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Legal Regulation of Remote Work in Slovakia and the Covid-19 Pandemic

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Abstract. This paper aims to examine the development of the legal regulation of remote working arrangements in Slovak labour law and to determine the main legal issues that keep this type of work from being more widely utilised in practice. To this end, the article analyses the applicable provisions of the Slovak Labour code, as they developed throughout the years, in particular the changes implemented in connection with the Covid-19n pandemic. It also investigates other applicable sources of law, as well as case law and relevant literature. The main issues identified by the article that need to be addressed by the legislator, involve three areas: (i.) formulation of the place of work in the employment agreement, (ii.) working time and rest periods of remote workers and (iii.) the range of supervisory powers of the employer vis-à-vis remote workers. The author argues that the legislator ought to create more favourable and clear legal conditions for remote work and to enable this type of work to be performed under all contractual types recognised by Slovak labour law, not just in the (standard) employment relationship.

Keywords: home work, telework, remote work, place of work, right to disconnect, covid-19, workplace privacy.

JEL Classification: K31, K24

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1. INTRODUCTION

Even though remote work has been legally recognised for decades in Slovakia, it has been struggling to get a foothold in practice. In 2005, only 3,4% of employees in Slovakia were involved in telework almost all of the time and 7,2% a quarter of the time or more (Eurofound, 2010). Ten years later 12% of employees and self-employed were working in a telework or ICT-based mobile work (TICTM) arrangements in Slovakia (Eurofound, 2020, p. 8), which was still one of the lowest in the EU. Low attractivity of remote work for employers could be at least partially put down to many legal uncertainties associated with such arrangement, especially those relating to working time, as

the self-scheduling of working time by an employee used to be one of the defining characteristics of home work and telework in Slovak law. Employers were concerned they would not have sufficient legal instruments at their disposal to ensure that home workers and teleworkers work when the employer needed them. Another sticking point has to do with limited scope for controlling employees working remotely.

The turning point in this respect came with the advent of the pandemic of Covid-19. Due to measures adopted by the government to prevent spread of the disease, many employers resorted (more or less reluctantly) to the implementation of remote work.[1] In June 2020, 67,2% of employees in Slovakia worked at their employer's premises and 29,8% worked at home (Eurofound, 2021). That was a substantial increase from 12% a few years earlier. In February 2021, the share of employees working from home further increased to 32,9%, with 57% working at their employer's premises (Eurofound, 2021). It should be noted that in June 2020 the first wave of the pandemic was almost over while in February 2021, the second wave was at its peak in Slovakia.

Given the changing patterns of work, associated with the fourth industrial revolution and increased mobility of workers, further increase of remote work is only to be expected. The legislator should therefore create conditions to facilitate further expansion of remote working arrangements. This paper will analyse the development of the legal regulation of remote work in Slovakia and seek to identify pertaining issues that need to be addressed in order to help remote work to become rooted not only in Slovak legislation, but in practice as well.

1. DEVELOPMENT OF THE LEGAL REGULATION

1.1. Labour Code of 1965 and the Regulation of Home Work

Legal regulation of work carried out outside the actual workplace has quite a long history in (Czecho)Slovak labour law. The first codification of labour law – the Labour Code of 1965,[2] already contained provisions on home work right from the outset. They were inserted in the final (6th) part of the Labour code in an article entitled "Special arrangements for the employment of certain workers". According to § 267 (1)[3] certain exceptions shall apply with respect to employment relationship of workers who, according to the employment contract, do not work at the workplace of the organization, but perform the agreed work for it at home. Noteworthy is the fact that even back in the sixties (during the communist regime) the home work was established on a contractual basis, which was explicitly underscored in the cited provision.

Three exceptions from the otherwise applicable rules related to home work. Firstly, provisions on the arrangement of the determined weekly working time and on idle time did not apply to home workers. Secondly, in the event of personal obstacles to work, they were not entitled to wage compensation from the employer. Finally, they were not entitled to any premium payment for overtime, for work on public holidays, night work and work on Sundays.

[1] Remote work or interruption of operations of undertakings was expressly ordered by authorities only with respect to certain sectors (e.g. schools, shopping malls, hospitality industry etc.), not generally, but measures such as radical reduction of public transport connections, mandatory testing or measures regarding the maximum number of people in a room effectively prevented many employers from operating normally. Remote work was, however, officially recommended by the Ministry of Labour.

[2] Act No. 65/1965 Coll. of 16 June 1965 Labour Code. Effective as of 1 January 1966, the original Labour Code continued to apply in both Slovakia and the Czech Republic even after the separation of Czechoslovakia (although after 1 January 1993 with different amendments in each country) until being replaced by the new Slovak Labour Code (Act No. 311/2001 Coll.) as of 1 April 2002 and the new Czech Labour Code (Act No. 262/2006 Coll.) effective from 1 January 2007.

[3] The provision was later amended and renumbered as § 267 (2).

This provision was later moved from § 267 (1) to § 267 (2) and fine-tuned, but in principle remained in force until 31 March 2002. On 1 April 2002, the new Slovak Labour code came into effect.

1.2. The New Slovak Labour Code of 2001 and the Reception of the Rules on Home Work

Slovakia adopted a new Labour Code on 2 July 2001 (*see* Labour Code, 2012). This codification retained the rules on home work from the previous legislation. They were, however, moved from the final provisions into the core of the Labour Code. A new section - §52 entitled "*Home worker*" was created within the second part of the Labour code, which addresses the employment relationship. This, however, came with one important caveat. Being incorporated in the second part of the Labour code, §52 did not apply to atypical working arrangements, regulated in the 9th part of the Labour code.[4] The rules on home work thus ever since remain limited to the (standard) employment relationship.

Originally the new §52 only comprised two clauses. The first clause largely corresponds to the original rules from the previous code, while accentuating two points. The first one concerns the place where the home worker performs the work. The new wording explicitly states that the home worker can carry out his/her work vis-à-vis the employer not only at the worker's home, but also at another place. This other place, however, cannot be determined unilaterally by the employee, but needs to be agreed with the employer. That was a shift from the previous rules that only allowed the home worker to work at home. The second point involves organisation of the working time, as the new phrasing stresses that it is the home worker himself/herself who schedules his/her working time.

The three derogations from the standard rules, that apply to home work, remained largely unchanged, with two minor differences, concerning the types of wage compensations to which home workers are (or are not) entitled.

One difference was that home workers were made eligible to wage compensation in the event of three specific personal obstacles to work: the death of a family member, one's own wedding and the wedding of employees' children. The second alteration was restrictive in nature since wage compensation for work in a difficult and unhealthy work environment was added to the list of compensations to which home workers are not entitled.

The most important change, however, was the introduction of a negative definition of a home worker. According to § 52 (2) an employee who, occasionally or in exceptional circumstances, with the consent of the employer carries out his/her work at home or at a place other than the usual place of work, provided that the type of work performed by the employee under the employment contract allows it, shall not be deemed to be a home worker. This means two things: *(i)* that one of the essential characteristics of home work is its regularity; *(ii)* effective creation of a new category, which is usually being referred to as home office. Home office will mean work performed at a place other than the usual workplace at the employer's premises on an irregular basis, with employer's permission. Provisions of § 52 will not apply to such an arrangement.

[4] Officially called Agreements on work performed outside employment relationship. The 9th part of the Labour code distinguishes three types of such agreements: Work performance agreement (SK: Dohoda o vykonaní práce, §226), Agreement on temporary job of students (SK: Dohoda o brigádnickej práci študentov, §§ 227-228) and Agreement on work activity (SK: Dohoda o pracovnej činnosti, §228a).

1.3. Introduction of Telework into the Labour Code in 2007

Significant revision of §52 was brought about by amendment No. 348/2007 Coll.,[5] that incorporated telework into this article, which is now entitled "Home work and telework". The original two paragraphs were extended to five. The amendment defines teleworker as an employee who performs work for an employer at home or at another agreed place, pursuant to conditions agreed in the employment contract, using information technology. The definition of a home worker remained roughly the same – it is an employee who performs work for an employer at home or at another agreed place, pursuant to conditions agreed in the employment contract. Integral part of the definition of both categories is that it is the employee who schedules his/her working time (§ 52 para 1). The three derogations from standard rules, that now apply to both home work and teleworkers (see above) remained unchanged.[6]

Newly added clause (§ 52 para 2) requires the employer to adopt appropriate measures to facilitate telework, namely:

i. to provide, install and perform regular maintenance of hardware and software necessary for the performance of telework, except in cases where an employee performing telework uses his/her own equipment;
ii. to ensure, especially with regard to software, protection of data processed and used in telework;
iii. to inform the employee of all restrictions on the use of hardware and software and of the penalties for any breach of these restrictions.

Two additional clauses were appended to §52 that apply to both home work and telework, aimed at ensuring wellbeing and equal treatment of these categories of workers. Under § 52 (3) the employer is obliged to adopt measures to prevent home workers and teleworkers from becoming isolated from other employees and give them an opportunity to meet with other employees. Principle of equal treatment is enshrined in §52 (4), according to which working conditions of home workers and teleworkers may not disadvantage them in comparison with comparable employees who work in the employer's workplace.

Finally, the negative definition of home work (see above), originally contained in § 52 (2), was moved to §52 (5) and now includes telework as well. Thus, an employee, who works at home or at another than the usual agreed workplace only occasionally or in exceptional circumstances with the consent of or under an agreement with employer, provided that the type of work that the employee performs under the employment contract allows that, is not deemed to be a home worker or a teleworker.

Legal setting created by amendment No. 348/2007 Coll. means that the Labour code distinguishes home work and telework as two different categories, but subjects them to the same legal regime (*see* Barancová et al., 2019), with a set of additional obligations for employers utilising telework. This solution is not generally acclaimed. Professor Schronk considers telework to be just a variation of home work and argues that the title of §52 should have remained unchanged (just "Home work") with additional requirements applicable if home worker uses information technology for work (Schronk, 2018, p. 62). One cannot but agree with this position, but given that home worker doesn't necessarily need to work from home, perhaps an umbrella term "remote work" (SK: práca na diaľku) could be used to cover both categories.

[5] Act No. 348/2007 Coll. of 28 June 2007, amending and supplementing Act No. 311/2001 Coll. Labour Code, and certain other laws.

[6] The entitlement to wage compensation for home workers (and now also to teleworkers) in the event of employee's own wedding and the wedding of employees' children was abolished back in 2004 by Act No. 210/2003 Coll.

2. AMENDMENTS ADOPTED IN THE WAKE OF THE OUTBREAK OF THE COVID-19 PANDEMIC

2.1. Amendment No. 66/2020 Coll. Introducing Home-office during States of Emergency

Shortly after the outbreak of the pandemic, new Slovak government pushed through the parliament a quick amendment[7] of the Labour code, which added a completely new (11th) part to the code. This part is only intended to be applied in extraordinary circumstances. It is therefore entitled as: Special provisions in time of emergency situation (sk: *mimoriadna situácia*), state of emergency (sk: *núdzový stav*) and exceptional state (sk: *výnimočný stav*).[8] Under these circumstances,[9] the normal provisions of the Labour code shall apply with the exceptions provided for in this new 11th part.

The key point of this amendment is introduction of the concept of Home-office in § 250b (2) (as opposed to Homework and Telework under § 52 of the Labour code). The crucial difference in comparison with homework and telework is that Home-office[10] may be instituted unilaterally by either employer or even the employee. This is, however, only possible during a period in which measures to prevent the emergence and spread of communicable diseases or measures in the event of a threat to public health, ordered by the competent authority in accordance with a special regulation, are in effect. In such a case, employer is entitled to order the performance of work from the employee's household. The only other condition that needs to be met is that the agreed type of work allows the work to be performed remotely. At the same time, the amendment introduces a right for the employee to perform work from his/her household. The same conditions apply as for the right of the employer to order home office[11] with one additional condition – that there are no serious operational reasons on the part of the employer that do not allow the performance of work from home (such as the need for some employees to be present at the workplace).

The right to introduce Home-office unilaterally clearly interferes with the principle of party autonomy (Barancová, 2020, p. 14) recognised explicitly as one of the fundamental principles of the Slovak Labour Code.[12] However, the possibility of establishing Home-office on a contractual basis (as is the case with both Home Work and Telework pursuant to §52) is not excluded and should indeed be preferred. According to the explanatory memorandum to the amendment No. 66/2020 Coll., the right of the employer to order Home-office unilaterally is intended for situations when the performance of work at the workplace is not possible, necessary or when it is risky due to prevention of the spread of a communicable disease and the employee refuses to perform work from his/her household without a valid reason. As regards formal requirements, the amendment does not prescribe written form for a unilateral legal act imposing Home-office. It follows that oral notification shall suffice, which makes switching to Home-office exceedingly easy and flexible. Nevertheless, it is still a (unilateral) legal act, which needs to be serviced to the other party before it takes effect.[13]

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[7] Act No. 66/2020 Coll. of 2 April 2020, supplementing Act No. 311/2001 Coll. Labour Code as amended and supplementing certain other laws.

[8] For more details see: https://ec.europa.eu/echo/sites/default/files/crisis_management_system_in_the_slovak_republic.pdf

[9] When the competent authorities declare either emergency situation, state of emergency or exceptional state under special rules and also during the period of two months after termination of these extraordinary situations.

[10] The Labour code does not in fact use the term Home-office, it does not give any name to this legal concept, which is only described as "performance of work from the employee's household".

[11] Public health measures ordered by competent authorities need to be in effect and the agreed type of work needs to allow for the work to be performed from employee's household.

[12] Article 2 of the Labour Code: „The labour-law relations according to this Act may only be established upon the consent of the natural person and the employer. " (...).

[13] For more on unilateral legal acts in Slovak labour law *see*: Barancová & Schronk (2018, p. 209).

Important to note is also the fact that since provisions on Home-office are placed in a brand-new section (11th part) of the Labour Code and thus outside the scope of § 52, they are applicable not only to (standard) employment relationship, but also to atypical working arrangements, enshrined in 9th part of the Labour Code (§§223 – 228a). According to §250b (1) the new 11th part of the Labour code shall (during states of emergency, see above) modify the provisions of parts 1 to 10 of the Labour Code, which explicitly includes the 9th part. This creates a wholly new situation, as the standard provisions on home work and telework, enshrined in §52, do not apply to the atypical working arrangements, regulated in the 9th part of the Labour code. This amendment thus opens the way for potential applicability of the (standard) provisions on remote work on atypical work as well or for creating special regulations on remote work designed exclusively for atypical working arrangements (*see also:* Barancová, 2020, p. 14).

The amendment instituting Home-office came into force on the 4th of April 2020. Subsequent experience showed that the authorities often adopted measures restricting or even suspending operations of certain types of establishments with very short notice and therefore the flexibility, provided to the employers by the legal regulation of Home-office proved to be indispensable. Noteworthy is also the fact that this amendment created a new category of home office. As a result, the Labour code now distinguishes between home office within the meaning of §52 – work performed from a place other than the employer's workplace on an irregular basis and home office in emergency situations under § 250b (2).

2.2 The Recast of Rules on Home Work and Telework by Act No. 76/2021 Coll.

The most recent and the most thorough amendment so far of the legal regulation of home work and telework was adopted in February 2021.[14] This amendment not only substantially extended article 52 from 5 to 11 paragraphs, but completely revamped the existing rules. The key changes may be broken down to the following categories:

a) Definitions of home work and telework and their essential characteristics
b) Introduction of mobile telework and partial home work/telework
c) Organisation of working time
d) Special obligations of the employer vis-à-vis home workers and teleworkers
e) Introduction of the right to disconnect

Ad a) (Definitions of home work and telework and their essential characteristics) and b) (Introduction of mobile telework and partial home work/telework)

The changes in definition of home work and telework are not major, it is rather a matter of clarifying the exiting wording and bringing it closer to that of the Framework agreement on telework[15] and the International Labour Organisation Home Work Convention (1996). Home work is now defined in § 52 (1) as work, which could be performed at the employer's workplace, but instead is being regularly carried out from the employee's household within the scope of the employee's weekly working time or at least part thereof. The same definition applies to telework, with one additional condition, namely that the work is being carried out using information technology in which electronic data transmission by distance takes place on a regular basis.

The first thing that catches the eye is the addition of a new condition (adopted from the Framework agreement on telework), that home worker or teleworker performs work which *could* be carried out at the employer's workplace.

[14] Act No. 76/2021 Coll. of 4 February 2021, in force as of 1 March 2021.
[15] Framework agreement on telework was negotiated and signed by the European social partners – *see*: ETUC et al (2002).

As the explanatory memorandum to the amendment No. 76/2021 Coll points out, this provision is meant to distinguish home work and telework from work performed on a business trip and in the client's premises, since these are also sites outside the employer's premises, but it is important to differentiate between these categories.

The updated definition of teleworker now requires not only that information technology is used to perform the work, but also that this technology is regularly remotely connected to the employer or employer's customers. The actual flow of data between the employee and the employer (or customers) draws the distinction between telework and mere use of information technology as one of the tools of home work.

According to the previous phrasing, home worker or teleworker could work at home or at another agreed place. The new definition only refers to employee's household. This might seem restrictive at first glance, but the amendment in fact brought a definition of this term. Employee' household is thus understood to be an agreed place of work other than the employer's workplace (§ 52 para 3).

That takes us to another point – the fundamental principle that home work or telework can only be performed on a contractual basis. This results mainly from §43 (1) of the Labour code, according to which among the essential terms of an employment agreement is the place of work (defined as "a municipality, part of a municipality, or a place otherwise determined"). Newly added §52 (4) emphasized this principle by clearly stating that an agreement between the employer and the employee in the employment contract is required for the performance of home work or telework. So, the employer is not entitled to institute home work or telework unilaterally and order the employee to work from home, as the determination of the place of work is not within the powers of the employer, but it must be agreed with the employee and stipulated directly in the employment contract. Therefore if home work or telework is to be instituted at a later stage of employment, an amendment to the employment contract will be necessary.

As part of an agreement on home work/telework, the employer and the employee will need to determine the place of work, which will be deemed to constitute the employee' household for the purposes of § 52 (1) and (2). This could be any place other than the premises/operations of the employer. According to § 52 (5), it may be agreed in the employment contract that the home work or telework will be carried out, in whole or in part, at a place to be determined by the employee, if the nature of the work so permits. This is a very significant innovation in terms of defining the place of work. The explanatory memorandum explicitly provides that the place of work could be agreed in such a way, that the employee chooses himself/herself from where he/she will perform the work, if the nature of the work allows it. Such an arrangement means that no concrete place of work would be agreed and defined, but instead the determination of the place of work will be left wholly to the employee. The purpose of this setting, as stated in the explanatory memorandum, is to enable mobile telework as well as the functioning of digital nomads. Nonetheless, it is a controversial solution, since it raises concerns about its compatibility with §43 (1) of the Labour code and related case law, which requires the place of work to be specified in the employment agreements as "a municipality, part of a municipality, or a place otherwise determined".

Another point, which is not new but rather emphasized by the recent amendment is the principle of regularity as a defining criterion of home work and telework. The negative definition of home work and telework (now moved back to § 52 para 2) remained untouched by the amendment. Thus, work performed from the employee's household only occasionally or in exceptional circumstances will not constitute home work or telework within the meaning of §52 of the Labour code. What is new now is that the criterion of regularity is enshrined right in the very definition of home work and telework, which needs to be carried out from the employee's household on a regular basis (§52 para 1). The amendment also provides that parties may agree in the employment contact that the home work/telework shall not be carried out exclusively from the employee's household and they may settle the extent of the home work or telework or the minimum extent of the work that has to be performed from the employer's workplace. Pursuant to the explanatory memorandum, regularity does not mean that the work needs to be performed from the employee's household to the extent of the entire determined weekly working time. Work could be carried out from the employee's household to the agreed extent, which forms just a part of the designated weekly working time of an employee (e.g. one or two days a week) and still qualify as home work/telework.

The amendment thus effectively creates a category of a partial home work/telework, where the employee works from his/her home (or another agreed place) several days a week and from the employee's workplace for the rest of the week. Such an arrangement would be deemed to constitute home work/telework and pursuant to the current wording, §52 would apply to such an employment relationship in its entirety, not only in those days when the employee doesn't work at the employer's premises.

On the other hand, when the pattern of regularity cannot be detected, the defining criteria of home work/telework will not be met and therefore such work would be considered as home office. The explanatory memorandum states technical difficulties in the workplace or a need to take care of a child on a particular day as examples of irregular situations when the employee may need to work from home, pointing out that these are usually unplanned situations. As of March 2021, home office is not entirely outside the legal framework of home work /telework. The amendment now cities in §52 (2) several provisions of §52 that will apply to home office. The employer will now be obliged to ensure protection of data processed and used in connection with home office. Also applicable will be newly added provision (see below), requiring the employee to notify the employer immediately about any technical issues (such as hardware or software malfunction or problems with internet connection) that prevent the employee from carrying out his/her work. The principle of equal treatment (§52 para 11) will also apply to home office, as will the newly enshrined right to disconnect (see below).

The explanatory memorandum suggests that the reason for extending the applicability of certain provisions on home work/telework to cover also home office, lies in the fact that the borders between these two categories are often quite blurred in practice, for example when the employer provides the employee with a laptop and fulfils certain obligations stipulated by §52 for home work/telework. The amendment therefore stressed the dividing line between home work/telework on one hand and home office on the other hand, which is the regularity of the working pattern and at the same time brought home office under the umbrella of certain provisions concerning home work/telework.

Ad c) (Organisation of working time)

Until February 2021, one of the defining criteria of home work and telework was the self-scheduling of the working time by the employee. This in no longer the case. The amendment provides that the employer and the employee may agree that the home worker/teleworker will organise his/her working time himself/herself or that the home work or telework will be performed in flexible working hours (regulated by §88 of the Labour Code). This means that in lack of such agreement, the default rules on organisation of working time will apply, namely §86 on even distribution of working time and §87 on uneven distribution of working time. If the parties do not agree on self-scheduling of the working time by the employee, the derogations from standard rules, now stipulated in §52 (7), will not apply. These derogations remain unchanged, with one exception – standard rules will apply with respect to ide time for which the employer is responsible (such as failure to supply supporting documents or malfunction of a computer provided by the employer).

Ad d) (Special obligations of the employer vis-à-vis home workers and teleworkers)

The Labour code already contained in §52 (2) and (3) a list of special obligations for employers that make use of home work and telework, which all remain in place (now in §52 para 8). The employer is thus still required to provide the employee with the necessary hardware and software (including its regular maintenance) and adopt measure to prevent home workers and teleworkers from becoming isolated from other employees (incl. access to the employer's workplace). The employer still bears responsibility for the protection of data processed and used in

connection with telework/home work[16] and for informing the employee of all restrictions on the use of hardware and software and also of the penalties for any breach of these restrictions.

The principle of equal treatment between home workers and teleworkers on one side and comparable employees working at the employer's workplace on the other side (formerly §52 para 4), as enshrined in both the Framework agreement and the ILO Convention C-177, was left untouched and is now expressed in §52 (11).

Two new obligations for employers were added by the latest amendment. Inspired by the Framework agreement on telework, the Labour code now explicitly requires the employer to provide home workers and teleworkers with the same access to training and career development opportunities as comparable workers at the employer's premises. Furthermore, in case the employee uses his/her own tools, equipment and/or other items necessary for the performance of home work or telework, the employer needs to cover provably increased costs associated with such usage (such as higher electricity bills or charges for higher speed/volume internet connection).[17] This obligation, however, needs to be read in connection with §52 (8) a) and §145 (2). The former provision demands that the employer provides the employee with the necessary equipment (unless they agree that the employee will use his/her own equipment) and the latter stipulates that employer shall provide an employee with compensation for the use of his/her own equipment if it is used with the employer's consent. It follows that home workers and teleworkers may only use their own equipment if it was agreed with the employer and such an agreement is also a precondition for the right to reimbursement as well as for the right to damages. Details, especially as regards the types of expenses that will be reimbursed and the ways of proving them, should be specified in the agreement. In any case, it is the employee who bears the burden of proving that he/she incurred increased costs.[18]

Freshly inserted §52 (9) obliges home worker or teleworker to immediately inform the employer about any technical problems associated with the hardware or software malfunction, problems with internet connection or any other such issue that prevent the employee from carrying out one's work.

Ad e) (Introduction of the right to disconnect)

Arguably one of the highlights of the latest amendment is the introduction of the right to disconnect. Based on § 52 (10), an employee engaged in home work or telework is entitled not to use equipment assigned for home work/telework outside working hours, unless a standby duty or overtime work was ordered to the employee or agreed with him/her. This accentuates the right of home workers and teleworkers to uninterrupted daily rest and uninterrupted weekly rest. The right to disconnect equally applies to public holidays, leave of absence and obstacles to work. The Labour code explicitly states that if the employee refuses to work or comply with an instruction during such time, the employer cannot qualify it as a breach of duty.

3. PERSISTING ISSUES OF THE CURRENT LEGAL FRAMEWORK

3.1 Definition of the place of work

Legal regulation of home work and telework needs to respect certain boundaries set by other provisions of the Labour code (as well as other laws). One of them is §43 (1) b) of the Labour code which cites as one of the essential

[16] This is the case even if the parties agree that the employee will use his/her own equipment.
[17] Such obligation is also enshrined in the Framework agreement on telework (paragraph 7).
[18] Explanatory memorandum to the Act No. 76/2021 Coll., p. 4.

terms of an employment agreement determining the place of work ("a municipality, part of a municipality, or a place otherwise determined"). There is also a significant body of case law relating to this provision, which allows for the place of work to be defined in the employment agreement with various degrees of specificity. According to the Slovak Supreme court, the place of work can be defined by stating the exact address where the employer or its organizational unit is located, or by stating the city or municipality in which the employee will perform his/her work or in another way (definition of a district, county, region, etc.).[19] The degree of specificity of the definition of place of work should depend on the nature of the work performed and on the concrete organizational set-up of the employer (whether the employer carries out activities in several places or has its activity concentrated in one place) (Olšovská & Laclavíková, 2018, p. 39). Therefore the place of work should not be defined too broadly with respect to those categories of employees for whom the nature of their work does not require it (Olšovská & Laclavíková, 2018, p. 39). The point is that the delimitation of the place of work in the employment agreement directly affects the scope of employer's powers to move an employee unilaterally to another location without the employee's consent (Olšovská, 2017, p. 67). Too wide definition of the place of work in cases when it is not justified by the nature of the work performed may qualify as evasion of law. An example of such practice could be formulation of the place of work as "operations of the employer", which would mean that the employee could be assigned even to any new branch, unilaterally created by the employer after the conclusion of the employment agreement (Olšovská & Laclavíková, 2018, p. 67).

In this respect it is also important to distinguish between place of work (SK: miesto výkonu práce), workplace (SK: pracovisko) and regular workplace (SK: pravidelné pracovisko). Place of work is an essential provision that needs to be agreed on in each employment contract (see above). Workplace, on the other hand, is "*a certain area in which an employee is to perform work within an organizational unit. The workplace is e.g. an office, a construction site, a workshop. With a very narrow definition of the place of work, it cannot be ruled out that the premises of the employee's workplace are identical with the premises that are the place of work agreed in the employment contract.*"[20] It follows that the term workplace is narrower than the contractually agreed place of work. The employer thus has some leeway to determine employee's workplace within the limits created by the definition of place of work in the employment agreement. For this reason, employers are often prone to define the place of work in terms that are wider than objectively justified. Slovak legislation uses also a third term – regular workplace, which is defined in and used for the purposes of the Act No. 283/2002 Coll. on travel compensations.[21]

The settled case law allows for the designation of multiple places of work: "If the work is to be performed not in one place but in several places, it is necessary to agree on all these places as the places of work. However, if the work is to be performed in different places, which cannot be specified in advance when concluding the employment contract, the place of work must be defined in a different way. It can be defined according to the specific conditions under which the work is to be performed, for example by agreeing on a certain part of the territorial district or determining the route of the territorial district, or by agreeing on the entire territorial district."[22] This is useful in

[19] Judgement of the Supreme court of the Slovak republic 5 Cdo 81/2010.

[20] Judgement of the Supreme court of the Slovak republic 5 Cdo 81/2010. The term workplace is also defined in Regulation of the Government of the Slovak republic No. 391/2006 Coll. on the minimum safety and health requirements for the workplace, which transposes Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace.

[21] According to §2 (3) of the Act No. 283/2002 Coll. on travel compensations, as amended: „A regular workplace under this law is a place agreed in writing with the employee. If such a place is not agreed, the regular workplace is the place of work agreed in the employment contract or in agreements on work performed outside the employment relationship. In the case of employees whose frequent change of workplace results from the special nature of their profession, the place of residence may also be agreed as a regular workplace. "

[22] Judgement of the Supreme court of the Czechoslovak Socialist Republic R 10/1971:

relation to partial home work/telework under §52 (5), when the employee works in part from the employer's workplace and in part from home (or another agreed place). In such a case, the employment agreement should state both the employer's workplace and the employee's household (or another agreed place) as the place of work. Furthermore, the employment agreement should be as specific as possible as regards the exact distribution of work between the employee's household and the employer's workplace (e.g. to state that the employee will work from home on Mondays and Fridays). In the absence of such provision in the employment agreement, which enshrines two (or more) places of work, it will be in the employer's discretion to determine the actual place of work (Olšovská & Laclavíková, 2018, p. 40).

Despite relative flexibility of the case law concerning the place of work, it seems challenging to reconcile the newly added provision that the employee might be able to unilaterally determine the place of work, with the existing body of case law. Under §52(5) of the Labour code: "*It may be agreed in the employment contract that the home work or telework will be carried out, wholly or in part, at a place to be determined by the employee, if the nature of the work so permits.*" At the same time, neither this, nor any other provision of §52 states that §43 (1) b) of the Labour code (which requires each employment agreement to define place of work) shall not apply to home work or telework. Therefore §52 (5) should be interpreted as only relating to the definition of the term household for the purposes of §52. The employment agreement should thus still include designation of the place of work. Only in that part of the employment agreement which concerns home work/telework, could the term "employee's household" be defined as "a place to be determined by the employee". The employee could then determine his/her place of work unilaterally, but only within the limits provided by the definition of the place of work in the employment agreement. It seems perfectly viable to define the place of work as a municipality, which could give the home worker/teleworker sufficient space to decide whether to work from home, from a coffee house, coworking space or even a park or the employer's workplace.

However, as regard true digital nomads, who might wish to choose to work from any part of the world, defining the place of work as "the whole world" or "planet Earth" is hardly compatible with the existing case law on place of work. Even designation of the whole territory of the Slovak republic as the place of work for the purposes of §43 (1) b) might be problematic, since it will depend on the nature of the work performed and on the organisational structure of the employer. Such a broad wording could be acceptable with respect to certain types of work, such as assembly or construction work (Barancová et al., 2019). The place of work needs to be defined in an explicit and comprehensible manner (Olšovská & Laclavíková, 2018, p. 38). At the same time, it is not uncommon for the place of work not to be linked to the employer's registered office at all (Olšovská & Laclavíková, 2018, p. 38). Hence to avoid potential clash with §43 (1) b) of the Labour code and to enable true mobile telework and operation of digital nomads, a clarification will be needed as to the relation between §43 (1) b) and §52 (5) of the Labour code.

Nevertheless, the Labour code explicitly allows in §43 (5) and (6) to agree for a place of work to be located abroad. If the employment abroad is to last longer than 5 months, the employment agreement must specify: *(i)* duration of work abroad, *(ii)* currency in which wages or part thereof shall be paid, *(iii)* further settlements in cash or in kind relating to performance of work abroad, *(iv)* possible conditions of the employee's return from abroad.

3.2 The Employer's Ability to Control Employees Working Remotely

As a result of the conclusion of an employment relationship, the employer incurs several obligations relating to the control of the work process. Pursuant to §47 (1) a) of the Labour code, from the day of establishing of employment relationship an employer shall be obliged (…) to create conditions for the performance of work tasks and to maintain other work conditions stipulated by legal regulations, the collective agreement, and the employment contract. Moreover, managers (executive/senior employees) are obliged by §82 to (inter alia) manage and control the work of employees, to create favourable working conditions and ensure safety and health protection at work, to

ensure that breaches of labour discipline shall not transpire or to ensure the adoption of timely and effective measures for protection of the employer's property.[23]

A whole another chapter concerns obligations in the field of occupational health and safety.[24] Besides general commitments in this area,[25] of special concern to home work and telework are regulations on requirements for the use of technical equipment. Should an employee use certain work equipment, the employer is obliged to take the necessary measures so that the work equipment provided to the employee is suitable for the work in question or adapted so as to ensure the safety and health protection of the employee during its use.[26] In case the employee is assigned a power tool or electrical appliance, the employer shall ensure that a check-up or revision of the power tool or electrical appliance takes place at regular intervals.[27] A series of obligations are established by Government regulation No. 276/2006 Coll.[28] The regulation holds the employer liable for ensuring regular interruption of work with a display unit after no more than four hours of continuous work, for securing that the use of any equipment which forms part of the workplace with the display unit does not endanger the safety and health of workers as well as for ensuring that the keyboard is separated from the display unit and that it complies with ergonomic principles.[29] National Labour Inspectorate points out that in the home office mode, the employer is not responsible for the condition of the workplace where the employee will perform work tasks (such as the condition and revision of the electrical installation, heating equipment and other energy equipment). Nor is the employer responsible for meeting the ergonomic requirements for the workplace (National Labour Inspectorate, n.d.).

Even though the range of obligations and responsibilities of the employer is almost the same with respect to both employees working at the employer's workplace and those working remotely, the options to control and surveil remote work and especially employees working from their homes are significantly limited. The employer needs to observe internationally recognised fundamental rights and freedoms of employees, including the right to respect for private and family life, enshrined in article 8 of the European convention on human rights and fundamental freedoms, in article 7 (and 8) of the Charter of fundamental rights of the European union as well as in articles 16, 19, 21 and 22 of the Constitution of the Slovak Republic. Everyone thus enjoys the right to respect for his private and family life, his home and his correspondence. The European court of human rights (ECtHR) developed a wide interpretation of the notion of correspondence, which includes letters of a private or professional nature[30] as well as telephone conversations,[31] data from a smart phone and/or the mirror image copy of it,[32] e-mails,[33] internet use,[34]

[23] For more on the topic of work discipline *see*: Barancová & Schronk (2018, p. 301-316).
[24] For an analysis of health and safety at work from the perspective of remote work in the Czech Republic, *see*: Tomšej, J. (2015).
[25] In Slovakia, the principal source of law in this area is the Act No. 124/2006 Coll. on occupational health and safety, as amended.
[26] Regulation of the Government of the Slovak Republic No. 392/2006 Coll. on the minimum safety and health requirements for the use of work equipment, §3 (1).
[27] Decree of the Ministry of Labour, Social Affairs and Family of the Slovak Republic No. 508/2009 Coll., laying down details for ensuring safety and health protection when working with technical pressure, lifting, electrical and gas equipment and laying down technical equipment that is considered to be special technical equipment, §13a and §13b.
[28] Regulation of the Government of the Slovak republic No. 276/2006 Coll. on the minimum safety and health requirements for work with display units, which transposes Council directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment. Court of Justice of the EU only excludes from the scope of the directive those employees who use information technology only for a short period time or in rare occasions (Judgment of 6 July 2000, C-11/99 *Margrit Dietrich v Westdeutscher Rundfunk*).
[29] For a detailed overview *see*: National Labour Inspectorate (n.d.).
[30] Case of *Niemietz v. Germany*, Application no. 13710/88, para 32.
[31] E.g. Case of *Lüdi v. Switzerland*, Application no. 12433/86, para 38-39.
[32] Case of *Saber v. Norway*, Application no. 459/18, para 48.
[33] E.G. *Case of Copland v. the United Kingdom*, Application no. 62617/00, para 41.
[34] Case of *Copland v. the United Kingdom*, Application no. 62617/00 para 41-42.

or data stored on computer servers[35] and hard drives.[36] Similarly broad interpretation was afforded also to the term home, which extends to premises used for activities of a professional or business nature.[37] It is not limited to property of which the applicant is the owner or tenant[38] and it could include even caravans and other unfixed abodes.[39]

Case law of both ECtHR and the Slovak Constitutional court allows for interference with the right to respect for private and family life as long as the principles of legality, proportionality and legitimacy are adhered to.[40] Any intrusion to this right thus needs to be permitted by law (legality), pursue a legitimate aim (legitimacy) and be necessary to achieve that aim while respecting the principles of a democratic society (proportionality). Slovak Labour code addresses this in §13 (4), according to which an employer shall not, except for grave reasons relating to the specific character of the employer's activities, intrude upon the privacy of an employee in the workplace and common areas of the employer by monitoring him/her, keeping records of telephone calls made using the employers'' equipment and checking e-mail sent from a work e-mail address and delivered to such an address without giving notice in advance. If an employer implements a control mechanism, the employer shall consult with employees' representatives on the extent of control, its method of implementation and its duration and shall inform employees of the extent of control, its method of implementation and its duration. Hence the employer may introduce a surveillance mechanism but must give affected employees prior notice and simultaneously needs to maintain strict distinction between matters (conduct, communication, premises) that are work-related and those that are private. This might often prove to be very difficult. As regards monitoring of e-mail traffic, if it is clear from identification marks, such as the sender, the recipient, or the suffix of the received e-mail, that the e-mail is private, the employer cannot open and read it (Greguš, 2016).

Constitutionally protected inviolability of the home (art. 21) prevents the employer from visiting the household where the employee carries out work without employee's consent. There is no legal licence in Slovak law that would allow employer to interfere with this right. Moreover, the employer must also give prior notice of such visit and agree with the employee on an exact date and time of the visit (Barancová et al., 2019). Some employers might be tempted to implement a prior consent with such visits into the employment agreement. Such a clause, however, would be void, as §17 (1) of the Labour code stipulates that any legal action whereby an employee disclaims his/her rights in advance shall be invalid.

However, a different situation arises with respect to the operation of labour inspection. The Act on labour inspection[41] provides in §2 (2) that labour inspection in carried out a) at all workplaces of employers and natural persons who are entrepreneurs and non-employers, including workplaces located on private land and in dwellings of natural persons, b) in all premises where the home worker[42] performs the agreed work and in which the employee performs work according to the agreement on work performed outside the employment relationship. Under §12 (1) a) of the act on labour inspection, a labour inspector is authorised to enter freely and at any time into premises and workplaces subject to labour inspection and, to the extent necessary to private land and roads. Labour inspector thus does not need employee's consent to enter his/her household for the purposes of carrying out labour inspection.

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[35] Case of *Wieser and Bicos Beteiligungen GmbH v. Austria*, Application no. 74336/01, para 45.
[36] Case of *Petri Sallinen and Others v. Finland*, Application no. 50882/99, para 71.
[37] Case of *Niemietz v. Germany*, Application no. 13710/88, para 29.
[38] Case of *Menteş and Others v. Turkey*, Application no. 23186/94, para 73.
[39] Case of *Chapman v. the United Kingdom [GC]*, Application no. 27238/95, para 71-74.
[40] E.g. Case of *Klass and others v. Germany*, Application no. 5029/71; I. ÚS 274/05, II. ÚS 280/09-16).
[41] Act No. 125/2006 Z. z. on labour inspection, as amended.
[42] Act No. 125/2006 Z. z. on labour inspection makes a reference here to §52 of the Labour code, which governs both home work and telework.

It follows that employers are advised to prefer control of work results rather than control of the course of work performance (Barancová et al., 2019). It is perfectly feasible for employers with the current state of the art technology to conduct effective enough surveillance remotely, for instance via telephone and/or video calls, daily reports, by sending documents prepared by employees, etc. (*see*: National Labour Inspectorate, n.d.).

4. CONCLUSIONS

Slovak legislation currently distinguishes four types of remote working arrangements: *i.* home work (§52 para 1 a. of the Labour code), *ii.* telework (§52 para 1 b.) *iii.* home office (§52 para 2) and *iv.* home office during emergency situations (§250b). The latest amendment to the Labour code clarified several issues, which made the legal framework clearer, more user friendly and more attractive to both employers and employees. Many employers were hesitant to introduce remote work due to uncertainties they associated with these atypical forms of work. One of the principal worries concerned the working time, since originally home workers and teleworkers automatically scheduled their working time themselves. This led to concerns that the employer will not be able to ensure that a home worker or a teleworker will be working during set periods of a day when the employer needs it. The solution to this was to make an agreement with the employee on a work schedule in the employment contract (Olšovská & Laclavíková, 2018, p. 43-44). The latest amendment resolved this issue by reversing the policy and making it default that it is the employer who schedules the working time unless parties agree otherwise.

Nevertheless, another important issue still remains unresolved. As Tomšej points out, Slovak legal regulation of home work and telework does not guarantee adherence to the maximum limits of working time, unlike the Czech law (Tomšej, 2015, p. 150). Indeed under §52 (7) provisions of the Labour code on continuous daily rest and continuous rest during the week do not apply[43] if the parties agreed that the employee will be scheduling his/her working time himself/herself. Such a derogation from rules on rest time runs counter constitutionally warranted right to observe the maximum permissible length of working time, which is guaranteed to all employees without distinction,[44] not to mention a recent judgement of the EU Court of Justice, which requires employers to keep record of working time of all employees in order to prevent maximum weekly working time being exceeded[45] (*see also*: Barancová, 2020, p. 17-18). This issue was partially remedied by the aforementioned change which revoked the previous automatic self-scheduling of working time by home workers and teleworkers. Another important point, which helps to tackle this issue is the introduction of explicit right to disconnect in §52 (10). This provision enshrines the right for home workers and teleworks (applicable also to home office) not to use work equipment allotted to him/her for home work/telework during continuous daily rest and continuous weekly resting time as well as while employee is on leave of absence, during bank holidays and during an obstacle to work. Even though §52 (7) a) provides that rules on daily and weekly rest do not apply in relation to home workers/teleworkers who are self-scheduling their working time, there is no derogation from the right to disconnect with respect to such workers.[46]

In any case the latest changes increased the motivation for both employers and workers to engage in remote work and made the legal regulation more flexible. Current legal framework offers quite a generous room for

[43] This wording was introduced by amendment no. 257/2011 Coll. as part of an extensive reform of labour law, implemented by a (short-lived) right wing government, which was reversed soon after new government took power in 2012. The provision in question, however, remained in place ever since.

[44] Article 36 (1) d) of the Constitution of the Slovak Republic (No. 460/1992 Coll.).

[45] Judgement of the Court of Justice of the EU of 14 May 2019 in case C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) vs. Deutsche Bank SAE*.

[46] For more on working time of remote workers *see*: Varga (2016).

customisation of the rules on home work and telework in the employment agreement, it even presumes that certain issues will only be regulated in an agreement between the employer and the home worker/teleworker.

Given the current circumstances it would be desirable to lay legal groundwork for further expansion of remote work. As mentioned, present legal regulation only allows remote work to be performed in the (standard) employment relationship. This includes part time work, fixed term work and even job sharing. However, it leaves out the whole category of agreements on work performed outside employment relationship (mini jobs), which are widely used in practice. The first step in this direction was taken by the "Covid amendment" no. 66/2020 Coll., which introduced home office in emergency situations, without limiting it to the (standard) employment relationship. Some inspiration could be drawn from the Czech Republic, where the Labour code also recognises the category of agreements on work performed outside employment relationship, but does not prevent them from being performed remotely. Professor Barancová suggests that remote work should be introduced in relation to self-employed workers as well (Barancová, 2020, p. 25).

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