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REGULATING THE RIGHT TO DISCONNECT AT THE EU LEVEL: CONSIDERATIONS ON THE FUTURE LEGISLATION SCOPE

Abstract

The following study concerns the actions taken by the European social partners and the EU institutions in recent years, aiming to regulate the right to disconnect at the EU level. This issue has been on the agenda for several years, yet the European Commission put the legislative process on hold, allowing space for the social partners to negotiate. However, due to the lack of agreement the issue has to be settled by the EU institutions' court again. A complex analysis of the proposals already in place is necessary, as they will significantly impact the shape of future legislation and further European integration at the social level in times of digital revolution.

The aim of this article is to identify key elements of future legislation and critically analyse the already existing proposals. To put the considerations in context, the author describes the circumstances of the adoption of the resolution and explores the nature of the right to disconnect. Consequently, the author concludes that there are key issues that need to be included in future legislation, such as the definition of the right to disconnect (R2D), personal scope, or mutual obligations. However, some interpretative doubts arise within these fields.

KEYWORDS

right to disconnect (R2D), remote working, teleworking, working time, right to leisure

SŁOWA KLUCZOWE

prawo do odłączenia (R2D), praca zdalna, telepraca, czas pracy, prawo do wypoczynku

I. INTRODUCTION

The way of working and delivering results is subject to constant changes and keeps on taking newer forms. This is influenced by social changes, development of technology and information systems, as well as progressive globalisation. Undoubtedly, the COVID-19 pandemic has also had a significant impact, leading in many cases to the relocation of workplaces to workers' homes and changing the way they communicate with their employers.¹ Increased availability of workers outside of working hours is not merely the result of the pandemic but also of the development of digital tools and remote work intensifying this phenomenon. Working with ICT tools is widely used in various industries and professions, giving workers greater flexibility and allowing enterprises to adapt smoothly to economic and social changes. However, this way of performing work can blur the boundaries between workers' professional and private lives, leading to physical and mental health problems over time. The use of digital tools for professional purposes has created a culture of 'always-available' workers, working anytime, anywhere,² which does not necessarily result in increased productivity.³

¹ For details check, e.g. Eurofound, 'Living, working and COVID-19 in the European Union and 10 EU neighbouring countries' (Publications Office of the European Union 2022) <<https://www.eurofound.europa.eu/publications/report/2022/living-working-and-covid-19-in-the-european-union-and-10-eu-neighbouring-countries>> accessed 5 March 2024.

² Emanuele Dagnino, "'Working Anytime, Anywhere'" and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the R2D' (2020) 3 *E-Journal of International and Comparative Labour Studies* 1,2. See also Eurofound and the International Labour Office, 'Working Anytime, Anywhere: The Effects on the World of Work' (Publications Office of the European Union, and International Labour Office, 2017, updated 2019) <<https://www.eurofound.europa.eu/publications/report/2017/working-anytime-anywhere-the-effects-on-the-world-of-work>> accessed 5 March 2024.

³ Pepita Hesselberth, 'Discourses on Disconnectivity and the R2D' (2018) 20 *5 New Media & Society* 1994, 1995; European Parliamentary Research Service (EPRS), 'The R2D' (European

While the appropriate use of digital tools has brought many economic and social benefits to both employers and workers, digital transformation should be based on respect for fundamental rights and values and positively impact working conditions. In recent years, the discussion on the consistent legal regulation of the right to disconnect has intensified. Actions have been taken by both the European social partners and the European Parliament. For these reasons, it has become necessary to examine the regulations already in force in selected Member States, as well as actions taken at the European level, and propose the most important issues that should be regulated concerning the right to disconnect, based, among other things, on the recommendations proposed by the European Parliament. Addressing them is particularly justified as the introduction and shape of future regulation at the EU level is still an open question.

II. THE TRIPLE-MODEL APPROACH TO THE R2D IN EU MEMBER STATES

The Right to Disconnect (R2D) has already been introduced in many countries, but its rapid expansion has occurred in recent years, largely due to the activities of EU organizations and institutions. There is a clear distinction between two primary models for its implementation: the first model involves legislation, and the second relies on corporate self-regulation. However, a third, referred to as the good-practice model, can also be identified.

The regulatory model has gained popularity, notably inspired by France, which became the first European state to incorporate the R2D into its national labour code in 2017. Procedures for fully exercising the employee's R2D, along with the establishment of mechanisms to regulate the use of digital tools while respecting rest, vacation periods, and personal and family life, are subject to mandatory annual negotiations between social partners at the workplace level for employers with 50 or more employees.⁴ Other European States, including Spain, Italy, Belgium, Greece, and Slovakia, have also introduced the R2D into their legal frameworks, adopting their own regulatory methods. In several other countries, such as the Netherlands and Lithuania, future legislation is either under

Parliamentary Research Service 2020) 1–2 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642847/EPRS_BRI\(2020\)642847_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642847/EPRS_BRI(2020)642847_EN.pdf)> accessed 5 March 2024.

⁴ Loïc Lerouge, Francisco Trujillo Pons, 'Contribution to the study on the "R2D" from work. Are France and Spain examples for other countries and EU law?' (2020) 13(3) *European Labour Law Journal* 450, 457, 459–460, <<https://doi.org/10.1177/20319525221105102>>; Luc Pansu, 'Evaluation of "R2D" Legislation and Its Impact on Employee's Productivity' (2018) 5(3) *International Journal of Management and Applied Research* 99, 100–101 <<https://doi.org/10.18646/2056.53.18-008>> accessed 5 March 2024.

discussion or already in progress.⁵ In Member States where legislation exists, the main reason for regulating the R2D has been the lack of specific measures in collective agreements at the sectoral or company level to effectively address the challenges posed by ICT-based working.⁶

The R2D can be granted to all workers, in both the private and public sectors, as was done in the case of Spanish data protection legislation,⁷ or only to certain categories of workers:

- those working in public or private enterprises with at least 50 employees (France); or
- civil servants, as initially occurred in Belgium,⁸ however, following subsequent amendments under the ‘Labour Deal’, starting from April 2023, employers with at least 20 employees in the private sector are also required to guarantee disconnection; or
- employees using digital tools for professional purposes (Article L.312-9 of the Luxembourg Labour Code⁹);
- teleworkers, as regulated in the Greek¹⁰ and Slovak labour codes,¹¹ or domestic workers, including occasional workers (Slovak labour code); or
- those working without precise restrictions on hours or place of work – referred to as *lavoro agile* in Italian legislation.¹²

Variations are also noticeable in how this right is implemented. It can be introduced through negotiations between social partners and collective agreements (France, Spain, Belgium, Greece, Luxembourg) or through individual agreements between the employer and worker (Italy). Generally, the existing laws do not provide for any concrete enforcement. Portuguese legislation is unique in that it imposes financial penalties on employers for contacting remote workers outside

⁵ LRT, ‘Changing work culture: Lithuanian MPs propose “R2D” legislation’ (2022) <<https://www.lrt.lt/en/news-in-english/19/1784252/changing-work-culture-lithuanian-mps-propose-right-to-disconnect-legislation>> accessed 5 March 2024; Legislative proposal on Dutch R2D available <<https://vng.nl/wetsvoorstellen/wet-op-het-recht-op-onbereikbaarheid>> accessed 5 March 2024.

⁶ Eurofund, ‘R2D in the 27 EU Member States’ (2019) 19 <<https://www.eurofound.europa.eu/en/publications/eurofound-paper/2020/right-disconnect-27-eu-member-states>> accessed 5 March 2024.

⁷ Loïc Lerouge, Francisco Trujillo Pons, see (n 4) 460–461.

⁸ European Trade Union Confederation (ETUC), ‘Belgian workers win R2D’ (2022) <<https://www.etuc.org/en/belgian-workers-win-right-disconnect>> accessed 5 March 2024.

⁹ Luxembourg Labour Code (2023) <https://legilux.public.lu/eli/etat/leg/code/travail/20240227#art_1_312_9> accessed 5 March 2024.

¹⁰ Jason Skouzos, ‘Law 4808/2021 (labour arrangements)’ (TaxLaw 2021) <<https://www.taxlaw.gr/en/practice-areas/law-4808-2021-labour-arrangements/>> accessed 5 March 2024.

¹¹ Marcel Dolobáč, ‘Legal protection of mental health of employees in Slovakia’ (2022) 30 *Studia Iuridica Toruniensia* 113, 121–123.

¹² UNI Global Union, ‘Legislating a R2D’ (2020) 4-5 <<https://uniglobalunion.org/report/legislating-the-right-to-disconnect/>> 5 March 2024; Evelina Dagnino (n 2) 5.

working hours (unless in an emergency). It only mentions a prohibited activity, but does not directly introduce the R2D as a separate employment right.¹³

The second model can be described as corporate self-regulation, meaning that the R2D is subject to voluntary consultation between social partners and is regulated at the level of specific workplaces, based on the assumption that existing legislation is sufficient. Germany has a rich history of self-regulation in this area, where the R2D has been granted in numerous private and public enterprises through collective agreements.¹⁴ Similarly, in Nordic countries, collective bargaining is considered the best approach to ensuring that workers can disconnect.¹⁵ It must be emphasized that the protection of work-life balance and collective bargaining is widespread across businesses in these countries, which facilitates solutions without the need for further legislation.

The third model, based on best practices, has so far been implemented only in Ireland, where a code of good practice was developed by the Workplace Relations Commission (WRC). This approach encourages employers to develop relevant policies that account for the needs of the business and its workforce. This does not necessarily need to be done through collective agreements. Additionally, the code highlights existing regulations, particularly regarding limits on working hours. However, there is no separate regulation for the R2D, and the code itself is legally non-binding. This means that the R2D is not enforceable in Ireland; however, courts and the WRC can rely on the provisions of the code when they are relevant to a specific case. Undoubtedly, one strength of the code is its definition of the R2D, which consists of three elements:

- the employee's right not to perform regular work outside normal working hours,
- the right not to face negative consequences for refusing to work outside of working hours,
- the obligation to respect the right of another person to disconnect.¹⁶

The above considerations lead to several conclusions. The provisions introduced by Member States vary, resulting in unequal levels of worker protection.

¹³ Mauro Pucheta, Ana C Ribeiro Costa, 'Going Beyond the R2D in a Flexible World: Light and Shadows in the Portuguese Reform' (2022) 51(4) *Industrial Law Journal* 967, 980–981 <<https://doi.org/10.1093/indlaw/dwac030>> accessed 5 March 2024.

¹⁴ e.g., BMW, Volkswagen, Audi, Telekom, German Ministry of Labour – Mark Bell and others, 'A R2D: Irish and European Legal Perspectives' A Public Policy Report of the COVID-19 (School of Law Trinity College Dublin 2021) 27 <<https://www.tcd.ie/law/2020.21/Final%20RTD%20report.pdf>> accessed 5 March 2024; Paul Secunda, 'The Employee R2D' (2019) 9(1) *Notre Dame Journal of International & Comparative Law* 1 29–30.

¹⁵ Eurofund (n 6) 18.

¹⁶ Workplace Relations Commission, 'Code of Practice for Employers and Employees on the R2D' (2021) 2 <https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf> accessed 5 March 2024.

Generally, these provisions are rather brief and aim to introduce specific arrangements at the level of a particular sector or undertaking. There is also typically a lack of specific sanctions and enforcement mechanisms to provide workers with tangible protection. Notably, Member States have not clearly defined the R2D in their regulations. Considering all these issues, there may be a strong justification for introducing proper regulation at the EU level to guarantee equal protection for workers.

Moreover, regulatory trends are gaining popularity in Europe, as seen in Germany and Ireland, where the debate has resurfaced, with trade unions favouring a legislative solution regarding the R2D. This is primarily due to the insufficient protection offered under a self-regulatory model, which only applies to workers covered by such agreements (mainly in large companies), leaving many without protection.¹⁷ Additionally, it may result in inconsistent standards, leading to unequal protection across different sectors and companies. It is also difficult to introduce a unified definition of the R2D under such a model.

III. THE ROLE OF THE EUROPEAN SOCIAL PARTNERS AND THE EUROPEAN INSTITUTIONS

Since the digital transition in the workplace presents many challenges for both workers and enterprises, labour markets, education, training, and social protection systems need to be adapted to this phenomenon. In 2020, the European social partners adopted the Framework Agreement on Digitalisation, covering areas such as digital skills, AI, surveillance, and connectivity. Regarding the R2D, they proposed providing employers and workers with information on compliance with working time regulations, teleworking, and remote working rules, including the use of digital tools and the risk of over-availability.¹⁸ The proposed measures are soft and focus primarily on awareness-raising activities and prevention.

Also, the European Parliament considered the R2D as urgent for workers, and in January 2021, it presented a resolution with recommendations to the Commission on the right to disconnect (hereinafter referred to as ‘the Resolution’), accompanied by an annex containing the text of a legislative proposal – a Directive of the European Parliament and the Council on the right to disconnect (here-

¹⁷ Eurofund (n 6) 21, 30–31.

¹⁸ BusinessEurope, SMEunited, CEEP, ETUC, ‘European Social Partners Autonomous Framework Agreement on digitalisation’(2020) 10 <<https://www.etuc.org/en/document/eu-social-partners-agreement-digitalisation>> accessed 5 March 2024.

inafter referred to as ‘the proposal’ or ‘the proposed directive’).¹⁹ According to the European Parliament, to prevent social dumping, it is necessary to define minimum requirements for the protection of all workers in the EU who use digital tools for professional purposes, as some Member States have already regulated this right at the national level.

Considering the initiatives described, a significant difference in the approach to regulating the R2D is evident. While in 2020, the social partners limited themselves to recommending a catalogue of measures for implementing the R2D, the proposal of the European Parliament includes detailed legal regulation of this right. The European Parliament emphasized, however, that the 2020 Framework Agreement on Digitalisation provided for the social partners to take implementation measures within three years, starting from 2020, and that a legislative proposal before the end of that implementation period would have undermined the role of social partners.²⁰

Consequently, in June 2022, the European social partners signed a joint 2022–2024 Work Programme, including negotiations, *inter alia*, on legally binding measures to regulate telework and institute the R2D.²¹ The social partners agreed to update the 2002 Autonomous Agreement on Telework (hereinafter referred to as the ‘2002 Agreement’), which would then be adopted as a legally binding agreement implemented through a European directive, introducing the R2D in line with previous recommendations from the European Parliament.²² Unfortunately, negotiations lasting more than a year were unsuccessful, as two of the three employers’ organisations refused to submit any text.²³

On 30 April 2024, the European Commission initiated the first-phase formal consultation of social partners under Article 154(2) TFEU to gather their views on the possible direction of EU action to ensure fair telework and the R2D. Now, the issue has to be settled by the Commission’s court and given the difficulties in reaching a common position among the European social partners, we can expect a directive from the Commission. The lack of consensus during negotiations is

¹⁹ European Parliament resolution of 21 January 2021 with recommendations to the Commission on the R2D (2019/2181(INL)) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html> accessed 5 March 2024.

²⁰ The Resolution Pt 13; David Mangan, ‘Agreement to Discuss: The Social Partners Address the Digitalisation of Work’ (2021) 50(4) *Industrial Law Journal* 689, 699–700 <<https://doi.org/10.1093/indlaw/dwab026>> accessed 5 March 2024.

²¹ The Work Programme has broader scope and also covers such priorities as green transition, youth employment, work-related privacy and surveillance, improving skills matching in Europe and capacity building – full text available here <https://www.buisseurope.eu/sites/buseur/files/media/reports_and_studies/2022-06-28_european_social_dialogue_programme_22-24_0.pdf> accessed 5 March 2024.

²² The Work Programme Pt 5.

²³ ETUC, ‘Telework: Legislative action needed by EU Commission’ (2023) <<https://www.etuc.org/en/pressrelease/telework-legislative-action-needed-eu-commission>> accessed 5 March 2024.

disappointing, as the issue clearly falls within their competence, and proper implementation requires cooperation between social partners. It also demonstrates that the R2D is a challenging issue to regulate.

However, sectoral social partners – representatives in the European Social Dialogue Committee for Central Government Administrations, EUPAE, and TUNED (composed of the trade union organizations EPSU and CESI) – succeeded in signing the Sectoral Agreement on Digitalisation,²⁴ which addresses the R2D, in 2022. Subsequently, they requested the Commission to put it forward for adoption as a European directive.²⁵ It is important to note, though, that the Commission is free to decide whether to present a proposal for a decision to the Council or not.²⁶ Even if adopted as a legally binding directive, the sectoral agreement does not fully resolve the issue, as it only covers public workers and civil servants.

Regardless of how it is adopted, the future directive should only set minimum standards and conditions to ensure that workers can effectively exercise their R2D, and its implementation, together with practical arrangements, should be entrusted to the social partners in accordance with national law and practice, i.e., using collective agreements.²⁷ This is both understandable and desirable – the specific solutions will depend on the type of work performed, the structure of the company and employment, the digital tools used, the working time systems and schedules, etc. Existing legislation on this right, such as in France or Spain, establishes worker participation in determining solutions that allow them to disconnect. Unfortunately, in some Member States with low union density, entrusting social partners with the responsibility of setting working conditions through collective agreements may not yield the expected results, and in such cases, employers should also be able to introduce these arrangements, e.g., in work regulations, taking into account the workers' opinions to the fullest possible extent.

²⁴ Trade Unions' National and European Administration Delegation (TUNED) and European Public Administration Employers (EUPAE), 'European framework agreement of European social dialogue committee for central government administrations (SDC-CGA) on digitalisation' (2022) <<https://www.epsu.org/sites/default/files/article/files/SDC%20CGA%20Agreement%20on%20digitalisation%20-%20EN%20-%20Signed.pdf>> accessed 5 March 2024.

²⁵ EPSU, 'EU Social Partners signed new agreement on digitalisation for central government' (2022) <<https://www.epsu.org/article/eu-social-partners-signed-new-agreement-digitalisation-central-government>> accessed 5 March 2024.

²⁶ Case T-310/18 *European Federation of Public Service Unions (EPSU) and Jan Willem Goudriaan v European Commission* [2019], <<http://publications.europa.eu/resource/cecl-ar/ad2b44b0-f63e-11e9-8c1f-01aa75ed71a1ad2b44b0-f63e-11e9-8c1f-01aa75ed71a1>> accessed 5 March 2024.

²⁷ The Resolution Pt 10, 13, 21.

IV. THE NATURE OF THE RIGHT TO DISCONNECT

Discussions on how to regulate the R2D should begin by exploring its origins and characteristics. There is a lack of academic studies on this topic and addressing this gap is essential to proposing specific legal solutions and resolving the debate over whether the R2D is necessary as a separate legal regulation.

The R2D is closely linked to fundamental workers' rights, such as a safe and healthy working environment, respect for private and family life, protection of personal data, and non-discrimination. The European Parliament even defined it as a fundamental right in Recital H of its Resolution. However, this right is secondary, as it derives from fundamental workers' rights. It should not be treated directly as fundamental, since such rights are already established and recognised in numerous documents. Nonetheless, given its close connection to fundamental rights, the R2D undoubtedly holds significant importance for workers.

The R2D is also closely tied to regulations on working hours and rest periods.²⁸ Like those regulations, it aims to preserve the health of the worker and is, therefore, an essential element of proper and safe work organisation. Given that working hours and rest periods are already regulated by the EU, some argue that these regulations are sufficient.²⁹ In my opinion, this reasoning stems from the mistaken assumption that the R2D is only about not working after hours. This issue is rooted in a legal dichotomy established by the Working Time Directive,³⁰ which separates working time from rest periods. The directive indirectly refers to the R2D by regulating maximum working time and minimum periods of daily and weekly rest, which must be observed to protect the health and safety of workers. In Article 5, the legislator uses the phrase 'uninterrupted rest period', making it clear that these rest periods must not be disrupted by, for example, electronic communications. The rest period cannot involve any activity for the employer that would limit the worker's freedom to manage their own time, even to the minimum extent.³¹ Moreover, the Court of Justice of the European Union ruled that the timeframe during which a worker at home is obliged to respond to employer calls

²⁸ Katarzyna Jaworska, 'The Right to Disconnect' (2022) 29 *Studia z zakresu Prawa Pracy i Polityki Społecznej* 51, 53 <10.4467/25444654SPP.22.005.15373> accessed 5 March 2024.

²⁹ Krzysztof Walczak, Maciej Chakowski, 'Rozwój nowoczesnych technologii w zatrudnieniu a konieczność wprowadzenia odrębnej instytucji prawnej, jaką jest prawo do bycia offline' (2024) 31(3) *Studia z zakresu Prawa Pracy i Polityki Społecznej* 211, 213–214 <<https://doi.org/10.4467/25444654SPP.24.013.19929>> accessed 5 March 2024.

³⁰ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time [2003] OJ L299/9.

³¹ Małgorzata Kurzynoga, 'Propozycje Parlamentu Europejskiego unormowania prawa pracowników „do odłączenia” (the R2D)' (2022) 5 *Praca i Zabezpieczenie Społeczne* 3, 5–6 <[doi:10.33226/0032-6186.2022.5.1](https://doi.org/10.33226/0032-6186.2022.5.1)> accessed 5 March 2024.

in a short period must be regarded as working time.³² If a worker using digital tools communicates with the employer or performs work-related tasks outside of working hours due to the employer's specific needs, overtime regulations should apply. However, this approach fails to consider situations where a worker's rest is disrupted by calls or messages, even though no actual work is performed. In such cases, claiming overtime pay becomes problematic. Additionally, what happens if, due to constant notifications, a worker mistakenly assumes they need to work, completes the task, and later finds out it was not an overtime order? The employer might argue that the worker voluntarily interrupted their rest period. The R2D is also about protecting workers' physical and mental health by effectively ensuring their rest time.³³ In other words, it aims to safeguard workers from disruptions to their rest, which is currently not adequately covered by existing regulations, despite these disruptions significantly impacting the quality of rest. The ETUC goes a step further by asserting that the R2D already belongs to every worker, and the directive's purpose is simply to ensure its enforcement.

Moreover, labour law serves a protective function, and to maintain this function in a changing world it must adapt to current needs. Numerous studies have shown that current regulations are not sufficient, so action is required to ensure that workers can exercise their rights in this new reality and boundaries between professional and private life are reinforced.³⁴ The initiative to regulate the R2D aligns with recent actions by the European Union to improve working conditions, such as Directive 2022/2041 on adequate minimum wages,³⁵ the proposal for a directive on improving working conditions in platform work,³⁶ or the 2023 European Declaration on Digital Rights and Principles for Digital Decade.³⁷

The concept of the R2D can have various dimensions. It can be limited to the worker's ability to refrain from working outside working hours or extended to a worker's duty, where non-compliance may bring negative consequences. It may also constitute an employer's duty to disconnect – in this scenario, employers are obliged to ensure that workers do not work during their rest periods, which means that the workers are disconnected even against their will. There is also the 'right to a chosen connection', where the worker can decide whether to connect outside

³² Case C-518/205 *Ville de Nivelles v Rudy Matzak* [2018], OJ C 414, 14 December 2015.

³³ European Law Institute, 'Guiding Principles on Implementing Workers' Right to Disconnect' (2023) 15 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Guiding_Principles_Workers_Right_to_Disconnect.pdf> accessed 19 June 2024.

³⁴ Loïc Lerouge, Francisco Trujillo Pons (n 4) 452.

³⁵ Directive 2022/2041 on adequate minimum wages [2022] <<http://data.europa.eu/eli/dir/2022/2041/oj>> accessed 5 March 2024.

³⁶ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work [2021] COM/2021/762 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021PC0762>> accessed 5 March 2024.

³⁷ European Declaration on Digital Rights and Principles for the Digital Decade [2023] C 23/01 PUB/2023/89.

their usual work periods.³⁸ Since it is established that the R2D stems from the right to safe working conditions and is closely tied to the right to rest, workers cannot have complete discretion over whether to exercise this right. The Latin maxim *Volenti non fit iniuria* undergoes many limitations in labour law, especially when worker health is at stake. In a sense, a worker must also use this right to protect their health. I believe that imposing a strict disconnection obligation on the employer is excessive and would significantly limit flexible work arrangements. However, giving workers full discretion regarding disconnection will not yield the expected results and contradicts the nature of this right. What if workers choose not to disconnect because they believe it will lead to career advancement? In exercising the R2D, workers' conduct is essential, as they are responsible for ensuring their health and safety, as well as that of others at work. Therefore, they should manage their time properly and respect the right of others to rest. The R2D should be seen as a shared responsibility between employers and workers.³⁹

In my opinion, employers should enable workers to exercise their rights, and their duties should primarily involve raising awareness, providing tailored methods and tools, and supervising, rather than directly disconnecting a worker. Although some 'hard' organizational measures, such as server blocking, may lead to forced disconnection, this should not be the employer's primary goal. If workers do not exercise their rights, the employer should identify the reasons and reorganise work or apply disciplinary measures – after all, ensuring adequate rest is essential and workers cannot waive this entitlement.

V. SCOPE OF THE FUTURE LEGISLATION ON THE R2D – KEY ISSUES

Since the social partners have failed to prepare relevant proposals for introducing the R2D, it is necessary to revisit the European Parliament's resolution to determine which provisions are crucial for future regulation and whether they require any amendments or elaboration.

1. DEFINITION AND PERSONAL SCOPE OF THE R2D

So far, national legal regulations do not provide a clear definition of the R2D. If uniform regulation is to be introduced at the EU level, it is crucial to include a definition in a future directive. The R2D is defined by the European Parliament

³⁸ Eurofund (n 6) 48.

³⁹ Małgorzata Kurzynoga (n 31) 10.

in Article 2(1) as the right not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working hours. The resolution explains that this includes phone calls, emails, or other messages. In my view, the future directive should clarify that the R2D consists of two elements: the right not to respond to various work-related communications, and the right not to be disturbed by work-related matters during leisure time (in other words, the duty of others to respect a worker's R2D), with certain exceptions.⁴⁰ It should also clearly state that disconnection covers interactions with superiors, co-workers, and customers of the employer.

Some doubts may arise concerning the personal scope of the R2D. The social partners' proposal to include the R2D in the telework agreement might imply that it would apply exclusively to teleworkers.⁴¹ Considering the expansion of ICT and digital tools in work processes, I believe that this right should be extended to the broadest possible group of workers, a view also supported by the European Parliament. According to the proposal, the R2D should apply to all sectors, both public and private, and all workers, regardless of their status or working arrangements, provided they use digital tools for work purposes.⁴² This means it would cover not only remote or teleworkers but also those working on the employer's premises, whether they use digital tools constantly, regularly, or incidentally. Importantly, when determining worker status, the criteria established by CJEU case law should be considered.⁴³ Thus, the personal scope of the future directive should also cover the bogus self-employment. Finally, it should apply to all employing entities, regardless of the number of workers employed. Naturally, broad application does not mean all workers will be subject to the same modalities of application.⁴⁴

The European Parliament's proposal refers to Directive 2003/88/EC, which provides for derogations from minimum rest periods in the case of managing executives or other persons with autonomous decision-making powers. Consequently, it is unclear whether they can exercise their R2D. To avoid any ambiguity, the future directive should explicitly state that there are no subject exemptions. I believe this is important given the high levels of mental and physical strain faced by managing executives, provided that practical solutions take into account

⁴⁰ Irmina Miernicka, 'Prawo do odłączenia się w świetle rezolucji Parlamentu Europejskiego z dnia 21 stycznia 2021 roku zawierającej zalecenia dla Komisji w sprawie prawa do bycia offline' (2022) 129 *Przegląd Prawa i Administracji* 123, 129 <<https://doi.org/10.19195/0137-1134.129.8>> accessed 5 March 2024.

⁴¹ ETUC, 'ETUC response to the Commission's first-phase consultation of the European social partners on possible action in the area of telework and workers' right to disconnect' (2024) 2 <<https://www.etuc.org/sites/default/files/document/file/2024-06/ETUC%20response%20to%20the%20Commission%20...%20Telework%20%20workers%27%20right%20to%20disconnect.pdf>> accessed 12 August 2024.

⁴² Proposal for a Directive on the R2D Article 1 para 1.

⁴³ Proposal for a Directive on the R2D Recital 15.

⁴⁴ ELI (n 33) 18

the interests of employers and the special regulations applicable to this group.⁴⁵ A similar view on this issue was also expressed by the ETUC.⁴⁶

2. OBLIGATIONS OF EMPLOYERS AND WORKERS

The proposed directive primarily emphasises the employer's responsibility to enable workers to disconnect after working hours. However, it is important to recognize that the successful implementation of the R2D requires collaboration from all the parties involved.

Regarding employers' responsibilities, special emphasis is placed on two measures for implementing the R2D: establishing rules for reasonable use, including practical arrangements for switching off digital tools used for work purposes and monitoring the time spent on work-related duties by introducing a system for measuring working time. Thus, it is evident that the European Parliament's proposal requires employers to adopt tangible solutions in this regard, rather than merely engage in preventive and educational actions.

In my opinion, mandatory time tracking may reduce the flexibility that many modern work environments rely on, particularly for remote or project-based work, where strict time measurement can feel overly rigid. For these groups, implementing measures must allow for dispersed working hours and disconnection after a certain number of hours, rather than at a specific time during the day. It might be necessary to move beyond a strictly quantitative approach to working time and instead assess the workload. Additionally, setting up and managing mandatory monitoring systems could impose a significant administrative burden on employers, particularly smaller companies. Moreover, in some work models, such as creative industries, productivity is not easily measured by time alone, making mandatory tracking less effective.

There should be a graduation of employers' obligations, starting with preventive actions, such as informational and educational measures that raise awareness and provide practical arrangements for switching off digital tools. Simplifying the dialogue on the quality of working conditions, their impact on occupational health, and promoting educational approach are key to implementing the R2D,⁴⁷ as workers' rest periods are frequently violated unintentionally. This often results from poor communication in the workplace and the absence of rules regarding contact with, for example, remote or task-based workers. Additionally, some

⁴⁵ Irmina Miernicka, see No 38, 131; Małgorzata Kurzynoga, Krzysztof Kurosz, 'Prawo kadry zarządzającej i kierowniczej do bycia offline na przykładzie orzeczenia kolumbijskiego trybunału konstytucyjnego' (2024) 31 *Studia z zakresu Prawa Pracy i Polityki Społecznej* 167, 176–178 <doi:10.4467/25444654SPP.24.013.19926.>.

⁴⁶ ETUC, 'Position on the R2D' (2021) <<https://www.etuc.org/en/document/etuc-position-right-disconnect>> accessed 5 March 2024.

⁴⁷ Loïc Lerouge, Francisco Trujillo Pons, see No 4, 464.

workers themselves may be excessively available, hoping to be rewarded by the employer or believing they are expected to be always available. With these considerations in mind, educational and training activities should inform employees about:

- The importance of the R2D and the psychosocial risks of violating it,
- The digital tools used by the employer and the risks associated with them,
- Communication rules and respecting working time regulations,
- The employer's policies and measures to implement the R2D,
- Possible exceptions to providing the R2D.

Next, practical arrangements should be offered by the employer, considering the type of work performed, positions held, working time systems and schedules, digital tools used, communication channels, and other factors. There is a wide range of organizational solutions that can be implemented, from milder approaches like pop-up messages reminding employees about rest, best practices for bulk emails, autoresponders, or availability information in email or chat footers, to more stringent measures like connectivity shutdowns, server blocking, message blocking or delaying, or leaving digital tools at work.⁴⁸ If these methods fail to deliver the desired results, the employer should evaluate the reasons behind the shortcomings. Is this due to excessive workload? A normal, constant increase in work demand should not justify assigning overtime work. Is it because of the organisational culture, allowing out of hours contact? Or perhaps the worker is not managing their time effectively or handling additional responsibilities with the hope of some reward? The employer should then consider work reorganisation or corrective actions and introduce mandatory work time monitoring as a final measure. That is why a systematic assessment of the risks of over-connection and its causes must be regularly (e.g. once a year) conducted by all employers.⁴⁹

The proposed directive lacks a clear emphasis on the responsibilities of workers, which are essential for effectively implementing the R2D. Workers should respect established boundaries for work hours and avoid engaging in work-related tasks or communications outside these hours unless otherwise agreed upon. They should comply with company policies and procedures regarding the R2D and make use of the resources and tools provided by their employer. Excessive ambition and the desire to excel cannot justify working excessive hours and forgoing rest. Moreover, workers should also respect their colleagues' R2D by refraining from sending non-urgent communications or expecting immediate responses outside agreed work hours. A significant role is assigned to management, who should demonstrate commitment to the disconnection policies by promoting expected behaviour, creating a culture that avoids out-of-hours contact and identifying necessary behavioural changes. They should also regularly exchange information

⁴⁸ Irmina Miernicka, see No 38, 132.

⁴⁹ ELI, see No 33, 19.

and participate in the process of evaluating arrangements for switching off digital tools already in place, to avoid infringements of working time regulations. Lastly, they are obliged to support a no-blame culture and guard against detriment to workers for not being contactable.⁵⁰

Workers should also have a duty to reconnect, but this must be limited to extraordinary situations⁵¹ – the proposal in Article 4, paragraph 1, *in fine*, describes these as ‘force majeure or other emergencies’. However, these terms are vague and to prevent misuse, company regulations should specify as precisely as possible what constitutes an emergency at a particular workplace or for a specific category of workers, considering i.e. their level of responsibility. Neither the concepts of emergency or force majeure should be equated with mere business needs. It should be a case posing serious risk to people or potential serious damage to the business, its customers and/or its shareholders or legal event whose urgency requires the adoption of special measures or immediate responses.⁵² Employers should establish with each worker which communication channel will be used for emergencies and specify the authorised contacts (e.g., only a supervisor or employer). They should also clarify the exact scenarios in which these contacts may reach the worker. This way, if a worker on leave receives a call from their supervisor, they will understand it is an emergency. There is no doubt that in the case of reconnection, a worker must be compensated. It is not clear from the proposal, however, whether overtime allowance is a sufficient form of compensation or if it should be an additional, special compensation for violating the R2D.⁵³

3. PRIVACY AND DATA PROTECTION

The R2D is inseparably linked to the right to privacy. Spain has even included it in data protection legislation, highlighting its importance in ensuring privacy while using digital devices in the workplace. This is due to three main reasons. Firstly, the use of digital technologies and systems for measuring working time may lead to constant surveillance of workers. Secondly, this can result in the disproportionate and illegal collection of data on their location, habits, private life, or health. Thirdly, the power imbalance between a worker as a data subject and an employer as a data controller often means that a worker’s consent to the processing of personal data is not freely given.⁵⁴

⁵⁰ Workplace Relations Commission (n 16) 8; 2020 Framework Agreement on Digitalisation, (n 18), 10.

⁵¹ ELI (n 33) 21.

⁵² ELI (n 33) 21–22.

⁵³ Irmina Miernicka (n 38) 133.

⁵⁴ The Resolution Pt 17; Paul Secunda (n 14) 9.

The proposed directive stipulates that employers shall process personal data only to record an individual worker's working time and by existing regulations, however, it lacks a clear instruction on protecting worker privacy. Specifically, this should include:

- An obligation to assess the impact of digital tools and measures implementing the R2D on personal data protection,
- An obligation to ensure the security of personal data processed in this context,
- An information obligation regarding the data processed by digital tools and the measures implementing the R2D,
- Training for workers on using available tools and measures to protect their personal data.

This is particularly important for those working remotely, using private equipment, private internet connections, or working under task-based systems, but should be applied equally to all workers using digital tools, regardless of their work organization.

4. PROTECTIVE MEASURES AND ENFORCEMENT

The legal regulation of the R2D would not be complete without protective measures for workers and mechanisms to address potential infringements. Such protective and enforcement measures are often absent in existing national legislation.

First, according to the proposal of the European Parliament, employers are required to perform health and safety assessments, including psychosocial risk assessments, concerning the R2D (Article 4, paragraph 1, Pt c). In February 2022, the World Health Organization and the International Labour Organization published a joint technical brief on healthy and safe teleworking, which emphasised that enterprises and governments should place clear limits on workplace surveillance and support workers' disconnection to reduce the negative physical and mental health implications.⁵⁵ Therefore, the obligation set out in the proposed directive can potentially lead to greater protection of workers' mental health, particularly regarding the risks associated with the use of digital tools.

Secondly, in cases where any derogation from the implementation of the R2D is permitted, employers must provide each affected worker with a written explanation substantiating the need for the derogation on every occasion it is invoked. The requirement for a written explanation may seem overly formal given the extraordinary circumstances. It might suffice to present the reasons for deroga-

⁵⁵ World Health Organization and International Labour Organization, 'Healthy and safe telework: Technical brief' (Geneva 2021) 8, 12–13 <<https://www.who.int/publications/i/item/9789240040977>> accessed 5 March 2024.

tion in a format that ensures the worker is informed, such as through an email or other electronic message.⁵⁶

Thirdly, the increase in workplace connectivity should not result in negative consequences in terms of recruitment or career advancement. Accordingly, under Article 5, Member States must ensure that discrimination, less favourable treatment, dismissal, or other adverse actions by employers due to the fact that workers have exercised or sought to exercise their R2D are prohibited. Given the challenges in proving that a worker was treated unfairly, the worker only needs to present facts that raise a presumption of such treatment. It would then fall to the employer to demonstrate that the adverse treatment was due to reasons unrelated to the worker exercising or attempting to exercise their R2D.

In case of the R2D violation, workers shall have access to swift, effective, and impartial dispute resolution mechanisms, as well as the right to redress (Article 6, paragraph 1). Member States are required to establish rules on effective, proportionate, and dissuasive penalties for infringements of national provisions. These proposed measures are essential – not only will workers be granted the R2D, but, perhaps more importantly in practice, they will be protected from negative consequences when exercising this right. Furthermore, employers will be prohibited from promoting continuous availability or rewarding employees who work outside of regular hours, as this could result in claims of unequal treatment. This is particularly important for workers who cannot be available outside regular working hours due to family, educational obligations, or health reasons.

VI. CLOSING REMARKS

The circumstances described in the article support the idea that future regulation of the R2D at the EU level is only a matter of time. Although legal acts relating to working time, rest periods, and health and safety are already in place, they do not guarantee sufficient protection for workers, and implementing some of these provisions may be challenging in jobs that rely on digital technologies. The European Parliament points out that the R2D is an inseparable part of the new working patterns in the digital era and should be considered an important social policy instrument at the EU level.⁵⁷ The digital transition should be guided by respect for human rights and the fundamental rights and values of the EU, with a positive impact on workers and working conditions.⁵⁸

⁵⁶ Irmina Miernicka (n 38) 133.

⁵⁷ The Resolution Pt H.

⁵⁸ The Resolution Pt C.

Delegating further work to the European social partners was a good solution, as they should play a central role in defining the practical details of the R2D. It was also desirable to turn their actions into a directive, as previous autonomous framework agreements have shown that implementation can be particularly challenging in countries where social dialogue structures are weakly developed,⁵⁹ leading to a differential impact on working conditions. However, due to the absence of consensus, the matter has returned to the European Commission's agenda to guarantee real protection of workers' rights. Still, some issues related to future legal regulation require further consideration.

Determining the origins of the R2D, along with its main functions, helps counter arguments about its redundancy while also enabling a clearer definition of its character, implementation, and regulation. EU legislation in this regard can only be general to reconcile the benefits of digitalisation with the need for effective worker protection. Detailed arrangements ought to be tailored to specific workplaces.⁶⁰ Nevertheless, the future directive should be more comprehensive than the existing legislation of Member States to provide uniform protection for workers throughout the EU.

Thus, it seems that minimum legal regulation at the EU level should specify the broad definition and personal scope of the R2D, the measures necessary for its implementation, the procedure for carrying out these measures (involving the role of Member States, social partners, and employers), possible derogations, and protection mechanisms (primarily protection against discrimination). This would ensure that workers can fully exercise this right without fear of repercussions. The draft directive proposed by the European Parliament contains most of these elements, but some still require further discussion and clarification to be applied effectively, as I have outlined in earlier sections of the paper.

Special emphasis should be placed on clearly defining the R2D, extending it to all workers using digital tools for work purposes, dividing the responsibilities between the parties in the employment relationship, and ensuring adequate protection for already acquired rights, including the right to privacy. It is also important to note that workers themselves have responsibilities regarding disconnection and proper work organization – an aspect currently missing from the proposal. The successful implementation of the R2D requires a collective effort across the entire workplace.

⁵⁹ European Commission, 'Study on the implementation of the autonomous framework agreement on violence and harassment at work' (2015) see, i.a., 67, 85, 98. <<https://op.europa.eu/en/publication-detail/-/publication/09cef40c-0954-11e7-8a35-01aa75ed71a1/language-en>> accessed 5 March 2024.

⁶⁰ Irmina Miernicka (n 38) 138.

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