

LABOUR AND SOCIAL JUSTICE

LEGISLATING A RIGHT TO DISCONNECT

Luminița Dima
Alex Högback
December 2020



In Romania the right to disconnect is not regulated by the legislation in force, but labour legislation regulates in a very restrictive manner the duration of working time.



Despite legal provisions, employees working remotely are faced with a significant issue as regards the balance between working time and private life. In the context created by the COVID-19 pandemic, the situation requires a specific right to disconnect to be recognised for employees.



The social partners must play a central role in defining the modalities underlying the right to disconnect and its related policies at the workplace.

LABOUR AND SOCIAL JUSTICE

LEGISLATING A RIGHT TO DISCONNECT

in cooperation with



Contents

1.	BACKGROUND	2
2.	LEGAL FRAMEWORK IN ROMANIA	4
	Limitation of daily working time	4
	Limitation of the working week	4
	Limitation of overtime	4
	Control and sanctions	4
	Specific rules for teleworking	5
3.	LEGAL FRAMEWORK IN OTHER COUNTRIES	6
3.1	Existing laws	6
3.2	Other legislative initiatives	8
4.	ANALYSIS AND RECOMMENDATIONS	10

1

BACKGROUND

The right to disconnect refers in short to the right of workers to disconnect from their work and to not receive or answer any work-related emails, calls, or messages outside of normal working hours. It is designed to establish boundaries delimiting the use of electronic communication and to provide workers with an opportunity to improve their work-life balance and ensure that they receive adequate rest and family time. It also protects workers against any negative repercussions for disconnecting.

The right to disconnect emerged as a legal right in France in 2016 and quickly spread to other countries in Europe. Chile was the first country outside Europe to legislate a right to disconnect in 2020 in connection with its new law on remote work, which was adopted during the COVID pandemic and then followed by a similar law being enacted in Argentina a few months later. In Romania as in the most European countries, the right to disconnect is not laid down in laws and regulations currently in force. However, it should be underscored that Romanian labour legislation regulates in a very restrictive manner the amount of working time and, respectively, rest time, their limits, as well as the organisation and periods for evidence of working time to be kept on file. Thus, under this legislation, employees may not be lawfully required to perform work outside stipulated working time limits.

From a different angle, legislation in the area of health and safety at work ensures the transposition of requirements laid down in European law, including the obligation of employers to ensure health and safety of workers in all aspects related to work. Observance of limits applying to working time is also universally regarded as crucial to ensuring the health and safety of workers. Within this context, no debates have taken place yet on the subject of employees' right to disconnect, no specific draft legislation has been proposed by the government or social partners with the aim of regulating or ensuring in a specific and express manner employees' right to disconnect. Generally

speaking, legislative recognition of a right to disconnection has not been considered necessary and the absence of any such specific right has not been considered to be an issue.

In 2018, after long discussions between the government and social partners on various aspects relating to the content of the draft law on teleworking, the Parliament adopted Law no. 81/2018 on telework activity (Telework Law)¹. Before this law entered into force, telework was used in practice based on companies' internal policies and their willingness to allow their employees to work from home several days per month, and was viewed as a fringe benefit. Since Law no. 81/2018 entered into force, telework has not registered any significant increase in use. When the ongoing Covid-19 pandemic broke out, telework was considered a very useful mechanism to diminish hygienic risks and protect the health and safety of a large number of employees. On this occasion, although under Law no. 81/2018 telework was based on an agreement between the parties, and by way of derogation, the Decree established state of emergency no. 195/2020 laying down that public and private employers can introduce by unilateral decision, wherever this is possible, work from home or telework during the period of emergency². Therefore, employees' consent was not necessary in this decision³. As a result, during this period, employers were allowed to require employees to work online, from home, during working hours.

Later, the state of emergency was replaced by a state of alert through other successive acts based on Law no. 55/2020 and providing for certain measures to prevent and combat the effects of the Covid-19 pandemic⁴. In accordance with this law, employers may decide with employees' consent that employees will perform their work by means of teleworking or from their home⁵.

In this Covid-19 pandemic context, the number of employees who work remotely has increased and is still increasing. According to a report by Eurofound (European Foundation for the Improvement of Living and Working Conditions), in Romania about 18.4% of employees have started working from home as a result of the COVID-19 pandemic⁶. By comparison, before the onset of the health crisis, only 0.8% of Romanian employees worked from home, according to Eurostat (2019). It is also relevant to underscore here that more than half (58%) of service employees worked from home during the epidemiological crisis, according to a survey conducted by Ipsos Romania in

1 Published in the Official Gazette no. 296 on 2 April 2018
 2 Art. 33 of the Decree of Romania's President no. 195/2020.
 3 The state of emergency was extended by Decree no. 240/2020 regarding the Extension of the State of Emergency in Romanian territory.
 4 Published in Official Gazette no. 396 on 15 May 2020.
 5 Art. 17 of Law no. 55/2020.
 6 <https://www.zf.ro/zf-news/revolutie-piata-muncii-munca-acasa-devine-normalitate-companii-dupa-19538313>

partnership with BestJobs and other online recruitment platforms in Romania⁷. Ever more observers believe that teleworking will become the new normal in employment relations⁸.

As regards the protection of employees and their rest time, it must be noted that the other provisions set out in the Telework Law and Labour Code, including the limits on, and monitoring of, working time, have remained in force for this entire period. Consequently, according to the legislation that has been in force, even during the pandemic employees could not be forced to perform work outside working hours or respond to the employer's requests or to requests by their employer's clients outside working hours.

Despite all these legal provisions, in practice it is a fact that the employees working remotely (teleworkers) face a significant issue as regards the balance between working time and private life. Most of them currently find themselves working "around the clock", sometimes without any limits. Of those service employees who worked from home during the epidemiological crisis, 42% up to the age of 34 complain of difficulties in maintaining their regular work schedule, while 28% of them complain that they are very easily distracted by other activities⁹. It would be

interesting to analyse the reasons why the border between working time and resting time is blurred, difficult to specify and impossible to pin down in a clear manner. Although current legislation protects employees and they are not obliged to perform work outside working hours, in practical terms they are not able to cite such legal limits.

As the employee is the weaker party in employment relationships, legislation needs to provide for effective instruments to ensure protection of their rights. However, the most effective legal provisions ensure protection of the rights and interests of both parties in employment relationships, employers and employees.

As legal systems can vary greatly from country to country, it is not possible to cover all possible aspects of legalising a right to disconnect in this paper. Instead, the aim here is to provide guidance and inspiration for national unions that are themselves experts on the laws in their countries and that wish to campaign for a legal right to disconnect.

Note that the translations of the laws provided in this paper are not official translations and should not be cited as such.

⁷ <https://www.news.ro/economic/sondaj-mult-jumatate-dintre-angajatii-domeniul-serviciilor-au-lucrat-acasa-perioada-crizei-salariatii-pana-a-34-ani-plang-ales-izolare-sociala-dificultatile-mentine-programul-lucru-obisnuit-1922401415112020061219391364>

⁸ <https://www.zf.ro/companii/analiza-zf-pandemia-schimba-piata-muncii-din-temelii-munca-de-acasa-19538216>

⁹ <https://www.zf.ro/profesii/6-din-10-angajati-din-servicii-au-lucrat-de-acasa-in-perioada-crizei-19287925>

2

LEGAL FRAMEWORK IN ROMANIA

In Romania labour legislation is very restrictive and protective as regards employees' working time. The Romanian Labour Code lays down maximum working times and minimum rest times¹⁰.

All provisions regarding working times and rest times are mandatory. Moreover, the Labour Code expressly states that employees may not waive the rights recognised by law and that any arrangement that seeks to waive the rights recognised by law to employees or limit these rights is null and void.

Working time is defined as any period during which employees perform work, are available to the employer and perform their duties and responsibilities in accordance with the provisions of the individual employment contract, the applicable collective labour agreement and / or the legislation in force.

LIMITATION OF DAILY WORKING TIME

Normal working time is limited to 8 hours a day and 40 hours a week. Usually, working time is equally distributed - 8 hours per each working day.

However, depending on the specifics of the company or the work performed, an unequal distribution of working time is also possible, but with the normal working time of 40 hours per week being abided by.

There is also a maximum limit for daily working time, applicable in all cases (i.e. unequal daily distribution of working time, performance of overtime): employees have a right **to a rest period that must not be less than 12 consecutive hours between two working days**. Moreover, the daily working time of 12 hours is to be followed by a rest period of 24 hours. Thus, daily working time cannot exceed 12 hours, but exceeding an 8-hour working day cannot become the rule since the total overtime within the week is also limited, as described above.

LIMITATION OF THE WORKING WEEK

The maximum legal working time may not exceed 48 hours per week, including overtime.

As a result of the transposition of European legislation in the area of organisation of working time, as an exception, total working time, including overtime, may be extended beyond 48 hours per week provided that average working hours calculated over a reference period of 4 calendar months do not exceed 48 hours per week¹¹.

In addition, employees are entitled to a **weekly rest period of 48 consecutive hours, generally Saturday and Sunday**.

LIMITATION OF OVERTIME

The maximum limit of the working week (48 hours) means, as a rule, a total number of 8 overtime hours per week.

It is to be noted that in case of part-time labour contracts, performance of overtime is prohibited by the Labour Code. Thus, **overtime is allowed only for full-time workers and it is limited to 8 hours per week**.

Overtime is defined by the Labour Code as work performed above and beyond normal weekly working time. Overtime work may not be performed without the consent of the employee, except in cases of force majeure or for urgent work intended to prevent accidents or to remove the consequences of an accident. Thus, the employee cannot be obliged to perform work above and beyond the normal weekly working time.

CONTROL AND SANCTIONS

The employer has the obligation to keep at the workplace a record of working hours performed on a daily basis by each employee, with the beginning and ending time of the work schedule being recorded, and to submit this record for review by labour inspectors if so requested.

On the other hand, in the event of any breach by an employer of any of the above-mentioned rules, employees have the right to submit a complaint to the employer or directly to the labour

¹⁰ Art. 111-119, 135, 137 of the Romanian Labour Code – Law no. 53/2003, as amended and supplemented.

¹¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. Other exceptions are allowed as well, but only within the limits of this Directive.

authority (labour inspectorate). Non-observance by the employer of the legal limits, especially rules on overtime and the weekly rest period, constitute administrative offences for which the employer may be fined.

SPECIFIC RULES FOR TELEWORKING

For telework (including online) activities, there are no rules derogating from the above-mentioned ones. Employees still cannot waive their rights provided by law.

The Telework Law adds to the general rules already laid down in the Labour Code some specific provisions protecting employees' rights. According to this law, telework can be performed somewhere other than at the employer's premises at least one day a month (either entirely somewhere other than at the employer's offices or partly at the employer's offices and partly elsewhere) using information and communication technology. Telework is considered by the social partners to be both a means for companies to modernise the organisation of work, and a means for employees to balance their work and private lives. Thus, it is not aimed at allowing any expansion or breach of the stipulated limits on working time, nor is it intended to affect the work-life balance.

In the case of the teleworking activity, the individual employment contract must state, in addition to general elements, the period and/or days when teleworkers are to perform their activities at the workplace organised by the employer, as well as the means of recording the working hours provided by the teleworker.

According to this law, in order to fulfil their duties, teleworkers are to organise their work schedules by mutual agreement with their employer, in accordance with the provisions of the law. Thus, although more flexibility is provided for here, the work schedule must be agreed upon by both sides in order to keep clear evidence as required in the above-mentioned provisions of the Labour Code, the monitoring of online work performed by teleworkers being required to be as rigorous as in the case of the employees who work at the company's premises.

Nor do the provisions governing overtime differ from this in any way. According to the Romanian Labour Code, Art. 120 (2), the employee has the right to refuse to work overtime. The Telework Law stipulates under Art. 4 (2) that if teleworkers agree to perform overtime, this consent must be provided in writing before the actual activity takes place. This is an additional requirement over and above employees working on the company's premises, as in the latter case no written consent from employees is required (this consent is presumed to be provided by the very act of performing overtime). Request of overtime by the employer and/or acceptance of overtime work by teleworkers, in the absence of any written consent from them, is deemed to constitute an administrative offence and is subject to fines.

As a result, it would appear that so far there has not been any need to regulate the teleworkers' right to disconnect, since

they cannot be legally forced to stay connected or to respond to requests from the employer outside working hours agreed with the employer as described above. Consequently, **employees (including teleworkers) cannot be sanctioned for misconduct for refusing to respond /work outside working hours or respond to a request communicated by the employer outside working hours.** If, however, such sanctions were applied, they would be deemed to be null and void by a court of law.

Given all the above, it appears that existing legislation has been considered sufficient to protect employees. On the other hand, from a social perspective, overtime has not been considered as having a potentially detrimental effect on workers' health for decades.

However, this does not mean that in reality employees do not perform work outside regular working hours or, more serious, exceed legal limits on overtime and on daily and/or weekly working time, but generally speaking such situations are not reflected in the records of times worked and are not reported, either. However, in such cases the parties involved are violating legal provisions and they may be subject to sanctions by the labour authorities.

This means that the main problem is not a lack of legislation protecting employees and their right to be disconnected from work, but the implementation/observance of this legislation, because in practice employees often continue to work outside working hours, even if they theoretically have the right not to do so. Thus, it was considered that in Romania the solution for better protection of employees would not be the adoption of a new arrangement in the matter, but the observance of the already existing one.

Current opinions on the need to adopt new arrangements in this matter may change because the factual situation of teleworkers working "around the clock" who are not able to place limits on their working time is getting more serious and may dramatically affect their health (stress, burnout) and their work-life balance (affecting their private/family lives).

It must be also highlighted within this context the particular situation of the banking, insurance and retail industries, where in some cases employees work with applications to which they are connected and which do not operate outside of working hours. Thus, they cannot receive communications from clients outside of working hours and, consequently, they are not requested to respond, as they are practically disconnected from the applications they use for their work.

3

LEGAL FRAMEWORK IN OTHER COUNTRIES

3.1 EXISTING LAWS

FRANCE

The right to disconnect as a legal right first emerged in France, where in 2016 a law (the so-called El Khomri law) was enacted, introducing a right to disconnect as an issue subject to mandatory negotiation in companies with more than 50 employees. The law built upon a 2001 French Supreme Court ruling that “the employee is under no obligation either to accept working from home or to bring there his files and working tools”¹², and a 2004 decision by the same court that an employee cannot be reprimanded for being unreachable outside working hours¹⁴.

The law also followed a National Inter-professional Agreement signed by the social partners on 19 June 2013 called “Towards a policy to improve the quality of life at work”¹⁵. This agreement included, under the heading of proper use technology and respect for workers' private lives, the notion of protecting workers' “time to disconnect” – something that had already been tested at a number of companies in France at the time.

In the 2016 reform of the labour code, the French government thus included in the chapter “Adapting Labour Law to the Digital Age” a provision to amend the labour code and introduce a right to disconnect as a subject for mandatory negotiations between the social partners at the company level. By adding a new section 7, Article L2242-17 of the Labour Code stated the following: “The annual negotiations on equal opportunities between women and men and the quality of working life cover ... The terms enabling employees to fully exercise their right to disconnect and the introduction by the company of schemes

regulating the use of digital tools, with a view to ensuring compliance with regulations governing rest and leave periods, privacy and family life.”

It further noted that if the social partners cannot reach an agreement, “an employer may draw up a charter, following consultations with the Works Council or, if such does not exist, with staff representatives. Such charter shall define the terms for exercising the right to disconnect while also providing for the implementation of training and awareness-raising measures relating to the reasonable use of digital tools. Such measures shall target employees, supervisors and management.”

SPAIN

Following the adoption of the French law, the Spanish government in 2017 began studying the possibility of enacting a right to disconnect in Spanish law as well. On 6 December 2018, the government adopted the new Data Protection Act, which transposed the European Union's (EU) 2016 General Data Protection Regulation (GDPR) into Spanish law, but which also introduced a new set of digital rights for both citizens and employees¹⁶. Article 88 thus stipulates that workers in both the private and public sectors are to have a right to disconnect in order to ensure respect for their periods of rest, leave, and holidays, as well as for their personal and family privacy.

The law does specify, however, that the right to disconnect must take into account the nature of the employment relationship in question, and that the right may be flexible or even inapplicable if the employment relationship does not allow it.

Like the French law, the Data Protection Act prescribes a central role for the social partners in negotiating the details of the right to disconnect. If there are no unions present, it is instead to be agreed upon between company and worker representatives. The employer is then to prepare an internal policy for all staff, including staff in managerial positions, outlining the proper exercise of the right to disconnect and ensuring that staff receive training on the reasonable use of technology to avoid the risks of digital fatigue. The law specifically notes that workers who work remotely or from their homes either occasionally or regularly may also exercise the right to disconnect.

¹² “Law on work, the modernisation of social dialogue, and the safeguarding of career paths”, aka. the “El Khomri Act”, Law 2016-1088 of 8 August 2016. The law entered into force on 1 January 2017. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032983213&categorieLien=id>

¹³ Labour Chamber of the Cour de Cassation, 2 October 2001, No. 99-42.727.

¹⁴ Labour Chamber of the Cour de Cassation, 17 February 2004, No. 01-45.889.

¹⁵ Accord national interprofessionnel du 19 juin 2013 “Qualité de vie au travail”. https://www.journal-officiel.gouv.fr/publications/bocc/pdf/2013/0041/boc_20130041_0000_0011.pdf

¹⁶ Ley Orgánica 3/2018, “Protección de Datos Personales y garantía de los derechos digitales”, 5 December 2018. <https://www.boe.es/eli/es/lo/2018/12/05/3#:~:text=Ley%20Org%C3%A1nica%203%2F2018%2C%20de,%C2%AB%20BOE%20%2C%BB%20n%C3%BAm.>

ITALY

A debate about the right to disconnect also ensued in Italy in 2016 in the wake of the French example. Two bills were introduced in the Italian Senate to lay down this right, with Bill No 2229 explicitly proposing that workers have the right to disconnect from technological devices and from online platforms without suffering any consequences with regard to their employment status or compensation. On 14 June 2017, the right to disconnect was finally codified in law when Law No. 81/2017 on “Smart Working” was enacted to update the country's outdated legislation on teleworking and to promote and provide a framework for new forms of remote working and facilitate workers' ability to shape their work-life balance¹⁷.

In Italy, “smart work” is defined as work with no precise constraints in terms of working hours or place of work. Work can thus be done partly from home or from another place of work as long as it is suitable for performing the job. The employer and employee must agree in writing about the terms and conditions of “smart working”, and this agreement must include provisions about the employee's rest periods as well as the technical and organisational measures necessary to ensure the employee's right to disconnect¹⁸.

The main difference between the Italian law and those of France and Spain is that in Italy the right to disconnect is limited to workers performing “smart work” and does not apply generally to the broader workforce. “Smart work” has increased since the passing of the law, however: Whereas an estimated 250,000 Italian workers worked flexibly in October 2016¹⁹, as of October 2019 more than 570,000 workers benefited from this form of working²⁰. The Italian government has also made a number of references to “smart working” in decrees issued in 2020 in connection with the COVID-19 crisis to broadly enable and promote remote working during the pandemic²¹.

BELGIUM

The issue of disconnection in Belgium is covered in a law of 26 March 2018, called the “Act regarding the strengthening of economic growth and social cohesion”, which was introduced as part of a series of initiatives to reform Belgian labour law²². The act made it mandatory for employers with more than 50

employees to discuss the issue of disconnection and the use of digital tools with the workplace health and safety committee. The stated purpose of these provisions was to ensure respect for employees' periods of rest, holidays, and leave, and their balance between work and private life.

Employees in Belgium thus have a right to discuss issues of disconnection with their employers, but they do not have a right to disconnect in the strict sense of the term. The employer can adopt disconnection policies after consulting with the committee, but is not required to do so. Nor does the law prescribe how often the employer should meet with the committee, but does note that the employer should do so regularly and whenever there are significant changes in the company, and whenever the committee asks for it. In the event there is no health and safety committee in place, the trade union delegation can assume this role instead.

CHILE

Chile became the first country outside Europe to legislate a right to disconnect when on 26 March 2020 it adopted Law 21.220 to amend the labour code with a new chapter on remote working and teleworking²³. The timing of the law coincided with the COVID-19 crisis in the country and efforts to limit the spread of the virus, although draft legislation on the right to disconnect had already been proposed at the end of 2018 and approved by the lower house of Congress in April 2019.

While the draft legislation sought to extend the right to disconnect broadly to workers in both the public and the private sector to safeguard their periods of rest, leave, and holidays, as well as their personal and family privacy, Law 21.220 only deals with this right in the context of remote work – like the Italian law on smart working.

The law stipulates that an employer and an employee can make an agreement setting out flexible work arrangements, where employees can perform their work in part or completely from a different location than the company's offices. They can also agree on flexible working hours for the employee, while taking into account general stipulations on working hours in the labour code, including a minimum 12 hours of consecutive rest between periods of work. The time of disconnection is also to be agreed upon in this context.

ARGENTINA

Following in the footsteps of Chile, but building upon years of efforts and proposals to regulate remote working in the country, the Argentine Senate adopted law 27.555 on telework on 30 July 2020²⁴. Article 5 of the new law introduces a right to disconnect, noting that remote workers have a right to disconnect from ICT-tools outside of their working day and during holidays. The Argentine law is the first law in the world to contain specific language to protect workers against sanctions if they exercise their right to disconnect. It further stipulates that the employer cannot communicate with or ask their employees to perform tasks outside of normal working hours.

¹⁷ Law No. 81 of 22 May 2017. <https://www.gazzettaufficiale.it/eli/id/2017/06/13/17G00096/sg>

¹⁸ *Ibid.*, art. 19.

¹⁹ <https://www.corporatelivewire.com/top-story.html?id=the-new-regulation-on-smart-working-in-italy>

²⁰ <https://www.warwicklegal.com/news/326/italy-smart-working-agile-performing-and-increasing>

²¹ Most notably decree 34/2020. It should be noted, however, that the form of remote work promoted by the government did not have the same characteristics of true “smart working”, which entails a large degree of flexibility on the part of the employee as to the place and hours to work.

²² Loi du 26 mars 2018 relative au renforcement de la croissance économique et de la cohésion sociale. https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2018032601

²³ Ley 21.220 Modifica el código del trabajo en materia de trabajo a distancia, 26.3.2020. <https://www.leychile.cl/Navegar?idNorma=1143741>

²⁴ <https://www.boletinoficial.gob.ar/detalleAviso/primera/233626/20200814>

The law was published in the official government bulletin on 14 August, but will only be effective 90 days after the end of the restrictions put in place by the Argentine government in March 2020 to tackle the COVID-19 crisis. Prior to the adoption of the law on telework, a draft law (S723/2020) had been introduced in the Senate to establish a right to disconnect for all workers in Argentina²⁵. The draft included several important elements of a comprehensive right to disconnect, such as a prohibition of sanctions and premiums for workers who disconnect and stay connected, respectively, a reference to the need for the social partners to negotiate the modalities of the right to disconnect, and the notion of a suspension of a right to disconnect only in case of emergencies or essential situations that have been previously defined.

3.2 OTHER LEGISLATIVE INITIATIVES

PHILIPPINES

In January 2017 a bill was submitted to the Philippine House of Representatives to amend the labour code and legislate a right to disconnect in the country²⁶. The bill would have expanded the definition of working hours to include time spent reading and responding to work-related communications after working hours, and would have established that an employee is not to be "reprimanded, punished, or otherwise subjected to disciplinary action if he or she disregards a work-related communication after work-hours". It would furthermore have added an obligation for the employer to state the hours when employees are not supposed to send or answer work-related communication.

Following submission of the bill, it was referred to the Committee on Labour and Employment, where the matter has officially been pending since 17 January 2017. Later that same month, however, the Secretary of the Department of Labour and Employment did issue a statement saying that it is up to employees to decide whether to respond to work-related messages from their employers after office hours. He noted that "Answering or ignoring texts and emails from employers after working hours is a voluntary engagement of an employee, and they are not obliged to respond. The right to disconnect is a choice of an employee." The Secretary added that completely

disconnecting would not apply for certain jobs, and that employers must be the ones to implement a policy in accordance with the standards of the labour code, which will benefit both parties²⁷.

CANADA

There have been two separate initiatives in Canada to enact a right to disconnect. At the federal level – which covers federally regulated workplaces in sectors such as transportation, banking, and telecommunications and which covers around 6% of the Canadian workforce – and at the provincial level in Quebec. In Quebec, Bill 1097 was introduced in the National Assembly in March 2018 to "ensure that employee rest periods are respected by requiring employers to adopt an after-hours disconnection policy"²⁸. Under this policy, employers would have had to determine the weekly periods when employees were entitled to disconnect from all work-related communication, and would also have had to provide for a protocol for the use of communication tools after hours. The bill also proposed minimum and maximum fines for employers who failed to produce either a workplace disconnection policy or an annual status report. The bill only progressed to a first reading and was abandoned in June 2018.

In 2018, the federal government issued a report from a year-long consultation on modernising the federal labour code, in which the right to disconnect was elevated to a prominent issue. The topic was further investigated by an Expert Panel on Modern Federal Labour Standards, which was appointed by the Canadian government in February 2019. The Panel published its findings in June the same year and recommended that there not be a statutory right to disconnect, as it would "currently be difficult to operationalise and enforce." The Panel instead recommended that employers covered by the labour code consult with their employees or their representatives and issue policy statements on the topic of disconnection²⁹.

USA

In March 2018, Bill 0726-2018 was submitted to the New York City Council to amend the city's legislation and introduce a right to disconnect³⁰. The bill would make it illegal for private sector employers with more than 10 employees to require their workers to stay connected to work after their formal working day ends, except in cases of emergency. It would further require these employers to adopt a written policy regarding the use of electronic communication tools outside of normal working hours, and would prohibit any retaliation or threat of retaliation against an employee exercising or attempting to exercise their right to disconnect. It would also establish a complaints system for workers and a system of supervision for the New York City Department of Consumer Affairs³¹ tasked with enforcing the law. The bill would also provide for fines for employers who breach the law.

The first hearing of the bill took place in January 2019 in the Committee on Consumer Affairs and Business Licensing. The response to the bill was mixed, and the bill has since then not moved forward in the city's legislative process.

²⁵ <https://www.senado.gob.ar/parlamentario/comisiones/verExp/723.20/S/PL>

²⁶ House Bill No. 4721 "An act granting employees the right to disconnect from work-related electronic communications after work hours". http://www.congress.gov.ph/legisdocs/basic_17/HB04721.pdf

²⁷ <https://www.manilatimes.net/2017/02/01/news/latest-stories/workers-right-disconnect-dole/310057/>

²⁸ Bill 1097 "Right-to-Disconnect Act". <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-1097-41-1.html?appellant=MC>

²⁹ Report of the Expert Panel on Modern Federal Labour Standards, June 2019, Chapter 4 "Disconnecting from work-related e-communications outside of work hours". <https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/expert-panel-final.html>

³⁰ Bill 0726-2018 "A Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to private employees disconnecting from electronic communications during non-work hours", March 2018. <https://legistar.council.nyc.gov/View.ashx?M=F&ID=6150433&GUID=F941D199-B386-40A4-9827-9A813B0FABBB>

³¹ Now called the Department of Consumer and Worker Protection.

INDIA

In December 2018, a bill to regulate the right to disconnect was also introduced in the Indian Parliament's lower house. Called "The Right to Disconnect Bill", it aims to recognise the right to disconnect as a way to reduce stress and to ease tensions between employees' personal and professional lives³². It includes elements of (draft) bills seen elsewhere, like protection against retaliation if an employee does not answer calls after the formal working day ends, and the requirement to negotiate with employees and unions about the terms and conditions of

disconnection. It also includes some novel ideas: local governments would need to provide counselling services to help workers maintain work-life balance and to establish "digital detox centres" to this end as well. The bill also foresees a penalty of 1% of total company payroll if an employer breaches the law. In India, bills introduced by Members of Parliament are called "Private Members' Bills" – as opposed to bills introduced by the government. While no private members' bill has become law since 1970, these bills have influenced governments and subsequent legislation on important issues and are thus not without importance.

³² Bill No. 211 of 2018 "The Right to Disconnect Bill, 2018". <http://164.100.24.219/billtexts/LSBillTexts/AsIntroduced/2317as.pdf>

4

ANALYSIS AND RECOMMENDATIONS

There is no question that the French law has been a great catalyst for initiatives around the world to legislate a right to disconnect, as all the laws and proposals outlined above draw upon it to some extent. In this section, we analyse the different laws and proposals to develop a set of recommendations that can be relied upon when seeking to introduce a right to disconnect in national legislation. In Romania, the need to regulate employees' right to disconnect started to be discussed as one of the practical aspects of employment relations during the Covid-19 period, when the number of employees working remotely has increased, without employers having in place policies detailing specific procedures for the organisation of teleworking time and without employees having attended specific training programmes to adapt to the teleworking specificity in order to be able to claim and benefit from their already recognised rights.

In some areas, the volume of activity has increased, including as a result of the practical challenges faced in using electronic information and communication technologies, which require considerable time to get used to. In other cases, overlapping between work and family life that is unavoidable when working from home when other family members are also present in the same area is difficult to handle for employees and it results in working late hours, outside normal working times.

This situation faced by teleworkers requires a specific right to disconnect to be recognised for employees. Given the necessity for national legislation to function as a consistent system of legal provisions, which should mutually reinforce each other, be interconnected in a logical, consistent manner without contradictions, any new rules should be incorporated in existing legislation. Moreover, any new rules should be adopted with a view to actual practice in the field of labour relations, the role that the social partners and government authorities usually assume with regard to similar rights and similar aspects, in order to be easily assimilated in practice and achieve its final purpose: its implementation and observance by the parties in an employment relationship.

In order to attain justified recognition and, eventually, regulation of employees' right to disconnect in a way that is best geared to needs with respect to employment relations in Romania, the following aspects should be considered:

- **Enshrined in existing legislation** – the issues described in the foregoing, which have come up during the pandemic period,

result in a need to regulate employees' right to disconnect primarily in connection with **work performed remotely (telework and teleworkers)**. Of course, such new rules must also be incorporated in existing legislation regulating employees' rights that are to be protected: **health and safety** of workers, **maximum working hours and minimum daily and weekly rest periods**.

- **Legal recognition** - the right to disconnect should ideally be **explicitly recognised as a right and hence laid down in national law** (and be explicit) because different language can be used to describe the issue of disconnection and the need for work-life balance, while it must be ensured that its essential meaning is generally acknowledged and mandatorily observed by any subsequent rules (either laws, collective agreements, internal rules or policies of employers or individual labour agreements) to remove the risk of skewing its meaning by improper, incorrect or faulty wordings.

To the same end, legal provisions should define the right by **providing a brief explanation/definition of the right to disconnect and highlight its most important principles in law** (its underlying principles may be provided if such principles are not already laid down by legislation in force - i.e. the legislation already ensures the protection of workers who exercise their rights recognised by law, they cannot suffer any negative consequences if they exercise such rights and any such negative consequence can be nullified by a court of law; as well non-discrimination is also ensured by the legislation in force, so that any favourable treatment afforded to workers who are constantly connected may be considered as an act of discrimination).

Providing a rationale for recognition of the right to disconnect may be regarded as not absolutely necessary to be included in the wording of a legal provision, but it may be found useful because in the event unclear subsequent rules adopted based on the legal provisions have to be interpreted, **such rationale would constitute useful grounds to facilitate correct interpretation** of such rules.

Recognition of employees' right to disconnect in legal provisions must be **equally applicable to all workers** regardless of their employment status, sector of work, work location, position and responsibilities, etc. (implicate all employees).

As regards the remedies, **the legislation in force already provides** for mechanisms with which to enforce the legal provisions, employees' right to submit complaints to the employer, labour authority and courts of law and, therefore, access of stakeholder employees to remedies. However, specific administrative sanctions could be considered.

- **Role of the social partners** - the **social partners must play a central role in defining the modalities (practical details) of a right to disconnect and its related policies at the workplace**, and national laws should necessarily prescribe a role for them in further negotiating the right to disconnect. Currently, the connection between teleworkers and employees' representatives is very weak and no real social dialogue regarding their specific rights can really take place. Apart from reshaping the modalities of electing employees' representatives, including setting up trade unions organisations, their mode of function and modalities, in order to adapt them to the digital era, a mechanism must be identified to involve social partners in identifying and defining rules on technical and organisational measures necessary to ensure employees' right to disconnect, on practical details relating to the implementation and observance of this right based on the specificity of the industry, company and, respectively, workplace, working conditions, job roles and related attributions.

The role of the social partners in identifying and defining the said rules may follow the mechanism already provided for in the Labour Code in other cases. The law may stipulate that such concrete rules are to be negotiated through the collective labour contract at the level of the employer or, in lieu of this, are to be laid down in internal rules. At the same time, such rules should be included among the mandatory

clauses in any internal employer rules and expressly cited in the law.

- **Training programmes for employees (teleworkers)** – a more practical mechanism to achieve implementation and observance of the rules adopted in the area of right to disconnection would be to ensure specific training of teleworkers on the rights they have and how they could organise their work and working time, prioritise tasks, give feedback to their direct superiors on deficiencies experienced in performing their work, communicate the challenges they face, the associated risks they identify, propose solutions to improve the situation, etc., and encourage a continuous dialogue between them and their employers.

Finally, we believe that it would be very useful for the purpose of identifying the most suitable solutions in regulating employees' right to disconnect in Romania to **previously perform a specific assessment from both a social and legal perspective of the effects of teleworking on employees, the problems they face, causes of problems and the most appropriate** remedies (regulation through law, collective labour agreements, internal rules and policies or individual labour agreements, the possibility of implementing disconnection from the applications, including emails, servers, etc., or mechanisms for receiving alerts from the applications used). Such assessments would be very useful in identifying to what extent and at which normative level rules should be adopted as well as the content of such rules and their limits in order to ensure protection of employees' right to disconnect without quashing the flexibility in employment relations that is currently valued by both employers and employees.

ABOUT THE AUTHORS:

Luminita Dima is a professor of Labour Law at the Faculty of Law, University of Bucharest. She is also a lawyer and has long years of experience in labour law and labour relations.

Alex Högback is a director of UNI Professionals and Managers, which represents highly skilled and highly educated professionals and managers globally.

IMPRINT

Friedrich-Ebert-Stiftung România | Str. Emanoil Porumbaru |
no. 21 | apartament 3 | Sector 1 | București | România

Responsible:

Juliane Schulte | Friedrich-Ebert-Stiftung Romania

Tel.: +40 21 211 09 82 | Fax: +40 21 210 71 91

www.fes.ro

For orders / Contact:

fes@fes.ro

Without an explicit written agreement from the Friedrich-Ebert-Stiftung (FES), the commercial use of the publications and media products published by FES is forbidden.

The views expressed in this publication are not necessarily those of the Friedrich-Ebert-Stiftung (or of the organization for which the author works).



LEGISLATING A RIGHT TO DISCONNECT



In Romania the right to disconnect is not regulated by the legislation in force, but labour legislation regulates in a very restrictive manner the duration of working time.



Despite legal provisions, employees working remotely are faced with a significant issue as regards the balance between working time and private life. In the context created by the COVID-19 pandemic, the situation requires a specific right to disconnect to be recognised for employees.



The social partners must play a central role in defining the modalities underlying the right to disconnect and its related policies at the workplace.

More information about this subject can be found here:

www.fes.ro