but only as far as necessary and for purposes that are acceptable in a democratic society.

In the Act on Collection and Manipulation of Personal Data (1973), it is stated that a licence from the *Swedish Data-Inspection* is needed in order to keep a register of people. Quite a few qualifications are required in order to obtain a licence. There are also a number of regulations and responsibilities on the licensee. There has to be a specific purpose for keeping a register, only data that are relevant to that purpose may be entered, the data can only be used according to the law or as agreed with the registered persons, and the information has to be protected against accidental or unauthorised destruction, alteration or spreading. Upon a written request the licensee is under duty to inform a person/employee whether he is registered and, if so, also of the content of the registered data. A breach of the law can lead to imprisonment for a year.

Sweden is also bound by the European Convention for the Protection of Human Rights. Art. 8 of the convention, stating the right of privacy, can be called upon directly in the Courts.

In the Netherlands, the basic right to personnel privacy is recognised in the Constitution (Art. 10, part 1); it is also contained in Art. 8 of the European Convention on Human Rights. Both have a directly binding effect and may also be invoked in private relationships, such as those which go along with teleworking.

b. Inviolability of the teleworkers home

The teleworkers' home is as a general rule selfevidently "inviolable" in the Member States of the E.U. According to article 15 of the Belgian Constitution, "a person's home (is) inviolable; no search can be made other than in the cases laid down by statute and in the manner prescribed". This applies to the teleworker's home. It should be noted that the violation is criminally sanctioned. In case of telework outside of the employee's home, e.g. in telecottages or telecentra or in decentralised units, normal rules regarding inspection apply. The labour inspector is entitled to visit them day and night. The labour inspector can visit homes only when the judicial authority grants permission beforehand.

In the national author's opinion, data collecting involving employees should be a subject for discussion in the works council or with any representative body of the employees and that agreements on this issue should be laid down in the work rules of the enterprise.

Legally there is a possibility to inspect teleworkers at home. However in practice, the Belgian labour inspection suffers from a shortage of manpower.

The teleworker can agree to a visit from the labour inspector as well as from the employer. The last can be dealt with in the individual employment contract as was provided for in the ABB case which states that in case of a visit advance notice needs to be given.

The labour inspection in *Austria* is only competent towards employees, not for employee-like persons, neither for self-employed. In case of tele-homework, permission from the teleworker is needed to visit his home.

In *Finland*, §§ 11 of the Constitution prohibits the disturbing of domestic peace. According to it, the conditions and execution of searching a home must be regulated by law.

Searching the employee's home to check that the rules for work done at home are observed is not allowed without special reasons, such as, for example, concrete suspicions of breaking the rules, and accident risk concerning the equipment assigned to the employee or an accident the employee has faced. With the consent of the employee, the occupational safety inspector and the employer can get acquainted with the work conditions at the employee's home also without such a special reason.

At Tele (case), no home inspections of any kind were even considered.

In *Ireland*, an employer would only be allowed to enter a teleworkers' home by agreement with the teleworker. This may be a general right of entry/inspection contained in the contract of employment and which could be subject to conditions as to notice etc. or it could be a specific agreement between the employer and the home teleworker in relation to a particular entry or inspection. The circumstances in which an employer could enter without agreement of the teleworker but under the sanction of the law would be very limited and might include an entry with the benefit of a Court in order to recover possession of equipment which the teleworker is refusing to return.

Inspection by State bodies, these are only likely to arise under the Health, Safety and Welfare at Work Act (1989) which gives the inspector power to entry and inspect etc. any "place of work".

According to the *Italian* constitution, a person's home is inviolable: no search can be made other than in the cases laid down by law and in the manner prescribed. This applies to teleworkers, performing at their home and is penally sanctioned. If telework is done in tele cottages or telecentres, normal rules regarding inspection apply.

In *Italy*, the question is debated whether safety and health inspections could be organised at the teleworkers home, according to Act 626 (1990) on health and safety. In case of a visit at home, advanced notice needs to be given to the teleworker.

Also in *Spain*, where privacy and inviolability of the home are constitutional rights (Art. 18), the question is open whether the labour inspection is entitled to control the application of labour standards at the homes of teleworkers.

In *Sweden*, legislation does not, however, provide the possibility to appoint a labour inspector in situations where a worker works alone. There has to be a minimum of five employees in the same location for that. Work by children is according to the law forbidden, something which also is impossible to control when work is performed in the employee's home. According to the Ordinance on Working Environment (1977), inspection by the Governmental Factory Inspection can only take place in a home at the request of the employer or employee, or else if there is a particular reason for inspection. Naturally, a teleworker can always agree to having his home inspected.

When the teleworker works from some other place than a home, such as in a telecottage, normal rules of the employer's right to inspection apply.

10 Suspension of the employment contract-justified absences

In case of suspension of the contract for reason of illness, vacation and the like, normal labour law rules apply as a general rule.

In the *Belgian ABB* case, a distinction was made between incapacity of the teleworker to work and incapacity to (physically) move. A special medical certificate to be filled in by the treating medical doctor takes care of this problem. If the doctor declares the teleworker only incapacitated to move, work has to be done at home. In case of prolonged incapacity to move, the allowance for heating, electricity and travel expenses may be adopted.

Regarding special events, like marriage and other for which an employee normally gets a number of day off with pay, the *ABB* contract foresees that, for that purpose, teleworkers are legally considered to be working from Monday on through Friday.

The *Portuguese* report mentions some particular problems. For example, the question what rules prevail when the teleworker cannot perform his duty due to a failure in electricity in the workers' house, or in a more extreme case, due to the efficiency of the electric system of the workers' house.

11. End of the employment contract - non competition clause

Normal labour law rules apply concerning the end of the contract and for non-competition clauses; nothing specific regarding telework is to be reported.

Under *Belgian* law, a non-competition covenant is permissible but must be put in writing and respect certain conditions regarding duration and the scope of activities covered by the covenant.

In the (*Belgian ABB* case a clause in the annex to the contract stipulated that either party could terminate the telework contract provided a notice of six months was given. As indicated earlier, *ABB* teleworkers always have the possibility to come back to their former status and work full-time in the office.

Similar principles are valid in other member States, like *Luxembourg, Denmark, Finland* and *Spain*.

In *Italy*, the examined agreements are intended to be experimental and their end is fixed at 6 months/ 1 year. In one case, a non-competition clause forbids teleworkers to use equipment for other companies which are in competition with the employer.

Also in *Spain*, normal rules apply. A non-competition clause is possible. The period of non-competition cannot be longer than two years if the employee is highly qualified. In Germany also a two period cannot be exceeded. A compensation equal to 50% of the remuneration must be paid.

Also in *Sweden* is termination of a teleworkers' employment contract no different from terminating any other employment contract, In the Siemens Nixdorf case it was in the agreement that one month's notice should be given after which the employer would return full time to the principal work place. Again, if a demarcation should be made, it should be made between the different categories of employment contracts. There can be a problem where a person is employed for a fixed period, since normally none of the parties then have the right to terminate the contract prematurely.

The regulations in the Act on Trade Secrets (1990) (Sweden) is an attempt to balance the freedom of speech, market economy and right of ownership, freedom of competition and the interest of workers in having control over their skill and knowledge. The law does not in principle however, contain any rules regarding a pledge of silence, just rules on responsibilities and sanctions. On the other hand it does contain statutes on the pledge of silence in labour law, instead such rules, as well as clauses on competition, are found in collective and individual agreements. There is, however, a general principle on loyalty which to a certain extent also includes an obligation of secrecy.

Non-competition *clauses* are commonplace in *Swedish* collective agreements and employment contracts.

Normally, an employer has no control over an employee's free time; but through non-competition clauses an employee is prevented from using his professional competition in any way which can harm his employer. These clauses are more strict than the duty of loyalty that comes through a regular employment contract. Therefore it is advisable to confer with one's employer before taking on any extra work. Normally, obligations between employers and employees cease when the employment comes to an end. Clauses on competition and secrets in agreements can, however, be extended to be valid over a period after the ending of the employment. A breach can be sanctioned.

B. Homeworker

1. Employee

The points raised about the teleworker/employee have equally to be dealt with if the teleworker would be considered to be a homeworker: In the Member States, where the homeworker is a specific category of employee normal labour law applies, *ceteris paribus*, like e.g. in *Spain*.

In cases where the homeworker is an employee, but does not fall under regulated employment contracts, like in *Belgium*, few labour law rules apply. There is of course no legal obligation to have a written contract of employment under *Belgian* law for homeworkers. But such a contract seems advisable and should deal with some or all the items which were previously mentioned. No specific rules prevail in case of illness, suspension of the contract, the termination of the contract or regarding competition clauses. General rules of law prevail. Basically this means that the parties are bound by their agreement or by what follows from what practice reveals.

In Germany also, certain labour laws apply, as was indicated above, but no regulation concerning working time prevails.

In *Portugal*, homework is governed by a number of mandatory rules. They cover the essential aspect of the employment relationship: privacy, duties of secrecy, health and safety, working environment, criteria for settling of the remuneration, forms of payment, Christmas bonus and termination of the agreement.

Self-evidently homework is voluntary and changes regarding the place of work would need the consent of both parties, the employer and the teleworker/employer.

The contract can be for a fixed period, an indefinite period, a task, part-time, full-time, or for replacement.

2. *Self-employed*

In case the homeworker is looked upon as a self-employed, general contractual-principles apply.

Regarding the responsibility of the teleworker/homeworker, general rules of law apply. In relation to privacy and the inviolability of the home, the same rules apply as in case of the teleworker/fully fledged employee.

C. Self-employed

In case of self-employment, no specific rules prevail in case of telework; neither is labour law applicable. So, all will depend on what the parties agree upon. This may be put in writing or be agreed upon orally, eventually following from ongoing practice between the parties involved.

Sweden illustrates the point : to be self-employed in *Sweden* means that *the* person, who hires you, has no other rights or obligations towards you than what is stated in the oral or written individual contract. General contractual law applies.

VI. EQUAL TREATMENT

Where teleworkers are treated as employees, they enjoy equal status with comparable workers. In case they are homeworkers/employees and do not fall under the full scope of labour law, like in *Belgium*, they do not enjoy necessarily similar status.

In case the teleworkers are self-employed, their rights will depend on the content of the individual agreement, which govern their relationship with the contractor.

In the Work Condition Barometer, measuring the changes and the direction of the changes in the quality of *Finnish working* life, wage earners were asked about the development of equality between men and women. The inquiry was interesting because it was made separately also to teleworkers. According to the results, telework polarises opinions so that teleworkers saw the development of equality as having been more positive or more negative than wage earners in general. 68% of the teleworkers were men, and they thought that equality is realised better than the wage earners in general thought. Among the women doing telework (30%), on the other hand, equality was felt to have been accomplished to a lesser extent than among the women workers in general.

The differences between *Finnish* men and women engaged in telework were substantial. Whereas 44% of the men thought that the development of equality had been positive, the corresponding figure among women was only 24%. The development of equality was considered negative by only ca. 10% of the men, while ca 38% of women in telework felt that the situation of equality had become worse.

In Portugal, the interdiction of discrimination based on gender, race, political or religious beliefs is prohibited by Art. 13 of the Fundamental Law. The principle is further elaborated in Decree-Law nr. 392/72.

This notwithstanding the fact that legislation concerning equal treatment and prohibition of discrimination on the basis of gender applies in all Member States to teleworkers whatever their legal status: employees, homeworkers and to self-employed. This corresponds to European requirements and concerns equal treatment regarding wages and working conditions in the broadest sense of the word. This also involves part-timers in relation to full-timers: there may be grounds for indirect discrimination on the basis of gender in case the group would be composed exclusively or predominantly of e.g. women.

In the Netherlands, the legal prohibition of discrimination on the basis of race, religion, opinion, sex or sexual orientation, both in civil and criminal law, covers all discrimination in office, occupation and trade and therefor protects the teleworkers, irrespective of their legal status, be it either employee or self-employed.

"Although it is not the case that teleworking in the UK is overwhelmingly a female occupation, it is also clear that women are in the majority in some common forms of teleworking, notably secretarial and administrative telework, writing and journalism, sales and marketing, training and education and research".

UK discrimination law is one of the areas of employment law whose application is not confined to employees but extends to all those employed under contracts personally to execute work or labour. Consequently, discrimination law *prima facie* applies to nearly all categories of teleworkers. Nevertheless, there is a problem about the application of the Equal Pay Act (1970) to workers who are not based on the employer's premises. In order to bring a case under the 1970 Act woman applicants must identify a male comparator who is employed on equal work or work of equal value and whose terms and conditions of employment are in some respect more favourable than the applicant's. However, the comparator must be employed in 'the same employment' as the applicant, and same employment is defined as where the man is 'employed by her employer or any associated employer at the same establishment or at establishments in *Great Britain* which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes. Although the point has not been considered by the courts, it is clearly arguable that the establishment of at least some types of teleworkers is their home, so that comparisons of pay cannot be made with employees of the employer who are based on the employer's premises, because that is a different establishment. It is true that cross-establishment comparisons are permitted where common terms and conditions apply to both the teleworker and those employed on the employer's premises (e.g. where a common collective agreement applies to them). However, it must be remembered that collective bargaining in the UK is declining in coverage and that, in any event, collective agreements are not legally binding in the *UK*".

“Again”, P. Davies states, “this is a disadvantage which is not unique to teleworkers: the location restriction is capable of preventing claims by workers based on the employer’s premises where the employer operates a multi-plant business but either ‘does not-bargain with trade unions at all or does so on an establishment; rather than an enterprise, basis. However, the reform of this restriction is worth considering, especially as there is some doubt about its compatibility with Article 119 of the EC Treaty and Directive 75/117, neither of which seem to contemplate such a restriction on claims.

In case of disabled workers, certain specific provisions prevail in case of homework in Belgium. In case telework is performed for the benefit of a protected enterprise (which mainly employs disabled people), the disabled teleworker would enjoy the same rights as disabled employees. This means that the protected enterprise can obtain subsidies for the adaptation of a workstation. In case of self-employment, the disabled worker can get help from the National Fund for the Handicapped for the equipment and the installation as well as obtain a loan with or without interest.

In Portugal, the legal regime regarding handicapped workers refers expressly to the performance of work at home or in appropriate centres. It foresees grants and incentives.

In *Sweden*, according to the Act on Certain Measures for Promotion of Employment (1976), a regional governmental body can instruct an employer to employ handicapped people. It can also point out ways to open up more opportunities suitable to them. Teleworking can be one way, suitable to many.

There are also state funds to help people start their own businesses. In determining, who will be given contributions from these funds, an evaluation of the applicants specific needs will be made. This may prove to be advantageous to handicapped people. The state can also help by providing the equipment a person might need to earn his income and can contribute to the extra costs for the creation of a suitable work place. The state could also give contributions for salary payments. No distinction is made, however, between teleworking handicapped workers and other handicapped employees.

There is no legislation in the UK relating directly to issues of disability or age (except in so far as age requirements may be indirectly discriminatory against women). However, legislation protecting the access of the disabled to employment is likely to be passed by the *British legislature*.

It is interesting to note that the proposed ILO Convention on homework (1995) wants homeworkers (employees) to be equally treated, *ceteris paribus*, with other employees. To this end, art. 4 of the proposed Convention reads as follows:

1. “The national policy on homework shall promote equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of homework and, where appropriate, conditions applicable to the same or a similar type of work carried out in an *enterprise*.”
2. Equality of treatment shall be promoted, in particular, in relation to:
 - a. the homeworkers’ right to establish or join organisations of their own choosing and to participate in the activities of such organisations;
 - b. protection against discrimination in employment and occupation;
 - c. protection in the field of occupational safety and health;
 - d. remuneration;
 - e. statutory social security protection;
 - f. access to training;
 - g. minimum age for admission to employment or work; and
 - h. maternity protection¹²

¹² *ILO, Homework*, Report IV(1), Geneva, 1995, 11-12

VII. INTERNATIONAL PRIVATE LABOUR LAW ASPECTS (TRANSBORDER ISSUES)

Regarding applicable law, in case a teleworker has clients or an employer across national boundaries, the European Convention of the Law Applicable to Contractual Obligation applies. This Convention has been ratified by most Member States of the E.U.

The provisions of the European Convention establish that freedom of choice of the applicable law is the general rule. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract, or the circumstances of the case: By their choice, the parties can select the law applicable to the whole or only a part of their contract. The parties may at any time agree to change the applicable law.

The choice of law made by the parties shall not result in depriving the employee of the protection afforded to him by the obligatory or mandatory rules of the law (*lois de police*) which would be applicable in the absence of choice. If the parties did not make any choice as far as the applicable law is concerned, the contract of employment shall be governed:

1. by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
2. if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated.

If, however, it appears from the circumstances that the contract is more closely connected with another country, the contract shall be governed by the law of that country. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, and those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be given to their nature and purpose and to the consequences of their application or non-application. The rules of the law of the forum shall be applied where they are mandatory irrespective of the law otherwise applicable.

The rules as laid out above, shall govern in particular:

3. interpretation;
4. performance;
5. within the limits of the powers covered on the court by its procedural law, the consequences of breach, including assessment of damages in so far as it is governed by rules of law;
6. the various ways of extinguishing obligations, and prescription and limitation of actions;
7. the consequences of the nullity of the contract.

The same applies *ceteris paribus* to the self-employed teleworker. Parties can choose applicable law. If no choice is made the law of the place where the work is done will prevail.

Some examples may illustrate one and another.

According to *Austrian* law, the applicable law is, the law of the country where the employee usually works. Parties can agree that *Austrian* law applies, in case that would be more advantageous for the employee. *Austrian wages* apply in case foreign employees operate in *Austria*.

In *Finland*, “the Employment Contracts Act’s defines which law is to be observed in employment contracts of international nature: to an employment contract with connections to different countries, the law of the employee’s home country will be applied if the employer has a place of business in this country. Otherwise the law of the country where most of the work is done is applied, or if the work can not be regarded as done primarily in some country, the law of the country where the employer has a place of business will be applied.

If the employment contract, taking into account all circumstances, in a single case is clearly more closely connected to some other country, than the one the law of which should be applied according to the clause of the contract, the law of the former shall be applied”.

It can be expressly agreed, that the law of the country where the work is primarily done or where the employee has his residence or where the employer has a place of business will be applied to the employment contract. The agreement on the law to be applied has to be made in writing.

Finnish law does not specifically mention telework, so the same apply to teleworkers as to workers.

Swedish labour law does not contain any statutory rules on which country’s law should be used when the employment relation has connections with several disparate national legal systems. These conflicts must be solved in accordance with general principles on international private law. These principles are in accordance with the rules in the Convention of the Law Applicable to Contractual Obligations of 1980, the Rome Convention, which *Sweden*, however, has not ratified

The convention establishes that freedom in the choice of law is the general rule. The choice. must be expressed or demonstrated in a contract or otherwise. It may regard the whole or part of the contract and a change of applicable law can be agreed on at any time. Regarding employment contracts, a choice of law, however, shall not deprive an individual employee of the protection mandatory rules otherwise would have given him. If the parties do not use their right to choose a law, the contract shall be governed by the law of the country in which the employee normally carries out his work and if there is no such place, by the law of the country in which his employer has his main place of business. If it is found that the contract is more closely connected to another country, however, the law of that country will be applied

Clauses in contracts on what law and what forum should be used in a conflict are very common. If there is no agreement, however, a compilation of connections to a certain country is made in each individual case. Factors such as the parties’ nationalities and residency, place of agreement and place of fulfilment of the agreement, are important. Normally, the law of the country in which the employee normally performs his work is applicable. If the employee works from various locations, the law of the country in which the company has its main production or the country where the employer’s headquarters are situated will apply. The same rules apply to self-employed teleworkers.

Through the so-called Lugano Convention of September 16, 1988, common rules regarding the recognition and execution of rulings between the European Union, and the EFTA states have been established. When conflicts arise within the European Union, the Brussels Convention of 1968 applies, a convention *Sweden has* not yet ratified The Lugano Convention is, however, parallel and practically identical to the Brussels Convention.

In the *Netherlands* the 1980 European Convention of the Law Applicable to Contractual Obligations applies in case a teleworker has clients or an employer across national boundaries. A. Jacobs (*the Netherlands* reminds us that the provisions of the European Convention establishing that freedom of choice of the applicable law, is the general rule. A contract shall be governed by the law chosen by the parties. The choice of the parties should be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By this choice the parties can select the law applicable to the whole or only a part of their contract. When no applicable law has been chosen by the parties involved, the contract of employment will firstly be governed by the law of the country in which the employee carries out his work. If the employee performs the work in different countries, the law of the employee’s contractual base of operations shall apply. If, however, it appears from the circumstances that, the contract is more closely connected with another country, the contract will be governed by the law of that country When there is no such base, the law of the domicile of the employer is applicable. Also in case the teleworker is self-employed, parties can choose applicable law. When no choice is made, the law of the place where the work is done, will prevail. Above-mentioned regulation, A. Jacobs says, implies that in case of telework parties have an enormous freedom regarding contract aspects. From this regulation it also follows that the employer can exclude the regimen of the country in which the firm is established, when the job is put out to a teleworker abroad. As such telework can easily lead to the transfer of employment as well as to so-called ‘social dumping’, i.e. calling in teleworkers who live in a country with a ‘lower’ socio-legal standard. The ‘higher’ standard in other countries may become under pressure. In the *Netherlands* this phenomenon already exists: several (large) companies have most type-work done in India. A.

Jacobs points to the enormous potentials of this development and doubts whether this should be stimulated by the law, as this phenomenon may lead to the decline of jobs in the *Netherlands* and in the-rest of *Europe*:

The Brussels Convention was also ratified by the UK. In case of a no-choice situation, the law of the country in which the employee works shall prevail. In the case of a teleworker who is resident in England but receives work from an organisation outside the UK, to which the results of the work are also sent, the contract of employment will be governed by *English law* in the absence of an express choice by the parties. Even if the parties have expressly chosen *a law to govern the contract* which is not *English law*, the employee will still have the protection of the mandatory roles of *English labour law*.

These would include the rights to a minimum period of notice, not to be unfairly dismissed, to maternity pay and to return to work after pregnancy, and to redundancy payments

VIII. COLLECTIVE LABOUR RELATIONS ASPECTS

Brief mention can be made of the collective labour law aspects. First, teleworkers enjoy freedom of association and the related collective rights, like any other worker or citizen. Collectively speaking, however, due to the fact that their labour market situation is decentralised, even atomised, the teleworkers are *de facto only a* marginal factor in the shaping of collective labour relations. The following examples may illustrate one and another.

In *Austria*, teleworkers/employees are mandatory members of Employee Chambers. However collective labour institutions do not apply to homeworkers, employee-like teleworkers or self-employed.

In Belgium, besides their normal role defending the interests of their constituencies, employer associations and trade unions pay attention to telework as previously indicated. They participate in the National Labour Council and formulate opinions on their legal position to engage, only exceptionally, in matters regarding telework. There are, as reported, some clauses in some sectoral agreements but these relate mainly to traditional manual homework. By and large, the social partners still consider this to be a marginal group of workers, but recognise and comprehend the potential of telework.

No specific rules regarding information and consultation of employees representatives in relation to telework can be reported; nor regarding the settlement of grievances nor concerning industrial conflict.

The same goes for other countries. In *Finland*, e.g. the employer and employee organisations' attitude to telework is, with a few reservations, positive. Collective agreements do however not include telework and the labour market organisations consider it unnecessary. According to the labour market organisations the basis for telework arrangements is that they are applying to company and case, based on voluntariness and that the details of the arrangements in each company are separately agreed upon in writing. The teleworkers' right to be represented vs. the employer in various information and consulting situations does not differ from the other workers. The right to represent is based on the employee's position at the workplace. Neither does the teleworker's position differ from other workers in negotiation or conflict situations.

In Germany and *the Netherlands*, the teleworker is self-evidently free to join a trade union and he will benefit from the provisions of collective agreements under normal conditions. He can be a candidate for elections for the works councils and participate in elections.

In Portugal, rules of trade union freedom apply to the teleworkers, as well as regarding the representation of employees.

In *Sweden*, teleworkers enjoy the freedom of association just like anybody else. Teleworkers are not organised in just one organisation, but the majority of *Swedish* teleworkers (working from home) belong to an organisation under *the Swedish* Central Organisation of Salaried Employees, TCO. The Central Organisation of Academics, SACO, has the biggest share of them among its members.

Special collective agreements for teleworkers in *Sweden* are still rare. So far there are comparatively few teleworkers, so individual agreements have been the natural way to regulate the terms. The interest in teleworking is increasing, however, and more attention is paid, both by the employers' and the employees' organisations.

“The historical dominance of voluntary collective bargaining in the UK has resulted in an underdeveloped system of legal representation of employees within the work place. In particular, there is no legally required system of works councils in the UK. Moreover, since the establishment of collective bargaining is a voluntary matter, the question does not arise in a legal form as to whether homeworkers should be included within the scope of bargaining arrangements.

Legal issues are confined to freedom of association and the freedom to take industrial action. Protection against acts of anti-union discrimination, whether at the point of hiring or termination or during the course of employment, is confined to those who are employees. and this is yet another example of the importance of teleworkers being brought within the category of employee, except where they are genuinely freelance.

However, provided the teleworker is an employee, the location of the employment is not relevant to the operation of the statutory protection. Although teleworkers who are employees are thus formally well protected against anti-union discrimination it is a well-established fact that trade unions have always found the recruitment of homeworkers and their representation in collective bargaining very difficult tasks.

As far as industrial conflict is concerned, the protections afforded to the organisers of industrial action usually apply to any 'person', provided they are acting in contemplation or furtherance of a 'trade dispute'. Consequently, the industrial conflict law will include teleworkers providing work personally, even if they do not fall within the narrower category of 'employee'. Thus, it would seem that the organisers of industrial action on behalf of teleworkers would be protected to the same extent as the organisers of other industrial action, even if the teleworkers were not strictly employees.

It should be noted, however, that the locational restriction on the legality of peaceful picketing will bear rather hardly on teleworkers. Lawful picketing can occur, normally, only at the picket's 'own place of work'. This means that when a workforce, consisting partly of teleworkers and partly of other workers, were in dispute with their employer, the teleworkers, rather uselessly, could picket only their own houses and not the premises of the employer, unless part of their work was discharged at the latter location. Only peripatetic teleworkers i.e. those who work 'otherwise than at any one place, would be better off, for they may picket 'any premises of his employer from which he works or from which his work is administered.' In short it is the locational aspect of telework which causes problems.

As far as strikers or those engaged in industrial action (as opposed to strike organisers or pickets) are concerned, the protection afforded to such workers by *UK* law against dismissal during the strike is very limited. In the case of unofficial strikes there is no protection; in the case of official strikes, the dismissals cannot be challenged if the employer dismisses all those engaged in the industrial action who are employed 'at the same establishment' as the dismissed worker. Once again the teleworker is at a disadvantage, this time a double one, even in relation to official strikes. He may not be regarded as an employee (only employees can complain of unfair dismissal in the first place); and his home may be regarded as an establishment separate from the employer's own premises, so that by the simple dismissal of the teleworker the employer fulfils the requirement of dismissing all those employed by it at that establishment".

Finally it should be stressed that the introduction of new technologies, in a number of Member States, like *Austria, Belgium, Germany and the Netherlands*, to give a few examples, is subject to a duty of information and consultation at enterprise level, eventually in the framework of works councils.

IX. ROLE OF PUBLIC ADMINISTRATION

A teleworker, using a computer, a modem and a fax, in general, does not need a special permission to start working at home. As indicated earlier, the labour inspector has the right, to visit homeworkers at their homes under certain conditions. The labour inspector has no access to the self-employed-teleworker. There may be a control at home by the tax authorities, provided the teleworker agrees or the necessary judicial authorities agree.

In the UK under the Wages Councils legislation which dated from the end of the nineteenth century; statutory wages councils were established to lay down minimum terms and conditions of employment in industries in which collective bargaining had not established itself and did not seem likely to do so. Among the industries which at the time were thought to be in need of this support, those employing large numbers of homeworkers, often in degrading conditions, were to the fore. In time the decisions of the wages councils as to minimum conditions came to be enforced by a wages inspectorate with wide powers of both criminal prosecution and civil recovery. However, with the emasculating and then repeal of the Wages Councils legislation in the 1980s, the wages inspectorate has disappeared as well. Consequently, today the only inspectorate which is relevant to teleworkers is the health and safety inspectorate, whose activities in this regard are the subject of a separate report.

X. POINTS OF VIEW

Points of view of Governments and of social partners can be summarised as follows.

Governments, in general, support telework, especially as another form of creating jobs. This is also underlined in the 1993 Delors White Paper on Growth, Competitiveness and Employment.

So do employers; they also are positive regarding telework, provided it is economically justified and adds to flexibility, regarding, the place 'and conditions of work:' 'Also trade- union organisation although 'in the beginning rather hesitant of telework, as it reminded them of certain forms of homework, going back to older days, today accept telework, provided it is voluntary and worker's rights, as well individual as collective, including a proper work environment, are protected and guaranteed.

In The Netherlands, for example the largest trade union confederation, the FNV, in a 1991 document on telework urged the improvement of the legal position of teleworkers by way of statutes and collective agreements.

Employers are usually of the opinion that no specific protective legislation is needed, neither for homework, nor for telework. The existing legal framework should be sufficient. Trade unions on the contrary want the teleworkers (including the homeworkers) to enjoy full employee rights.

In the UK, to give one example, the government is strongly in favour of greater use being made by employers of telework. The government sees the introduction of telework as essentially a matter for managerial decision. Though there is stress on the need to select and train teleworkers carefully, there is no discussion of the question of how far the introduction of telework requires the consent of the employees, who will be so employed or of the involvement of trade unions in the process. Nor is there any suggestion that the government considers that the existing framework of labour law, social security or health and safety needs to be amended to facilitate the process of introducing telework or to protect the workers who may be employed in this way.

As far as trade unions are concerned, they have normally called for heavy regulation or even the prohibition of homeworking. Whilst still wishing to assert that the mere addition of computing and telecommunications equipment does not necessarily turn a casual and precarious job into something different, nevertheless in recent years *some trade unions in the UK have* begun to take a more discriminating and positive attitude towards teleworking. Partly because trade unions have been learning to cope with what appears to be a permanently more flexible labour market and partly because some telework jobs are clearly high-value ones, some trade unions have begun to take a more favourable attitude towards this form of employment. The union guidelines suggest no opposition to telework in principle, but rather a concern to ensure a proper working environment for the employee, the allocation of the costs of providing that environment to the employer, the voluntary nature of telework arrangements, the preservation of the worker's status as an employee, the proper integration of the worker into the employer's organisation, and a role for the trade union in the setting up of telework arrangements.

As for employers' organisations, the position of the Confederation of British Industry is that there should be no other overall policies to encourage nor a detailed legislative framework which might constrain the development of telework. Instead, the use of telework should develop 'from the "bottom up" as a response to particular situations. Managers who had been involved in the running of telework schemes seemed in general to be well satisfied with the way in which they had operated.

CONCLUDING REMARKS AND FUTURE DEVELOPMENTS

Work at a distance

Telework, this is the work performed (mainly or for an important part) at a location other than the traditional workplace of the employer, involving the use of telecommunications, although still marginal in most of the Member States, as far as numbers is concerned is undoubtedly in the lift. This goes along with the fundamental changes on our labour markets, moving towards an information- and network society, based on of technical developments which make its implementation *easier* and partly because it can help to address certain contemporary social needs, notably greater flexibility in working patterns for both employers and employees.

Emerging, from home

Teleworkers engage in white collar tasks of all sorts, ranging from people who work at low-level, relatively unskilled, to highly skilled professionals, with much after sought talents. Most of them seem to be working from their homes.

Economic and social efficiency

Giving the growing importance of telework, the question arises whether the actual portfolio of labour law and contractual laws is adequate to monitor telework and to exploit its full potential, especially in the area of job creation, while at the same time establishing and maintaining an adequate balance between economic and social efficiency in this moving part of the labour markets.

No specific legislation

The fact is that, in most Member States, no specific rules have been developed to monitor telework. The same can be said about specific collective agreements; they are rather rare. So it goes for work rules and case laws. Individual agreements, either in writing or informal, however, deal with a number of issues.

This has a consequence that when determining the legal status of the teleworkers, one has basically to fall back on existing and traditional legal categories and the arsenal of rules which go along with their application. This means that the traditional *Summa divisio* of the labour market prevails : teleworkers are either employees or self-employed.

Employees or self-employed and homeworkers

This means that in many countries teleworkers are either looked upon as employees or as self-employed depending on the nature of their relationship with their contractor. In certain Member States there is an in between category, either legally organised or de facto, nl. the homeworker - a kind of almost forgotten - but now, thanks to telework, revived category, which mainly applied to manual homeworkers. As a homeworker, the teleworker, can be an employee, possibly of a specific sort or again be classified as a self-employed, depending on the applicable legislation and caselaw of the Member State(s) *in* which he performs.

The summa divisio between teleworkers is clear cut: either employees or self-employed. In some countries a distinction will be made between self-employed at the one hand and entrepreneurs at the other hand. But this is not so relevant here, as for both, self-employed and entrepreneurs, labour law does not apply.

If the work is done in subordination, under the command and the control of the contractor, the teleworker will control at a distance concerning working time, work speed and work performed, mistakes and the like.

The basic notion of subordination varies from country to country, also depending on the legal overtones or the more economic character of the dependency retained.

One and another is extremely important. In case of subordination, labour law applies and with it a protective umbrella of minimum standards with social protection and specific social security provisions. In case of self-employment, there is only the protection, the written, eventually informal, agreement contains.

A teleworker can be part-time, have contract for a fixed period, for an indefinite period, can be a temporary worker and the like. All possible categories and sorts of agreements Can apply to him

A fact, however, is, that the dynamic, determining the legal status of the teleworker is pointed to the category of the self-employed. The reason is simple : a self-employed worker is less expensive from the point of view of social security costs and much more flexible, as no protective labour standards apply and full contractual freedom prevails, which can be in the (economic) advantage of either party depending on their respective market strength. Some national reporters have expressed concern that this may be a route to undermine protective labour standards and that one should prevent treating workers, who are genuinely integrated into the employer's organisation, as non-employees, with self-evidently due regard for genuine freelance workers for whom self-employed status would seem fully appropriate.

Conditions

No information seems available about the conditions under which self-employed teleworkers perform their tasks, unless the general consideration that contractual freedom prevails, which means that voluntarism plays at full. Here, more data gathering is indicated, as well as regarding the kind of jobs and the conditions under which telework is performed.

Regarding teleworkers/employees, including homeworkers, conditions relate to :

- voluntarism (telework cannot be imposed and consent is needed);
- form of contract : in writing or informal; here Directive 91/553 EEC on the employer's obligation to inform employees on the conditions of his employment contract has to be mentioned;
- job description and function : mostly laid down in individual agreements;
- work place : freedom to choose; expenses for heating and lighting...;
- infrastructure and equipment;
- working time, showing great diversity between the various cases;
- responsibility for damages, security, safety, secrecy and the lie;
- remuneration and other conditions, promotion included;
- suspension of the employment contract and justified absences;
- end of the employment contract and clauses of non-competition.

By and large, the cases of the teleworkers, reported on, give a picture of a teleworker, who freely engages in telework, has the right to come back to headquarters and is basically treated as another employee.

Privacy

Here, particular problems arise, since many teleworkers perform from home and consequently there is a possible fusion and overlap of work and private life, of working time and leisure time, of work place and home. So, privacy, the right to respect for his private and family life, is at stake.

Privacy is a fundamental right, explicitly recognised in most Member States and contained in art.8 of the European Convention on the Protection of Human Rights, which has been ratified by most Member States. It fully applies to teleworkers.

This means that supervision, in case of computer aided control of telework, must be relevant and justified e.g. necessary for adequate performance of the job or for the protection of the rights of third parties, that the teleworker must be informed and eventually agree with the supervision. If information is gathered through smartcards, computers and the like, legislation concerning manipulation of data may play; that principles of transparency and finality should prevail, as well as the possibility for the teleworkers to control data about themselves : they should have the right to be informed and the right to correct the collected information.

There is also the question of the inviolability of the teleworkers' home. The employer has no right to visit the inspect the home of the teleworker, unless this is agreed upon. The labour inspector can, in normal circumstances, only visit the home of the teleworker with the benefit of a judicial authority.

Equal treatment

Here different points can be retained. First, where teleworkers are treated as employees, they enjoy equal treatment with comparable office workers. The same goes for homeworkers, if they are regarded to be employees. Secondly, equal gender legislation applies, also to possible indirect discrimination if unequal conditions would have to be linked with the fact that the majority of a group of workers would belong to one specific gender. Rightly, the UK report reveals difficulties in the organisation of comparison of e.g. pay, when homeworkers are involved. Thirdly, some Member States have specific provisions in case of disabled workers in relation to homework.

In this context one should also note that the ILO in its proposed Convention on Homework wants homeworkers=employees to be treated equally in relation to other (office-enterprise) employees.

Transborder issues

In case of transborder telework, mention should be made of the European Convention on the Law applicable to Contractual Obligations (1980), which has been ratified by most Member States. This means that the freedom of choice of the applicable law is the general rule.

Regarding employees, however, special rules prevail. The choice of law shall not result in depriving the employee of the protection afforded to him by the obligatory or mandatory rules of law which would be applicable in the absence of choice. In case of no choice by the parties, the law applies of the country where the employee habitually carries out his work in performance of the contract. If work is done in more countries, the place of the business through which he was engaged is determining for the applicable law.

A. Jacobs points out that the freedom of choice of applicable law may have an effect on employment and lead to the decline of jobs in *the Netherlands* and in the rest of *Europe*.

Collective aspects

Teleworkers/employees enjoy all collective rights, like the right to associate, bargaining collectively and to engage in industrial action. It is however a fact of life that it is difficult, at least in a given number of countries, to organise teleworkers and to bargain collectively for them, let alone organise industrial strife. In fact there are few collective agreements dealing with telework. This should not wonder as telework is an example of decentralisation, let alone atomisation of the employment relations. One should also keep in mind that many teleworkers, maybe most of them, also in the future, will operate in a freelance basis.

Points of view

It is clear that telework stirs up a lot of interest. Governments, in general support telework, as another form of creating jobs, as is also underlined in the Delors White Paper (1993) on Growth, Competitiveness and Employment.

So do employers; they also are positive regarding telework, provided it is economically justified and adds to flexibility, regarding the place and conditions of work. Also trade union organisations, although in the beginning rather hesitant of telework, as it reminded them of certain forms of homework; going back to older days, today accept telework, provided it is voluntary and worker's rights, as well individual as collective, including a proper work environment, are protected and guaranteed. Some trade unions however fear that collective labour relations may become undermined.

Employers are usually of the opinion that no specific protective legislation is needed, neither for homework, nor for telework. The existing legal framework should be sufficient. Trade unions on the contrary want the teleworkers (including the homeworker) to enjoy full employee rights.

Future developments

No action

Although telework is bound to grow in importance and numbers, it remains up to now so marginal in some Member States that no real specific attention has been paid and that no specific measures, specifically

regulating the employment relation of the teleworker, are considered in the near future. Some Member States consider the present legal situation to be adequate, also for the near future.

Some other Member States have set up task forces to examine and consider the implications involved and the follow up to be given. This a.o. in the case in *Finland* and *Sweden*.

Study

In *Finland*, the telework committee's (1990) view was, that the existing labour legislation is relatively applicable also to telework and there is no need for separate legislature reforms because of telework. However, in connection with the general reform of legislation, attention should be paid to clarifying the terms of employment in telework.

The Finnish government's program (1995) has a mention of this reform of labour legislation: labour legislation will be reformed tripartitely, taking into account the developments in working life. "The position of those working according to different working hour arrangements and in atypical employment relationships will be clarified and secured. The legislation on working hours, annual vacations and codetermination will be reformed so, that both, the protection of employees and the increase of flexibility, are achieved at the same time".

"The *Finnish* national telework development program (1995) proposes that, the Ministry of Justice together with the Ministry of Finance, the Ministry of Labour and Ministry of Health and Security and the labour market parties immediately start a joint-project, in which the comprehensive *Finnish* situation of atypical employment contracts and models of work (including telework) are studied in relation to legislation, social and regional policy and taxation and contract practice. On the basis of this account proposals will be made to change the legislation and taxation practices keeping in mind the future development of working life".

In *Sweden*, a special commission (1995) shall try to find solutions to the labour law problems pointed out by social partners. One reason for setting up the commission is the transfer from an industrial society to an information society. The new technology has made it possible to change the work structure, and has made work less dependent on where and when it is performed. New forms of employment are emerging to an increasing extent, and it will be natural for the commission to bring up the question of atypical employment, such as teleworking, in their work. A report will be prepared by 1996.

Existing laws and regulations as well as collective agreements in *Sweden* are based on the assumption that work is performed under the control of and subordination to an employer. This perception is not well suited to teleworking situations, but no new laws on telework or teleworking are expected in the near future. Most likely we will, however, see an increase in collective agreements and individual contracts regulating the special the need of flexible instruments also increases.

Homework : equal treatment

A certain movement can be seen in the reorganisation and regulation of homework. Examples are *Belgium* and the proposed ILO Convention concerning homework. This is important for a number of reasons. First, a lot of telework is done from home, probably the bulk of it. Secondly, the definition of homework is a broad one : it covers work performed, as well from home as on other premises, other than the workplace of the employer. Thirdly, the proposals concern only homeworkers, who can be considered as employees, leaving the independent-self-employment out of the reach of labour law or of other special social protection. Fourthly, the idea is one of equal treatment : between homeworkers and other wage earners.

Indeed, it is very likely that specific rules will be accepted in *Belgium* in the near future concerning homework, including telework. A legislative proposal has been prepared by the Government (27 January 1995), but has not yet been adopted by Parliament. That proposal provides for identification of the parties, a written contract with an obligatory content and clauses concerning remuneration, working time and the like. The proposal is however limited to employees-teleworkers only, who work at home or at a place of their choice. No regulation is provided for self-employed. They continue to be covered by agreements made between the parties and this may not amount to much. In this context, the *Belgian* national report reads as follows: "It is important to consider whether it is useful to continue distinguishing between employees and self-employed as the notion of subordination, used as the criterion to distinguish between the two, gets blurred and fades away in the variety of situations in which people may perform telework in return for remuneration. It seems that the classical

method of classifying workers as either employees or self-employed is less and less suited to answer to the needs to protect for teleworkers in the future”.

Art. 4 of the proposed ILO Convention *on Homework* wants equal *treatment* between homeworkers and other wage earners, taking into account the special characteristics of homework. According to the ILO, equality of treatment should be promoted, in particular, in relation to:

- a) the homeworkers’ right to establish or join organisations of their own choosing and to participate in the activities of such organisations;
- b) protection against discrimination in employment and occupation;
- c) protection in the field of occupational safety and health;
- d) remuneration;
- e) statutory social security protection;
- f) access to training;
- g) minimum age for admission to employment or work; and
- h) maternity protection” (art. 4).

National laws should also, where appropriate, establish conditions under which, for reasons of safety and health, certain types of work and the use of certain substances may be prohibited in homework (art. 7).

Promotion of self-employment

Another deliberate movement can be discerned, namely in the direction of promoting the legal status of self-employment in telework. This development has been particularly encouraged by recent legislation (1994) in *France*, where teleworkers, if registered as a tradesman or as a commercial agent, are *de jure* looked upon as self-employed, unless proof of the contrary is given, so that eventual contractors will not shy away from providing the teleworker with business out of fear of being confronted with labour law protection. J.E. Ray underlines that teleworkers, who are not registered as such, may not be chosen to perform as teleworkers and rather slim and *de facto* non-existent, since teleworkers may fear for retaliation of not getting new contracts. This movement towards the independisation of teleworkers in France is a remarkable feature and can be discerned in other Member-States. The same possibility of “independisation” is available in *Luxembourg*, where M. Feyereisen fears similar developments.

J. Koukiadis (Greece), stresses that this tendency may undermine traditional labour law protection of employed persons. In this line of thought he welcomes a new Act (1990) in Greece whereby collective agreements are also applicable to independent workers, whenever it is evident that they are economic and social dependent. Inter-industry agreements thus could provide conditions for eventual dependent teleworkers.

Other Proposals

P. Davies (UK) underlines that the regulatory problems which face teleworkers are not unique to them and, indeed, that teleworkers do not form a homogenous group of workers. This is not to argue, of course, that problems which teleworkers have in common with analogous groups of worker should not be addressed. Within the current framework of *UK* labour law two such problems stand out. The first is the need to ensure that teleworkers and other atypical workers, who are not genuinely independent from an economic perspective, should be treated as employees rather than as independent contractors. The second is to review the operation of establishment restrictions in *UK* law, which can produce some startling and unjustifiable results when the teleworkers’ home is treated as a separate establishment.

J.E. Ray (*France*) pleads for the inclusion in the individual contracts of the teleworkers of specific clauses concerning :

- 1) a return clause as well for the teleworker as for the employer;
- 2) the (exclusive) utilisation of the equipment;

3) a complete list, relating to secrecy requirements (codes, disks, memories, safe, access to the office and the like);

4) costs of infrastructure and use of telecommunications;

5) control working time, whereby a distinction has to be made between

1) telework, with permanent contact with headquarters

2) telework, rewarded on a piece basis (pages of translation), or

3) telework, involving a complex task for which only a lump sum reward system is appropriate.

A special question relates to the situation where a teleworker is asked to be at the disposal of the contractor any time for urgent work of translation, e.g. at night. Is this work or how to be rewarded ?

Collective bargaining may be an appropriate way to deal with flexibility aspects; especially regarding working time for teleworkers, while specific problems arise concerning the collective representation of teleworkers and their taking into account for thresholds.

These issues, J.E. Ray underlines, have urgently to be addressed.

Labour inspection ?

Specific needs may relate to the content of contracts, suitability of the workplace, the workload, elementary rest, privacy, income guarantee and others. Establishing rules however; is one issue, but monitoring them is quite another. It may be almost impossible to organise labour inspections when homes increasingly become places of work, as also W. Däubler and P. Wedde underline in the German report..

Creativity -Research

A lot of creativity and common sense will be needed to find the right balance between traditional labour law and the new realities of telework, including self-employed workers, taking into account the special characteristics of homework and, where appropriate, conditions applicable to the same or a similar type of work carried out in an enterprise.

It is however evident, as has been demonstrated in the course of this general report, that more field work needs to be undertaken in order to get a better view and insight of the evolving world of telework and the complex relationships it may entail.

ANNEX: Outline for the national reports

INTRODUCTION

A. Scope of the study

Telework is an integral part of fundamental changes on the labour market.¹³ The labour law study will consequently take a broad approach, but concentrate mainly on those aspects in which work is done by using telecommunications, which leads to new forms of work, away from traditional pattern¹⁴ and especially working in a way which is independent from a fixed location.¹⁵ These forms of work may lead to the status of self-employed, relate to projects, working à la carte and others. So the idea is to concentrate on new(er) patterns of employment linked to telecommunications.

This study is part of larger study of Telework. Aside from labour law, this study will also deal with social sanity and health and safety aspects. Each of those three aspects will be studied in separate national reports, leading to three comparative reports, which themselves will be summarised in a consolidated report.

For each of the three aspects a European report, as well as an international report could be drafted.

B. Labour law

The reports aim to describe the present status of the law (legislation, case law, collective agreements, work rules, individual employment contracts, custom, formal and informal practices) regarding Telework. The national reports should indicate the specific rules which are in place regarding Telework; if there are no specific rules the report should indicate what kind of other rules apply, without describing those (latter) rules in detail. Attention should also be paid to the points of view of the political and social actors.

The study may contain some introductory remarks concerning the introduction of new technologies and labour law.

C. Terminology

National reporters are asked to follow as close as possible the terminology used in the *Employment and Industrial Relations Glossaries*, published by the European Foundation for the Improvement of Living and Working Conditions.

¹³ The object of the study will be indicated in a preamble. This will include a number of examples of concrete situations under which telework at present is performed.

¹⁴ Such as full-time contract of employment for an indefinite period in a given location, provided for by the employer.

¹⁵ In other words, moving work to workers instead of moving the workers to work.

I. DEFINITIONS AND CATEGORIES

Relevant categories of workers : employees, self employed, homeworkers or other

Relevant categories of employment contracts (indefinite, fixed period, temporary, replacement...)

Telework and teleworker

Some statistical data on the-number of teleworkers;homeworkers .

II. SOURCES

Legislation

Case Law

Collective agreements

Work Rules

Individual contracts

Custom

Formal and informal practices

Short bibliography

III. POINTS OF VIEW

Political (Government, main political parties...)

Social Partners

Others

IV. LEGAL STATUS OF THE TELEWORKER¹⁶

Employee. (blue, white, homeworker

Single-multiple employer

Self-employed

One/several contractors

Homeworker

Other

Thresholds

V. EMPLOYMENT CONDITIONS

A. Employees

* Promotion

¹⁶ Here the notion of subordination may be of importance.

- * Form of the contract (written, verbal, other...)
 - * Working time
 - * Work place
 - * Responsibility
 - * Data protection and security
 - * Damages
 - * Privacy
 - * Equipment
 - * Remuneration including expenses
 - * Training
 - * Suspension of the employment Contract (illness, holidays...)
 - * End of the contract
 - * Non competition clause
- B. Self-employed¹⁷ (wherever appropriate)
- * Voluntarism¹⁸-Mobility : return to traditional work
 - * Form of the contract (writing:..)
 - * working time
 - * Work place
 - * Responsibility
 - * Data protection and security
 - * Damages
 - * Privacy
 - * Equipment
 - * Including expenses
 - * Training
 - * Suspension of the employment contract (illness, holidays...)
 - * End of the contract
 - * Non competition clause

C Homeworkers

In certain Member States, homeworker is a specific category. Where this is indicated one should pay attention to the points enumerated under VI A, as far as appropriate.

D. others

VI. EQUAL TREATMENT

¹⁷ As far as appropriate.

¹⁸ Can the employer impose Telework? Can acceptance by the employee mean a modification of the contract?

- * Gender
- * Disabled
- * Age

VII. INTERNATIONAL PRIVATE LABOUR LAW ASPECTS (TRANSBORDER ISSUES)

- * Applicable law
- * Social security, taxation, data protection

VIII. COLLECTIVE ASPECTS

- * Freedom of association
- * Role of the employer associations and trade unions
- * Information and consultation of employees representatives
- * Collective bargaining
- * Settlement of grievances and disputes
- * Industrial Conflict

IX. ROLE OF PUBLIC ADMINISTRATION

- * Labour and Social Affairs (including environment)
- * Role of Courts
- * others

X. FUTURE DEVELOPMENTS

In the area of labour law and law for independent workers. Views of the political and social actors. If Telework is becoming more important are the -existing rules appropriate ?

XXXXXXXXXXXXXXXXXX

CASES

If case material is available, describing Telework realities, they should be used as appropriate. It may be indicated that the same cases could be referred to in the various national reports (Labour Law-Social Security-Health and Safety) for the same E.U. Member States. National reporters should work together to this end wherever appropriate.

GUIDELINES

National reports should be made according to guidelines concerning format, structure, footnotes, bibliography and the like.

One copy of the text should be send to the general reporter and one to Mr. E. Ghler, Dublin Foundation. The text should also be delivered on a disk.

TIMETABLE

National reports should be in the latest by July 15, 1995

LANGUAGES

The reports should be drafted in either *English or French*

LENGTH

National reports should be maximum 25 pages each page containing 40 lines

Roger Blanpain

27 April 1995