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Coláiste na Tríonóide, Baile Átha Cliath
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A Right to Disconnect: Irish and European Legal Perspectives

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A Public Policy Report of the

COVID-19 LEGAL OBSERVATORY

School of Law, Trinity College Dublin

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Harnessing Trinity's Collective Expertise for the Greater Good

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ABOUT THE COVID-19 LEGAL OBSERVATORY

Harnessing Trinity's Collective Expertise for the Greater Good

COVID-19 presents an unprecedented public health crisis. New laws were introduced at a rapid pace on the basis of compelling public health and economic concerns. Universities play a vital role in ensuring that laws are effective but also that rights and fundamental freedoms are protected insofar as possible, even in emergency circumstances.

To address this, the COVID-19 Law and Human Rights Observatory¹ of Trinity College Dublin engages in research across the full range of Ireland's legal response to COVID-19. Academics in the Observatory the work with research assistants to identify, aggregate, contextualise, explain, and analyse the legal components of Ireland's COVID-19 response. We aim both to inform the public and to provoke public debate.

The Observatory's Blog² publishes academic commentary on Ireland's legal response to COVID-19 as it evolves. The Observatory also provides an unofficial consolidated version of Ireland's regulatory response to COVID-19, as well as a range of official guidance documents. This is the first public policy report of the Observatory. Other policy work of the Observatory is focused on data protection issues relating to the pandemic, and the public health response to the pandemic. The Observatory is also completing a report on behalf of the Irish Human Rights and Equality Commission that analyses how Ireland has deployed emergency powers in response to the pandemic.

The work of the Observatory is supported by the Trinity College Dublin COVID-19 Response Fund.

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¹ <https://www.tcd.ie/law/tricon/covidobservatory/index.php>.

² <https://tcdlaw.blogspot.com/>.



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ABOUT THE COVID-19 LEGAL OBSERVATORY	i
Contributors to this Report	ii
Executive Summary	5
Introduction	6
Section I: Current legal position in Ireland	7
Legislation	7
Recent Irish case law	7
Problems with existing framework	8
Further recent developments	10
Section II: The right to disconnect and EU Law	13
Introduction	13
EU law and workers’ right to rest.....	13
Proposals for legislative reform	17
Summary	19
Section III: The right to disconnect in France.....	20
Background	20
Legislation	21
Case law	23
Implementation in practice.....	25
Section IV: The right to disconnect in Germany	26
Background	26
Legal uncertainty.....	28
Creating clarity and certainty.....	29
Conclusion.....	30
DISCLAIMER	33



Executive Summary

The pandemic provoked a sudden increase in the proportion of people working remotely. While the vaccination programme is creating conditions that should permit a gradual return to workplaces, it seems likely that remote working will remain a prominent feature of the post-pandemic labour market. While remote working offers flexibility in respect of where and when work is performed, it poses challenges for work-life balance. In particular, there is a risk that remote working gives rise to an organisational culture of constant availability. If work can be performed anywhere, and at any time, then workers may find themselves ‘always on’, with damaging consequences for physical and psychosocial well-being. In response, there are growing calls across Europe for the creation of a legally-enforceable ‘right to disconnect’.

This report explains the current law in Ireland. On the one hand, there are enforceable rights to rest found in the Organisation of Working Time Act 1997. On the other, there is a Statutory Code of Practice on the Right to Disconnect. This is not legally-binding, but it can be taken into account when the 1997 Act is being applied. Contrary to the Government’s current position, this report concludes that these instruments are insufficient to provide adequate and effective enforcement of the right to disconnect. It recommends that Ireland goes further by putting the right to disconnect into binding legislation, which should include a definition of ‘working’ and ‘leisure’ time that sufficiently captures the need to protect workers from the expectation of work as well as its actual performance, and of the circumstances in which it is permissible to contact workers outside normal working hours.

To illuminate the context and options for such legislation, the report examines the situation in EU Law, followed by discussion of the position in France and Germany. At EU level, the European Parliament has called for legislation on the right to disconnect and it has adopted detailed proposals to this end. France provides an example of the first European jurisdiction to enact a statutory right to disconnect. It demonstrates that practical implementation of this right demands the active involvement of employers and trade unions. In contrast, Germany has not yet adopted such legislation. Nevertheless, as in Ireland, there is an active debate on the rights already flowing from the law on working time and certain businesses have already taken initiatives designed to facilitate disconnection by workers.



In the light of the examples provided in this report, it concludes with a set of recommendations for measures to be addressed in any future legislation on the right to disconnect in Ireland. Legislation needs to clarify the distinction between ‘working time’ and rest periods; during the latter, the worker should not be expected to be normally available to the employer, albeit that there may be circumstances where flexibility is required. This non-availability is key – rest periods must be protected from the risk or expectation of being contacted for work purposes, whether or not work is actually performed. However, account needs to be taken of the realities of the business – including any business conducted across time zones, and flexible working arrangements. For such laws to function in practice, it is necessary that they are implemented by employers with the participation of trade unions or other workers’ representatives. To be effective in practice, all workers should be included and this should encompass ‘non-standard’ forms of employment, such as those in the ‘gig-economy’.

Introduction

Over the course of the past year, the Trinity Covid-19 Law and Human Rights Observatory has published a number of pieces on effects of the pandemic on workers’ rights and challenges for employment law.³ This fits into a broader global literature on the same subject, as well as long-term trends in the nature of work in the modern economy. A perceived decline in ‘9-to-5’ working patterns, alongside the ever-onwards march of digitalisation, has led to several high-profile calls for a legislative ‘right to disconnect’. These have found purchase at the European Parliament which has called on the European Commission to propose legislation to this effect, and suggested a proposal of its own (discussed further section II). Various national governments have also heeded the call (the positions of France and Germany will be considered below), although in Ireland, action has thus far been confined to the promulgation of a code of practice from the Workplace Relations Commission.

³ See, for example: Alan Eustace, ‘Protecting Workers’ Rights during Covid-19 – a Remote Prospect?’ (Trinity Covid-19 Observatory blog, 12 June 2020) <<https://tcdlaw.blogspot.com/2020/06/protecting-workers-rights-during-covid.html>>; Des Ryan, ‘Safeguarding Employees’ Welfare during COVID-19: Is Employment Law ‘Working From Home’?’ (Trinity Covid-19 Observatory blog, 22 July 2020) <<https://tcdlaw.blogspot.com/2020/07/safeguarding-employees-welfare-during.html>>; Deirdre Ahern and Suryapratim Roy (eds), ‘Law and Policy Responses to Covid-19 in Ireland: Supporting Individuals, Communities, Businesses, and the Economy’ (Trinity Covid-19 Observatory, November 2020) <[https://www.tcd.ie/law/2020.21/Covid-19 Public Policy Report.pdf](https://www.tcd.ie/law/2020.21/Covid-19%20Public%20Policy%20Report.pdf)> ch 3; Alan Eustace and Niamh Egleston, ‘“Baby, You’re the Boss at Home”: Giving Employees the Right to Work from Home’ (Trinity Covid-19 Observatory blog, 18 January 2021) <<https://tcdlaw.blogspot.com/2021/01/baby-youre-boss-at-home-giving.html>> (links to earlier posts contained therein); Mark Bell, ‘No Jab, No Job? Vaccine Requirements and Anti-Discrimination Law’ (Trinity Covid-19 Observatory blog, 25 March 2021) <<https://tcdlaw.blogspot.com/2021/03/no-jab-no-job-vaccine-requirements-and.html>> (all links accessed 10 May 2021).



This policy report analyses the current position on working time regulation in Ireland and the new code of practice. It recommends specific legislation to strengthen workers' rights further and improve legal certainty for both workers and businesses. To that end, it considers the position in EU law as things stand, and the new proposal from the European Parliament. Subsequently, it draws on the experiences of France and Germany. Ultimately the report advocates that the Irish government does not wait for potential action at EU level, but rather legislates for a robust right to disconnect at a national level as a matter of urgency.

Section I: Current legal position in Ireland

Legislation

Working time in Ireland is primarily regulated by the Organisation of Working Time Act 1997. In turn, that legislation is based on the EU's Working Time Directive, which will be explored in more depth in section II.

The Organisation of Working Time Act 1997 provides for a minimum rest period of 11 hours per day, plus at least one full day off per week, and a maximum average working week of 48 hours. Employers are obliged to keep records to demonstrate they have complied with these requirements in respect of any given worker. The Act defines both 'working time' and 'outworkers' in terms that capture employees who are working remotely, but there is no specific provision made for the monitoring and recording of working time of outworkers apart from the general obligations of employers under section 25. That section provides that an employer must keep records stored on the business premises 'in such form... as will show whether the provisions of this Act are being complied with in relation to the employee' for the past three years, and make them available to Workplace Relations Commission inspectors upon request. 'Working time' is defined as time spent at a place of work or 'at the disposal' of an employer *and* 'performing the activities or duties' of that employee's work. 'Leisure time' is defined negatively as all time not spent working.⁴

Recent Irish case law

⁴ Organisation of Working Time Act 1997, s2(1).



A recent determination of the Labour Court is highly relevant for the discussion of the right to disconnect. In *O'Hara v Kepak Convenience Food*,⁵ the complainant worked as a business development executive for the respondent. Although based at the respondent's head office, she spent a lot of time travelling between customer sites. The respondent had in place a computer system for monitoring her time spent working on which she had to log her activities. Although her contract stipulated a normal working week of 40 hours, it was apparent that the complainant had been sent numerous work emails outside of normal business hours, including on some occasions after midnight. The complainant also contended that the administrative burden associated with logging her activities routinely required her to work 60 hours *per week*.

The respondent argued that if the complainant had been more efficient in organising her time and her use of the administrative system, she could have completed her work within the 40 hours provided by contract. However, the Labour Court quite rightly held that the relevant section of the 1997 Act provides that 'An employer shall not *permit* an employee to work' in excess of the maximum working hours.⁶ The Court determined that whether or not the complainant's workload was capable of being completed within 48 hours is immaterial. All that matters is (a) whether the employee did in fact work more than 48 hours *per week*; (b) whether the employer was aware of this, such that they could be said to have permitted it. In light of the computer system used by the respondent and the regular correspondence by email outside of working hours, the Court held the respondent was 'necessarily aware' of the complainant's working time, and took no action to prevent her working longer than the maximum hours. The Court revised upwards the award of damages made by the Adjudication Officer at first instance from €6,240 to €7,500.

Problems with existing framework

A number of features of the *Kepak* decision and of the underlying Irish and EU law stand out as significant for the present discussion of the right to disconnect. First, it illustrates two quite distinct ways in which the right to disconnect may come into play: on the one hand, the employee had to respond to emails outside of business hours, but even if there was no such communication, she already had a workload that required far in excess of normal business hours to complete. Second, it shows the burden is firmly on the employer to keep sufficient records of working time, and to pay close attention to these on an ongoing basis. Third, it demonstrates that the relevant legislation

⁵ Labour Court determination DWT 1820.

⁶ Organisation of Working Time Act 1997, s15(1); emphasis added.



imposes an obligation on employers not to permit employees to work excessively (even if the employee is willing to, or feels they need to in order to complete their assigned work).

On its face, it appears existing working time regulation is capable of accomplishing at least some of what a right to disconnect would provide. However, there are serious limitations that make strengthened legislation vital. The key to remember is that there are two distinct issues at play in respect of the right to disconnect: overall working time, and uninterrupted rest periods (sometimes called ‘always-on culture’). Both arose simultaneously in the *Kepak* case. However, it is not clear how the 1997 Act deals with emails outside of normal business hours where handling these does not take the worker beyond the 48-hour overall limit. Dealing with emails and other communications from work may count as interrupting the statutory rest period of 11 hours between working days, or the mandatory day off *per* week. It does seem unlikely that a single email after working hours would ‘restart the clock’ on that 11 hours, but it is equally unclear how interruptions in the daily rest period can be compensated for.

Of course, even isolating such cases will be complicated by the fact that workers will often anticipate emails outside of business hours (or be told to expect them). Perhaps dealing with whatever matter is the subject of the communication does not take the worker beyond the 48-hour limit, but a question arises as to whether the time spent waiting for the email to come in should count. After all, the expectation of a work assignment or query in the evening or weekend will inevitably shape how the worker spends that leisure time. In the recent case of *Matzak*,⁷ the CJEU held that in some circumstances, time spent waiting for work must be counted as ‘working time’, but this is notoriously difficult to monitor (as we know from experience with the ‘gig economy’).⁸ If an employee passes up on after-work drinks to be at home to deal with a late-night query from a manager or client, but that email never comes through so the worker spends the evening watching television instead... is that time spent working or not? Was his rest period interrupted or not?

This issue becomes especially fraught once flexible working schedules are introduced to the mix. An earlier report from the Observatory noted that:

⁷ C-518/15 *Matzak*, in particular para 53 ff; see also Leszek Mitrus, ‘Potential implications of the *Matzak* judgment (quality of rest time, right to disconnect)’ (2019) 10(4) *European Labour Law Journal* 386, 394 ff.

⁸ Issues of EU law will be discussed in a later section of the report.



...lower-ranked employees in large organisations whose work is generally not self-directed but assigned by superiors... may know to expect an email or a video-call at some time during the day, but not when, which affects how [they] spends [their] ‘free time’ in between.⁹

Clearly there is a need for legislation to define not only ‘working time’ and ‘leisure time’, but to place limits on the expectation of work that may or may not materialise. It is far from clear that such circumstances fall within the definition of being ‘at the disposal’ of an employer and ‘performing the duties’ associated with one’s work as things stand.

Further recent developments

The Government has announced its intention to legislate for a right to request to work remotely.¹⁰ The terms of the public consultation suggest that the model to be favoured is one in which relatively well-established employees would be able to work entirely off-site for a definite or indefinite period of time.¹¹ This combines with the provisions of the new EU Directive 2019/1158 (which provides a right to request ‘flexible working arrangements’ for workers with young children or who are carers), to create a risk that lower-level staff could spend much of their working day waiting (whether in the office or at home) to be sent assignments or information from superiors. A distinct right to disconnect is needed to accommodate the need for those lower-level staff to define their own working hours and plan their leisure time, rather than having to adapt to the ‘flexible’ schedule of superiors they may never even see in person. A right to leisure must encompass the right to determine how to spend it. That implies the worker must be able to ‘ring-fence’ certain periods of time in advance, by exercising a right to disconnect.

In recognition of these issues, the Workplace Relations Commission has recently adopted a code of practice which has been promulgated by statutory instrument.¹² Although not formally binding, it

⁹ Deirdre Ahern and Suryapratim Roy (eds), ‘Law and Policy Responses to Covid-19 in Ireland: Supporting Individuals, Communities, Businesses, and the Economy’ (Trinity Covid-19 Observatory, November 2020) <[https://www.tcd.ie/law/2020.21/Covid-19 Public Policy Report.pdf](https://www.tcd.ie/law/2020.21/Covid-19%20Public%20Policy%20Report.pdf)> (accessed 19 April 2021) 42 (and see ch 3 generally for more discussion).

¹⁰ <[Making Remote Work: National Remote Work Strategy - DETE \(enterprise.gov.ie\)](https://www.enterprise.gov.ie/en/remote-work)> (accessed 16 April 2021).

¹¹ Contrast this with the model proposed by the Observatory, which envisages a more flexible arrangement. For further information on this, see Alan Eustace and Niamh Egleston, ‘“Baby, You’re the Boss at Home”: Giving Employees the Right to Work from Home’ (Trinity Covid-19 Observatory blog, 18 January 2021), available at <<https://tcdlaw.blogspot.com/2021/01/baby-youre-boss-at-home-giving.html>> (links to earlier posts contained therein) accessed 16 April 2021.

¹² SI no 159/2021; see also WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021), available at <[code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf \(workplacereactions.ie\)](https://www.workplacereactions.ie/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf)> accessed 19 April 2021.



appears this will be used to interpret the relevant provisions of the 1997 Act. This code requires employers to create an in-house 'Right to Disconnect Policy', in consultation with employees and/or their representatives.¹³ This policy should, in particular:

...emphasise that there is an expectation that staff disconnect from work emails, messages, *etc*, outside of their normal working hours and during annual leave.

...allow for occasional legitimate situations when it is necessary to contact staff outside of normal working hours, including but in no way limited to ascertaining availability for rosters, to fill in at short notice for a sick colleague, where unforeseeable circumstances may arise, where an emergency may arise, and/or where business and operational reasons require contact out of normal working hours.

...recognise that business and operational needs may dictate that there will be situations which clearly require some out-of-hours working by some employees depending on the service being provided, the employee's role, the needs of customers/clients and the unique requirement of critical services and as agreed in an employee's terms of employment. Where relevant to the business, a right to disconnect policy should address the issue of working across global time zones.¹⁴

The code recognises the risks posed by various employees adopting conflicting flexible working patterns, although does not offer specific guidance on how to fix this.¹⁵ It also emphasises the importance of tone in work communications, and that employees should take care not to convey an unwarranted sense of urgency in such communications so as to compromise another worker's leisure time.¹⁶ It recommends staff, in particular managers, are trained in matters related to the policy so as to develop a 'culture' amenable to disconnection in the workplace.¹⁷ It also recommends a tiered approach to resolving employees' concerns about an infringement of their right to disconnect, progressing from informal discussions with a line manager to a designated HR officer responsible for resolving such issues.¹⁸ It notes that there are two potential risks of penalisation: against workers who

¹³ WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021) 7.

¹⁴ WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021) 7.

¹⁵ WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021) 8.

¹⁶ WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021) 8.

¹⁷ WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021) 8.

¹⁸ WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021) 9-10.



exercise their right and thereby do not reply to communications outside of working hours; and against workers who do respond at the time but subsequently raise a complaint under the grievance procedures that their right to disconnect was not respected.¹⁹ The code then offers a sample policy that employers can adapt to their own workplaces.

In its new National Remote Work Strategy,²⁰ the Department of Enterprise, Trade and Employment (DETE) reported the following in respect of its public consultation on remote working:

Where submissions differed was on whether new specific legislation on the right to disconnect was required. It was highlighted that the over-regulation of remote working could undermine its flexibility, one of its fundamental benefits. Concerns were also raised in terms of how such legislation would affect employers who operate across time zones and so accommodate different schedules. The Government is aware of the need to find the right balance [so] has asked the WRC to draw up a code of practice in this area for approval by the Minister.²¹

Now that this code has been promulgated, it appears the Government does not deem legislation to be necessary.²² However, the authors of this report consider this view to be misguided. The code does not adequately address the issues raised by remote working in particular (and the modern workplace in general), and excessively delegates regulation of the right to disconnect to businesses. It does not answer the questions raised above as to the interpretation of the 1997 Act. These problems will only be compounded once legislation providing rights to request to work remotely and flexibly are put in place. Therefore, the passage of that legislation (expected by September 2021),²³ both offers an opportunity and generates an obligation to strengthen the right to disconnect through legislative provision. The remainder of this report will offer suggestions for this, drawing on comparisons with other jurisdictions and recent proposals from European institutions.

¹⁹ WRC Code of Practice for Employers and Employees on the Right to Disconnect (2021) 9.

²⁰ Making Remote Work: National Remote Work Strategy (DETE 2021), available at <<https://enterprise.gov.ie/en/Publications/Publication-files/Making-Remote-Work.pdf>> accessed 19 April 2021.

²¹ Making Remote Work: National Remote Work Strategy (DETE 2021), available at <<https://enterprise.gov.ie/en/Publications/Publication-files/Making-Remote-Work.pdf>> (accessed 19 April 2021) 15.

²² See the statements on DETE's website: <<https://enterprise.gov.ie/en/News-And-Events/Department-News/2021/April/01042021.html>> accessed 19 May 2021.

²³ Making Remote Work: National Remote Work Strategy (DETE 2021), available at <<https://enterprise.gov.ie/en/Publications/Publication-files/Making-Remote-Work.pdf>> (accessed 19 April 2021) 17.



Section II: The right to disconnect and EU Law

Introduction

EU law does not currently include any express ‘right to disconnect’, but as explained above, existing legislation and case-law place employers under an obligation to ensure that workers are entitled to rest. The implication of these existing rights is that workers should already enjoy some protection from being constantly available to their employer. As mentioned earlier, the European Parliament has recommended that the European Commission propose a Directive on the right to disconnect in order to strengthen the existing rights and to flesh out the detailed arrangements for implementing the right to disconnect.²⁴ This section will begin with a summary of the rights already found in EU law before turning to look at the proposals for legislative reform.

EU law and workers’ right to rest

Article 31(2) of the EU Charter of Fundamental Rights states: ‘Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave’.²⁵

The Court of Justice of the EU has repeatedly affirmed that the right to rest is ‘a rule of EU social law of particular importance’ and, as a fundamental right, it must not be interpreted restrictively.²⁶ At a general level, this right is implicit in the 1989 Framework Directive on the Safety and Health of Workers.²⁷ This Directive places employers under ‘a duty to ensure the safety and health of workers in every aspect related to the work’.²⁸ ‘Health’ encompasses both physical and psychosocial aspects. When interpreting the terms ‘health’ and ‘safety’, the CJEU cited the definition found in the

²⁴ European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect, P9_TA-PROV(2021)0021: <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html> accessed 12 May 2021.

²⁵ It should be further observed that the right to adequate leisure time has substantial support in international human rights law, for example: Art 24 of the Universal Declaration of Human Rights: ‘Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay’; Part II, Art 2(1) of the European Social Charter: ‘With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake... to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit’.

²⁶ C-55/18 *CCOO*, paras 30 and 32.

²⁷ Directive (EC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1 (as amended).

²⁸ Directive (EC) 89/391, art 5(1).



Constitution of the World Health Organisation: ‘a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.’²⁹

This broad understanding of worker well-being underpins the Working Time Directive,³⁰ it is premised upon the belief that lengthy working hours and a concomitant lack of opportunity for rest pose risks to workers’ physical and psychosocial health. The Directive sets down minimum requirements for: breaks during working time; daily rest (within each 24 hours period); weekly rest; maximum weekly working hours; and paid annual leave. A basic dichotomy in the Directive is the distinction between ‘working time’ and a ‘rest period’. The former is ‘any period during which the worker is working, at the employer’s disposal and carrying out his activities or duties’.³¹ Time is either ‘working time’ or a ‘rest period’; the CJEU has described these as ‘mutually exclusive’.³² In the classic image of work, the working day had a clear start and finish: the ‘9-to-5’ job.³³ This made it clear what was working time and what was a rest period. Obviously, this has been transformed by the possibility to work remotely, as well as the growth of forms of employment where workers enjoy considerable autonomy as to how, when and where tasks are performed. Yet the dichotomy between work and rest in the Working Time Directive means that even short bursts of work outside of the principal part of the working day must be counted as working time. Therefore, if it is expected that a worker checks her email account in the evening for anything urgent, then it is likely that any time spent on this task qualifies as working time.

Once it is recognised that reading and responding to emails, or other types of communication, constitutes working time, it becomes clear how the obligations of the Working Time Directive imply a right to disconnect. This arises in several respects. First, the minimum daily rest period is ‘11 consecutive hours *per* 24-hour period’.³⁴ This will not be respected if a worker is answering emails at 10pm and then again at 8am the next morning. Second, in each seven-day period, there is a right to a ‘minimum uninterrupted rest period of 24 hours plus the 11 hours’ daily rest’.³⁵ Third, average weekly working time, including overtime, must not exceed 48 hours. Fourth, there shall be at least four weeks of paid annual leave. With the exception of the right to paid annual leave, the Directive permits some flexibility in how these requirements are applied. Derogations can be made for ‘activities involving the

²⁹ C-84/94 *UK v Council (Working Time)*, para 15.

³⁰ Directive (EC) 2003/88 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

³¹ Directive (EC) 2003/88, art 2(1).

³² C-121/02 *Jaeger*, para 48.

³³ Alan Eustace, ‘Protecting Workers’ Rights during Covid-19 – a Remote Prospect?’ (Trinity Covid-19 Observatory blog, 12 June 2020) <<https://tcdlaw.blogspot.com/2020/06/protecting-workers-rights-during-covid.html>> accessed 12 May 2021.

³⁴ Directive 2003/88, art 3.

³⁵ Directive 2003/88, art 5.



need for continuity of service or production’, such as the media or transport, or ‘where there is a foreseeable surge in activity’.³⁶ However, such measures must still normally ensure ‘equivalent periods of compensatory rest’.³⁷ Significantly, it is not possible to derogate from the definitions of ‘working time’ and ‘rest period’.³⁸ The Court has also emphasised that ‘derogations must be interpreted in such a way that their scope is limited to what is strictly necessary’.³⁹

Even taking into account the possibility of derogations, certain types of working practices cannot be reconciled with the Directive. For example, it would be contrary to the entitlement to weekly rest if an employer required workers to check their email and social media accounts on a daily basis. It is clear that the Directive already ensures that workers have a right to disconnect during the rest periods that it guarantees. Being aware of these legal obligations, it may be unlikely that an employer would issue an express instruction that workers have to maintain a constant online presence. Instead, this may arise through organisational culture and managerial expectations. If an employer conveys the impression that constant availability is valued and rewarded within the organisation, then this exerts considerable pressure on workers to behave in this manner. In this regard, it is important to note that the Court’s case law on the Working Time Directive places obligations on employers to take steps to ensure that workers are *actually* receiving their rest breaks. An employer that tacitly encourages constant availability may be in breach of these duties, as well as their basic duty to protect workers’ health in the 1989 Framework Directive.

In *CCOO*, a Spanish trade union brought legal proceedings against Deutsche Bank seeking a declaration that the bank had to create a system for recording daily working time. Although this was not an obligation of Spanish law, the Court of Justice held that the combined effects of Article 31(2) of the Charter, the 1989 Framework Directive, and the Working Time Directive, were that ‘the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.’⁴⁰ In particular, the Court was alert to the imbalance of power within the employment relationship and the difficulty that workers might have in challenging expectations of long working hours:

³⁶ Directive 2003/88, art 17(3).

³⁷ Directive 2003/88, art 17(2).

³⁸ C-515/18 *Matzak*, para 39.

³⁹ C-515/18 *Matzak*, para 38.

⁴⁰ C-55/18 *CCOO*, para 60.



...on account of that position of weakness, a worker may be dissuaded from explicitly claiming his rights *vis-à-vis* his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker.⁴¹

The Court has acknowledged that, in general, the Working Time Directive does not oblige employers to ‘force’ workers to take rest periods.⁴² At the same time, the employer must ensure that workers are enabled to benefit from their entitlement to rest. Consequently, the Court held that it was a breach of the Directive when the UK government issued guidelines to employers that let ‘it be understood that, while they [employers] cannot prevent those rest periods from being taken by the workers, they are under no obligation to ensure that the latter are actually able to exercise such a right ...’.⁴³ For the Court, such practices were liable to render ‘meaningless’ the rights conferred by the Directive.⁴⁴

Although the Working Time Directive is the most significant piece of legislation when considering the right to disconnect, it is important to acknowledge other relevant EU law measures. In 2017, the European Pillar of Social Rights was proclaimed by the Commission, Parliament and Council.⁴⁵ This sets out 20 principles, including ‘work-life balance’. Subsequently, the Union adopted a Directive on transparent and predictable working conditions⁴⁶ and a Directive on work-life balance.⁴⁷ Space does not permit a detailed examination of each of these Directives, but they can also play a part in avoiding a working culture of constant availability. For example, even if a worker’s hours are entirely or mostly unpredictable, it is still a requirement that the employer specify ‘predetermined reference hours and days’ in order that there are limits to the periods of time when the worker may be requested to work.⁴⁸ The Work-Life Balance Directive includes a new right to request flexible working arrangements for caring purposes, which extends to requesting ‘remote working arrangements’.⁴⁹ The Directive does not explicitly address the question of disconnecting when not working; however, given that, in this context, remote working is designed for the purpose of enabling the worker to combine working with caring responsibilities, then it is implicit that the worker should be protected from interruptions or

⁴¹ C-55/18 *CCOO*, para 45.

⁴² C-484/04 *Commission v UK*, para 43.

⁴³ C-484/04 *Commission v UK*, para 44.

⁴⁴ C-484/04 *Commission v UK*, para 44.

⁴⁵ [2017] OJ C 428/10.

⁴⁶ Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union [2019] OJ L 186/105.

⁴⁷ Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188/79.

⁴⁸ Directive 2019/1152, art 10(1)(a).

⁴⁹ Arts 3(f) and 9, Directive 2019/1158.



expectations of availability in the periods of time devoted to caring. If the worker continued to be at the disposal of the employer in time intended to be spent caring for children or dependent adults, then this would undermine the ability of the Directive to allow workers to reconcile work and family life.

Proposals for legislative reform

As discussed above, existing EU legislation contains important protections that contribute to ensuring that workers are entitled to rest. These measures do not, though, fully respond to the dilemmas posed by remote working. The Working Time Directive places limits on working time, but these do not, by themselves, tackle the problems arising from a culture of constant online availability. The Court's existing case-law on 'on-call' workers has linked working time to being on-call at the employer's premises or being required to reside geographically close to the premises in case of a call-out.⁵⁰ In contrast, remote working during the pandemic has meant that many workers are performing all their tasks from home. Even though workers are not on their employer's premises, this does not negate the possible disruption to the ability to rest and to pursue family life if the worker is expected to respond promptly to online or telephone communications irrespective of time or day. This has prompted calls for additional measures to tackle the specific context of disconnecting from remote working.

In June 2020, the European Social Partners adopted a Framework Agreement on Digitalisation.⁵¹ One of the four themes in this Agreement is 'modalities of connecting and disconnecting'. This includes a commitment to collective bargaining in order to clarify the 'legitimate expectations' of workers when using digital work devices. Matters that should be addressed during such bargaining include:

- Ensuring compliance with working time rules;
- Creating a culture that avoids out of hours contact and where workers are not obliged to be contactable;
- Developing guidance on the risks to health and safety of being overly connected coupled with 'alert and support' procedures.

⁵⁰ For example, in C-515/18 *Matzak*, a firefighter was required to be able to reach the employer's premises within 8 minutes of being called.

⁵¹ Available at https://www.etuc.org/system/files/document/file2020-06/Final%2022%2006%2020_Agreement%20on%20Digitalisation%202020.pdf accessed 12 May 2021.



The Framework Agreement is not legally-binding, but the social partners are committed to implementing it within the Member States during a period of three years from its adoption. Measures can be taken at national, sectoral and enterprise levels in accordance with arrangements in each Member State.

In January 2021, the European Parliament proposed that the Union go further by adopting a Directive on the right to disconnect. Although the power to propose such legislation lies with the Commission, the Parliament adopted a draft text of such a Directive.⁵² It is described as an instrument that ‘particularises and complements’ the existing Directives mentioned earlier in this section.⁵³ At its heart, the following definition is provided: “‘disconnect” means not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time’.⁵⁴ Consistent with the Working Time Directive, employers must have an ‘objective, reliable and accessible system’ for measuring working time; such data must be available also to workers.⁵⁵

The most novel element of the proposed Directive is a duty to ensure that detailed arrangements are made to enable workers to exercise the right to disconnect.⁵⁶ These should address:

- Practical arrangements for switching off digital tools;
- Systems for measuring working time;
- Health and safety assessments, including psychosocial risk assessments;
- Criteria for derogations and any related compensation for work outside normal working hours;
- Awareness-raising measures and in-work training to be taken by employers.

The proposed Directive includes measures designed to enhance its effectiveness in practice; these are similar to those found in other recent Directives on employment rights. Each worker would be provided by their employer with written information on the right to disconnect.⁵⁷ Workers would be entitled to a right of redress in case of a breach of the rights provided by the Directive, including a

⁵² Annex to European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect, P9_TA-PROV(2021)0021: <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html> accessed 12 May 2021. The Parliament may request the Commission to submit a legislative proposal under Art 225 TFEU, but the Commission is not obliged to act upon this request.

⁵³ Art 1(2).

⁵⁴ Art 2(1).

⁵⁵ Art 3(2).

⁵⁶ Art 4(1).

⁵⁷ Art 7.



right for trade unions to engage in proceedings on behalf or in support of workers.⁵⁸ Penalties should be effective, proportionate and dissuasive.⁵⁹ Workers (and their representatives) would be protected from adverse treatment or adverse consequences resulting from making a complaint or initiating legal proceedings to enforce the rights in the Directive.⁶⁰ If a worker establishes facts that give rise to a presumption that they have been dismissed or subject to adverse treatment because of exercising, or seeking to exercise, the right to disconnect, then the burden of proof shifts to the employer to prove that the dismissal or treatment was because of other grounds.⁶¹

During the discussion on the proposed Directive, a significant issue was its relationship to the Framework Agreement adopted in 2020. As mentioned above, this has a three-year period for its implementation, and some argued that this should be respected before any further legislative action was considered. Indeed, the Parliament's resolution was amended to insert a statement that 'a legislative proposal before the end of that implementation period would disregard the role of social partners laid down in the TFEU'.⁶² In contrast, the European Trades Union Confederation issued a statement after the resolution rejecting this interpretation of the Framework Agreement and calling on the Commission to bring forward a legislative proposal.⁶³

Summary

This review of existing EU instruments and proposals for reform provides an essential context for measures to create a right to disconnect in Irish law. Any new Irish legislation should build upon the foundation of existing rights in EU law, in particular, the Working Time Directive and its interpretation by the Court of Justice. At the core of the Working Time Directive is the idea that 'working time' and 'rest periods' are mutually exclusive. While there can be flexibility in the organisation of working time, this must not deprive workers of their entitlement to uninterrupted daily and weekly rest. A rest period must be characterised by the ability of the worker to be free from any expectation that she remains available to employers, colleagues, clients or service-users. Both the Framework Agreement on Digitalisation and the European Parliament's draft Directive provide some useful indications of the

⁵⁸ Art 6.

⁵⁹ Art 8.

⁶⁰ Art 5(2).

⁶¹ Art 5(3).

⁶² European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect, P9_TA-PROV(2021)0021: <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html> para 13. These words were not present in the original motion for a Parliament Resolution: see <https://www.europarl.europa.eu/doceo/document/A-9-2020-0246_EN.html#title1>. Links accessed 12 May 2021.

⁶³ See <<https://www.etuc.org/en/pressrelease/right-disconnect-needed-now>> accessed 12 May 2021.



likely direction of future EU measures in this field. In essence, they focus upon ensuring that working time rules are respected; that there is a protected period when workers will not be contacted (save for exceptional circumstances); that there is clear information for workers on their employer's measures to ensure periods of disconnection; and that these rights are meaningful and effective in practice.

A European right to disconnect is unlikely to be highly prescriptive; instead, it can be anticipated that it will identify key outcomes that will have to be secured through national implementation, including dialogue between governments, employers and trade unions. In its 2021 Action Plan on the European Pillar of Social Rights, the Commission has committed to: (i) encouraging the social partners to continue working on an effective right to disconnect, and (ii) ensuring 'an appropriate follow-up' to the European Parliament's proposed Directive.⁶⁴ While this leaves it open as to whether or not the Commission will ultimately propose new EU legislation on the right to disconnect, it is evident that this topic is now firmly on the EU policy agenda.

Section III: The right to disconnect in France

Background

France was the first country in the world with a statutory right to disconnect, introduced alongside a substantial reform of the Labour Code.⁶⁵ Yet, the so-called 'El Khomri Law'⁶⁶ was far from a much-awaited harbinger of social change in the French Republic. On the contrary, the Labour Code revision caused violent street protests with dozens injured⁶⁷, backlash from the trade unions⁶⁸ and an unsuccessful constitutional challenge initiated by some Members of the Parliament.⁶⁹

⁶⁴ European Commission, 'The European Pillar of Social Rights Action Plan' COM (2021) 102, 14.

⁶⁵ Code du travail, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000032983213/> accessed 4 May 2021.

⁶⁶ Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels (1), available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000032983213/> accessed 4 May 2021.

⁶⁷ Anne de Guigné and Charles Gautier, 'Loi travail : nouvelle journée de manifestation ultraviolente à Paris' (Le Figaro, 14 June 2016) available at <https://www.lefigaro.fr/actualite-france/2016/06/14/01016-20160614ARTFIG00334-loi-el-khomri-nouvelle-journee-de-manifestation-ultraviolente-a-paris.php> (accessed 4 May 2021).

⁶⁸ Nicolas Boring, 'France: Controversial Labor Law Reform Adopted' (Global Legal Monitor, 14 October 2016) available at <https://www.loc.gov/law/foreign-news/article/france-controversial-labor-law-reform-adopted/> accessed 4 May 2021.

⁶⁹ Conseil Constitutionnel, Décision n° 2016-736 DC du 4 août 2016, Loi relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, available at <https://www.conseil-constitutionnel.fr/decision/2016/2016736DC.htm> accessed 4 May 2021.



Proposed by the socialist then-Labour Minister Myriam El Khomri and ultimately signed in August 2016 by the socialist President François Hollande, the reform aimed to modernise the country's labour market and boost employment levels by simplifying and relaxing the labour legislation. Among the most contested measures was one allowing to negotiate company-specific collective agreements, for example with regard to working time over the statutory 35-hour week in France, which would bypass those agreements concluded nationwide or on an industry level.⁷⁰

The introduction of a statutory right to disconnect, linked to the modernisation aspect of the reform, was, thus, overshadowed by the controversial remainder of the 'El Khomri Law'. While generally welcomed as a positive development for employees, the right to disconnect, currently laid down in Article L 2242-17 of the French Labour Code, was criticised for its vagueness. In addition, many argued that such a right had already been recognised by the courts, notably by the French Supreme Court (*Cour de Cassation*) and, therefore, the 'El Khomri Law' only reaffirmed its existence.

In fact, some companies had already accommodated the right to disconnect prior to the 2016 reform, and the government's plan to regulate it is thought to have originated from the corporate world. The inclusion of the right to disconnect in the Labour Code is often linked with the so-called 'Mettling report'⁷¹ on digital transformation and life at work, submitted to Minister El Khomri in 2015 by an Orange executive. Mettling argued in favour of a statutory right to disconnect, observing that 72% of French employees worked in companies that had not taken any measures to regulate online communication, and that a third of the workers did not have any right to disconnect whatsoever.⁷²

Legislation

The right to disconnect, introduced by Article 55 of the 'El Khomri' Law which came into force from January 2017 is currently laid down in Article L 2242-17 of the French Labour Code.⁷³ The provision is linked to Part II of the Code dedicated to collective employment relationships. More specifically, it has been included in a chapter on mandatory collective bargaining, in Subsection 3 entitled 'Professional

⁷⁰ *ibid.*

⁷¹ 'Droit à la déconnexion : ce que dit le Code du travail' (JDN, 17 February 2021) available at <https://www.journaldunet.fr/management/guide-du-management/1201613-droit-a-la-deconnexion-code-du-travail-loi/> accessed 4 May 2021.

⁷² Bruno Mettling, 'Transformation numérique et vie au travail', rapport à l'attention de Mme Myriam El Khomri, Ministre du Travail, de l'Emploi, de la Formation Professionnelle et du Dialogue Social (2015) available at <https://www.vie-publique.fr/sites/default/files/rapport/pdf/154000646.pdf> accessed 4 May 2021.

⁷³ It was initially intended to be laid down in Article L.2242-8 of the Labour Code, see Loi n° 2016-1088 (n 2) art 55.



Equality between Women and Men, and the Quality of Life at Work'. The right to disconnect has been inserted into paragraph 7 of the provision, otherwise primarily concerned with ensuring gender equality in collective bargaining.

According to the Labour Code, employers shall engage in mandatory collective bargaining concerning a number of issues including the quality of work on an annual basis.⁷⁴ This applies to every company that has a collective representation, which in France is the case in all companies with more than 50 employees.⁷⁵ Exceptionally, mandatory collective bargaining may be carried out once every four years if a separate collective agreement on the frequency of bargaining is in place.⁷⁶ Failure to engage in mandatory bargaining with the workers results in a fine for the employer.⁷⁷

Paragraph 7 of Article L 2242-17 states that mandatory bargaining in the sphere of quality of life at work shall concern 'the modalities of the full exercise by the employee of their right to disconnect', and the regulation by the company of the use of digital tools with a view to ensuring respect of the rest periods and annual leave, as well as appropriate work-life balance.⁷⁸ The Labour Code does not lay down any sanctions in case the bargaining on the right to disconnect is unsuccessful. Yet, that does not mean that no sanctions are envisaged for employers who do not respect their obligations with regard to the right to disconnect, especially if the employee's working time and mandatory rest periods are affected as a result of having to work remotely after hours. The issue of compensation for employees for failure to ensure the right to disconnect, which has been addressed by the French courts, will be discussed in the next section.

In the absence of an agreement with the workers regarding the quality of life at work, the employer shall adopt a 'charter' defining the modalities of the exercise of the right to disconnect. Such charter shall put into place measures aiming to inform the employees about 'reasonable use of digital tools' in the workplace.⁷⁹ The charter, however, may only be adopted upon consultation with the social and economic committee,⁸⁰ a representative body which, since a 2017 order by President Macron is only

⁷⁴ Code du travail (n 1), art L2242-8.

⁷⁵ Code du travail (n 1), art L2143-3.

⁷⁶ Code du travail (n 1), Domaines et périodicité de la négociation obligatoire, arts L2241-1-L2243-2.

⁷⁷ Code du travail (n 1) art L2242-7.

⁷⁸ Code du travail (n 1), art L2242-17 7°.

⁷⁹ *ibid.*

⁸⁰ *ibid.*



mandatory in companies with at least 11 employees.⁸¹ This means that smaller undertakings have no such obligation with regard to the right to disconnect.

It is also important to note that Article L 2242-17 uses the term '*salarié*' in the context of the right to disconnect, meaning an employee receiving a salary who has an employment contract. This includes fixed-term and part-time workers, but not self-employed workers who might provide services for a company as external contractors. Another limit to the right to disconnect is that the Labour Code applies solely to employment relationships within the private sector, while professions in the public sector are regulated by separate legislation. The latter issue resurfaced in 2019, on the occasion of an intended reform of the civil service, when the French Parliament rejected the introduction of a statutory right to disconnect for civil servants, justifying the decision with the 'specifics of the public sector and the necessity of continuous service'.⁸²

Case law

Apart from the lack of a clear definition in the Labour Code, another reservation expressed about the newly created right to disconnect was the fact that the existence of such right had already been recognised by the Supreme Court prior to the 'El Khomri Law'. Back in 2001, the *Cour de Cassation* acknowledged that workers had the right to separate their private home from their working life in a case concerning an insurance agent who handed in his notice after the employer forced him to work from home upon closure of the company's offices.⁸³ The Court stated that the worker in question was under no obligation to agree to take calls from clients or store professional documents at home after the employer had unilaterally changed the employment contract.

An important case was the Supreme Court's judgment from 2004 where a private ambulance driver had been dismissed for gross misconduct via a special disciplinary procedure having failed to answer three phone calls from his supervisor, made to his private mobile phone.⁸⁴ While the employer argued

⁸¹ Ordonnance n° 2017-1718 du 20 décembre 2017 visant à compléter et mettre en cohérence les dispositions prises en application de la loi n° 2017-1340 du 15 septembre 2017 d'habilitation à prendre par ordonnances les mesures pour le renforcement du dialogue social, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000036240557/> accessed 4 May 2021.

⁸² 'Droit à la déconnexion pour le salarié: de quoi parle-t-on?', Syndicat CFTC 2019, available at <https://www.cftc.fr/actualites/droit-a-la-deconnexion-en-2019-de-quoi-parle-t-on> accessed 5 May 2021.

⁸³ Cour de Cassation, Chambre sociale, du 2 octobre 2001, 99-42.727, Publié au bulletin, available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007046319/> accessed 5 May 2021.

⁸⁴ Cour de Cassation, Chambre sociale, du 17 février 2004, 01-45.889, Inédit, available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007473856/> accessed 5 May 2021.



that the worker had put a patient in danger, the *Cour de Cassation* ruled that ‘the fact that the worker could not be reached on his private mobile phone outside his working hours was not of wrongful nature and did not, therefore, justify a disciplinary dismissal for gross misconduct’.⁸⁵ This judgment is generally considered as the first to have recognised a worker’s right to disconnect.

The most famous judgment of the *Cour de Cassation* to date regarding the right to disconnect addressed the issue of compensation for workers who had not been able to exercise this right.⁸⁶ The decision was issued in 2018, when the ‘El Khomri Law’ was already in force yet concerned a situation that had predated the reform. It was, therefore, dealt with on the basis of the previous version of the Labour Code. The applicant was a former corporate executive who, following his dismissal, brought an action against the employer claiming payment for the work that he had performed outside his working hours, notably when he had to have his mobile phone switched on at all times to take urgent phone calls. The matter ended up before the Court of Appeal of the city of Montpellier in December 2016, less than two weeks ahead of the ‘El Khomri Law’s entry into force. The Court ruled that being available to take phone calls should count as ‘standby period’ and, thus, should be remunerated accordingly.

The defendant challenged the decision before the Supreme Court, and the most interesting argument invoked was the fact that being available to take phone calls was allegedly outside the statutory definition of a standby period. Indeed, according to the Labour Code prior to the ‘El Khomri Law’, the standby period was defined as having to *remain at home* or in close proximity to home in order for the worker to be available to be called in to work by the employer.⁸⁷ Consequently, the defendant submitted that the worker had at no time been obliged to stay at home as the phone calls at issue were performed remotely. Yet the *Cour de Cassation*, in line with the new definition of a standby period which has removed the requirement to remain at home, did qualify the situation at issue as a standby period.

Furthermore, according to the previous statutory definition of standby period, the worker was to be remunerated only in the event where the work had actually been carried out. Here, again, the ‘El

⁸⁵ *ibid.*

⁸⁶ *Cour de cassation, civile, Chambre sociale, 12 juillet 2018, 17-13.029, Inédit, available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000037384264> accessed 5 May 2021.*

⁸⁷ Former art L3121-5 of the *Code du travail*. Currently, the standby period is defined in art L3121-9 of the *Code du travail* (1). See Céline Leborgne-Ingelaere, ‘Chronique de droit du travail (4e partie)’, (Actu-Juridique.fr, 24 October 2019) available at <https://www.actu-juridique.fr/social/travail/chronique-de-droit-du-travail-4e-partie/> accessed 5 May 2021.



Khomri Law' has intervened, for the revised Labour Code stipulates that aside from the remuneration for the work actually carried out, the standby period shall also be compensated, either financially, or with time off. While the case at issue occurred prior to this change in the law, the applicant's employer was bound by a collective agreement that also envisaged a special bonus for standby periods. Accordingly, the *Cour de Cassation* ruled that the applicant was entitled to a €60,000 'standby bonus' that had accumulated over the years. The judgment is important insofar as it has clarified that workers who are not able to disconnect due to the nature of their job, and who are obliged to be available to take phone calls, answer emails etc. outside working hours, are in fact on standby.

Implementation in practice

While Article L 2242-17 of the Labour Code mentions the 'modalities of the full exercise of the right to disconnect by employees', the legislation does not clarify *how* in practice this right should be facilitated by companies. The choice of appropriate measures, often purely technical, is, therefore, left to the employer. One possible solution is to set a 'disconnection timetable' within the company.⁸⁸ This requires further implementation measures, such as pop-up notifications reminding workers that it is time to disconnect, email autoresponders, switching on a 'do not disturb' mode on work phones or leaving them behind in the office before annual leave. More radical steps include verifying remotely that workers do not connect to the company servers outside working hours or even blocking those servers during this time.⁸⁹

What may be problematic about the above solutions is striking the right balance in order to ensure that the right to disconnect remains a right and does not turn into an obligation. On this note, a collective agreement on remote work signed in 2016 by the Société Générale bank contained a controversial clause concerning work emails. It specified that an employee working remotely should not consult their email account or reply to any messages outside working hours, and if they did so out of their own initiative, this activity would not be considered as work performed for the employer.⁹⁰ This clause seems to go clearly against the above discussed case-law which reiterates that workers shall be remunerated for the work performed outside their working hours.

⁸⁸ Marianne Lecot, 'Le droit à la déconnexion : mythe ou réalité ?', available at <https://www.village-justice.com/articles/droit-deconnexion-mythe-realite,24542.html> accessed 6 May 2021.

⁸⁹ *ibid.*

⁹⁰ 'Guide du droit à la déconnexion ; Droit ou devoir de déconnexion, quelle est la différence ?', available at <https://droitaladeconnexion.info/devoir-de-deconnexion/> accessed 6 May 2021.



While in the above case the employer proved overly diligent in trying to ensure that the employees disconnect from their email account after work, there are instances where disconnection may lawfully be required by the employer. For example, a sector-wide collective agreement signed by Syntec (a federation of trade unions encompassing professions such as engineering, IT or consultancy) in 2014, prior to the 'El Khomri Law', introduced 'an obligation to disconnect'.⁹¹ What was meant by that, however, was that the employer had an obligation to set up a system to verify that workers disconnect from digital devices in order to ensure the minimum statutory daily and weekly rest periods. In this vein, it would appear that workers may choose to check their emails outside the 35-hour working week (for which they should be remunerated accordingly), as long as their activity does not interfere with the daily and weekly rest periods required by the EU Working Time Directive.⁹² In the event that the minimum rest period is interfered with, it seems that employers are under an obligation to request that workers disconnect from digital devices.

Section IV: The right to disconnect in Germany

Background

In Germany, the right to disconnect has long been discussed under the heading of 'constant availability'. The legal arguments against the long existing 'always-on' culture are centred around the supposedly clear structure of the national statute regarding working time, namely the *Arbeitszeitgesetz* ('ArbZG'). The law is modelled on the Working Time Directive.⁹³ Thus, the ArbZG is equally based on the distinction between working time and rest periods. This is in accordance with the Working Time Directive which establishes the mutually exclusive nature of 'work' and 'rest', in other words a distinction without any type of layers or grey areas in between.⁹⁴ § 5 (1) ArbZG imposes an uninterrupted daily rest period of 11 hours (with certain narrow exceptions). Due to the mandatory

⁹¹ Viviane Stulz, 'Droit à la déconnexion : "Il faut inventer de nouvelles méthodes de travail', available at <https://www.editions-legislatives.fr/actualite/droit-a-la-deconnexion-il-faut-inventer-de-nouvelles-methodes-de-travail-> accessed 6 May 2021.

⁹² Council and Parliament Directive 2003/88/EC concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

⁹³ Directive (EC) 2003/88 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

⁹⁴ Stefan Sträßer, '§ 3 Herausforderungen der Digitalisierung für das Arbeitszeitrecht' in Nicolai Besgen and Thomas Prinz (eds), *Arbeiten 40 - Arbeitsrecht und Datenschutz in der digitalisierten Arbeitswelt* (DeutscherAnwaltVerlag 2018) para 69; C-14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* ECLI:EU:C:2005:728, para 42.



nature of the respective provisions, this may not be circumvented by way of contractual agreement.⁹⁵ So, for example, an employee may not simply waive his rest period if the employer suggests a monetary compensation. Therefore, technically, the ArbZG already clearly establishes a 'right to disconnect' without explicitly referring to this wording.

In the last decade, prominent corporations, such as BMW, Audi and Telekom, have all implemented codes of conduct to regulate that employees should not, notwithstanding exceptional circumstances, be contacted outside of regular working hours.⁹⁶ Most prominently, Volkswagen shuts down the e-mail function of work smartphones thirty minutes after the end of regular working hours.⁹⁷ Consequently, correspondence between employees must take place between 7.00 am and 6.15 pm.⁹⁸ Already as of 2015, 4,000 employees were covered by this in-house regulation.⁹⁹ This has proven to be very effective to counteract the often natural understanding to contact others outside of working hours. Codes of conduct also show awareness of the problem and clarify that work outside of regular working hours is neither excepted nor desired. However, most of these guidelines only constitute recommendations and the practical implementation heavily depends on the direct superior.¹⁰⁰

Regarding the European Parliament resolution of 21 January 2021, the *Bundesvereinigung der Deutschen Arbeitgeberverbände* (Confederation of German Employers' Associations) has rejected the legal necessity to implement a right to disconnect.¹⁰¹ It argued that the Working Time Directive and the corresponding German legislation are sufficiently and exhaustively addressing the issue. On the contrary, an explicit right to disconnect would contravene flexible solutions that are more desirable in the modern economy. The *Deutscher Gewerkschaftsbund* (German Trade Union Confederation)

⁹⁵ Stefan Sträßer, '§ 3 Herausforderungen der Digitalisierung für das Arbeitszeitrecht' in Nicolai Besgen and Thomas Prinz (eds), *Arbeiten 40 - Arbeitsrecht und Datenschutz in der digitalisierten Arbeitswelt* (DeutscherAnwaltVerlag 2018) para 72.

⁹⁶ Nathalie Maier and Verena Ossoinig, 'Freizeit und Beruf - Rechtliche und technische Unterstützung der Work-Life-Balance' (DB 2015) 2391, 2393; Matthias Kaufmann, 'Erreichbarkeit nach Dienstschluss, Deutsche Konzerne kämpfen gegen den Handy-Wahn' (*DER SPIEGEL*, 17 February 2014) <www.spiegel.de/karriere/berufsleben/erreichbar-nach-dienstschluss-massnahmen-der-konzerne-a-954029.html> accessed 23 April 2021.

⁹⁷ Nathalie Maier and Verena Ossoinig, 'Freizeit und Beruf - Rechtliche und technische Unterstützung der Work-Life-Balance' (DB 2015) 2391, 2394.

⁹⁸ Felix Frieler, 'Ständige Erreichbarkeit, Nach Dienstschluss schweigt das Handy' (*Stern*, 29 November 2013) <www.stern.de/wirtschaft/news/staendige-erreichbarkeit-nach-dienstschluss-schweigt-das-handy-2074511.html> accessed 1 May 2021; Nathalie Maier and Verena Ossoinig, 'Freizeit und Beruf - Rechtliche und technische Unterstützung der Work-Life-Balance' (DB 2015) 2391, 2394.

⁹⁹ Nathalie Maier and Verena Ossoinig, 'Freizeit und Beruf - Rechtliche und technische Unterstützung der Work-Life-Balance' (DB 2015) 2391, 2394.

¹⁰⁰ Nathalie Maier and Verena Ossoinig, 'Freizeit und Beruf - Rechtliche und technische Unterstützung der Work-Life-Balance' (DB 2015) 2391, 2394.

¹⁰¹ Bundesvereinigung der Deutschen Arbeitgeberverbände, 'Europäisches Parlament verabschiedet Initiativbericht zum „Recht auf Nichterreichbarkeit“' (*Bundesvereinigung der Deutschen Arbeitgeberverbände*, 1 February 2021) <<https://arbeitgeber.de/europaeisches-parlament-verabschiedet-initiativbericht-zum-recht-auf-nichterreichbarkeit/>> accessed 28 April 2021.



agrees insofar as the problem is seen as revolving more around enforcement than introducing a new right to disconnect.¹⁰² Taking the seemingly straightforward legal situation, the measures taken by companies and the opinions of relevant parties into account, there does not seem to be urgent need for new legislation.

Legal uncertainty

However, a different conclusion might be supported by taking a closer look at the legal situation. In fact, there is an undeniable legal uncertainty regarding the problem of constant availability in German labour law. In the academic literature, the matter is highly disputed and there is an unclear opinion picture.¹⁰³ By the letter of the law, strictly applying § 5 (1) ArbZG, even a short answer to an e-mail at midnight would lead to a 'restart' of the rest period of 11 hours.¹⁰⁴ The employee would, in consequence, be only allowed to continue to work beginning at 11 am on the next morning. It is argued that this outcome is too formalistic and should be corrected.¹⁰⁵ In contrast, a more restrictive interpretation is proposed to exclude answering an e-mail or a short phone call from constituting working time because these activities are often so insignificant that the underlying objectives of the rest period remain untouched.¹⁰⁶ This obviously raises other questions as to how to set the boundaries: in other words, which work would still constitute 'working time'. Also, such an approach would contravene the jurisprudence of the Court of Justice of the European Union that strongly points in the direction that the intensity of the work should not play a role in the assessment whether the activity in question constitutes work.¹⁰⁷

This is far from being the only proposed solution. On the other end of the spectrum, based on the literal interpretation, it is suggested that an absolute character of health protection should be

¹⁰² Deutscher Bundestag Deutscher Gewerkschaftsbund, Ausschuss für Arbeit und Soziales, 19. Wahlperiode, *Schriftliche Stellungnahme des Deutschen Gewerkschaftsbundes, Rahmenbedingungen für orts- und zeitflexibles Arbeiten, Homeoffice und mobile Arbeit*, 29 April 2021) 9.

¹⁰³ Jürgen Röller, 'Mobiles Arbeiten' in Wolfdieter Küttner (ed), *Personalbuch 2021* (2021) para 8.

¹⁰⁴ Nicolai Besgen, 'Stress am Arbeitsplatz - Ständige Erreichbarkeit und Freizeitarbeit aus arbeitsrechtlicher Sicht' (B + P 2017) 19, 22; Thomas UW Baeck, 'Aktuelle Herausforderungen des Arbeitszeitrechts - betriebsnahe Vereinbarungen als Lösungsansatz, Ein Plädoyer für die Stärkung der Betriebsparteien in Arbeitszeitfragen' (NZA 2020) 96, 98.

¹⁰⁵ Thomas UW Baeck, 'Aktuelle Herausforderungen des Arbeitszeitrechts - betriebsnahe Vereinbarungen als Lösungsansatz, Ein Plädoyer für die Stärkung der Betriebsparteien in Arbeitszeitfragen' (NZA 2020) 96, 99.

¹⁰⁶ Nathalie Maier and Verena Ossoinig, 'Freizeit und Beruf - Rechtliche und technische Unterstützung der Work-Life-Balance' (DB 2015) 2391, 2392; Thomas UW Baeck, 'Aktuelle Herausforderungen des Arbeitszeitrechts - betriebsnahe Vereinbarungen als Lösungsansatz, Ein Plädoyer für die Stärkung der Betriebsparteien in Arbeitszeitfragen' (NZA 2020) 96, 99.

¹⁰⁷ C-14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* ECLI:EU:C:2005:728, para 43: 'the intensity of the work done by the employee and his output are not among the characteristic elements of the concept of "working time" within the meaning of that directive'.



promoted to fulfil the aim of the German statute and, ultimately, the Working Time Directive. Furthermore, it is argued that ‘voluntary’ work cannot be deemed to interrupt the rest period.¹⁰⁸ This would lead to the additional requirement that the work has to be explicitly ordered by the employer at the given time.¹⁰⁹ In conclusion, the narrative that there is no need for a right to disconnect because the current legal framework is cohesive and exhaustive is contradicted by the plethora of academic contributions on the matter.

Creating clarity and certainty

Ultimately, on the level of German national law as well as on the level of European law, the crux of the legislative matter at hand lies within a balancing act of desirable flexibility and necessary protection of health and leisure. As the issue of remote work naturally came to the forefront, more flexibility concerning working hours is increasingly welcomed by employees to reconcile work and family life. The described legal uncertainty is detrimental on both ends. It could create loopholes to circumvent the required rest period, but also prevent flexible solutions. This balancing act should be more adequately addressed by the law when introducing the right to disconnect. The examples mentioned above illustrate that large companies have already acknowledged this problem and a more cohesive, but also flexible legal framework, might be welcomed by both the employer- and employee-side.

Another issue that is closely related – and might also be resolved by legislation enshrining a right to disconnect is the fact that the requirements set by the CJEU in the *CCOO* case have not yet been legislatively implemented into German labour law.¹¹⁰ Essentially, the employer is obliged to create an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.¹¹¹ Currently, under German law, this obligation only exists regarding overtime hours, § 16 (2) ArbZG.¹¹² It is opportune to advance in this direction at this point in time, especially as Article 4(1)(b) (‘the system for measuring working time’) of the proposed directive in the Annex to the European Parliament resolution also emphasises this connection.

¹⁰⁸ Stefan Sträßer, ‘§ 3 Herausforderungen der Digitalisierung für das Arbeitszeitrecht’ in Nicolai Besgen and Thomas Prinz (eds), *Arbeiten 40 - Arbeitsrecht und Datenschutz in der digitalisierten Arbeitswelt* (DeutscherAnwaltVerlag 2018) para 77.

¹⁰⁹ Thomas UW Baeck, ‘Aktuelle Herausforderungen des Arbeitszeitrechts - betriebsnahe Vereinbarungen als Lösungsansatz, Ein Plädoyer für die Stärkung der Betriebsparteien in Arbeitszeitfragen’ (NZA 2020) 96, 99.

¹¹⁰ C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, ECLI:EU:C:2019:402.

¹¹¹ C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, ECLI:EU:C:2019:402, para 60.

¹¹² Sabine Poeche, ‘Arbeitszeit’ in Wolfdieter Küttner (ed), *Personalbuch 2021* (2021) para 25.



In Germany, it also seems evident to use the collective bargaining structures to find tailor-made solutions on the sectoral or company level. In 2016, the German Federal Ministry of Labour and Social Affairs published a white paper on the modern work environment ('Arbeiten 4.0').¹¹³ It emphasises the potential of social partners and, in particular, work councils, to find specific solutions to balance the need for uninterrupted rest periods and flexibility.¹¹⁴ Preferably, a clause emulating the structure of Article 88 (1) EU-GDPR ('Member states may, by law or **collective agreement**, provide for more specific rules to ensure the protection of rights and freedoms...') would create opportunities to find practical solutions.¹¹⁵ Therefore, it is specifically to be welcomed that the European Parliament resolution (point 13) mentions that the legislative initiative should respect the social partners' autonomy at the national level, national collective agreements, and national labour market traditions and models.

Conclusion

Countries all over the world are grappling with the problems of 'always-on' culture and the risks posed by digital, flexible and remote working to workers' health and the right to leisure. In Europe, France led the way on legislating for a specific right to disconnect, but it has experienced teething problems in its implementation. Germany has dealt with similar issues to Ireland, albeit that these have been discussed to a significantly greater extent in legal academic commentary. There are clear lessons for Ireland to learn from these experiences.

An Irish right to disconnect must build on not only existing working time regulation, but also EU law in this area. The CJEU has made important recent determinations that have yet to be fully reflected in Irish law. Furthermore, social partners in the member states are committed to implementing the Framework Agreement negotiated at EU level within three years from June 2020. More recently, the European Parliament has seized the initiative in this area and called on the Commission to propose binding legislation on a right to disconnect, going so far as to adopt a draft text for a directive.

The momentum is clearly in favour of enhanced legal protection for workers. The authors recommend that the Irish government take the opportunity offered by the Strategy on Remote Working to

¹¹³ Bundesministerium für Arbeit und Soziales, *Weissbuch Arbeiten 4.0* (March 2017).

¹¹⁴ *Ibid.*

¹¹⁵ Baeck, 'Aktuelle Herausforderungen des Arbeitszeitrechts - betriebsnahe Vereinbarungen als Lösungsansatz, Ein Plädoyer für die Stärkung der Betriebsparteien in Arbeitszeitfragen', 100.



implement a legislative right to disconnect. In doing so, the experience of our neighbours and the proposals from the European institutions should inform developments in this area. In particular, we recommend that the government incorporates the following elements:

- The right to disconnect should be placed on a specific legislative footing. The legislation should:
 - define what counts as ‘work’ for the purposes of ‘working time’;
 - define the broad circumstances when it is permitted to contact workers outside of normal working time and the consequences of such interruptions for rest periods;
 - allow leisure time to be ring-fenced in advance from both work and the expectation of communication, with robust protection against penalisation;
- The government should consult with the social partners in designing the legislation. Social partners should also be involved in the implementation of the right to disconnect in each workplace. Where trade union membership in a particular workplace is weak, there should nonetheless be consultation between management and workers’ representatives;
- Legislation should clarify the relationship with existing working time regulation and with other legislation on flexible working arrangements and remote working, and how the right to disconnect should operate in circumstances where business is conducted across time zones;
- Atypical and ‘gig-economy’ workers should be included within the scope of protection;
- There must be adequate remedies available to workers and effective enforcement mechanisms.



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