

## Smart teleworking – Guidelines to obtain cost efficiency and active risk management



**The former classic (*to be read “rigid”*) system where performance of work is accomplished in just a single physical workspace for all employees is already starting to fade away, due to its declining economic benefit and its missing opportunity of enjoying a great variety of services offered in modern society (set aside by the consuming action of moving from home to the workplace and vice versa).**

While the core points of this article may not seem alluring for organizations resisting change, respectively with on-going concerns about productivity / performance indicators (easily and undoubtedly manageable through attentive remote work policies and tailored KPIs for both management and employees, aiming real and transparent expectations from employees and efficient monitoring of performance), a great deal of organizations that actually use telework do not seem to use it to its full potential.

A smart use of telework means dealing with key points on how technology influences the employment relationship, in the present context of convenient access to technology, especially in terms of costs for employers and ways to achieve an effective/useful risk management.

Although Romania is way down in EU statistics in the usage of frequent / occasional work from home rankings (according to latest Eurostat data), the terrible COVID-19 pandemic brought upon an exponential increase of interest for telework/work from home.

Companies should however avoid jumping at such flexible working schemes before knowing how to handle key legal topics prospecting both risk prevention and cost efficiency.

### **“Work from home” and “telework” are two separate labor institutions as per the law**

Just because companies use complicated internal policies and try to implement different tools to ease the performance of *remote* work, does not necessarily mean that one or both labor institutions are actually being utilized.

In a nutshell, the possibility to perform work from home is defined under the Romanian Labor Code (*i.e.*, Law no. 53/2003) as those employees performing their job related tasks *at their domicile*. On the other hand, the following entered into force Law no. 81/2018 regulating the teleworking activity (“Teleworking Law”), as amended over

time, expressly states that teleworking is that work organization form based on which the employee, constantly and voluntarily, performs the duties specific to his/her position, occupation or profession in another place than the workplace organized by the employer, *using the information and communication technology*.

Thus, it's rather obvious to conclude that in most cases (if not in all cases) where the homeworker uses also information and communication technology (in other words, a laptop connected to the Internet) for carrying out the activities according to the employment agreement and job description, telework regulations are most likely to be applicable for the envisaged performance of "work from home" carried out by homeworkers.

In consequence, all the elements required for performance of telework (*i.e.*: home inspections, health and safety clauses and statements) are to be carefully assessed and included in the individual employment agreement even in case of *work from home*, as the homeworkers will almost certainly use information and communication technology to carry out their day-to-day activities.

Also, the regulations within the company's internal policies/IT tools are usually incomplete compared to those required under the Teleworking Law, even if a mechanism of seemingly bilateral consent of the parties can be deemed to have taken place.

### **Agree the work schedule with employees**

Telework derogates from the classic enforcing of a fixed work schedule by the employer (*e.g.*, from 9AM to 6PM; with an 1 hour lunch break), as the parties may opt for a different work schedule than the one normally regulated at company level (*i.e.*, through the Internal Regulations or the Collective Bargaining Agreement, if applicable), thus meeting both the employer and the employee's business/personal needs.

Setting a flexible but clear work schedule folded around the activity's specific will generate productivity, and should avoid griefs from employees for lack of protection / violation of their *right to disconnect*.

### **Regulate specific places for carrying out the telework activity**

Although such element (*i.e.*, the place of work) was recently repealed from the Telework Law as a key element to be regulated by the parties, great attention should be paid towards the places where the telework activity is performed, especially in case of cross-border teleworkers.

A recent framework agreement (in the application of Article 16 (1) of Regulation (EC) No. 883/2004) provides for a system whereby an employee who carries out cross-border telework can remain subject to the social security legislation of the state where the employer has its registered office or place of business, provided that telework in the employee's state of residence accounts for less than 50% of his/her working time (comparing to the current percentage of maximum 25%).

In case employers determine such cross-border working situations starting 1 July 2023, an analysis of the concerned employees' social security status should be carried out immediately in order to implement appropriate changes within the employment relationship.

In addition, providing only the employee's domicile as place of work means that, by principle, the employee should only perform telework from his/her domicile. On the other hand, regulating a wider and unidentified place of work (*e.g.*, a whole city) is strongly not recommended, as several risks may appear from such agreement of the parties (*e.g.*, potential health and safety issues; data security etc.).

More specifically, the employer should regulate all specific places where telework is to be performed, in order to

ensure health and safety at the workplace and to avoid headaches as data theft or keeping track of the employee's whereabouts within the working time.

### **Regulate concrete ways of performing the control of the employee's activity**

Besides the schedule for verifying the activity of the teleworker which is also to be regulated by the parties, don't miss out on clearly regulating the concrete ways for performing control over the employee's activity.

It may be hard to keep track of the actual activity of the employee in lack of physical presence at a workplace, yet modern technology comes to the rescue with plenty of ways to perform an effective control over the employee's day-to-day activity (*e.g.*, phone-calls, Skype calls, instant messages, e-mails etc.).

### **Provide key tools related to working hours**

More and more overtime requests in front of the courts of law are submitted by employees, as employers tend to lose sight of the working hours of teleworkers. Clear regulations regarding the recording of the working hours of the employee are thus essential to be agreed by the parties, in order to avoid overtime claims and other related material/moral damages (*e.g.*, manual or automatic timesheet; punch in/out tool; mandatory prior request for overtime etc.).

### **Use shared workspaces**

As the employers are bound by law to take measures to avoid isolation of the teleworkers (besides trainings and team building activities), in case the employer has also a headquarter where work is performed by non-teleworkers, don't overlook the opportunity to efficiently use shared workspaces for teleworkers and thus reduce office space costs, where teleworkers are to perform their activity also from a workplace organized by the employer.

This comes at hand in the context of a more and more interest for hybrid work, whose principal benefits include improved well-being, greater productivity and work satisfaction, and more importantly a better work-life balance.

While there is no single efficient method for finding the best office space to suit the company's needs, a great starting point is to thoroughly understand what activities the company will be overseeing within a shared workspace.

### **Establish clear terms for assuring the costs of telework**

Lately, many opinions are thrown into the market regarding a potential rent to be paid to the employee for the spaced used within the latter's premises and with respect to the utilities costs.

While a rent payment demand from the employee may seem ludicrous at first glance, in case your company is requesting conspicuously inflexible measures such as fixed delimitation of the work station, restraints on movement of house pets, childcare avoidance, leasing that highly regulated workspace may not be seen as that unreasonable after all.

Also, the much disputed dilemma on who is obliged to bear costs of internet services remains to be a topic among scholars, and a clever method to avoid such debates is also through conventional regulation.

The law permits the parties to establish the terms under which the employer bears the costs of telework. Thus, providing various wordings that includes such costs (*i.e.*, actually borne by the employee) within the basic salary

rights or even within an immaterial (i.e., for the employer) supplement, may avoid considerable future claims from the employees on these topics.

### **Carefully oversee and use performance of telework from abroad**

Although, by principle, telework from abroad may be performed, considering the extraneous element and thus the prospective application of different legislation than Romanian law, companies should be aware that certain legal and practical implications may arise in case the telework activity is interpreted as being habitually carried out in other country than Romania (e.g., proper informing of the employee on certain aspects, such as the period of time during which the activity is intended to be performed from abroad, the main employment regulations under the legislation of the concerned country, the local habits that might endanger the employee's freedom or personal security; proper functioning of security systems and related IT applications from the concerned location; potential cross-border employment and inherent applicability of overriding mandatory provisions).

**To sum up**, there is no single key to success in telework, as the spectrum of activities and the internal structuring of the organization differs from one entity to another. Be that as it may, helpful guidelines such as regulatory simplification, achieving clear objectives on costs and management awareness, increased but carefully weighted flexibility, and last but not least, best use of technology, may turn the average telework concept into a new age one of smart telework, that may eventually overturn the modern values on work and address the opportunities that are opened to organizations.

#### About the authors

#### **Mihai Popa**

*Deputy Managing Partner, Mușat & Asociații*

*Head of the Labor Law and Employee Benefits Department and the Restructuring and Insolvency Department*

Mihai advises national and international clients from all industries, both on consulting and litigation mandates in the field of Labor Law and Employee Benefits. His experience includes assisting with restructuring plans, voluntary retirement plans, employee benefits, individual employment contracts, transfer of employees, collective labor contracts, collective negotiations and consultation, disciplinary and professional liability proceedings, discrimination and harassment claims.

With over 17 years of experience in business law, Mihai offers consultancy in judicial and voluntary reorganization procedures, pre-insolvency procedures, bankruptcy and liquidation, asset recovery and/or negotiations with debtors and creditors.

#### **Dragoș Lungu**

*Managing Associate, Mușat & Asociații*

*Department of Labor Law and Employee Benefits*

With over 10 years of legal experience, Dragoș provides assistance to national and international clients in various labor law mandates, including, but not limited to, assistance and representation in collective layoff projects, outsourcing, individual and collective labor contract drafting and negotiation, collective labor conflicts.

Dragoș is also a litigating lawyer, working closely with local and international clients in the pharmaceutical,

energy, real estate, retail, technology and outsourcing sectors, being known for the innovative solutions offered to clients.

### **About Muşat & Asociații**

Muşat & Asociații stands for the highest level of expertise and commitment in assisting clients in their business. Muşat & Asociații provides consulting services in all business law areas, including Mergers & Acquisitions, Privatization, Real Estate, Banking, Energy & Natural Resources, Competition, Corporate, Telecommunications & IT, Labour, Tax, Capital Markets, Environmental Law, Litigation & Commercial Arbitration and Criminal Law.

Recognized as one of the pillars of Romania's business law practice, Muşat & Asociații is constantly recommended by international specialized publications (Chambers & Partners, International Financial Law Review, Legal 500 etc.) as a leading law firm in Romania. Besides, many of its attorneys have been nominated by such publications among the elite of business law in Romania.

v **2023:** Muşat & Asociații has been named for the second consecutive year **winner of the Eastern Europe Firm of the Year award** at the **LMG Life Sciences Awards EMEA 2023**, which took place on 13 July in London. LMG Life Sciences is one of the most prestigious legal guides that centralizes the leading law firms and lawyers working in the life sciences sector (biotech, pharmaceuticals, medical devices, dietary supplements, food, cosmetics, etc.).

v **2022:** Muşat & Asociații was the winner of the award “Eastern Europe Law Firm of the Year” during the gala organized in London by LMG Life Sciences, one of the most prestigious international guides which awards the law firms and lawyers behind some of the most innovative and challenging projects in the EMEA, USA and Canada, together with its sister companies International Financial Law Review, Benchmark Litigation, Managing IP, Expert Guides și ITR.

v **2022:** Muşat & Asociații won the „Best Law Firm in M&A, Litigation and Pharma” awards, a distinction handed out by during the Romanian Legal Awards Gala, by the reputed publisher “Legal Marketing”. This was the third time when Muşat & Asociații won the trophy for the Mergers & Acquisitions practice area after **2020** and **2019**, the year when Musat & Asociații was designated the Romanian Law Firm of the Year.

v **2019:** Muşat & Asociații won the “Law Firm of the Year in Romania” award, a distinction handed out by the “The Times Legal Innovation, as well as awards for the areas of practice: Mergers and Acquisitions/Privatization, Infrastructure and PPP/Public Procurement and Criminal Law.

v **2018:** Muşat & Asociații was awarded by prestigious magazine, CEE Legal Matters, for the largest M&A Pharma transaction in Romania (Dr. Max acquisition of A&D Pharma group). Also in 2018, The Times legal Innovation granted awards for the areas of practice: Mergers and Acquisitions/Privatization, Infrastructure and PPP/Public Procurement and Criminal Law.

v **2016:** Muşat & Asociații received the award for the largest transaction in the energy field, for assistance granted to Sterling Resources in the process of sale of operations in Romania to Carlyle International Energy Partners, as well as the award for the largest HORECA transaction for assisting Premier Capital in purchasing McDonald's in Romania (awards granted by Ziarul Financiar, during the Attorney Gala).

v **2015:** Mușat & Asociații won the “Law Firm of the Year in Romania” award, a distinction handed out annually by the reputed British publisher “The Lawyer”.

v **2013:** Mușat & Asociații was appointed “Law Firm of the Year in Romania” by International Financial Law Review (IFLR), and this was the second time when the firm was granted this prestigious award, after the distinction received in 2011 (when Romania was included for the first time on the list of countries nominated for the International Financial Law Review (IFLR) awards).

v **2012:** Mușat & Asociații won the Gold Award for the “Best Law Firm in Central and Eastern Europe”, an accolade awarded by the 2012 International Legal Alliance Summit & Awards, and in 2011, the renowned publication Chambers Europe awarded the “Romanian Law Firm of the Year” trophy to Mușat & Asociații, the law firm with the best performance in Romania, during the “Chambers Europe Awards for Excellence 2011” gala.