

## Trends and Developments

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### Evolution of the Legal and Regulatory Framework for Telework in Luxembourg

#### Introduction

In 2019, 11.6% of working people residing in Luxembourg declared that they were teleworking from home at least one day a week, placing Luxembourg in third position of the European countries where telework was most widespread (source: [Eurostat](#)). As of mid-March 2020, 69% of working people (excluding those benefiting from short-time working and leave for family reasons) switched to telework during the pandemic-related lockdown, and this generally outside the existing legal framework (source: [Statec](#)). The COVID-19 health crisis has therefore accelerated the government's revisions of the legal and regulatory framework for telework.

Based on the opinion issued by the Economic and Social Council on 11 September 2020 on teleworking in Luxembourg, on 20 October 2020 the social partners (LCGB, OGBL and UEL) signed a new cross-industry agreement governing teleworking ("New Agreement") to replace the framework agreement of 21 February 2006 applicable in this area ("2006 Agreement"). Declared generally binding by the Grand-Ducal regulation of 22 January 2021, the New Agreement is applicable since 2 February 2021 to all companies established on the national territory.

On 9 April 2021, the Luxembourg financial markets' supervisory authority, the *Commission de Surveillance du Secteur Financier* (CSSF), published CSSF Circular 21/769 on governance and security requirements for supervised entities (as defined below) to perform tasks or activities through telework ("Circular 21/769"). Therefore, save for exceptional circumstances, as from 30

September 2021, employers in the financial sector will have to ensure compliance with Circular 21/769 in addition to the New Agreement.

Thus, in a timely and pragmatic way, the New Agreement and Circular 21/769 provide several clarifications on how telework should be implemented by employers and carried out in Luxembourg from 2021.

#### Scope of the New Agreement and Circular 21/769

As with the 2006 Agreement, the New Agreement applies to employees covered by the Labour Code, with the exception of those who have public law status or similar. Nevertheless, the New Agreement specifies that the following are excluded from its scope of application:

- secondment abroad;
- the transport sector in the broadest sense (excluding administration);
- trade representatives;
- co-working spaces, in the sense that the work is performed in a satellite office of the company;
- smart-working, in the sense of one-off interventions by smartphone or laptop outside the workplace or the usual teleworking location; and
- all services provided outside the company's premises to customers.

Of more limited application, Circular 21/769 applies under general working conditions but does not apply in case of a pandemic (for example, COVID-19) or in other exceptional circumstances similarly impacting general working conditions. Furthermore, the text focuses on

financial sector regulatory requirements, while contractual relations between supervised entities (as defined below) and their employees remain outside of its scope. However, it applies to all employees of all entities supervised by the CSSF (supervised entities), including persons contracted to them by a third-party employer.

Circular 21/769 introduces telework-related governance and security requirements for a wide range of professionals in the Luxembourg financial sector, including credit institutions, alternative investment funds managers licensed under the law of 12 July 2013, investment funds, authorised securitisation undertakings, payment and electronic money institutions, as well as any other entity supervised by the CSSF.

More specifically, it applies to all supervised entities, including their branches in Luxembourg or abroad, to the extent that telework is authorised in the countries where the branches are established and they comply with national regulations, to Luxembourg branches of entities originating from outside the European Economic Area (EEA) and/or to Luxembourg branches of entities originating from a member state of the EEA, which may also use telework in accordance with the requirements provided for in Circular 21/769, as long as teleworking is authorised in their home country and they comply with all national rules and regulations applicable in the home member state.

#### *Definition of telework*

The New Agreement slightly modifies the definition of telework in the 2006 Agreement to provide that it is a “form of organising or carrying out the work, usually using information and communication technologies (ICT), so that work, which would normally have been carried out on the employer’s premises, is performed outside these premises”.

Reference is no longer made to the employee’s home, so that the employee can telework from any other place outside the employer’s premises. The New Agreement also no longer mentions the three cumulative criteria for determining a telework relationship, but clarifies what is to be considered as “regular” telework and “occasional” telework.

Telework shall be considered occasional when (i) it is carried out to cope with unforeseen events, or (ii) it represents less than 10% on average of the teleworker’s normal annual working time. In any other cases, telework is regular. It is also specified that the reference period is the calendar year.

In a much more precise way, Circular 21/769 defines “telework” on the basis of the following cumulative criteria:

- work must be delivered by means of ICTs based on a previous approval by the employer; and
- it must be performed on a regular or occasional and voluntary basis and within the defined working hours at a predetermined place that is different from the employer’s premises;
- supervised entities shall have documented rules in place to define from where telework is allowed.

On the contrary, other forms of remote access by supervised entities staff (while on business trips – eg, client relationship managers, when attending conferences or professional training), connections from the employer’s premises to systems not hosted in the employer’s premises and work carried out by supervised entities staff in a location other than the employer’s premises, in the context of the activation of a disaster recovery plan or business continuity plan do not qualify as telework.

## *Telework on a voluntary basis*

In both Circular 21/769 and the New Agreement, telework must by definition be voluntary, but neither text establishes a “right to telework”.

As was also the case in the 2006 Agreement, the New Agreement maintains the principle that both the employer and the employee are free to choose the telework formula, while adding that this choice takes into account, where appropriate, the provisions in force at the level of the sector or company concerned, as soon as the employee takes up his or her duties or at a later date.

Thus, according to the New Agreement, at the time of hiring, Luxembourg employers may offer a position that is wholly or partly remote (this can be indicated in the job offer) and the employee is free to accept or not. During the performance of the contract, a change to a teleworking formula can only be implemented by mutual agreement

Consistently, it is reaffirmed that the employee’s refusal of a telework offer made by his or her employer does not in itself constitute a ground for terminating his or her employment contract. Nor can this refusal justify the employer’s use of Article L. 121-7 of the Labour Code concerning the unilateral modification of an essential element of the employment contract to the employee’s disadvantage in order to impose this form of work.

## *Role of the staff delegation and specific telework regime*

The New Agreement provides for regular information to the staff delegation on the number of teleworkers and its evolution within the company. The arrangements for the transmission of this information shall be agreed within the company concerned.

According to the New Agreement, a specific telework regime, adapted to the particular situation of the company or sector, can be defined by means of a collective agreement or a subordinate agreement or in accordance with the expertise of the staff delegation. This optional tool can be used to indicate, for example, the categories of employees excluded from telework, the authorised places or types of places, the rules on safety and health at work, the rules on the protection of personal data and the contact persons for telework.

The introduction and modification of the optional telework agreement shall be done, in companies with less than 150 employees, after informing and consulting the staff delegation. In companies with at least 150 employees, the obligation is greater because this requires a mutual agreement between the employer and the staff delegation (“*co-décision*”).

Unlike the New Agreement, Circular 21/769 requires the adoption by the board of directors or any other body representing the supervised entity of a telework policy, which must set the framework and the limits under which telework may be allowed.

This policy shall clearly define:

- the business units or departments that may use telework and activities and/or functions that may be performed via telework;
- those that must always be performed on-site in the premises of the supervised entity;
- the minimum number of employees required to work at the same time at the premises in Luxembourg at entity level and, where relevant, at business unit or department levels;
- the working hours within which telework is allowed (which must necessarily take into account the legal limits);

- control procedures that have to be implemented in order to be able to monitor the proper execution of work performed by the staff through telework;
- minimum physical meetings that should be held at the head office in Luxembourg; and
- measures to be taken in order to ensure that risks remain contained, including compliance with confidentiality and data protection regulations.

The telework policy must be reviewed annually based on an updated risk analysis and the operational and management objectives of the entity. No approval by the CCSFF is required in order to implement, maintain or extend telework solutions for staff in a supervised entity. Nevertheless, as the CSSF monitors compliance with Circular 21/769, any supervised entity must ensure that it keeps evidence to monitor compliance with the telework policy.

#### *Written agreement between employee and employer*

The New Agreement recognises telework without the need for an amendment to the employment contract. Individual agreements are no longer necessary if agreements have been concluded at the collective level.

For regular telework, a written agreement between the employer and the employee must mention:

- the place of telework or how to determine this place;
- the hours and days of the week during which the teleworker is teleworking and must be reachable by the employer or the guidelines on how to determine these periods;
- the terms and conditions of any compensation for benefits in kind;
- the monthly lump sum for covering communication costs; and
- the conditions for returning to regular office work.

For occasional telework, a written confirmation is sufficient as proof (eg, a text message or an email). Although the content of this written confirmation is not fixed by the New Agreement, it is recommended to include certain information such as

- the place from which the employee can telework;
- the fact that the employer agrees that the employee can telework;
- the telework arrangements (frequency, maximum and minimum duration);
- how the employee should announce his or her intention to telework and the possibilities for the employer to oppose it if the service is needed;
- a warning that telework may not exceed 10% of the annual working time; and
- a warning to the frontier worker of applicable tax and social security rules and the thresholds not to be exceeded.

#### *Work equipment*

The New Agreement maintains that employers are required to provide their teleworkers with appropriate technical support and be responsible for any cost related to the damage or loss of equipment and data used by the teleworker. An exception is explicitly provided for when the damage is caused by a wilful act or gross negligence of the employee. On the other hand, teleworkers must immediately inform their employer in the event of equipment failure or malfunction.

However – and this is one of the main innovations introduced by the New Agreement – a distinction must be made between regular and occasional telework. In the case of regular telework, employers must provide the technical support and bear the costs directly linked to telework, in

particular costs relating to communications (eg, by paying a monthly lump sum to employees); in the case of occasional telework, employers have no obligation to provide the technical equipment and to cover the costs related to telework.

In practice, it has been observed that in case of regular telework, many employers in all sectors of activity offer a monthly allowance of between EUR10 and EUR30.

## Work organisation

On this specific point, the New Agreement contains two provisions relating to overtime and the right to disconnect. The terms and conditions relating to overtime are to be agreed between the parties and must be aligned as far as possible with internal procedures. Overtime shall remain an exception. In addition, the New Agreement provides that any provisions relating to the right to disconnect also apply to the teleworkers. This is the first time that this right to disconnect has been mentioned in Luxembourg law.

Circular 21/769 requires careful governance, adequate internal and external organisation and security of information when implementing telework. These requirements can inter alia be summarised as follows.

- Supervised entities, when resorting to telework, are required to maintain, at all times, a robust central administration in Luxembourg – ie, a “decision-making centre” and an “administrative centre” equipped with sufficient and skilled personnel, as well as with the technical and administrative infrastructure required to exercise a supervised entity’s activity and sufficient substance at their premises. In order to comply with this requirement, staff working remotely shall be able to return to the supervised entity’s premises on short notice in case of need.

- Supervised entities are required to perform a risk analysis to identify risks arising in the context of telework and implement all necessary mitigating controls and measures. Risk identification and mitigation measures should be adequately formalised and regularly reviewed.
- They are also subject to internal control requirements (including, inter alia, review of the telework policy and process flows) and reporting to the CSSF.
- Supervised entities must implement a number of security measures in a proportionate manner in order to guarantee the confidentiality, integrity and availability of the entities’ data and information and ICT systems (eg, include in their security policy high-level principles applicable to telework, raise awareness on teleworking-related risks, align access rights with their risk assessment and telework security policy, keep control over the security of devices used by the staff working remotely, and maintain a high level of security and availability of the telework infrastructure).

## Teleworker’s privacy, data protection, equality of treatment, health and safety regulations

In order to respect the employee’s privacy, inspection visits by the employer, the health and safety delegate or the health and safety authorities to the teleworker’s accommodation (and limited to the place where the work equipment provided was located) are no longer permitted under the New Agreement. However, the employee remains entitled to request an inspection visit by the company’s external or internal occupational health and safety service, the company’s safety officer (“*travailleur désigné*”) or the Inspectorate of Labour and Mines (ITM).

The New Agreement further maintains the same obligations regarding data protection, equality of treatment and health and safety regulations as in the 2006 Agreement.

More generally, Circular 21/769 states that the use of telework by supervised entities may not contravene any legal provisions that are part of the mandatory public policy provisions and must, in particular, comply with the provisions of the Luxembourg Labour Code.

In conclusion, in the light of the above, it would seem that one of the challenges for employers this coming year will be to determine as soon as possible what type of telework to implement in their company, and then to implement or adapt their employees' employment contracts or internal policy.

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