

The right to disconnect

This EPRS Briefing relates to the subject of the legislative initiative report currently being prepared by the Employment and Social Affairs Committee (rapporteur: Alex Agius Saliba, S&D, Malta; 2019/2181(INL)).¹

Key aspects

According to Eurofound, the 'right to disconnect' refers to a worker's right to be able to disconnect from work and refrain from engaging in work-related electronic communication, such as emails and other messages, during non-work hours and holidays.²

Twenty years ago, it was exceptional (unless in the case of emergency) to contact an employee outside working hours, and even more so during weekends or holidays.

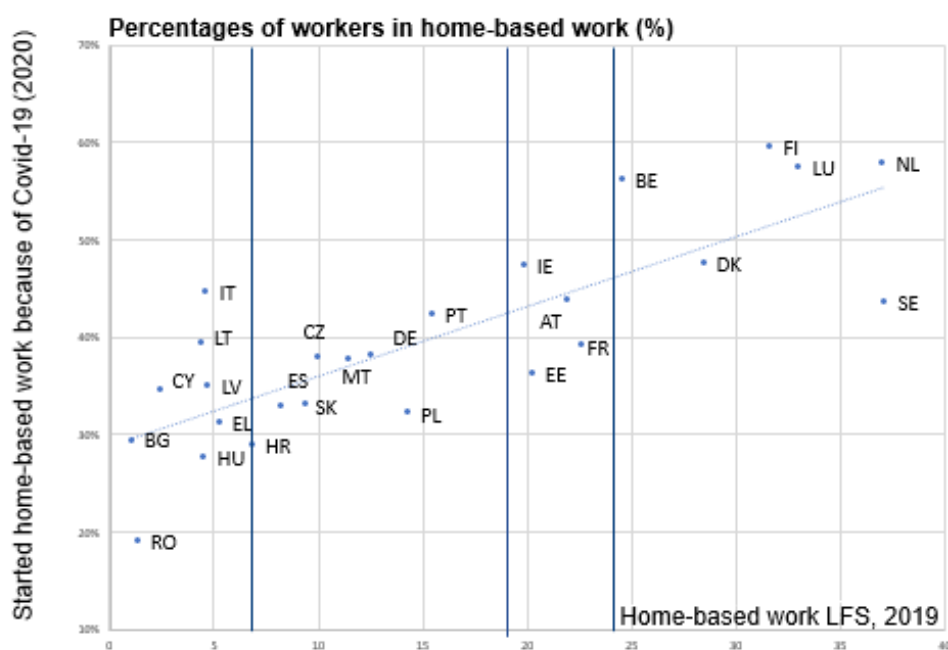
Today, many managers routinely contact employees/colleagues by e-mail or by phone after work, at the weekend and during holidays. In some companies/countries, 'on call' is becoming the new norm. Not infrequently, contracts oblige employees to be available after work, at the weekend and during holidays. Being prompt is associated with higher productivity and considered a necessary condition for career advancement;³ for this reason, some employees consent to taking on the burden of onerous work schedules that invade their private lives.

In 2019, 5.4 % of employed persons in the EU-27 aged 15-64, reported they 'usually' worked from home (Eurostat). This share remained constant at around 5 % throughout the 2009-2019 period. However, over the same period, the share of those who 'sometimes' worked from home gradually increased, from 6.0 % in 2009 to 9.0 % in 2019. The Netherlands and Finland topped the EU list for remote working, with 14.1 % of employed persons usually working from home in 2019. They were followed by Luxembourg (11.6 %) and Austria (9.9 %). By contrast, the lowest rates of home workers were reported in Bulgaria (0.5 %), Romania (0.8 %), Hungary (1.2 %), Cyprus (1.3 %), Croatia and Greece (both 1.9 %).⁴

In 2020, the coronavirus crisis forced many (private and public) companies and organisations to switch to teleworking, there has been a recent spike in the number of teleworkers. According to the 'Living, Working and COVID-19' online survey carried out in April 2020 by Eurofound, 37 % of respondents started working from home during the lockdown. This increase was significantly higher in those countries that already had larger shares of teleworkers (see Figure 1). It is expected that teleworking will become increasingly common in the future.⁵

The widespread increase in telework has positive and negative effects. Telework affords increased productivity, a better work-life balance and greater working-time autonomy. During the coronavirus crisis, teleworking has made it possible to maintain business continuity and employment. However, it can blur the boundaries between people's professional and private lives.⁶

Figure 1 – Home-based work because of coronavirus-related lockdown (2020), compared to routine home-based work (2019), percentage



Source: Eurofound, LFS 2019 and Online Survey Wave April 2020 (R2=0.6).

Working time standards

From an ergonomic point of view, employees should be productive, resilient and satisfied with their work for a long time (and in reality for longer working lives). The ergonomic parameters of working time in the EU (8 hours a day, 40 hours a week and 11 hours rest time) can be seen as a standard for a healthy and safe arrangement of work.⁷ Organisations should pay greater attention to this matter not only because it is required by law, but also because of their employees' welfare and the decreased productivity that may result from an overuse of digital tools.

A common misconception is that longer work means more output. The result of long working hours is clear: working significantly longer decreases productivity. In fact, 'an increasing body of evidence underlines that the effects of a reduction of regular long working hours include positive impacts on workers' physical and mental health, improved workplace safety and increased labour productivity due to reduced fatigue and stress, higher levels of employee job satisfaction and motivation and lower rates of absenteeism. Appropriate government policies to limit excessively long working hours are an important feature of any legal framework on working time and these also exist in most European countries at both the country level and at the supranational level in the form of the EU Working Time Directive'. (Messenger, ILO).⁸

Companies learned that a long time ago. In the 19th century, when organised labour first pushed employers to limit workdays to 10 (and later eight) hours, management was surprised by the fact that output actually increased – and that expensive failures and accidents at work decreased.⁹

Another risk stems from the potential for work intensification, if the right of teleworkers to switch off is not explicitly regulated and fully respected.¹⁰ Of even greater concern is the fact that 'the monitoring of employee mobile devices can often allow employers to obtain GPS tracking information through which employers can uncover employees' locations, daily routines, private sexual information, and medical conditions'.¹¹

Payment for overtime work

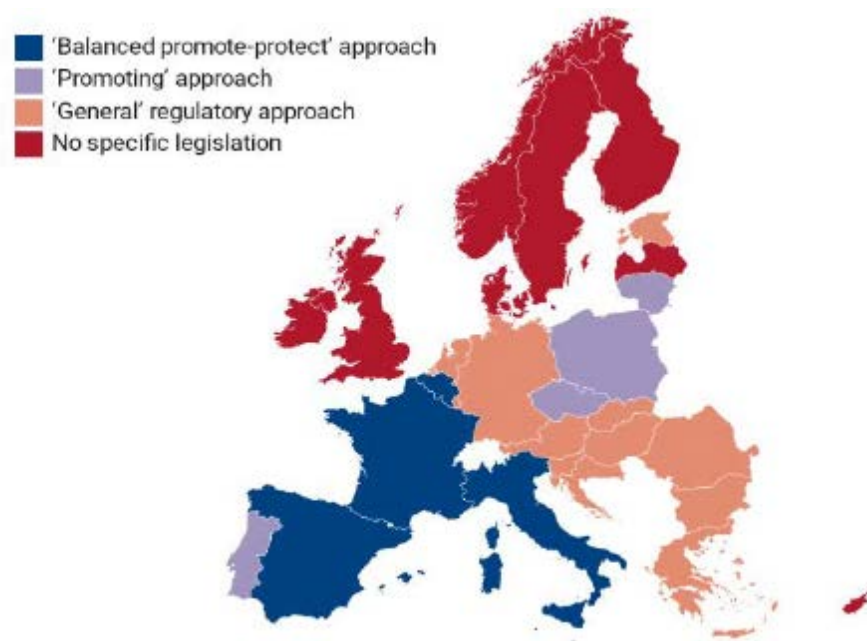
The question of overtime wages is linked to the fact that non-exempt workers tend to be paid by the hour, while exempt workers are not eligible for overtime no matter how many hours they earn. When it comes to employees working after hours, being exempt means there is no compensation. By contrast, non-exempt employees must be paid for additional work done after working hours and at a premium rate for any work done for more than 40 hours in a workweek. Many employers have responded with strict overtime policies, establishing specifically when employees are allowed to log overtime hours.¹²

National law, case law and social partner agreements

A number of EU countries have recently taken affirmative steps to regulate the (tele)work-related use of digital communication in order to provide employment protection to employees. Eurofound (2020) classifies the provisions addressing teleworking in different Member States as follows:¹³

- *'balanced promote-protect' approach*: specific legislation introducing a legal framework for the right to disconnect (Belgium, France, Italy and Spain);
- *'promoting' approach*: legislation on the use of telework, with provisions identifying its potential advantages but not its potential disadvantages (Czechia, Lithuania, Poland and Portugal);
- *'general' regulatory approach*: only general legislation regulating the use of tele/remote work (Austria, Bulgaria, Estonia, Germany, Greece, Croatia, Hungary, Luxembourg, Malta, the Netherlands, Romania, Slovenia and Slovakia);
- *no specific legislation* governing tele- or remote working (Cyprus, Denmark, Finland, Ireland, Latvia and Sweden).

Figure 2 – Cluster analysis of national legislation (2020)



Created with Datawrapper

Source: Eurofound compilation based on the contributions from the Network of Eurofound Correspondents.

France

France is considered the EU pioneer in legally recognising the right to disconnect. As early as 2013, a national cross-sectoral agreement on quality of life at work encouraged businesses to avoid any intrusion into employees' private lives by defining periods when their electronic communication devices could remain switched off. This right was subsequently made law on 8 August 2016 and is now regulated by Article L.2242-17 of the French Labour Code.¹⁴ The new law – focusing on the *droit à la déconnexion* (right to disconnect) – requires companies with 50 employees or more to establish a dialogue between employer and employees (via representatives) in order to regulate the use of digital tools beyond working hours, to specify employees' rights to switch off, and to ensure these rights are enforced.

Furthermore, the right to disconnect has to be included in the mandatory annual negotiation process focussing on quality of life at work and gender equality. It only applies to businesses with 50 or more employees. Electronic requests made beyond working hours are compensatable time, just 'as if someone was having work phone conversations outside of normal business hours or reviewing files'.

Even before the 2016 legislation, French law recognised a contractual right to disconnect for employees working from home. France's Supreme Court ordered Rentokil Initial, a British pest-control company, to pay €60 000 to one of its former France-based employees for having required them to be constantly accessible in case a work issue arose. The employee left the company in 2011.¹⁵

Germany

German employers have also made significant progress in regulating after-hours work, but no specific legislation has been adopted in this regard. German employers recognise the harmful effects of constant pressure on their employees. For example, companies such as Volkswagen, BMW and Puma have all voluntarily imposed restrictions on when managers can e-mail employees outside working hours.¹⁶

Germany's corporate self-regulatory approach allows employees to engage in discussions with the relevant social partners with the aim to develop unique regulations tailored to the needs of each party. The risk involved in self-regulation, however, is that employers will often create rules that seemingly favour employees yet in practice fail to give them substantive protection. Moreover, German employers are not bound to engage in corporate self-regulation.

The German Labour Ministry itself has also adopted policies regarding after-hours communication, in order to encourage other employers to follow suit. The ministry has banned any communication with staff outside working hours, except in emergencies, and implemented rules that do not allow managers to take disciplinary action against employees who switch off their mobile devices or fail to respond to communication after working hours.¹⁷

Examples

There are regional examples, such as the tariff agreement of the metal industry of Baden-Württemberg. This agreement allows to reduce the daily rest time of employees to nine consecutive hours (instead of 11), if during telework employees can set the beginning and the end of their working day by themselves.¹⁸

European law

There is currently no existing or proposed EU legislation¹⁹ that directly addresses the scope or timing of work-related electronic communication between employers and employees.

a. Primary law

Articles 153 and 154 of the Treaty on the Functioning of the European Union (TFEU) stipulate that the EU shall adopt directives setting out minimum requirements with regard to working conditions, as well as support and complement the Member States' activities in this domain. Article 153(2) TFEU further stipulates that such requirements shall extend to social security and social protection of workers.

Article 154 TFEU states that social partners are to be consulted on possible initiatives envisaged under Article 153 TFEU. They can sign agreements, which, upon their request, can be implemented at EU level in accordance with Article 155 TFEU. Social partners may also collect and exchange good practices across the EU. Nationally, social partners can support the implementation of this principle via collective bargaining and through involvement in the design and implementation of relevant policies.

Article 31 of the Charter of Fundamental Rights of the EU, entitled 'Fair and just working conditions', gives every worker the right to working condition that respect his or her health, safety and dignity.

b. Secondary law

The right to disconnect should be considered in relation to attaining a better work–life balance and health and safety at work, objectives that have been at the core of recent EU initiatives. Principle 10 of the European Pillar of Social Rights (healthy, safe and well-adapted work environment and data protection),²⁰ as well as the Directive on Work-Life Balance for Parents and Carers are also relevant to this right, although they do not refer specifically to it.

The Working Time Directive

The Working Time Directive (WTD, 2003/88/EC),²¹ by defining working time, maximum working hours and minimum daily and weekly rest periods that should be respected in order to safeguard workers' health and safety, indirectly relates to the right to disconnect.

Working time

Article 2(1) of the WTD defines working time²² as 'any period during which the worker is working [at work', in some linguistic versions], at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice'. It is established case law that on-call time, where workers are required to be available for the job, must be regarded in its entirety as working time, regardless of whether they actually perform tasks during this period. Stand-by time of a worker at home who is obliged to respond to calls from the employer within a short period must be regarded as 'working time'.²³

Working time has to be documented. Article 2(1) introduces the requirement to set up a system measuring the duration of time worked each day by each worker.²⁴

Rest periods

The WTD provides for three types of minimum rest periods²⁵ (as well as paid annual leave). The Court of Justice of the European Union (CJEU) has emphasised that these minimum rest requirements 'constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health...'²⁶

Minimum daily rest

Article 3 of the WTD provides for a minimum daily rest of 11 consecutive hours: 'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period'.

This core requirement appears to have been satisfactorily transposed into national law by Member States for most sectors. However, there are some ambiguities for sectors or groups of workers that are not included or exempted from national working time legislation. Most Member States require a minimum of 11 consecutive hours of rest, as imposed by the Working Time Directive. However, some Member States go further by requiring a minimum rest of 12 consecutive hours.²⁷

Minimum weekly rest

Article 5 of the WTD provides that 'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3'.

In other words, Article 5 provides for a minimum 35-hour continuous rest period for every period of seven days, which may only be reduced to 24 hours if objectively justified. Article 16(a) of the WTD allows Member States to establish a reference period of up to 14 days for the purpose of granting this weekly rest.

This provision has been transposed into national law by the majority of Member States. While around half of the Member States stick to the minimum requirements set out in the WTD, several go beyond the minimum and provide workers with 36,²⁸ 42,²⁹ 44³⁰ or 48³¹ hours of rest per week. Some Member States also establish additional rules such as a requirement to grant weekly rest as far as possible simultaneously for all employees or whenever possible on the same day for workers of the same household.

c. Court of Justice of the European Union

Below are examples of case law that can be important to support the right to disconnect:

- CJEU judgment in Case C-518/15, Stand-by time of a worker at home who is obliged to respond to calls from the employer within a short period must be regarded as 'working time', 21 February 2018;³²
- CJEU judgment in Case C-55/18, Member States must require employers to set up a system enabling the duration of daily working time to be measured, 14 May 2019.³³

Conclusions

Even if there is no enacted or proposed EU regulation³⁴ that directly addresses the right to disconnect, Articles 153 and 154 TFEU could be the basis for the adoption of directives setting out minimum requirements, as well as supporting and complementing the activities of the Member States in the area of working conditions.

The Working Time Directive, by defining working time, maximum working hours and minimum daily and weekly rest periods that should be respected in order to safeguard workers' health and safety, refers to a number of rights that indirectly relate to 'right to disconnect' issues: in particular, the definition of what working time is, maximum working hours, the minimum daily and weekly rest periods that are required in order to safeguard workers' health and safety.

In addition, taking into account recent CJEU case law, (see above):

- stand-by time of a worker at home who is obliged to respond to calls from the employer within a short period has to be regarded as 'working time',
- Member States must require employers to set up a system enabling the duration of daily working time to be measured.

However, it will be difficult to revise the WTD in a way that takes into account the right to disconnect. In 2010, the consultation of EU-level workers' and employers' representatives on the possibilities to amend the WTD did not result in a social partners' agreement.³⁵ Employers tended to see the changes as necessary for achieving greater flexibility in the organisation of working time, while trade unions, on the contrary, considered it important to provide effective legal protection for workers against excessive working hours.³⁶

A more pragmatic approach could be to adopt an enforcement directive related to the WTD, which would be of a more technical nature, similar to the Posting of Workers Enforcement Directive (2014/67/EU).³⁷ This directive was adopted with the aim to increase the awareness of workers and companies about their rights, to improve cooperation between national authorities, to clarify the definition of 'posting', to increase legal certainty for posted workers and service providers, and to define Member States' responsibilities. A WTD-related enforcement directive related could, based on recent developments and case law, give some clarifications in the measurement of working time, daily and weekly rest periods and the role of agreements between social partners.

ENDNOTES

- 1 [Legislative initiative procedure](#), 2019/2181(INL).
- 2 [The right to switch off](#), Eurofound, July 2019.
- 3 IW Köln, [Zur Ambivalenz flexiblen Arbeitens](#). Der Einfluss betrieblicher Familienfreundlichkeit, 2019.
- 4 [How usual is it to work from home?](#) Eurostat, April 2020.
- 5 Background summary report for a webinar on the right to disconnect, Oscar Vargas Llave, Tina Weber, Matteo Avogaro, Eurofound, June 2020.
- 6 Eurofound, June 2020.
- 7 Deutscher Bundestag Ausschussdrucksache 19(11)83.
- 8 Jon C. Messenger, 'Working time trends and developments in Europe', *Cambridge Journal of Economics*, 2010.
- 9 Sarah Green Carmichael, [The Research Is Clear: Long Hours Backfire for People and for Companies](#), Harvard, 2015.
- 10 [Challenges and Opportunities of Teleworking for Workers and Employers in the ICTS and Financial Services Sectors](#), Sectoral Policies Department, ILO, Geneva 2016.
- 11 Paul M. Secunda, [The Employee Right to Disconnect](#), 2019.
- 12 Ibid.
- 13 Background summary report for a webinar on the right to disconnect, Eurofound, June 2020.
- 14 [Article L.2242-17](#) of the Labour Code.
- 15 [More Countries Consider Implementing a 'Right to Disconnect'](#), International Labour and Employment Law, 2019.
- 16 Paul M. Secunda, 2019.
- 17 Ibid.
- 18 [Tarifabschluss Mobiles-Arbeiten](#), Südwestmetall, 2018.
- 19 [Right to switch off](#), Eurofound, 2019.
- 20 [Principle 10](#) on 'healthy, safe and well-adapted work environment and data protection'. Workers have the right to a high level of protection of their health and safety at work. They have the right to a working environment adapted to their professional needs and which enables them to prolong their participation in the labour market.
- 21 [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](#), 4 November 2003.
- 22 Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, [SWD\(2017\) 0204 final](#), European Commission, April 2017.
- 23 *Ville de Nivelles v Rudy Matzak*, CJEU judgment [in Case C-518/15](#).
- 24 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*. CJEU judgment in [Case-C-55/18](#).
- 25 Different rules apply for two specified groups of workers: mobile workers (Article 20) and workers on seagoing fishing vessels (Article 21).

- 26 Judgment of 7 September 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:526, para 38; Judgment of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, para 36.
- 27 SWD(2017) 204 final.
- 28 SWD(2017) 204 final: Spain (private sector), Croatia, the Netherlands, Austria, Sweden.
- 29 SWD(2017) 204 final: Latvia.
- 30 SWD(2017) 204 final: Luxembourg.
- 31 SWD(2017) 204 final: Bulgaria, Estonia, Hungary (the 48 hours of weekly rest may also be split into two non-consecutive weekly rest days), Romania, Slovakia, Spain (Guardia civil and police).
- 32 [Judgment in Case C-518/15](#), 21 February 2018.
- 33 [Judgment in Case C-55/18](#), 14 May 2019.
- 34 [Right to switch off](#), Eurofound, 2019.
- 35 [Working Conditions – Working Time Directive Archives](#), European Commission, 2010.
- 36 [Detailed overview of the replies received from the social partners](#) at European level to the first-phase consultation under Article 154 TFEU on Reviewing the Working Time Directive, COM(2010) 801 final, Staff Working Paper, European Commission.
- 37 [Legislative Train, Posting of Workers Enforcement Directive](#), EPRS, European Parliament, 2019.

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