Mental Health and the Right to Digital Disconnection at Work: A Panoramic Vision from the Spanish Experience and the Recent Approaches of the European Parliament

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Summary:

Briefly, digital disconnection at work refers to the right of workers not to receive or reply to any work-related email, call, or message outside of normal working hours. Advances in technology and mobile devices allow employees across Europe to work anywhere, anytime. While this flexible approach to work has its benefits, it also carries the risk of eroding the barriers between work and rest times. Also, and as an immediate consequence, the danger of a negative impact on the mental health of employees and on their right to work-life balance.

In this regard, while in Spain the right is stated on the Organic Law 3/2018, of December 5 (about the protection of personal data and the guarantee of digital rights), in the European Union, there are many countries that still do not have a specific regulation.

For this reason, and due to the issue's urgency, due to the extension of digital devices caused by COVID-19, and the consequent teleworking, the European Parliament, which is especially aware and concerned about mental health in the digital world of work, intends to advance regulations regarding the right to digitally disconnect at the European Union level. The proposed Directive could help protect and guarantee the right of workers to technological disengagement.

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I. Introduction

The so-called "Information and Communication Technologies" (hereinafter, ICTs) have completely transformed the way that companies work and manage their resources.

The globalization of economies and the increase in competitiveness have led to greater flexibility in the organization of work time and a new way of understanding

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connectivity. Traditional forms of organization have become more technological. All this is due to the "daily use of ICTs in the workplace" (Manzano, 2018, p. 2). These more flexible and technological forms of work will be an upward trend in the coming years. Hence the importance to protect workers against the excessive use of certain technological means (computers, tablets, smartphones, etc.). In other words, tools related to the transmission, processing, and digitized storage of information.

The use of ICTs in society in general and, by logical extension, in the workplace can sometimes be favourable. The available technology helps connect employees and optimize work times by breaking down certain barriers (something impossible to imagine decades ago). Also, according to theories, these new technologies were created to "free people from tedious, degrading and alienating work and allow them to satisfy their curiosity, learn, enjoy life and dedicate most of their time to leisure and play." (Dosi and Virgillito, 2019, p. 3)

However, on the other hand, the indiscriminate use of email, virtual meetings (through programs such as Skype or Zoom), etc., also considerably worsens the productivity of workers, as they are very powerful distractors that cause a lack of concentration. In addition, ICTs can blur certain labour rights, which must always be guaranteed in their entirety and without exception. Specifically, something as basic as the rights to rest or to be protected at work can be violated precisely by the massive use of digital media. In this way, the right to digital disconnection in the workplace (the central axis of this study) is occupying a nuclear position at the international level in the current framework of labour relations. And the prospect is that in the future, it will become an even more essential right.

The exercise of the right to technological disconnection from work helps not only to respect the right to rest, but also to leave, vacations and the personal and family privacy of the worker (in its maximum expression, whether public or private and regardless of its contractual modality). After all, a characteristic feature of the guarantee analysed is its multidisciplinary nature, because it overlaps various aspects such as the physical and mental integrity of the workers, their privacy, and their right to work-life balance.

The use of technological and telematic means allows the worker to be connected 24 hours a day, 7 days a week. Hence, the importance in the practice of the right not to answer, outside working hours, any work-related email, communication, call, message, *WhatsApp*, etc.

Now and in the future, legal systems must advance in parallel with changes and technological advances. So that they are respected, labour legislators must clearly regulate or update certain basic and classic workers' rights, such as rest, labour risk prevention, etc. Indeed, global technological transformations are causing important changes in the framework of labour relations. This represents a challenge for all the agents involved (not only workers and employers, but also governments, unions, judicial authorities, etc.), which are called to reinforce the protective purpose of labour regulations, originally intended for works performed in person, not "remotely" or "digitally."

In fact, many companies, apart from providing their human resources with portable devices (laptops, smartphones, smartwatches, tablets, etc.), have workers who, on a regular basis, carry out their activity outside their facilities and, consequently, in order to work, they connect to the ICTs of their companies through telematic networks (for example, it is common to use VPN connections[1]). This circumstance has been enhanced by the global pandemic caused by COVID-19 and the subsequent preponderance of remote work.

II. The right to digital disconnection at work: some specific reflections

All employees, public or private, have the right to digital disconnection in the workplace, especially, when they work remotely, for example, at their own home (Trujillo Pons, 2020, pp. 9 *et seq.*), because "work time at home is exactly the same work time as work outside the home."[2]

As will be the object of analysis, current laws give the worker the right not to respond. However, is it equivalent to the company's obligation to refrain from sending communications or contacting its staff outside of working hours? It seems that nothing prevents the employer, among other options, from sending and preparing "pending jobs" for the next day, even outside the employee's schedule, who of course will not be obliged to respond until the beginning of his next working day. But, sending such during the rest time is a common and even expected practice. Hence, it is possible to conclude that, unfortunately, there is still a long way to go to guarantee the right globally.

Companies must be aware of the paradigm shift in current organizational models (due to the massive use of telematic and technological tools by their workers) and search professional agreements that help to balance work and rest times, especially, when they do not take the right to disconnect with the seriousness that they are supposed to, limiting themselves exclusively to fulfilling their obligations in few concrete terms (for example, with the drafting of internal policies and the signing of collective agreements without real and practical content).

It seems that a worker's availability, both hourly (at any time, "24/7" style) and locative (wherever he is), is taken for granted, so he must answer messages, calls or emails (in many cases indiscriminate) even outside his working time. It is the culture of "digital presenteeism." In other words, some companies (especially among those with many hierarchical lines, known as "pyramid management") aspire to absolute control of the employee, where he feels that someone is always "on top" of him.[3] However, this "digital presenteeism" or "tele-presenteeism" is not beneficial for the worker or for the company, since the increase in levels of technological stress in the first, due to that permanent connectivity, will not necessarily mean higher levels of efficiency and productivity.

By contrast, at the business level, the law must be applied with the maximum guarantees and seriousness, and companies must be more aware and sensitive towards respecting their staff's right to digital disconnection. After all, in the medium and long term, the issue can affect the health and mental integrity of workers and, consequently, can cause a very important cost (personal, social, economic, etc.). Nevertheless, and significantly, legal regulations (such as, for example, those in Spain) do not usually prohibit companies from making calls or sending emails or instant messages to their workers during their break time. They simply protect the right not to respond. Although it is not trivial, under the current regulations, the worker can ignore the communication until he begins his agreed working day, without being able to suffer negative repercussions (dismissals, sanctions, etc.). Notwithstanding, the lack of response by the worker may cause a negative perception by the company.

In this sense, the ethical, conduct, or deontological codes of companies with respect to the right to digital disconnection at work will be important, as they collect the set of criteria, norms and values that make up the company's ideology regarding the law, which must be assumed by human resources. Also, the workers' representatives (collective bargaining, union actions, complaints in cases where companies violate the regulations, etc.) have a significant role to play in preventing those issues from materializing. Thus, it can be agreed by collective agreement that the employee cannot suffer any damage at work, whatever kind, due to exercising his right to digitally disconnect.

Likewise, the worker who wishes to exercise his right to digitally disconnect once his working day is over, must assert this desire and, if that is the case, not tolerate those negative practices, reporting them to the competent judicial or administrative authorities. Be that as it may, a simple way to ensure the effectiveness of the right to disconnect is that the employee cannot view emails and messages until he starts his working time, in such a way that, for example, he should not be forced to have the professional email account on his personal mobile phone, or to have it active after the end of his shift.

Usually, any damage suffered by the worker when his right to digitally disconnect is violated occurs due to a business irregularity. As it is a right in favour of the employee, correlatively it is an obligation for the employer. Therefore, the company default is reportable to the public authority, either directly by the worker or by his legal representatives, being able to finish the procedure that is opened with a sanction proposal. However, this does not prevent the employer or immediate superior of the worker from writing or calling him to ask for a professional question outside of working hours.

This incipient labour right acquires a special meaning in current labour relations, because with it, the use of technologies is limited and, concurrently, everything concerning job and rest times is guaranteed (working hours, schedules, holidays, etc.). This is remarkable, given that the professional technological tools that have been established in companies for years are going to have an unstoppable boom and are going to be exponentially enhanced. Additionally, ICTs, due to technological innovation, are constantly updated and renewed, also increasing the possibilities of more connected work environments.

In any case, this labour right, in spite of its novel appearance due to the rise of ICTs, is based on an already existing set of regulations: on the one hand, in accordance with the limits between work and rest time (that, historically, have been developed to balance business powers against possible worker abuses); and, on the other hand, in accordance with the standards health and safety at work. Thus, there are:

1. The right to rest [Charter of Fundamental Rights of the European Union, of December 12, 2007 (art. 31), and Directive 2003/88/CE, of November 4, relative to certain aspects of management working time].
2. The right to safety and health at work [in Spain, arts. 13.4 and 19 of the Workers' Statute (WS)[4], and arts. 14, 15 and 22 of Law 31/1995, of November 8, on Occupational Risk Prevention (LORP)][5].
3. The right to daily, weekly, and annual rest (again in Spain, arts. 34-38 of ET).

Therefore, digital disconnection is not only immediately related to workers' rest time, but also to their safety and health at work. In this sense, there is no doubt that the lack of breaks caused by the so-called "hyperconnectivity" of the worker can lead to the appearance of psychosocial risks-mental burden, stress, burnout syndrome (chronic stress derived from the

inability to disconnect from work), etc. Psychosocial risk factors (boosted by the implantation of remote work due to the COVID-19 health crisis), such as high workloads and rhythms, long working hours, the perception of having to be always available, the lack of professional development, the excessive fragmentation of tasks, etc., hinder the execution of the worker's right to technological "unhooking."

In this context, it is crystal clear that the line that separates effective working time from leisure and rest time is becoming thinner, which in the end practically causes the employee to never disconnect from work. And this is so because ICTs lead to a constant time and location availability of workers, even outside their working hours. Everything has a negative impact on the outlined spiral: "hyperconnectivity" generates in the worker an unfavourable sense of urgency, that leads him to answer immediately any communication received, even detrimental to his rest time, work-life balance or, even, health.[6]

Therefore, it is worth emphasizing that digital disconnection at work must serve to fulfil this essential function for the worker's rest, health, and work-life balance. In this sense, the employer must be aware of this and not exceed his power of direction and control; that is, not to issue orders and instructions that affect non-work periods. After all, according to an extensive European judicial doctrine, there is a presumption of legitimacy in the employer's orders, which will only fail if they violate any fundamental right of his workers.

In any case, the existence of a solid and complete regulatory framework is essential.

III. The Spanish regulation: lights and shadows

In Spain, as in other countries with specific regulations (such as France, Belgium, or Italy), the labour law guarantees the worker's rest, from the framework of their privacy, work-life balance, and occupational health (Rodríguez and Pérez, 2017).

Specifically, the subject is regulated by three main legal norms:

1. Fundamentally, the Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (OL 3/2018)[7], as a genuine workers' right (art. 88), regarding which it is possible the (more than recommendable) involvement of collective bargaining through the introduction of additional guarantees and improvements (art. 91), something rarely extended in practice, despite the relatively large number of agreements that mention the right.
2. WS, a text that, in addition to other related labour guarantees (for example, rest, work-life balance, or occupational health), also includes an express (but simple) reference to the right to digital disconnection (art. 20 bis).
3. Law 10/2021, of July 9 (LRW)[8], specifically focused on remote work (and teleworking), whose article 18 practically follows the OL 3/2018 (art. 88).

After the approval of the OL 3/2018, a series of obligations fall on companies (public and private), regardless of their size and the number of workers employed:

1. Guarantee their employees the right to digital disconnection, to assure that, outside of work time, their rest time, permits, vacations, personal and family privacy, etc. are respected (art. 88.1).

Logically, the above implies a correlative duty for the employer [although it is only expressly mentioned in the LRW (art. 18.1)], which, for example, obliges him to restrict the invasive use of technological means of communication and work outside the workday.

In this way, based on respect for his privacy (personal and familiar) and rest (surprisingly, the law does not make any reference to occupational health and safety, although there is no doubt of its importance in this context), outside of work hours, the employee does not have the obligation to respond to calls, emails, text messages, etc. But as usual, there are exceptions, this is "unless otherwise agreed."

This agreement may take the form of a conventional clause or individual agreement. In these cases, the worker must be "available" and "reachable," and therefore has the obligation to answer calls, e-mails, or messages outside his working hours. During this time of availability, if an effective provision of his services is required, the worker will obtain remuneration according to the "availability plus," due to this is considered as effective working time. Pact, therefore, that can invalidate the digital disconnection (but always within adequate margins).

2. The different modalities of exercising the right (comprehensive expression of what its materialization may imply) must consider the nature and purpose of each employment relationship (for a better adjustment), the right to work-life balance and what could have been established (actually, it is rarely done) in the collective bargaining or, otherwise (or as a complement), in the alternative agreement between the company and the workers' representatives (art. 88.2).

3. In any case (it is mandatory), ensuring at least the prior hearing to the staff representatives,[9] the employer will develop an internal policy (protocol) on the topic. In this document, if necessary, he will provide special attention to those who hold management positions or are remote

workers (including teleworkers). In addition, the employer will reflect the “modalities of exercising the right” (according to the nature and purpose of each employment relationship, what has been agreed through collective bargaining, etc.) and training and awareness-raising actions to foment a reasonable use of technological means and, significantly, prevent the risk of computer fatigue (art. 88.3).

Nevertheless, these internal policies or protocols have to play a secondary or complementary role. After all, the OL 3/2018 previously points out (art. 88.2) that “the modalities of exercise” of the right always “will be adjusted” either to “what is established in the collective bargaining,” or to “what is agreed between the company and the representatives from the workers.” In the end, the different instruments cannot be incompatible with each other, but must act in a coordinated and uniform manner for a better guarantee of the right.

However, despite constituting an obligation, not all companies have these protocols, and there are many workers who do not benefit from these corporate health and wellness plans.

4. As an important counterbalance for workers to deal with the considerable autonomy of the employer in the elaboration of the internal policy (although it is a mere possibility, it has huge potential), it is also stipulated that “collective agreements may establish additional guarantees of rights and freedoms related to [...] the safeguarding of digital rights in the workplace.” (art. 91) Among them, without any doubt, the right to digital disconnection at work.

On this point, the OL 3/2018 does not even offer an indicative group of possible measures to be applied in practice. Certainly, this could be valued as something positive, since the range of options must be extensive and open to innovation (to offer a better response to the specific circumstances of each technology, productive sector, company, employment relationship, etc.). For this reason, the collective agreement should be the priority instrument to regulate the right. After all, internal policies are often drawn up with minimal worker intervention and, furthermore, are characterized by the latent risk that the employer uses the faculty held in an unbalanced way (even though he must consult to the staff representatives in advance).

However, the improvable content of the legal norm (practically “blank”) causes certain problems: an excessive heterogeneity of perspectives and approaches; the existence of gaps in relation to some crucial aspects (for example, the possible limitations or exceptions to the right); the risk of reducing the regulatory provision to a mere declaration of good intentions, etc.

For this reason, it is not surprising that collective agreements, in the limited occasions in which they approach the right,[10] tend to use repetitive and ineffective formulas. In other words, four years after the date of approval of the OL 3/2018, the assessment continues to be negative. Even though more and more collective agreements contemplate the right (although there are still many more that omit any reference), the current situation is far from desirable: in spite of notable exceptions (such as, for example, the collective agreements of Telefónica and related companies[11], the sector of savings banks and financial institutions,[12] Decathlon Spain,[13] Sabeco Supermarkets,[14] BT Spain,[15] Redexis Gas Group,[16] Ercros,[17] Generali Group Spain[18] or Evolutio Cloud Enabler[19]), too many texts limit themselves to mentioning the guarantee (and little else), do not improve the legal content,[20] do not seek true solutions to the problems, etc.

In conclusion, the concision and little ambition that usually characterize the collective agreements in Spain cause their content to provide little or nothing in terms of improvement over the unsatisfactory legal framework of reference.

However, it should be clarified that digital disconnection at work supposes a labour right that is fully effective in legal terms for the employment relationship. Consequently, its conventional recognition is not necessary.

IV. The current plan of the European Parliament

Because of the increasing use of digital devices caused by COVID-19 and the consequent teleworking,[21] the institutions of the European Union (mainly, the European Parliament) are making important advances in regulating the right to digital disconnection at the supranational level.[22]

Although it is true that, for example, in Directives 89/391/EEC, of June 12 (on the introduction of measures to promote the improvement of the safety and health of workers in the workplace),[23] 91/383/EEC, of June 25 (which complements the measures to promote the improvement of safety and health at work of workers with a fixed-term employment relationship or a temporary employment relationship),[24] 2003/88/EC, of November 4 (concerning certain aspects of the organisation of working time)[25] [in line with the right to rest included in article 31 of the Charter of Fundamental Rights of the European Union (European Parliament, Council and Commission, 2007)], or 2019/1158/EU, June 20 (on work-life balance for parents and carers),[26] references are made to a series of indirectly related guarantees, and that the European Pillar of Social Rights (European Commission, 2021) stresses the importance of work-life balance (principle 9) and safety and health at work (principle 10), currently, there is not an European legal framework that defines and regulates the

right to digital disconnection at work,[27] one of the possible negative repercussions of ICTs in the lives of employees (European Observatory of Working Life, 2021).

In this context, on December 1, 2020, in a resolution adopted with 31 votes in favour, 6 against and 18 abstentions, the Parliament's Committee on Employment and Social Affairs, after a wide period of consultations with stakeholders (experts and interested parties), presented a draft report in which it asked the European Commission to draw up a Proposal for a Directive on the right to digital disconnection at work, in order to establish a culture and a set of minimum conditions in relation to the use of the digital tools for professional purposes outside the working day. It aims to further address workers' rights to fair working conditions and employers' duties and obligations.

In particular, this initiative emphasizes the important role of social partners, as well as the need to enable solutions tailored to the specific characteristics of each company (depending on the different national and regional levels, sectors and industries). It stresses that the possibility of disconnecting from work must be considered as a fundamental right.[28] This implicitly recognizes a broad protection of the guarantee.

The initiative of the European Parliament is driven by the current context of COVID-19, where many workers have increased their working hours during the pandemic by not disconnecting their digital devices during break times, so much so that those who work regularly from home are more than twice as likely to work more than the maximum requirement hours per week and run the risk of resting less than the hours required between working days.[29]

According to their arguments, this right to switch off at work is vital to protect work-life balance, physical and mental health, and well-being. Especially since (with the exception, at that time, of France, Belgium, Italy, and Spain) many Member States lack regulations in this regard.[30]

On January 21, 2021, the European Parliament adopted the report (with 472 votes in favour, 126 against and 83 abstentions) and passed a resolution in favour of the "fundamental" right to disconnect.[31] In it, calls on the European Commission to prepare a Directive "that enables those who work digitally to disconnect outside of their working hours" without fear of repercussions, establishes "minimum requirements for remote working and clarify working conditions, hours and rest periods," and finally, but not less important, protects workers' physical and mental health and well-being.

In this context, MEPs are committed to a future regulation that specifies this right so necessary for workers at the European Union level. And not only with a profuse and concrete regulation, but they also advocate considering the technological "disengagement" as a fundamental right of the European Union.

Recovering ideas already expressed (regarding the presumption of legitimacy in the employer's orders), if in the legislative initiative the right to disconnection is recognized as fundamental, the employer must justify and specify with the legal representation of the workers the instances in which the employees will have to obey the orders received by their superiors outside of their agreed working hours. Companies will be required to detail these urgent circumstances more clearly, so they are not a generality, but an exception.

The Directive could stimulate, nationally, a more completed right to digital disconnection at work. Today, few European countries have their own regulations in this regard. And those that do have it, such as France or Spain, are characterized by rules more temporary rather than structural, and that require a thorough review and supplementation. In any case, it is hoped that the proposed Directive will help all countries (whether they have or not an own regulation) to better protect and guarantee the labour right to digital disconnection.

The serious damages that employees can suffer due to the rapid and unprecedented permanent connectivity that they are experiencing in their jobs are undoubted (for example, situations of stress and computer fatigue arising from excessive use of ICTs). Far from resting, they can continue working almost constantly. The consequent lack of technological "disengagement" leads to the appearance of psychosocial (computer fatigue, mental burden, stress, etc.) and ergonomic (back pain and joint problems) professional risks. Therefore, the European Union lawmakers must regulate the right properly and with the maximum guarantees, to provide legal certainty and protection to workers. The right to digitally disconnect and, thus, not be available once the workday ends, on days off or on vacation periods, must be exercised with full guarantees, especially due to the promotion of remote work and telework (through the exclusive or prevalent use of computer, telematic and telecommunication media and systems) derived from COVID-19.

At this point, we analyse the content of the legislative initiative to reflect and determine what it may entail for the member states of the European Union, because, if that is finally approved, they must adapt their internal legal system.

In particular, the annex to the resolution of the European Parliament for the future Directive is made up of 14 articles. Among them, the most relevant content is the following (it is a draft, so, perhaps, it will not be the final one):

1. It begins (art. 1) by analysing its object and scope, clarifying that the Directive aims to detail the minimum requirements so that workers who use digital tools for professional purposes can exercise their right to disconnect (according to the text, "an inseparable part of the new work models in the new digital era"). Also, to "guarantee" (that is, not to force them) that the employers, public and private, respect the right, regardless of the type of contract signed with their workers, including those from a temporary work agency.
2. Then (art. 2), it defines "disconnect" as the fact of "not participating in activities related to work or communications through digital tools, directly or indirectly, outside of working hours" (art. 2). Something that, for example, the Spanish regulation does not include.
3. Next (art. 3), the text requires that Member States ensure that employers:
    a. Take the necessary measures to provide their workers with the means to exercise the right to disconnect.

       In Spain, in compliance with the regulation, employers are required to draft, after hearing the representatives of the workers, internal policies (also, adjusted either to "what is established in the collective bargaining," or to "what is agreed between the company and the representatives from the workers"). With the precept of the proposed Directive, perhaps Spain should better guarantee this business obligation with a more severe sanctioning regime and with more obligations than the previously indicated.
    b. Establish an objective, reliable and accessible system that makes possible to measure the duration of the time worked each day by each worker, in accordance with the employees' right to privacy and protection of their personal data.

       In principle, in Spain this obligation is already fulfilled thanks the provisions of the Royal Decree-Law 8/2019, of 8 March,[32] by which employers are required to have a daily record of the working day, where they must include the specific start and end times of the working day of each employee. In this sense, the breach of that obligation will mean incurring a grave administrative infraction.

       It is easy to understand that the recording of working hours is directly linked to the exercise of the right to digital disconnection (Serrano and Sabaté, 2019, p. 3), since it represents a barrier to working overtime and, of course, to the lack of rest and privacy after the working day. In any case, to make the right to digital disconnection effective, this record needs to be reliable and real, that is, the data stored must register the hours worked and the check-in and check-out times.

Further, the precept of the proposal Directive orders that Member States must ensure that employers apply the right to disconnect in a fair, lawful and transparent manner, and without discrimination (by gender, disability, existence of family responsibilities, condition of temporary or part-time worker, etc.).

4. Advancing in the text of the annex, article 4 is characterized by its broad content (composed of three sections), dedicated to an essential aspect to guarantee the right: the measures to be implemented.

   In a more complete way than the Spanish regulation, very specific working conditions are determined, such as "the practical arrangements for switching off digital tools for work purposes, including any work-related monitoring tools;" "the system for measuring working time;" "health and safety assessments, including psychosocial risk assessments;" "the criteria for any derogation by employers from their requirement to implement a worker's right to disconnect"[33] and "for determining how compensation for work performed outside working time is to be calculated;"[34] or "the awareness-raising measures, including in-work training."

   Also, Member States, in accordance with national law and practice, may "entrust the social partners to conclude collective agreements at national, regional, sectoral or employer level providing for or complementing the working conditions."

   In any case, all workers, are or not covered by a collective agreement, will benefit from protection in accordance with the proposed Directive.

5. Continuing with the analysis of the text of the initiative, regarding the protection against adverse treatment (art. 5):
    a. By exercising or demanding his right to digital disconnection, an employee

(or the workers' representatives) may not be subject to discriminatory or less favourable treatment, dismissal, or any other unfavourable reactions from the employer.

In the same way, although the text does not expressly indicate it, any rule that determines rewards or better benefits for the worker who does not disconnect must be annulled.

The workers, when they have been dismissed or subjected to other adverse treatment due to exercise or demand their right, can turn to the competent judicial or administrative authority in defence of their interests. In addition, if there are sufficient signs of retaliation, the employer will must prove that the measure was based on other grounds.

It should be emphasized that, in the absence of a protocol or an action against the law, the company cannot sanction or react negatively against a worker who exercised his right to digital disconnection. For example, since the employee is not obliged to answer calls or messages outside of his working hours, a dismissal for this circumstance would clearly be inadmissible or even null (due to the proposed Directive considers that it is a fundamental right of the worker).

Additionality, in relation to the right of redress (art. 6), affected workers will have access to a swift, effective, and impartial dispute resolution (individual or collective), as well as the right to an adequate reparation.

These summary and preferential proceedings are characteristic in the protection of fundamental rights (also in Spain, where these types of procedures exist). The proposed Directive seems to grant to the right to digital disconnection at work, because its infringement may go against "fair working conditions, including their right to a fair remuneration and the implementation of [...] [the] working time, health and safety, and equality between men and women", as well as having a negative impact on workers with care responsibilities (usually, woman).

6. No less important is article 7 of the legislative initiative, relative to the employer's obligation to communicate to all personnel, in writing, the content of their right to digital disconnection.

   Such information shall include: "the practical arrangements for switching off digital tools for work purposes, including any work-related monitoring tools;" "the system for measuring working time;" "the employer's health and safety assessments with regard to the right to disconnect, including psychosocial risk assessments;" "the criteria for any derogation from the employers' requirement to implement the right to disconnect and any criteria for determining compensation for work performed outside working time;" "the employer's awareness-raising measures, including in-work training;" "the measures for protecting workers against adverse treatment;" and "the measures for implementing workers' right of redress."

   Wide list of measures with a marked purpose of protecting, most of them expectable and logical in an internal company policy on digital disconnection. Although they must be valued positively (the more information the better), in practice, however, some of them may be limited to mere general statements, of a simply formal nature and without any real or effective content.

7. According to article 8 (penalties), Member States shall lay down a set of rules regarding the applicable sanctions ("effective, proportionate and dissuasive") against the possible infringements of national regulations (a circumstance that does not happen in Spain, since there is no specific and explicit infraction in the law that typifies this kind of irregularities).

   Likewise, the previous sanctioning regime (and its possible modifications) must be communicated to the European Commission, within the period established for it.

   On this matter, the text of the proposed Directive, like the Spanish regulation, does not explicitly mention the type of infringement, perhaps because the topic is configured as a worker's right instead of as a business duty.

   At this point, it would be convenient to properly delimit the legal right protected through the guarantee to digital disconnection, since this will allow a better delimitation of the applicable protection mechanisms. After all, there are many rights involved (among the main ones, rest,

measuring working time, safety and health at work, data protection, work-life balance, privacy or, even, dignity[35]), so the possible responsibility to be imposed to the offender could be different (fundamentally, administrative, or penal).[36] In addition, knowing the regulations makes it easier to understand what actions must cease or be applied.

8. Lastly, the legislative initiative ends with its articles 9 to 14, general and specific to any Directive [respectively, level of protection (9); reporting, evaluation, and review of the right (10); transposition (11); personal data (12); entry into force (13); and addressees (14)].

In broad terms, the text of the proposed Directive (which has more lights than shadows) reveals a significant regulatory deficit in the European Union, due to the fact that there is no specific and explicit regulation on the worker's right to disconnect from digital tools, including ICTs, for work reasons.

Particularly, in comparison to the Directive, the Spanish government must better specify its regulation on the right to digital disconnection at work, establishing more specific information for workers, the protection instruments, and the penalties. The reform of the current Spanish law and the future Directive must reinforce the protection mechanisms, so that workers can exercise this labour right without reprisals or negative consequences.

One of the proposed Directive objectives is to balance the forces inside the labour relationship, preventing the employer from exploiting the workers for his own economic benefit through the abusive use of digital means. With the minimum requirements determined in the text of the initiative to guarantee the right to digital disconnection at work, it is intended to respect everything that overlaps with its exercise: a fair remuneration, a limit on working time, a work-life balance, the effective equality between genders, the improvement of health and safety conditions, etc.

The legislative initiative spares no effort to protect all employees (private and public), regardless of their contractual modality, or if they provide services remotely (who, probably, could work more hours) or in ordinary workplaces. Likewise, it clearly defines the right to digital disconnection, which provides determination and legal certainty.

Specifically, considering that the pandemic has brought to light very serious safety and health problems (social and professional isolation, physical and mental fatigue, anxiety, depression, musculoskeletal pain, etc.), all due to the increase in working hours and the excessive use of digital devices, the right to digital disconnection at the European Union level must be regulated in terms of prevention of occupational risks, in a way that employers must take care of the health of their workers.

However, although the strategic framework of the European Union on health and safety at work (2021-2027) (June 2021)[37] indicates that it will "ensure appropriate follow-up" on the matter, the European Commission does not mention any dates or instruments, implying that the issue of the right to disconnect is not considered a priority. It seems that, before initiating a legislative procedure, the Commission prefers to assess the effects on business of the 2020 Europe Agreement on digitization[38] (European Observatory of Working Life, 2021). In fact, the European Commission Work Programme for 2023 does not mention the right to disconnect, but it foresees a maybe useful or interesting, non-legislative initiative with a comprehensive approach to mental health for second quarter of 2023.

In fact, on July 5, 2022, the European Parliament published an outstanding Resolution on mental health in the digital world of work.[39] Among other issues, the text insists that "physical and mental health is a fundamental human right and whereas every human being is entitled to the highest attainable standard of health."

In particular, some of the effects of COVID-19 on work have had a negative impact on the psychological health of workers, and in gender equality (sharp increase in care responsibilities, which disproportionately affected working women). Added to this are certain negative consequences of teleworking (ambit where psychosocial risks are the most prevalent[40]), namely, "being overly connected,[41] a blurring of the lines between one's work and private life, a greater intensity of work and technology related stress."

For this reason, in the words of the European Parliament, today it is necessary "a fresh and broader definition of health and safety at the workplace, which can no longer be separated from mental health." Furthermore, inside of "a comprehensive EU mental health strategy and European care strategy." In parallel, it requires "a new paradigm to factor in the complexity of the modern workplace in relation to mental health, as the regulatory instruments currently in force are not sufficient to guarantee the health and safety of workers and need to be updated and improved."

And among the set of aspects to consider in this context, the European Parliament grants a space reserved for the right to digital disconnection at work (statement 22nd), a guarantee "essential to ensuring the mental well-being of employees and the self-employed, not least for female

workers and workers in nonstandard forms of work [...] [that] should be complemented by a preventive and collective approach to work-related psychosocial risks." Hence, in line with its Resolution of January 21, 2021, the MPEs urge the European Commission to draw up a Directive on minimum standards and conditions to guarantee the right to disconnection and to regulate the use of digital tools for professional purposes.

Sadly, adverse effects persist, "despite the existence of a legislative framework aimed at protecting worker health and safety, in particular regarding working hours, rest periods and risk prevention."[42]

V. Conclusions

Few countries in the European Union currently have their own regulations regarding the right to digital disconnection at work, and those that do have it (such as Spain) are characterized by texts that are more circumstantial than structural, which require adequate revision or updating.

In this sense, it is foreseeable that the Directive on digital disconnection at work proposed by the European Parliament would help to better guarantee and protect such an important right, especially in the current digital world of work, where mental health has acquired such prominence.

For this reason, the initiative to promote minimum regulations (through a Directive) deserves a more than positive assessment, as well as its consideration as a "fundamental" right, because this circumstance will reinforce the guarantee and make it an essential element to ensure fair and just working conditions.

At this point, the caution and apparent indifference of the European Commission stands out negatively. For this institution, an adequate regulation of the issue does not constitute one of its current priorities, even though, after the pandemic caused by COVID-19 and the subsequent wide extension of teleworking, the gradual worsening of the mental health of many employees is evident (among other reasons, because they are not able to digitally disconnect from their jobs).

Of course, the situation requires an urgent and appropriate response from the European Commission, which is responsible for completing the process started several years ago by the European Parliament. While it arrives, the other agents involved (national governments, social agents, companies, or the workers themselves) must take the initiative and, within their respective possibilities, develop actions capable of improving the implementation conditions of this significant right.

VI. References

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1 Acronym for "Virtual Private Network". It is used by many companies as a computer network technology, that enables a secure extension of the local area network over a public or uncontrolled network such as the Internet.

2 Sentence of the Superior Court of Justice of Castilla y León, Valladolid (Social Chamber), of February 3, 2016 (appeal number 2229/2015).

3 In these cases, which are amplified in the remote work, many employers distort the real hours of work for the simple fact that the worker is at home and has no qualms about demanding tasks, whatever the moment. Then, the worker finds himself under the pressure to be constantly connected and not to stop answering work-related messages or phone calls. This is going to have a negative connotation for his health in terms of mental burden.

4 Royal Legislative Decree 2/2015, of October 23, which approves the revised text of the Workers' Statute Law (https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430; accessed on 18 January 2023).

5 Law 31/1995, of November 8, on the prevention of Occupational Risks (https://www.boe.es/buscar/act.php?id=BOE-A-1995-24292; accessed on 18 January 2023)).

6 As one of the most common possibilities, the company can use *WhatsApp* as the main communication channel between its employees, which directly interferes with their quality of work life. It is recommended to agree (even informally) with the creator of the group some message rules: for example, that after 7 pm it is not allowed to write in the chat. However, there is always the risk that it is not respected and that workers end up looking at their mobile phones, which can lead to significant energy consumption (continuous attention to the mobile phone causes this effect).

7 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (https://www.boe.es/buscar/act.php?id=BOE-A-2018-16673; accessed on 19 January 2023).

8 Law 10/2021, of July 9, on remote work (https://www.boe.es/buscar/act.php?id=BOE-A-2021-11472; accessed on 19 January 2023).

9 Although it is not equivalent to a true consultation or negotiation, always better, at least it allows the workers' legal representatives to have a voice and be heard in this procedure.

10 Paradoxically, "when comparing the impact of different types of legislation at national level, including the right to disconnect, the information available to date appears to suggest that relatively broad provisions, such as those included in the Belgian legislation, have had a more limited impact on the number of relevant collective agreements concluded. However, more research in this area is required" (Eurofound, 2021, p. 55).

11 https://www.boe.es/buscar/doc.php?id=BOE-A-2019-16313 (accessed on 19 January 2023).

12 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-15571 (accessed on 19 January 2023).

13 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-14396 (accessed on 19 January 2023).

14 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-16279 (accessed on 19 January 2023).

15 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-18790 (accessed on 19 January 2023).

16 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-14674 (accessed on 19 January 2023).

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18 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-19064 (accessed on 19 January 2023).

19 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-447 (accessed on 19 January 2023).

20 As potential additional contents, common in the best examples at a conventional level, it is possible to highlight: *a*) Clarify that communications sent outside of working hours will be answered at the beginning of the next working day. *b*) Point out that all devices and tools capable of enabling work-related communications (mobile phones, tablets, laptops, mobile applications, emails, instant messaging systems, etc.) will be considered. *c*) Identify certain extraordinary situations in which the exercise of the right to digital disconnection may be conditioned (availability periods, on-call times, recurring needs to connect with countries in other time zones, emergencies, force majeure, etc.). *d*) Periodic training and information actions, and good practice guides on responsible use of computer and technological means. *e*) Regarding email, deferred sending (until the recipient begins his next working day) and automatic responses (when the recipient of a communication is enjoying a break, vacation days, a permit, a reduction in working hours, a suspension of the professional relationship, etc.), in which the situation, the dates and the substitute workmate will be reported. *f*) Especially involve those who manage work groups, so that they are the first to respect the right to digital disconnection and become an example for their subordinates. *g*) Send the communications to the people exclusively involved, with the essential content and simplifying the information. *h*) Plan the meetings, presentations, professional trainings, etc., so they take place within working hours. *i*) Establish communication channels to report practices and behaviors that break the right to digital disconnection. *j*) Or even establish disciplinary sanctions against possible breaches.

21 In this area, the COVID-19 pandemic has led to the rise of remote work at the community level, a type of work that blurs the line that separates the personal and professional lives of workers. After all, digital devices, such as mobile phones or computers, can lead them, directly or indirectly, to remain in constant contact with their companies.

22 "Although working from home has been instrumental in helping safeguard employment and business during the COVID-19 crisis, the combination of long working hours and higher demands also leads to more cases of anxiety, depression, burnout and other mental and physical health issues" (European Parliament, 2021).

23 Directive of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC) [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0391&from=EN; accessed on 20 January 2023].

24 Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31991L0383; accessed on 20 January 2023).

25 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 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0088; accessed on 20 January 2023).

At present, it is true that times of effective work and rest are blurred. To avoid confusions, the Directive 2003/88/CE makes the following definition of working time: "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".

26 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1158; accessed on 19 January 2023).

27 In similar terms, the International Labour Organization (ILO) also has published texts (normative or not) related with the exercise of the right to digital disconnection (although, in the same way as the European Union, there is no specific convention or recommendation in this regard). For example, the Conventions number 1 [Hours of Work (Industry)], 1919 (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C001; accessed on 20 January 2023); 30 [Hours of Work (Commerce and Offices)]. 1930 (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C030; accessed on 20 January 2023); or 156 (Workers with Family Responsibilities), 1981 (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156), and the ILO

Centenary Declaration on the Future of work, 2019 (https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf; accessed on 20 January 2023).

[28] In the sense postulated by the Charter of Fundamental Rights of the European Union. Among others, it already includes the fundamental rights to: physical and mental integrity of the person (art. 3); respect for private and family life (art. 7); fair and just working conditions (art. 31); or preventive health care (art. 35).

[29] Thus, Members of European Parliament (MEPs) highlight a reality that has been endorsed months after the massive use of distance work worldwide: although digitization brings many economic and social benefits (for example, a greater autonomy and flexibility for the worker), the abusive use of ICTs also causes important disadvantages (greater workloads, more hours of effective work, etc.), blurring the limit between work time and leisure/rest time.

[30] At that time, Netherlands and Portugal had made legislative proposals, but the process was stalled. Also, in other eight countries (Germany, Finland, Ireland, Luxembourg, Lithuania, Malta, Sweden, and Slovenia) the right to digital disconnection was being debated. In contrast, in the remaining Member States of the European Union, the issue had not even begun to be addressed (because existing legislation was perceived as sufficient, ICT-based flexible working was not widespread, as in most Eastern European countries, or collective bargaining was preferred when it comes to improving the balance between work and life, as in the Scandinavian countries).

However, a large number have "taken affirmative steps to regulate the (tele)work-related use of digital communication in order to provide employment protection to employees", being able to classify the different regulatory approaches as follows: "balanced promote-protect" (Belgium, France, Italy and Spain), "promoting" (Czechia, Lithuania, Poland and Portugal), or "general" (Austria, Bulgaria, Estonia, Germany, Greece, Croatia, Hungary, Luxembourg, Malta, the Netherlands, Romania, Slovenia and Slovakia). Without a specific legislation governing tele or remote working would be, in 2020, Cyprus, Denmark, Finland, Ireland, Latvia and Sweden (European Parliamentary Research Service, 2020).

[31] European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect [2019/2181(INL)] (https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html#title1; accessed on 20 January 2023).

[32] Royal Decree-Law 8/2019, of March 8, on urgent measures for social protection and the fight against job insecurity during the working day (https://www.boe.es/buscar/act.php?id=BOE-A-2019-3481&p=20230111&tn=6; accessed on 20 January 2023).

[33] "Such as force majeure or other emergencies [for example, circumstances of serious damage to the company that require an immediacy of response], and subject to the employer providing each worker concerned with reasons in writing, substantiating the need for the derogation on every occasion on which the derogation is invoked", the precept continues indicating.

In Spain, the internal protocols and the collective agreements usually determine these exceptions, but vaguely, without further details. In this regard, apart from to detail these cases of imperative need through examples, it could be positive sign an agreement setting a time where the workers, just in case, must check their digital devices (mobiles, computers, etc.).

[34] Obviously, this (extraordinary) economic remuneration will be at least equal in amount to the (ordinary) remuneration received by the worker under normal conditions.

[35] For example, due to hypothetical cyberbullying behaviors (*netmobbing*), to which the ILO refers in its Convention num. 190, on violence and harassment (2019) [https://www.ilo.org/dyn/normlex/es/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:3999810,en:NO; accessed on 20 January 2023], and, complementing the latter, Recommendation num. 206 (2019) [https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206; accessed on 20 January 2023].

[36] In Spain, considering that they are breaking the right to digital disconnection, the competent administrative authority for labour inspections is already beginning to propose sanctions (with a possible fine of up to 6,250 euros) to companies which send professional electronic communications outside working hours (unless they prove that informed the recipient indicating that he should respond to the communication received during the working hours).

[37] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty: EU strategic framework on health and safety at work 2021-2027. Occupational safety and health in a changing world of work [SWD(2021) 148 final]-[SWD(2021) 149 final] (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0323&from=EN; accessed on 20 January 2023).

[38] *European Social Partners Framework Agreement in Digitalisation* (June 2020) [https://www.businesseurope.eu/publications/european-social-partners-framework-agreement-digitalisation; accessed on 20 January 2023].

[39] European Parliament resolution of 5 July 2022 on mental health in the digital world of work (July 2022) [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0279_EN.html; accessed on 20 January 2023].

[40] "Evidence available from Eurofound survey data and other studies demonstrates the impact of working with mobile digital tools on work–life balance and overconnection. Particularly for regular teleworkers and highly mobile workers, there has been an expansion of working hours and a reduction in rest times, with associated detrimental impacts on work–life balance, overall physical and psychological health and well-being, and gender equality. The impacts of workplace stress, burnout and other health issues on workplace absences and the associated costs for employers, workers and the public purse are also well documented" (Eurofound, 2021, p. 55).

[41] "Given that research has demonstrated a link between constant availability and work overload, the inclusion in company-level agreements of a recognition of this interaction and the development of processes to monitor whether evidence of overconnection may be linked to workloads being too high also appear to demonstrate an element of good practice" (Eurofound, 2021, p. 55).

[42] "Evidence available from Eurofound survey data and other studies demonstrates the impact of working with mobile digital tools on work–life balance and overconnection. Particularly for regular teleworkers and highly mobile workers, there has been an expansion of working hours and a reduction in rest times, with associated detrimental impacts on work–life balance, overall physical and psychological health and well-being, and gender equality. The impacts of workplace stress, burnout and other health issues on workplace absences and the associated costs for employers, workers and the public purse are also well documented" (Eurofound, 2021, p. 55).