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The Future of the Employee's Right to Disconnect in the European Union and Latvia

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ABSTRACT

The right to disconnect refers to a employee's right to be able to disconnect from work and refrain from engaging in work-related electronic communication, like emails and other messages, during non-work hours and holidays. If the rights to disconnect are not explicitly regulated, the risk of disbalance between work and private life is at stake. It was also recently decided by Employment Committee MEPs that EU countries must ensure that workers are able to exercise the right to disconnect effectively. The Latvian Labour Law does not directly determine the right to disconnect from digital devices, however, such rights arise from certain legal norms. The goal of the research is to provide an in-depth analysis of the legal status of the "right to disconnect" in the legal system of the European Union and Latvia.

Keywords: Labour law, The right to disconnect, Work-life balance, EU law

INTRODUCTION

Rapid development of information and communication technologies is fueling the relevance of the topic of the employee's right to disconnect, especially in the context of Covid-19, while also considering the factor of achieving ecosystem sustainability. In the context of cautious and careful technological growth, sustainability is also viewed from the position of the effective use of information and communication technologies. This means that the employee's right to disconnect from digital devices must be viewed not only as a fundamental human right, but also as necessity for preserving a more sustainable ecosystem. Recent studies show that Covid-19 has caused teleworking to considerably change the approach to worktime planning, affecting the organization of work, and the work-life balance of workers. (OECD, 2020) The last few years may have brought the biggest changes in the working environment since the industrial revolution (de Vos, 2019).

The problem with the matter lies in the fact that although technological growth spurs productivity, it can also have a severe impact on the work-life balance of workers. Preventing employee burn-out and supporting the sustainability of workers' professional life requires legal solutions that restrict employers and at the same time provide certain freedoms to the employees. Introducing the employee's right to disconnect from digital devices is a way for achieving work-life balance and thus, sustainability on the job market.

Overall, the right to disconnect means employees having the right to disconnect from work and not to receive any messages pertaining to work or reply to them beyond their working hours. This right restricts the use of information and communication technologies during the off-hours of workers, making it possible for them to improve their work-life balance and get sufficient time for rest. This right also includes the prohibition of creating any negative consequences for the worker if they use this right (Secunda, 2019). The approach to implementing the employee's right to disconnect from digital devices differs in European Union (EU) member states and other countries. Some do not treat this as a separate right, though it may arise from other legal provisions. Typically, the right to disconnect is enshrined in the laws of a country or is introduced through social dialogue among stakeholders. Each of the approaches for introducing the right to disconnect has its drawbacks and advantages.

The author of this article analyses the legal framework of the right to disconnect in the EU and in Latvia. The purpose of the study is to use legal regulations and case-law as a basis to assess implementation of the employees' right to disconnect in the EU and Latvia, and to draw evidence-based conclusions about the future of this right, and about the legal changes necessary to guarantee a valuable protection mechanism. Due to the existing opinion that there is no single correct method for researching human rights topics (A.P.M. Coomans, 2010), the author uses different legal research methods to achieve the goal of the study: analytical, comparative, deductive, and inductive. The focus is on analyzing the case-law of the EU Court of Justice, and on conducting a detailed and comprehensive analysis of legal regulations and their interpretation in the context of EU and Latvian law. The results confirm that despite an attitude of openness towards the right to disconnect present within the legal space of the EU, there is an urgent need for the Latvian government to legislate for a robust right to disconnect on a national level.

EMPLOYEE'S RIGHT TO DISCONNECT IN EU

Because so many professional activities are now conducted online, new digital rights are becoming increasingly important to enable employees to enjoy their fundamental rights and guaranty work-life balance. Technological development has helped create obstacles to the fair use of breaks and off-hours in the context of work. Currently, no direct legislation exists at the EU level that encompasses the employee's right to disconnect from digital devices. However, this right can be derived from the regulations providing the right of the worker to periods of rest. Similarly, to other international human rights treaties, Article 31 part 2 of the EU Charter of Fundamental Rights states that "Every worker has the right to the limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave" (European Union, 2010). On a general regulatory level, the Working Time Directive, 2003/88/EC (European Parliament, the Council, 2003), determines the minimum daily and weekly rest periods to protect the health and safety of workers. Compliance with the rest period regulations is not only

the worker's right, but also their duty. In relation to this, Working Time Directive Article 2 also defines the principle of "adequate rest", meaning that workers have regular rest periods, the duration of which is expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers, or to others, and that they do not damage their health either in the short term or in the longer term. In assessing the legal nature of the directive as a vehicle for the right, it is important to point out the risk of its different implementation in the legal systems of member states, because these provisions do not apply directly. There is a risk of incorrect or incomplete implementation of these directives. This leads to different interpretations of the right within the Single Market, preventing legal certainty in the context of protecting employee's right to disconnect.

In essence, the right to disconnect is also present in the 20 principles of the European Pillar of Social Rights, which, among other things, establishes the principle of work-life balance (Principle 9), and the principle of a healthy, safe, and well-adapted work environment and data protection (Principle 10) (Secretariat-General (European Commission), 2018). Despite the non-binding nature of this document, it is critical for harmonizing the laws within the EU Single market. As response to digital transformation in 2020, the European social partners signed the European Framework Agreement on Digitalisation, which among other things includes provisions for compliance with the working time arrangements in the legislation and collective agreements. The social partners implement the framework agreement at the member state level, and this agreement is not equivalent to a directive in terms of legal consequences (Battista, 2021). The EU Court of Justice has also played a role in developing the understanding of the employees' right to rest and thus the right to disconnect in the EU. The case-law of the EU Court of Justice establishes the fact that the terms "working time" and "rest period", as defined by Working Tome Directive, may not be interpreted based on the different provisions of the national law of EU member states, as these are terms of the law of the European Union that are defined based on objective properties and with references to the system and purpose of the directives. According to Matzak case (2018) paragraph 62 and Jaeger case (2003) only such an autonomous interpretation makes it possible to achieve full effectiveness of the directive, and a uniform application of the above terms in all member states. This leads to the conclusion that interpretation of the employee's right to disconnect must also be that of the EU Court of Justice.

According to the Jaeger case The EU Court of Justice has emphasized the worker's right to rest, i.e. to a strict separation of rest periods and working time (Paragraph 48). This means that every moment of time that the worker spends performing work-related activities is considered to be work time, even in the context of distance working. The author believes it not to be important if the activity in question is included in the worker's duties; but the communication in general of all kinds with the employer (e.g. receiving e-mail messages from the employer). For example, in Matzak case, the EU Court of Justice established that the duty of the worker to quickly answer to the employer's phone calls while at home constitutes work time. The author suggests, that

given the diversity of communication technologies, one can extend this to other types of communication, such as e-mail, work chatrooms, etc. Importantly, in Matzak case, the EU Court of Justice confirmed that the workers' right to rest is a human right (Paragraphs 30–32). In the case, the EU Court of Justice clearly pointed to the need for member states to define the responsibility of the employer for keeping transparent and clear worktime records. In D. J. v Radiotelevizija Slovenija case (2021) the EU Court of Justice continued emphasizing the responsibility of the employer, pointing out that the employer was required to protect the worker from psychological risks. Overall, the assignment or responsibility to the employer has affected the progress of the understanding of the right to disconnect in EU member states.

The EU law and EU Court of Justice case-law reviewed so far lack the separation of the employee's right to disconnect, even though there are protections of the employees' right to rest in general. To protect the workers' right to rest established in the legal regulations, it is critical to emphasize the employee's right to disconnect from digital devices. The broadening use of communication technologies as part of distance working has created challenges for the ability of workers to use their rest periods in a complete and quality manner. Eurofound data shows that prior to the Covid-19 pandemic, only 5% of workers in the EU regularly engaged in teleworking. By mid-2020, the pandemic pushed this figure to 50% (Eurofound, 2021).

Raising awareness of the digitalization of working environments and broadening use of teleworking, in January 2021, the European Parliament issued a resolution to protect the employee's right to disconnect from digital devices (The European Parliament, 2021). The resolution urges the European Commission to issue a directive, as the Commission has the right of initiative, as per Articles 153 and 154 of the Treaty on the Functioning of the European Union (TFEU). So far, the European Commission has not used its right of legislation initiative to protect the employees' right to disconnect. Given that the EU Court of Justice has found that the workers' right to rest is a fundamental right, and that the employee's right to disconnect is a part of workers' rights within the scope of rest periods, implementing this right in the context of rapid digitalization and expansion of teleworking in the European Union is critical and urgent, and the prevarication of the legislator in the matter is hard to understand.

Although EU member states have taken steps to implement the employee's right to disconnect from digital devices, they have chosen different routes in doing so. For example, Spain, Italy, France, and Belgium included the right to disconnect in a separate legislation act. Some EU member states opted for more emphasis on social dialogue, urging trade unions to include the right to disconnect in their collective bargaining agreements. In others, such as Estonia, Slovakia, Greece, and Germany, the prevalent opinion is that the employee's right to disconnect from digital devices can be derived from already existing general regulations governing labour rights.

This lack of unanimity at the EU level, and the differing approaches of EU member states to the right to disconnect shows that there is no harmonization. This results in obstacles for the Single Market, specifically impeding the workers' freedom of movement. The initiative of the European Parliament

should be viewed positively. However, there is a need for effective legal protection of workers in the context of teleworking, due to the rapid technological development and the Covid-19 pandemic.

EMPLOYEE'S RIGHT TO DISCONNECT IN LATVIA

Latvia is one of the EU member states that does not separately regulate the employee's right to disconnect, and only recently introduced the concept of teleworking in its legal acts. The provisions of the Latvian Labour Law pertaining to working time (Article 130) and rest periods (Article41) were taken from Working Time Directive concerning certain aspects of the organization of working time, including the provisions of its Article 4 ("Breaks"). According to Working Time Directive, the terms "working time" (Article 2 Paragraph 1) and "rest period" (Article 2 Paragraph 2) are mutually exclusive. The right to rest in the context of employment is also established in the EU Charter of Fundamental Rights (Article 31 Paragraph 2), and the Constitution of the Republic of Latvia (Article 107).

Because the Working Time Directive is implemented in the Labour Law in Latvia, the employee's right to disconnect from digital devices arises from specific legal provisions that govern rest periods and breaks at work. This right can also be derived from Article 27 of the Labour Protection Law, which states that the employer is responsible for the health and safety of the worker.

Having analyzed Latvian court case-law, the author concluded that so far, the case-law does not provide any clarifications as to the employee's right to disconnect from digital devices. The Department of Civil Cases of the Republic of Latvia Supreme Court Senate has only made a note that given the binding nature of the interpretation of EU law provided by the EU Court of Justice (Article 267 of the Treaty on the Functioning of the European Union), in applying the provisions of the Labour Law and in determining their scope (at least to the extent associated with the implementation of EU law), the Senate follows the case-law of the EU Court of Justice (SKC-577/2020, 2020). That means that such an approach could also be used in relation to the employees' right to disconnect from digital devices, and the progress of this right in Latvia will be significantly affected by its progress in the context of the EU law.

In late 2020, the author participated in a government research programme that analyzed Entrepreneurs Survey data on the response of businesses to Covid-19-related pandemic restrictions and government assistance in Latvia. In September-October 2020, the Research Center SKDS conducted a CAWI/CATI survey of Latvian entrepreneurs. 750 respondents were chosen from the enterprise database for the multi-level quota sample, which was broken down into industries according to NACE codes. The survey included a total of 55 questions. Some questions were devoted to the legal aspects of the effects of the Covid-19 pandemic.

Results showed that 61% of the companies that introduced teleworking increased their use of information technologies and digitalization in their business. This shows that as teleworking becomes more common, the use of information technologies rises as well, which creates risks in what pertains

to the use of such technologies that concerns the employees's right to privacy or rest. It is specifically in the context of teleworking that the possibility of making workers take "hidden" overtime not paid by the employer is at the highest, leading to unfair working conditions.

Despite the absence of case-law pertaining to the employee's right to disconnect from digital devices so far, the actual situation demonstrates a need to clarify the matter, in order to prevent risks associated with violations of workers' rights and adverse effects on work-life balance. Given the legal environment in Latvia, it is important to build up social dialogue and explain the employees' right to disconnect and its significance in ensuring human rights in the country. The analysis of Latvian case-law carried out by the author shows that EU initiative and an accurate interpretation of the employee's right to disconnect by the EU Court of Justice are prerequisites for implementing separate regulations.

CONCLUSION

Considering recent changes in work organization and based on the analysis of the EU and Latvian law and rulings by the EU Court of Justice, one can conclude that clear action by the legislator is urgently needed to protect the employee's right to disconnect from digital devices and thus protecting sustainable work environment in EU. Rapid technological growth creates risks of adversely impacting work-life balance, workers burn-out, and risks to the enforcement of human rights pertaining to rest from work. Although Working Time Directive, among other documents, does indirectly include the employee's right to disconnect from digital devices, this is not sufficient for a complete implementation of the right throughout the European Union. The legal nature of the directives and the procedure for implementing them is different in EU member states and that results in a fragmented approach towards protecting this right. To make a harmonized enforcement of the right to disconnect possible in the EU, the EU Commission must clearly determine the nature and role of this right in the legal system of the EU. This would facilitate a uniform approach to the scope of the employee's right to disconnect and its compliance with the idea and purpose of the EU Single Market. Minimal work organization standards should be introduced in EU law, to be implemented further in the legal system of EU Member states.

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