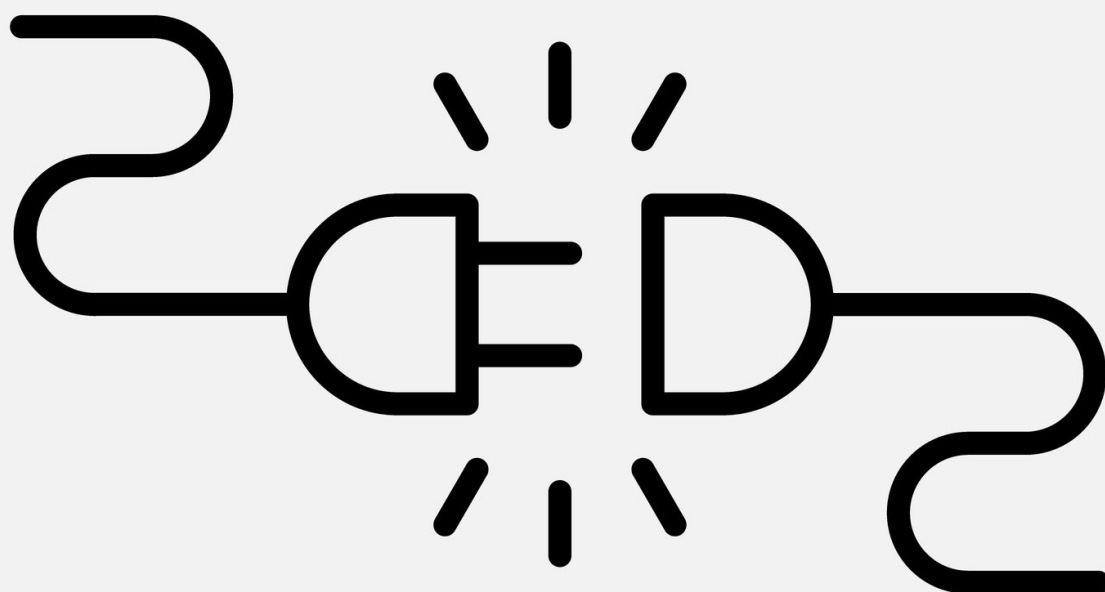


Guiding Principles on Implementing Workers' Right to Disconnect

Report of the European Law Institute



The European Law Institute

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Executive Summary

The world of work is experiencing a digital revolution. The growing use of digital and technological tools over the last few decades has made it possible to work anywhere and anytime. The Covid-19 pandemic only increased the pace of this development. Whereas the digitalisation of work and the expansion of telework present potential advantages in terms of flexibility, productivity and conciliation, these trends can also result in an intensification of work, long working hours, the blurring of limits between work and rest time or increased stress arising from continuous surveillance and monitoring of performance and productivity. These factors can, in turn, negatively affect the physical and psychological health of employees.

As a consequence, it seems necessary to regulate some aspects of the new digital work environment with the aim of offsetting at least some of the negative impacts deriving from the frequent use of digital work tools. It is in this context that the right to disconnect (R2D) becomes relevant. The ten fundamental principles (Guiding Principles) herein set a regulatory foundation for the R2D in Europe. These cover aspects that ought to be considered when drawing up standards, to ensure a balanced regulation of the R2D.

The Guiding Principles, which are aimed at all European legal systems, are purposely broad in scope. Insofar as the problem of excessive connectivity extends throughout Europe, it seems restrictive to limit the analysis to the EU. Both national legislation and EU law and policy documents are important sources of inspiration. The debates that took place during the drafting process highlight the particular concomitant difficulties with a regulation on the R2D in Europe. Particularly challenging is the level at which the rules on disconnection should be applied, and the people they should target. Subsidiarity, the articulation of sources and scope are, therefore, key aspects to consider.

The tension between a regulation that is applicable on a large scale and the need to adapt the R2D to the specificities of each country, sector and company in order to ensure its efficient and smooth application is reflected in these Guidelines. Particular attention has been devoted to the careful articulation of regulatory sources in order to combine flexibility and adaptability with clear protective principles (see Guiding Principle 5). Thus, while the R2D is intended to be uniformly applied throughout Europe, the specific rules and modalities for implementing the R2D are left mainly to collective bargaining or, failing this option, to be regulated at company or employee level. The idea is to be responsive to the realities of each workplace. However, this does not impede the introduction of clear rules guaranteeing the effective implementation of the R2D. The result is, in our view, a delicate balance between principles and implementation.

Regarding scope (Guiding Principle 2), the Guidelines propose a R2D that applies to all workers, as defined in EU law and national legislation. This is coherent with its purposes: the protection of workers' health and the achievement of a better work-life balance. This implies that the R2D is not limited to specific categories of employees: it applies to all those carrying out their activities under conditions of control and subordination, which will include, critically, the bogus self-employed. On the other hand, we propose to include, with limitations, managerial staff, insofar as they are in a position comparable to that of workers. The inclusion of managerial staff is balanced by the adaptation of the R2D to their particular position: even if a manager should enjoy the R2D, in principle, in the same way as their subordinates, the scope and terms of such a right will not be the same, due to the former's responsibilities and activities.

Lastly, particular attention must be paid to the match between the requirements and expectations imposed on employers and the reality on the ground. It is, therefore, important to consider the size of the companies concerned and to ensure that their obligations do not represent an excessive burden. The adaptation of their obligations (Guiding Principle 3) as well as collective negotiations on the R2D (Guiding Principle 5) are likely to safeguard the interests of employers, regardless of their sizes and resources.

These Guiding Principles are the result of collective reflection and discussions, which led to certain proposals and choices. The overall aim is to reconcile the interests of all parties and, in particular, the imperatives of protection and flexibility, while guaranteeing a broad application of the R2D to all those in need of it.

Introduction

In the last decades, technological advances have led to a revolution in IT technologies, opening up new opportunities for the world of work. Digital tools make it possible to communicate everywhere and at anytime, enabling endless possibilities for telework and remote work (Eurofound and ILO, 2017),¹ thus contributing to the vanishing of the concept of workplace as a physical space. These developments may result in economic and societal benefits and advantages, such as 'increased flexibility and autonomy, the potential to improve work-life balance and reduced commuting times' (EP, 2021), but they also come with potential problems and disadvantages, in particular for some occupations. Among such problems, the potential of digital tools that lead to 'intensifying work and extending working hours ... blurring the boundaries between work and private life' (EP, 2021; Eurofound 2022) stands out. When they lead to an 'ever-connected' or 'always on' culture, the use of digital tools in the world of work has detrimental effects on the limitation of working time, with a negative impact on work-life balance (and therefore gender equality) as well as on the physical and mental health of workers. Moreover, the 'always on' culture is in contradiction to the digital sobriety policies that pursue environmental protection goals (Ferrebœuf *et al*, 2020; Bisello, and Profous, C, 2022). The aforementioned problems have been aggravated by the changes resulting from the COVID-19 pandemic and, in particular, by the rise of telework that had hitherto been a minoritarian phenomenon in the EU. Instances of remote working and telework increased during the COVID-19 pandemic and are expected to remain higher than before the crisis or even to increase further in the future. Research by Eurofound reveals some telling results: over one-third of workers across the EU started working from home during the lockdown phase of the pandemic, compared to 5% who usually worked from home, and there was a substantial increase in the use of

digital tools for work purposes. At the same time, up to 27% of respondents working from home reported that they had worked in their free time to meet work demands (Eurofound, 2020 b). In total, over 40 million employees teleworked in the EU in 2021, according to available data (Eurofound, 2022 a).

The above calls for a better enforcement of existing legislation on working time and/or regulatory intervention, with a view to protecting workers from the negative effects of the excessive use of digital working tools. It is in this context that the R2D must be situated. In the EU, the R2D is not explicitly regulated. Regulation across the EU varies widely, with some Member States having introduced legal provisions on the R2D in their legal orders, others relying mainly on collective bargaining to regulate this issue, and the majority not having taken any action at all. A risk of this patchwork situation is that balanced regulation of employment relationships across Europe is endangered. This is the case despite the fact that working time has been regulated at EU level, establishing minimum rest periods applicable, as a general rule, throughout the Union. As the establishment of appropriate rules on the R2D cannot be sufficiently achieved by individual Member States but rather seems, by reason of its rationale, scale and effects, to be better achieved at Union level, EU action on the R2D would seem appropriate and it would be in line with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty on the European Union (TEU).

Not surprisingly, the European Parliament has called for a proposal of a directive to ensure that workers are able to effectively exercise their R2D (EP, 2021). This directive would complement Directive 2003/88/EC concerning certain aspects of the organisation of working time, Directive (EU) 2019/1152 on transparent and predictable working conditions, Directive (EU)

¹ Remote work or telework is defined by ILO as the work performed through the use of information communication technology (ICTs such as smartphones, tablets, laptops and desktop computers) outside the employer's premises. The European framework agreement on telework defines only telework, which is 'a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work that could be performed at the employer's premises is carried out away from those premises on a regular basis'.

2019/1158 on work-life balance for parents and carers, and Council Directive 89/391/EEC on the safety and health of workers. The legal basis of such a proposal would be, in the opinion of the Parliament, Article 153(2)(b) (minimum harmonisation directives) in conjunction with Article 153(1)(a) (protection of workers' health and safety), (b) (working conditions) and (i) (equality between men and women with regard to labour market opportunities and treatment at work) Treaty on the Functioning of the European Union (TFEU). For their part, the EU cross-industry social partners are currently negotiating a framework agreement to be transposed into a Directive on telework and the R2D in the context of the EU social dialogue.

A regulatory intervention at EU level would also be in line with the 2023 European Declaration on Digital Rights and Principles for the Digital Decade, issued by the EU Commission, Parliament and Council (European Declaration, 2023). This declaration explicitly mentions the R2D in its section on fair and just working conditions, where it states that the EU is committed to 'ensuring that everyone shall be able to disconnect and benefit from safeguards for work-life balance in a digital environment'. The R2D must be seen as a concrete measure to ensure that '[e]veryone has the right to fair, just, healthy and safe working conditions and appropriate protection in the digital environment as in the physical workplace, regardless of their employment status, modality or duration', as can be read in the declaration. Last but not least, this declaration also provides interesting elements to consider in the following Guiding Principles, especially on how to deal with data protection.²

Furthermore, the R2D, as a specific right, helps define the boundaries between working time and rest time. Respect for working time and its predictability is considered to be essential to ensure the health and safety of workers and their families. In this sense, the

R2D aims at protecting workers' health and safety at work as well as achieving a better work-life balance, which, in turn, has a gender impact.

A precondition for a proper understanding and application of the R2D, therefore, implies a consistent regulation of working time, including, in particular, maximum working hours, minimum rest periods, and clear definitions of work modalities such as 'stand-by' and 'on-call' periods. Pursuant to Directive 2003/88/EC, workers in the EU have the right to minimum safety and health requirements concerning certain aspects of the organisation of working time. In such context, the Directive provides for daily rest, rest breaks, weekly rest, maximum weekly working hours and paid annual leave, and regulates certain aspects of night work, shift work and work patterns. According to the Court of Justice of the European Union (CJEU), on-call time, during which a worker is required to be physically present at a place specified by the employer, is to be regarded as 'wholly working time [...], irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity'.³ Stand-by time, in the sense that a worker is obliged to be available to the employer and does not have the ability to freely dispose of their time, is also to be considered as working time.⁴ Moreover, the CJEU has interpreted minimum rest periods as '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'.⁵ However, Directive 2003/88/EC makes no express provision for a worker's R2D, nor does it require workers to be available outside working hours, during rest periods or other non-work time, but it does provide for the right to uninterrupted daily, weekly and annual rest periods, during which the worker should not be reached or reachable (EP, 2021).

The Guiding Principles contained in this document

² European Declaration on Digital Rights and Principles for the Digital Decade. [2023/C 23/01] Chapter V: Safety, security and empowerment: 'privacy and individual control over data. Everyone has the right to the protection of their personal data online. That right includes the control on how the data are used and with whom they are shared. Everyone has the right to the confidentiality of their communications and the information on their electronic devices, and no one shall be subjected to unlawful online surveillance or interception measures.'

³ ECJ Joined cases C-397/01 to C-403/01 *Pfeiffer and others* [2004] ECR 2004 I-08835, para 9.

⁴ ECJ C-518/15 *Matzak* [2018] CR – general – 'Information on unpublished decisions' section, para 66. Subsequent caselaw further detailed the Matzak doctrine. See ECJ C-344/19 *Radiotelevizija Slovenija* [2021] CR – general, para 37 et seq.; ECJ C-580/19 *Stadt Offenbach am Main* [2021] CR – general; ECJ C-214/20 *Dublin City Council* [2021].

⁵ ECJ C-173/99 *BECTU* [2001] ECR I-4881, paras 43 and 47.

seek to outline the main building blocks for a common regulation on the R2D across Europe, including at EU level. These Principles are the result of an analysis of existing regulations at national level. To a great extent, they also correspond to those underlying the 2021 proposal by the European Parliament (EP, 2021). However, on specific aspects the Guiding Principles provide more extensive reflections or more comprehensive analysis, with national examples, including from non-EU States.

The illustrations accompanying each Principle make it possible to relate the proposed new standards to existing practices at national level.

The national or subnational jurisdictions analysed for this purpose are Belgium, France, Germany, Greece, Ireland, Italy, Luxembourg, Spain, Sweden, Switzerland, Poland and Portugal, some of which have no express legal rules in place on the R2D.⁶ Outside Europe, Canada (Ontario, Quebec) was also considered because of its innovative and recent legislation on the R2D.

Finally, the Guiding Principles contained in this document incorporate ideas and findings from ongoing research on telework and its regulation.

We propose a total of ten Guiding Principles that would provide for the basic content of a true 'right to disconnect'. Each Principle is commented upon in order to explain its context and rationale. Examples of existing regulations at national level are added in the commentaries, where relevant.

⁶ For instance, in Poland there is no specific regulation of the R2D, or any plan to adopt specific regulation. Regulating the R2D explicitly is perceived as unnecessary. The existing regulation on working time is considered to adequately protect the rest time of workers, including the possible negative effects of a 'wrong' use of digital tools (See Jaworyska, K, (2022) 'The right to disconnect', *Studies on Labour Law and Social Policy*, 29, nr 1 51-5). Furthermore, the widespread application of task-based work systems would hinder the implementation of the R2D in Poland. Additionally, a high proportion of employment in Poland is based on civil law contracts, with no statutory guarantees linked to the right to rest (Eurofound, 2020 a). The German Working Time Act (*Arbeitszeitgesetz, ArbZG*) defines working time and rest time as mutually exclusive. The enshrinement of the R2D in the law has been debated as part of global reflection between the authorities and the social partners on the future of work (Work 4.0). However, it appeared that more specific legislation is not desired, mainly as employers' organisations see it as a brake on flexibility. There is a debate about the interpretation of the law and the question arises whether brief connections of an employee outside working time should not be considered as such. The lack of precision in the law is compensated in practice by the social partners: large companies have taken measures (BMW, VW, Audi, Telekom) such as Codes of Conducts or disconnection of servers at certain times. There is no legal rule in Switzerland specifically addressing the R2D. While there have been many debates in the Federal Assembly over the past five years, none have resulted in a bill. A strong majority in the legislature, as well as the executive, believes that the rules on working time are sufficient to enshrine the R2D and that it is not necessary or desirable to specifically regulate it. Conversely, a movement advocating a relaxation of working time, which would not consider as such the occasional connection of the employee outside working hours, has tabled several legislative initiatives, which will be followed up by the Parliament in 2023. Ireland does not have specific legal rules on the R2D. However, a Code of Practice has been adopted by the Workplace Relations Commission (an independent, statutory body established by law). The Code of Practice is recognised as not having the force of law but can be used to support employees' claims against their employer for failure to respect working time and health and safety.

Guiding Principles

1

Guiding Principle 1: PURPOSE

1. The purpose of the R2D is to protect the physical and mental health of all workers, by effectively ensuring workers' rest time.
2. The R2D helps to promote gender equality and work-life balance and ensures predictability of working schedules.

2

Guiding Principle 2: SCOPE

1. The R2D applies to all employing entities without consideration of the number of workers employed and to all workers, including managerial staff, regardless of their contractual arrangements, in both the private and the public sector.
2. In circumstances where a worker has already entered into a contractual obligation with their employer which contains provisions that in any way undermine the employee's R2D, the rules adopted on the basis of these Guiding Principles shall be applicable and take precedence over any such provisions to the contrary and likewise to any future contractual arrangements.

3

Guiding Principle 3: PREVENTIVE ACTION AND INFORMATION

1. The effective implementation of the R2D requires preventive actions in order to prevent an 'always on' culture in employing entities.
2. A systematic assessment of the risks of over-connection and its causes must be conducted by all employing entities on a regular basis, as an integral part of their occupational health and safety duties, with due regard to the functioning of micro and small enterprises. All workers, and in particular managers, should be informed about the main findings of this assessment.
3. The need to respect working time limits and the right of other employees to disconnect must be incorporated into the employer's preventive actions, which may include training activities.

4

Guiding Principle 4: DUTY TO RECONNECT

1. The duty to reconnect during a disconnection period must be limited to absolutely extraordinary situations.
2. All reconnections during a disconnection time entitle the employee to compensation commensurate with the facts.

5

Guiding Principle 5: LEVEL OF REGULATION

1. The R2D must be recognised by law as an individual right of workers.
2. The specific implementation and modalities of the R2D shall be determined by collective agreements, of any kind, adapted to each work situation.
3. Collective agreements should be negotiated at any appropriate level, with full respect of social partners' autonomy, in accordance with national laws and practices. In the absence of an applicable collective agreement, the law shall promote alternative sources of the R2D, including Codes of Conduct, ensuring workers' involvement and respecting the purpose of the R2D.

6

Guiding Principle 6: PROTECTION AGAINST ADVERSE TREATMENT OR CONSEQUENCES

1. The exercise of the R2D (or the reporting of the violation thereof) must not lead to any adverse treatment or retaliation, including discrimination, downgrading, disciplinary sanctions, or dismissal for the individual worker concerned as well as their representatives.
2. In case of dismissal or other adverse treatment after a worker's refusal to be available while covered by the R2D, they may bring to court facts from which it may be presumed that such refusal was the ground for dismissal or other adverse treatment. It shall then be for the employer to prove that the dismissal or other adverse treatment was based on other grounds.

7

Guiding Principle 7: MONITORING AND ENFORCEMENT

1. Compliance with the R2D within employing entities should be regularly assessed and monitored at appropriate levels by labour inspectorates or other independent competent bodies.
2. Employees' representatives and/or trade unions having a legitimate interest in ensuring that the principles on the R2D are complied with may engage, either on behalf or in support of the complainant, with their approval, in any judicial and/or administrative procedure for the enforcement of the R2D.

8

Guiding Principle 8: DATA PROTECTION

1. The treatment of data concerning the exercise of the R2D by individual workers must respect the principles laid down in European, EU and national regulations on data protection. Such data shall not be used for any purpose other than for the control of working time and the correct exercise of the R2D.
2. Workers and their representatives have the right to access data collected by employing entities in connection with the exercise of the R2D and to control how such data are used and with whom they are shared.

9

Guiding Principle 9: SANCTIONS

1. A violation of the R2D shall lead to specific sanctions, including administrative fines that are effective, proportionate, and dissuasive.

10

Guiding Principle 10: NON-REGRESSION

1. Nothing in the regulation of the R2D shall be construed as diminishing workers' existing rights and entitlements.

Definitions

For the purposes of the present Guiding Principles, the following definitions apply:

(1) Right to Disconnect: the right of workers not to engage in work-related activities or communications by means of digital tools (including *inter alia* smartphones, tablets, laptops and desktop computers) or other communication tools outside working time.

(2) Working Time means working time as defined in point (1) of Article 2(1) of Directive 2003/88/EC: any period during which the worker is working, at the employer's disposal, and carrying out their activities or duties, in accordance with national laws and/or practice. The concept must be understood with consideration to the CJEU case law concerning stand-by and on-call time.

(3) Worker: any person who has an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case law of the CJEU.

Commentary

The R2D is closely related to working time regulations. However, working time regulations are particularly complex, with some grey areas. For instance, some jurisdictions draw different consequences from time qualified as 'on-call' or 'stand-by' and whether such periods should be considered as working or rest time.

The CJEU has had the opportunity to clarify some points in this area in relation to Directive 2003/88/EC.

⁷ According to the CJEU:

it should be underlined that a period of stand-by time during which the worker may, taking

into account the reasonable time period allowed for him or her to resume his or her professional activities, plan his or her personal and social activities does not, a priori, constitute 'working time', within the meaning of Directive 2003/88.

Conversely,

a period of stand-by time during which the time limit within which the worker is required to return to work is limited to a few minutes must, in principle, be regarded, in its entirety, as 'working time', within the meaning of that directive, since in that case the worker is, in practice, strongly dissuaded from planning any kind of recreational activity, even of a short duration.⁸

In case C-580/19, paragraphs 38–39, the Court stated that, as regards the classification of periods of on-call duty, the concept of 'working time' within the meaning of Directive 2003/88/EC covers the entirety of periods of stand-by time, including those:

according to a stand-by system, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests.

Conversely, where the constraints imposed on a worker during a specific period of stand-by time do not reach such a level of intensity and allow them to manage their own time, and to pursue their own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time' for the purposes of applying Directive 2003/88/EC.⁹

The CJEU has used the term 'on-call time' rather than 'stand-by time' in a series of cases connected to

⁷ See Zahn, Rebecca, (2021) 'Does stand-by time count as working time? The Court of Justice gives guidance in DJ v Radiotelevizija Slovenija and RJ v Stadt Offenbach am Main' [2021] European Papers 6(1), 121 .

⁸ ECJ C-344/19, *Radiotelevizija Slovenija* [2021] CR – general, para 67.

⁹ ECJ C-580/19 *Stadt Offenbach am Main* [2021] CR – general, paras 38 and 39.

the interpretation of Directive 2003/88/EC. In case C-303/98, the Court considered that:

time spent on-call by doctors (...) must be regarded in its entirety as working time (...) if they are required to stay at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary health care services must be regarded as working time.¹⁰

In case C-151/02 and subsequent case law, the CJEU considered that such is the case even *'where the person concerned is permitted to rest (during on-call) at his place of work during the periods when his services are not required'*.¹¹

At International Labour Organization (ILO) level, Convention No 189 (2011) on domestic work includes the periods 'during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls' (Article 10) in the concept of working time (hours of work).

There is certain terminological confusion in the CJEU case law between stand-by and on-call time. The CJEU appears to use both terms interchangeably. The situation, however, may be different at national level. Across EU Member States, a distinction between stand-by and on-call time may indicate different legal regimes. For instance, in Austria, the differentiation in the Working Time Act between stand-by and on-call time results in differences as regards remuneration. Such a difference will be 'invisible' for EU law since 'remuneration' is and will remain within the competence of Member States given the limits deriving from Article 153(5) TFEU.

The definition of 'worker' builds on the experience of the most recent EU directives in the field of social policy. Such definition is clearly composed of two parts. The first maintains the idea that each Member State remains free to define the scope of application

(and the relevant protection) of labour laws, also respecting the role of social partners; the second, relies on the evolving case law of the CJEU, which especially based on the principle of *effet utile*, has developed a rich and fairly consistent jurisprudence on the definition of worker.

The CJEU evolving case law, in combination with the principle of *effet utile*, results in an open and dynamic concept of worker that allows for adaptation to cope with social and economic change. On this point, it is important to make a reference to the self-employed. The distinction between workers (employees) and the self-employed has become blurred across European legal systems. The CJEU has had the opportunity to clarify that bogus self-employed ought to be considered as workers for the purposes of EU law,¹² but an outright inclusion of the self-employed within the scope of EU labour law has not taken place.

It is true that, for the purposes of, for instance, privacy and data protection or non-discrimination, the self-employed have been considered as deserving protection,¹³ but the distinction between workers and the self-employed continues to draw the boundaries of the scope of EU labour law. For this reason, in the Guiding Principles contained in this document, which have a social policy legal basis (Article 153 TFEU), the scope is restricted to workers, although broadly conceived. The more so since the autonomy to determine their own working time and the number of hours worked is one of the criteria allowing for a distinction between workers and those genuinely self-employed.

However, since the definition is open to the evolving EU concept of worker as defined by the CJEU, it is not impossible that, in the future, such a definition could include certain categories of vulnerable self-employed who, due to their particular position vis-à-vis a client, may not be able to decide on their working time independently, along the lines defined by the draft Guidelines issued by the European Commission on the collective bargaining of solo self-employed persons.¹⁴

¹⁰ ECJ C-303/98 *SIMAP* [2000] ECR 2000 I-07963.

¹¹ ECJ C-151/02 *Jaeger* [2003] ECR 2003 I-08389; ECJ C-14/04 *Dellas and others* [2005] ECR 2005 I-10253.

¹² See, among others, ECJ C-413/13 *FNV Kunsten* [2014] ECR – general.

¹³ See ECR C-356/21 *JK* [2023] or the inclusion of the self-employed in the scope of the provisions on algorithmic management, covered by the complementary legal basis of art 16(2) TFEU in the Proposal for a Directive on platform work, (European Commission, COM(2021) 762 final).

¹⁴ European Commission, *Communication from the Commission Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 347/02).

Guiding Principle 1: PURPOSE

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1. The purpose of the R2D is to protect the physical and mental health of all workers, by effectively ensuring workers' rest time.
2. The R2D helps to promote gender equality and work-life balance and ensures predictability of working schedules.

Commentary

Respect for working hours and predictability of schedules are essential to ensure the health and safety of workers and their families (EP, 2021). More specifically, respect for working and rest time is a key factor in preventing burnout and in enabling unpaid caregivers (the majority of whom are women) to balance private and professional responsibilities. The purpose of the R2D is, therefore, twofold. Primarily, it aims to safeguard workers' health and safety in a broad sense, by ensuring respect for working time regulations by explicitly guaranteeing the right of workers not to be disturbed outside working hours. The R2D will help to limit and change the 'always on' culture and ensure a proper use of digital tools. Secondly, the R2D will contribute to achieving a better work-life balance, by guaranteeing resting time and improving the predictability of working schedules.

The R2D can be conceptualised as belonging to the group of occupational health and safety (OHS) rules. This is closely connected with working time regulations, and, in particular, with respect for rest time, the rationale of which is precisely to protect the health and safety of workers.

At national level, this aim is explicit in Law n° 7890 in Luxembourg, where a new section on 'the respect of the right to disconnect' (section 8) has been added to Book III, First Title, Chapter II of the Labour Code, Book III being devoted to the 'protection, safety and health' of workers. Equally, the law in Italy makes explicit the connection of the R2D with the protection of workers' right to rest and, more generally, to the

protection of workers' health and safety. This is also the case in Belgium ('with a view to ensuring respect for rest periods and the balance between private and professional life' – Article 16, Law of 26 March 2018 and Article 29, draft Law of 7 July 2022, Article 7bis, paragraph 2, Royal Decree of 2 October 1937 on the status of state employees, modified by the Royal Decree of 2 December 2021). In Ireland, the Code of Practice refers to the health and safety of employees at work, advocating a proactive commitment by employers to take account of the relevant rules (page 7).

At the same time, the R2D favours a better balance between family and work life and, therefore, has an important gender equality dimension. In this sense, Article L.2242-17 of the Labour Code in France introduces the R2D as one of the obligations containing measures for equality between men and women that need to be negotiated annually in companies of more than 50 workers.

At EU level, the R2D would complement Directive 2003/88/EC concerning certain aspects of the organisation of working time, Directive (EU) 2019/1152 on transparent and predictable working conditions, Directive (EU) 2019/1158 on work-life balance for parents and carers and Council Directive 89/391/EEC on the safety and health of workers.

Guiding Principle 2: SCOPE

Guiding Principle 2: SCOPE

1. The R2D applies to all employing entities without consideration of the number of workers employed and to all workers, including managerial staff, regardless of their contractual arrangements, in both the private and the public sector.
2. In circumstances where a worker has already entered into a contractual obligation with their employer which contains provisions that in any way undermine the employee's R2D, the rules adopted on the basis of these Guiding Principles shall be applicable and take precedence over any such provisions to the contrary and likewise to any future contractual arrangements.

Commentary

Since the purpose of the R2D is to protect workers' health and safety, and indirectly achieve a better work-life balance (see Guiding Principle 1), it has to apply to all workers.

Consequently, its scope of application must be the same as that of working time and health and safety regulations: it must apply to all workers, as defined in EU law and national legislation.

An example of legislation that follows this principle is Article L.312-9 of Law n° 7890 in Luxembourg, which states that 'employees using digital tools for professional purposes' will be covered by rules on the R2D adopted at company or sector level, without any distinction between teleworkers and other workers.'

The Irish Code of Conduct also applies to all employees and employers.

However, in the existing regulations at national level, several jurisdictions provide for limits to the scope of application of the rules on the R2D. For example,

companies with employees below a maximum number are not, or are only partially, covered by the rules on the R2D (25 employees according to the law in Ontario,¹⁵ 20 employees in the Belgian draft law,¹⁶ and 100 in the Quebec law¹⁷).

The appropriateness of rules on the R2D varying according to the size of the company is unclear and must be questioned. If we agree that the R2D serves the purpose of health protection by guaranteeing respect to rest periods, exempting small- and medium-sized enterprises (SMEs) that in several European jurisdictions constitute the majority of employers (employing the majority of workers) is not justified. In practice, it would deprive most workers, at least in the EU, of the R2D. The working time regulation does not distinguish enterprises according to their size, and, therefore, the R2D should not do so. Similar arguments call for the application of the R2D in both the private and public sectors.

Regarding the inclusion of managerial staff, Article 17(1)(a), Directive 2003/88/EC gives Member States the opportunity to have more flexible rules on working time concerning daily rests, breaks, weekly rests, maximum weekly time, night work and reference periods. Internal policies established at enterprise level across Europe also exclude managers from the R2D, being essential to the well-functioning of productive organisations. Guiding Principle 2, instead, includes managerial staff under the R2D, relying on the R2D's main purpose, as explained in Guiding Principle 1, also in the light of Article 17(1) of the Working Time Directive (2003/88/EC), which requires due regard to the general principles on the protection of the health and safety of workers. Due to the fact that managers are frequently the most affected by the 'always on' culture, the R2D should ideally also apply to managerial staff, irrespective of whether they are considered to be workers at EU or national level in the specific circumstances. However, given the responsibilities entrusted to them, managers are more likely to have to deal with emergencies and will have to reconnect (see

¹⁵ Employment Standards Act, 2000, Part VII.0.1.

¹⁶ Draft law of 7 July 2022.

¹⁷ Bill n°799 – or 'Right to Disconnect Act' – submitted to Parliament on 10 December 2021.

Guiding Principle 4) more often for that reason. What constitutes an emergency depends on the level of responsibility of the concerned employee and will, if necessary, be assessed *ex post*.

Furthermore, many people working remotely do so in combination with in-person work, in what is referred to as 'hybrid' work (ILO, 2021). Given the flexibility of regulations on remote work and the possibilities to combine different forms of work models, it seems desirable that the R2D applies to all workers without distinctions being made between in-person, hybrid and remote workers. The key is that, regardless of the manner in which work is organised and the working modality, rest time must be respected for all workers using IT and communication technologies.

Box 1: Scope of application

Spain provides for a broad scope of application, where no distinction is made as regards the size of the company. Article 18 of Law 10/2021 'Right to Digital Disconnection': *'those persons working remotely, particularly in telework, have the right to digital disconnection outside their working time (...)' [Las personas que trabajan a distancia, particularmente en teletrabajo, tienen derecho a la desconexión digital fuera de su horario de trabajo (...)]*

France has chosen to leave the responsibility for defining the practical arrangements for the R2D to collective bargaining. Companies employing at least 50 workers are under an obligation to negotiate on the R2D. In the absence of an agreement, it will be up to the employer to define these arrangements. The question of the effectiveness of this right in small companies, where there is no obligation to negotiate, is open. Article L.2242-17 of the Labour Code specifies that one of the points of the annual negotiation on equality between women and men is the 'modalities of disconnection' [*Les modalités du plein exercice par le salarié de son droit à la déconnexion et la mise en place par l'entreprise de dispositifs de régulation de l'utilisation des outils numériques, en vue d'assurer le respect des temps de repos et de congé ainsi que de la vie personnelle et familiale*].

The references to the R2D in Articles L.3121-64 and L.3121-65 of the Labour Code concern employers that, regardless of their workforce size, use flat-rate agreements in hours or days (*forfaits annuels en heures ou en jours*).

Given its purpose, the R2D applies to all workers, independently of their employment status. This means that the R2D applies to all employees: it is not limited to specific categories, but also applies to those carrying out their activities under conditions of control and subordination, which will include, critically, the bogus self-employed. In any case, according to the CJEU, the national definitions of employee cannot have the effect of depriving the concept of worker at EU level of its content.

The R2D is conceived in Portugal as a protection provided to all employees (ie, not only teleworkers), regardless of the type of work and the size of the company (see Law No 83/2021 of 6 December 2021, consisting of a modification of the telework regime, in connection with the rules on health and safety at work, in particular, its preamble and Article 1).

However, in some jurisdictions, existing legislation introduces limitations on the scope of the R2D on grounds of employment status and modalities. In Italy, the R2D only applies to employees working under the 'smart work' modality; in Spain, it is only for regular remote workers as defined in the law (see Box 2); in Greece, the law establishes that the R2D is strictly limited to teleworkers.

Box 2: Broad and narrow scope of application of the modalities of work/employment status

Some existing national legislation has limitations on the scope of application of the R2D linked to employment status.

In Italy, the R2D is linked to 'smart work', or *lavoro agile*, which is defined as:

a way of providing work under an employment contract, which is established through an agreement between the employer and the employee; it can also be

organised through phases, working cycles and objectives and without specific bonds regarding working time and the workplace and can be performed with the use of technological tools. Work is carried out outside and at the employer's premises in alternation, without a fixed workstation and (only) complying with the maximum limits of daily and weekly working hours (Article 18, Law 81/2017).

Law 81/2017, introducing this model of remote working, which is considered a subordinate employment relationship model, specifies that arrangements regarding 'smart work' must be agreed upon through individual agreements that have to include measures ensuring rest and the R2D.

Therefore, only one category of employee, those on *lavoro agile*, has a legal R2D in Italy.

Also, as previously seen, Spain limits the R2D: *'the persons working remotely, particularly in telework, have the right to digital disconnection outside their working time (...)'* [Las personas que trabajan a distancia, particularmente en teletrabajo, tienen derecho a la desconexión digital fuera de su horario de trabajo (...)] (Article 18 of Law 10/2021).

The broad application of the R2D does not mean that all employees will be subject to one and the same regime when it comes to the specific content and mode of application. As outlined in Principle 5 below, the details are to be decided in agreement with workers' representatives, leaving space for adaptation to the particular circumstances of the sectors and employing entities. It should be borne in mind that an employer may have different disconnection policies for different categories of employees. Similarly, the rules should be adapted to different situations: types of communication, types of interlocutor, topics, times of the day covered, clarification of the different possible situations and actions to be taken (reading, replying, setting an out-of-office message, etc).

Guiding Principle 3: PREVENTIVE ACTION AND INFORMATION

Guiding Principle 3: PREVENTIVE ACTION AND INFORMATION

1. The effective implementation of the R2D requires preventive actions in order to prevent an 'always on' culture in employing entities.
2. A systematic assessment of the risks of over-connection and its causes must be conducted by all employing entities on a regular basis, as an integral part of their occupational health and safety duties, with due regard to the functioning of micro and small enterprises. All workers, and in particular managers, should be informed about the main findings of this assessment.
3. The need to respect working time limits and the right of other employees to disconnect must be incorporated into the employer's preventive actions, which may include training activities.

Commentary

Even if the R2D might have the effect of limiting working hours, this right goes beyond the simple respect of schedules. The effective application of the R2D requires preventive action on the part of employers with the participation of employees and their representatives. This preventive action has to address the causes leading to over-connection and the 'always on' culture. This includes a reflection on workload, the organisation of work (including the number of staff employed), corporate culture and the behaviour of management staff, aspects already identified in the *European Social Partners Framework Agreement on Digitalization* (2020). In this context, the Framework Agreement mentions measures such as *'commitment from management to create a culture*

that avoids out of hours contact' and advocates for physical and mental health risk assessments that must be conducted on a regular basis.

All enterprises should comply with the risk assessment duty with due regard to their operational capacity and their internal functioning. Micro and small enterprises, as defined by Commission Recommendation 2003/361/EC, would require adaptations thereof.

At national level, in Luxembourg, Law 7890 refers, in the modification of Article L.312-9 Labour Code, to *'awareness raising and training measures'* [*mesures de sensibilisation et de formation*] among the contents that must be part of the regime ensuring the effectiveness and practical application of the R2D.

All staff members must be informed about the risks of over-connection, their R2D and their duty to respect other employees' R2D (by not routinely emailing or calling outside normal working hours). Attention must be paid to the fact that some colleagues might work in a different time zone.

This preventive action implies a paradigm shift, setting up a space for reflection on and an increased awareness of needs, expectations and work culture.

In Ontario, an entity that employs 25 or more employees shall, each year, ensure it has a written policy in place for all employees with respect to disconnecting from work. The employer shall provide a copy of such written policy to each of the employees within 30 days of preparing the policy or, if an existing written policy is changed, within 30 days of the changes being made. Also, the employer shall provide a copy of the written policy with respect to disconnecting from work that applies to a new employee within 30 days.¹⁸

The Irish Code of Practice also takes a preventive approach, focusing on raising awareness and

¹⁸ Employment Standards Act, 2000, Part VII.0.1, art 21.1.2.

assisting employees and employers in adopting good practices, as well as on the importance of corporate culture in implementing the R2D.

Box 3: The application of the R2D and preventive action: an example from Belgium

In order to clarify the modalities of the R2D for civil servants, in 2021 the Belgian administration issued a circular (Circular No 702 of 20 December 2021, C - 2021/22705), which offers details on the R2D and a roadmap for its implementation. In particular, the circular proposes a method of reflection, allowing the realisation and implementation of the R2D, in relation to the reality of each workstation, in several steps:

Step 1: Determining the state of play, needs and expectations.

Step 2a: Application of the rules on working time, working time limits, rest time and leave schemes ('general framework').

Step 2b: Determining specific working time arrangements: telework and satellite office work, flexitime, flexible working hours and part-time work.

Step 3: Vigilance against risks.

Step 4: Adaptation of all legal sources and awareness raising, support and coaching for the organisation, teams and the individual.

Guiding Principle 4: DUTY TO RECONNECT

Guiding Principle 4: DUTY TO RECONNECT

1. The duty to reconnect during a disconnection period must be limited to absolutely extraordinary situations.
2. All reconnections during a disconnection time entitle the employee to compensation commensurate with the facts.

Commentary

According to the proposal for a Directive of the European Parliament and the Council on the Right to Disconnect, annexed to the Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)) (para 25), *'derogations from the duty to implement the R2D should be provided only in exceptional circumstances such as force majeure and other emergencies and subject to the employer providing each worker concerned with reasons in writing, substantiating the need for the derogation'*.

The criteria for establishing derogations should be clearly defined. Derogations from the R2D resulting in a duty to reconnect must be compensated.

It appears justified to be able to contact an employee in case of emergency and for justified reasons. However, these notions are vague and need to be defined, which is not currently the case. The notion of urgency or *force majeure* should not be confused with the needs of the company and this notion has to be clarified, either by reference to existing legal concepts or as an autonomous concept.

In any event, the duty to reconnect during a disconnection time cannot be justified by simple business needs.

When, in the abovementioned circumstances, a worker is required to reconnect, they must be compensated. Work done during the reconnection should be considered as work performed outside

regular working time and, therefore, compensation that adequately reflects the inconvenience that this may cause the worker is due. The criteria for determining this compensation should take into account the principles established in national law and practice as well as the provisions of EU Directives 89/391/EEC, 2003/88/EC, (EU) 2019/1152 and (EU) 2019/1158.

At national level, Portuguese law refers, without further clarification to *'force majeure'*,¹⁹ while the Belgian law on civil servants²⁰ provides that *'exceptional and unforeseen reasons requiring action that cannot wait until the next working period'* may constitute an exception to the R2D. Similarly, Law n° 7890 of Luxembourg mentions *'exceptional derogations'* (that must be compensated), without further specification.

Box 4: Focus on the duty to reconnect in Spain and Switzerland

In Spain, studies on the negotiating practices subsequent to the introduction of the R2D by Organic Law 3/2018 reveal that there are many agreements in which the reference to the right to digital disconnection, usually not strengthened by any additional right or guarantee, is accompanied by the recognition of the possibility to impose reconnection on the worker.

This reconnection is established, not only for reasons of *force majeure*, but also for meeting any type of business needs, provided that these are urgent or that their postponement would harm the employer. In the field of remote work, this approach could become an unexpected way to increase the telework imposed on workers without their consent for dealing with normal business needs. This would certainly be lawful, but should respect the agreed coordinates of space and time or comply with usual flexibilisation mechanisms

¹⁹ Law No 83/2021 of 6 December 2021, art 199 A.

²⁰ Royal Decree of 2 October 1937 on the status of state employees, modified by the Royal Decree of 2 December 2021.

on working time.

It has been recommended to limit the use of this reconnection to 'absolutely extraordinary situations'. The reconnection should be associated with the need 'to prevent or remedy incidents and other extraordinary and urgent damage'. This case should be added, if anything, to other similar particularly serious situations relating to the need for essential goods and not to a purely economic interest of making profit (Sanguinetti Raymond, 2021).

Example extracted from the collective agreement for financial institutions of credit, art. 35c (2021, Spain)

Right to digital and work-related disconnection:

a) Employees have the right not to use digital devices outside their working day, nor during rest periods, leaves, leaves of absence or vacations, except in cases of justified urgency as stipulated in point c) below.

c) Exceptional circumstances shall be considered to be highly justified in the case of events that may involve a serious risk to people or potential damage to the business, its customers and/or its shareholders, as well as any other legal and/or regulatory event whose urgency requires the adoption of special measures or immediate responses.

Example extracted from Swisscom's Mobile Work Regulation (2018, Switzerland)

'In emergencies where the employee must be reached immediately or where a fast answer is required, communication will take place by SMS. This communication rule (SMS) does not apply during the on-call duty.'

Guiding Principle 5: LEVEL OF REGULATION

Guiding Principle 5: LEVEL OF REGULATION

1. The R2D must be recognised by law as an individual right of workers.
2. The specific implementation and modalities of the R2D shall be determined by collective agreements, of any kind, adapted to each work situation.
3. Collective agreements should be negotiated at any appropriate level, with full respect of social partners' autonomy, in accordance with national laws and practices. In the absence of an applicable collective agreement, the law shall promote alternative sources of the R2D, including Codes of Conduct, ensuring workers' involvement and respecting the purpose of the R2D.

Commentary

The R2D must be framed as an individual right of workers and established by law.

According to the proposal for a Directive of the European Parliament and the Council on the Right to Disconnect (Article 4), Member States shall ensure that detailed arrangements are established after consulting the social partner at the appropriate level to enable workers to exercise their R2D. Member States may entrust the social partners with the task of concluding collective agreements at national, regional, sectoral or employer level.

The European Trade Union Confederation (ETUC) Position on the Right to Disconnect (2021) stresses that 'Unilaterally established arrangements by the employer or based on individual agreements with the workers concerned should be prohibited'. Therefore, the future Directive should respect the autonomy of social partners and provide for their full involvement, not only in the implementation of the Directive as such, but also in the effective application and enforcement of the R2D in the workplace.

At national level, existing legislation in Italy and Spain foresees that the R2D is regulated through individual agreements (the same agreement that establishes the modality of 'smart work' to which the R2D is

linked in Italy, and the agreement on 'remote work' in Spain), although there is room for the intervention of collective autonomy on this point in both jurisdictions.

Therefore, an adequate articulation of sources that guarantees the intervention of the social partners and/or staff representatives at adequate levels in the regulation of the R2D must be ensured.

The implementation of the R2D should also respect the general principle of proportionality, and adequately consider all interests embedded in the employment relation.

As for the specific modalities to implement the R2D, Eurofound (2021) has observed that company-level agreements implement the R2D in more or less incisive ways. The most radical measures consist of shutting down the company's servers or blocking access to emails after a certain time. Softer measures include pop-up windows informing staff or customers that there is no obligation to process emails outside business hours. While the first approach guarantees a true 'right to be disconnected', the second approach presupposes that the employee has been made aware of the importance of maintaining a work-life balance, by making use of their 'right not to connect'. Compared to the right 'to be disconnected', the right (and the duty) 'to disconnect' offers more flexibility in the execution of work, which can be in the interests of both the employer and the employee.

It appears that concrete disconnection measures are typically not included in branch/sectoral collective agreements and are not implemented on a wide scale, but only on a voluntary basis or negotiated with trade unions by a few companies.

Box 5: Selection of collective agreements with a detailed regulation of the R2D

Company level agreements

In France, some company agreements provide details on the R2D:

At Reunica, a social protection company, the company's mail system is switched off between 20:00 and 07:00 on weekdays and

from Friday at 20:00 to Monday at 07:00, with the result that nobody (except top managers) can send emails during these periods. Four unions approved this agreement – CFE-CGC, CFDT, CGT and the National Union of Autonomous Trade Unions (UNSA). The agreement stipulates that ‘every employee has the right of respect during rest periods and no interference with private life, including limited use, through their own initiative, of communication means’.

The InVivo agreement, after having provided that ‘the teleworker at home [has] a right to disconnect outside the reachability range’, specifies that ‘no reproach can be addressed to him if he does not respond to a request addressed outside it’.

Before the entry into force of the reform of Article L.2242-17 (Loi 2016–1088), at Thales (electronic specialists), a group agreement dated 4 February 2014 on well-being at work granted ‘a right to disconnect outside company opening hours’, or at least ‘for the duration of the legal daily and weekly rest periods.’ Line management also undertook not to send emails during those periods. Article 9.2 of the agreement, entitled ‘Control and management of working time’, envisaged disconnection from a technical point of view, both as a right of the teleworker, and a duty of the manager. It provides that:

the parties recognise that ICT will have to be mastered and, in this context, it is recognized to the teleworker a right to disconnect outside working hours the opening of the establishment in which he regularly carries out his work, or failing that, at least during the legal period of daily rest. As such, the employee working from home has the possibility to disconnect from the equipment made available by the company (ICT). Management will ensure compliance with this right, in particular by endeavouring not to send an email during the period concerned.

The Thales agreement provides for a series of measures to ensure the psychological

disconnection of the teleworker: the realization of support actions such as computer alerts; support through training/awareness-raising actions for employees and management concerned with the use of ICT and teleworking; a guide to teleworking (good practices, etc.) made available to all and read specifically by the teleworker and his manager as soon as the amendment for teleworking is signed.

In Germany, although the R2D is not subject to specific legal rules, several companies’ collective agreements regulate the rights and obligations of employers and employees in this area. Often mentioned as an example, the VW collective agreement allows the use of smartphones by managers and senior technical experts at any time. Between 18:15 and 07:00, however, all other employees have no access to the server, nor to emails, text messages and video calls (Eurofound (2020 a), page 30). BMW, Audi and Telekom also have rules on the R2D, in the form of Codes of Conduct.

In Switzerland, an interesting example can be drawn from Swisscom’s Mobile Work Regulation (2018): holidays are intended exclusively for rest. During their holidays, employees are not expected to read or reply to their emails or to be available by telephone. The out-of-office message should include the contact details of the substitute (the employee on holiday should not give their personal mobile number). Time slots before or after working hours, weekends, holidays and days off are also considered as time off. During free time, there is no obligation to read emails or to be available by telephone. Exempted from this rule are those employees who work on-call in accordance with a contingency plan. In emergencies where the employee must be reached immediately or where a fast answer is required, communication will take place by SMS. This communication rule (SMS) does not apply during periods of on-call duty.

In Italy, in the public sector, CCNL *Funzioni centrali* – that is set to be the reference for collective bargaining on *lavoro agile* – contains some specifications regarding the R2D, building

on the Guidelines issued by the Minister of the Public Administration. Beyond the specific time-span, a statement recalling the right not to have to respond to communication and to log into working platforms was introduced (Article 39, paragraphs 1 and 6).

Several European countries (such as France, Belgium, Spain and Italy) have adopted legislation guaranteeing the right (not to disconnect, but) to collective bargaining on disconnection-related issues. For instance, in France, companies with at least 50 employees are subject to the annual negotiation on professional equality between women and men with regard to the quality of life at work. These negotiations must include how the R2D can be exercised by employees and how employers should regulate the use of digital tools. In the absence of such an agreement, the employer must draw up a charter (after consulting the works council or, failing that, staff representatives), which defines the modalities for the exercise of the R2D and provides for the implementation, for employees and management staff, of training and awareness-raising actions on the reasonable use of digital tools.

In the case of Spain, the law states that '*collective agreements or arrangements may establish the appropriate means and measures to ensure the effective exercise of the right to disconnection in remote work and the appropriate organisation of the working day compatible with the guarantee of resting time*' (Article 18(1) in fine of Royal Decree-Law 28/2020). In the same vein, Law n° 7890 in Luxembourg also considers collective agreement (or the 'subordinate agreements') to be the 'natural' way of regulating the R2D. The Luxembourgish Law states that, when collective agreements are absent, the regulatory regime of the R2D will be adopted at company level, respecting the competences of workers' representatives (*délégués*) where these exist. In any case, when the regulatory regime has been established at company level, any modification has to inform and consult in advance the workers' representatives at that same level (*délégation du personnel*) or needs the agreement of the workers' representatives in companies of more than 150 employees.

There are also examples of existing or planned laws referring more directly to the R2D. This is the case in Portugal, which prohibits employers from contacting

employees during their rest periods and of Belgium that has imposed the R2D for all its civil servants. In addition, a Belgian draft law aimed at strengthening the R2D is currently under discussion. The bill sets out that negotiated agreements, at a minimum, must cover some aspects of the R2D.

Box 6: Extracts from the Belgian Right to Disconnect Bill (Amendment to the Law on strengthening economic growth and social cohesion, 2018)

Article 30

Article 17 (new). The procedures and arrangements referred to in Article 16 shall, as a minimum, provide for

- the practical arrangements for the application of the worker's right not to be contactable outside working hours;
- instructions on how to use digital tools in such a way as to ensure that the worker's rest periods, holidays and private and family life are guaranteed;
- training and awareness-raising measures for workers and management staff on the sensible use of digital tools and the risks associated with excessive connection.

Guiding Principle 6: PROTECTION AGAINST ADVERSE TREATMENT OR CONSEQUENCES

Guiding Principle 6: PROTECTION AGAINST ADVERSE TREATMENT OR CONSEQUENCES

1. The exercise of the R2D (or the reporting of the violation thereof) must not lead to any adverse treatment or retaliation, including discrimination, downgrading, disciplinary sanctions, or dismissal for the individual worker concerned as well as their representatives.
2. In case of dismissal or other adverse treatment after a worker's refusal to be available while covered by the R2D, they may bring to court facts from which it may be presumed that such refusal was the ground for dismissal or other adverse treatment. It shall then be for the employer to prove that the dismissal or other adverse treatment was based on other grounds.

Commentary

An employee may be reluctant to exercise their R2D (eg by refusing to attend to work matters outside normal working hours) if doing so could be interpreted as a lack of commitment or result in other negative consequences.

An employee who complains about a violation of their R2D must be protected from retaliation. Witnesses reporting such violations should also be protected. Although breaches of Union law relating to working conditions are not in the material scope of Directive (EU) 2019/1937 (the so-called Whistleblowing Directive), the protection of workers and witnesses who complain about the violation of the R2D could draw inspiration from the Directive's contents, in particular the protective measures in Article 19 (prohibition of retaliation), that include the prohibition of dismissal and other retaliating actions affecting the working conditions and prospects of whistleblowers. At national level, existing legislation protects workers from retaliation resulting from the

exercise of the R2D. In Italy, the law explicitly states that workers cannot suffer any consequences to their employment relationship from the exercise of the R2D, including being sanctioned, and they can also not have their salary reduced for that reason. Portuguese law, on the other hand, directly sanctions an employer who contacts an employee during their rest period, which, therefore, suggests that the employee cannot be punished for not connecting or being available during their leave, although the law does not express this principle.

Conversely, preferential treatment for employees who do not respect the R2D should be avoided. The latter rule was foreseen in a Belgian draft law (10.11.2020), introduced in the House of Representatives, but not acted upon by the legislature.

In Article 5.3 (EP, 2021) of the proposal of the European Parliament, a reversal of the burden of proof in the case of dismissal of workers who refused to be contacted outside normal working hours is explicitly mentioned. A comparable formulation of such reversal is also provided for in the 2023 Pay Transparency Directive (Article 18(1)).

Guiding Principle 7: MONITORING AND ENFORCEMENT

Guiding Principle 7: MONITORING AND ENFORCEMENT

1. Compliance with the R2D within employing entities should be regularly assessed and monitored at appropriate levels by labour inspectorates or other independent competent bodies.
2. Employees' representatives and/or trade unions having a legitimate interest in ensuring that the principles on the R2D are complied with may engage, either on behalf or in support of the complainant, with their approval, in any judicial and/or administrative procedure for the enforcement of the R2D.

Commentary

The implementation of the R2D is a process that not only affects our understanding of working time principles and the relationship between employees and employers, but also aims at changing certain habits and corporate cultures. It is, therefore, important to ensure regular monitoring of the implementation of the R2D, at least during its first years of application.

Different modalities of monitoring should be considered, such as State control by the labour inspectorate or other bodies (in the form of regular reporting or by conducting checks) or monitoring by the social partners. Although sanctions exist in the event of a violation of the R2D, the principle of monitoring is not necessarily included in the legislation in force and merits further consideration. It would, therefore, seem appropriate for this element to be the subject of a Guiding Principle.

Self-assessment must be viewed critically. It would be too easy for employers to avoid monitoring of compliance based on self-assessment.

As provided in Recital 30, Directive (EU) 2022/2041 (on adequate minimum wages in the European Union):

to strengthen the effectiveness of enforcement authorities, close cooperation with the social partners is also needed, including to address critical challenges such as non-recorded overtime or health and safety risks linked to an increase in work intensity. The capabilities of enforcement authorities should also be developed, in particular through training and guidance. Routine and unannounced visits, judicial and administrative proceedings and penalties in the case of infringements are important means by which to dissuade employers from effecting infringements.

Box 7: Extracts from the Quebec Bill n°799 'Right to Disconnect Act' and from Ontario Law on the R2D

Quebec Bill n°799

For employers with more than 100 employees:

9. By 31 March each year, the employer shall review the use of communication tools and the application of the out-of-hours disconnection policy and submit this review to the committee members.

After analysing the review, the committee shall decide whether to revise the policy on disconnection outside working hours.

10. In the event of disagreement concerning the development or revision of the policy on disconnection outside working hours, a representative of the employer or of the employees may ask the Commission to appoint a mediator.

The mediator may convene an initial mediation session and the members of the committee are obliged to participate.

11. The role of the mediator is to enable the members of the committee to exchange views and to promote agreement between

them.

17. If mediation fails, the committee shall, after hearing the representatives of the employer and the employees, draw up the policy on disconnection outside working hours applicable to all employees.

For employers with less than 100 employees:

18. An employer with fewer than 100 employees shall, after consultation with the employees or their representatives, draw up a policy on disconnection outside working hours and shall forward this policy to the Commission for verification and approval.

19. The Commission may request an employer to make changes to the out-of-hours disconnection policy that it has forwarded.

The Commission shall give the employer a reasoned opinion and indicate the period within which the policy must be amended and sent back to the Commission for verification.

20. If the Commission considers that an employer has failed to develop or implement an out-of-hours disconnection policy or has failed to amend its policy in accordance with the Commission's advice, it may make recommendations to the employer.

21. If an employer fails to comply with a recommendation of the Commission, the Commission may apply to the Labour Administrative Tribunal, which may order the employer, within such period as it may specify, to draw up, amend or implement a policy on disconnection outside working hours.

The policy is filed with the Tribunal, which may make any changes it considers appropriate.

23. An employer must review its out-of-hours disconnection policy at least every two years and forward it to the Commission for re-approval.

Ontario Employment Standards Act, 2000

(ESA), as amended on December 2, 2021

Written policy on disconnecting from work

21.1.2 (1) An employer that, on January 1 of any year, employs 25 or more employees shall, before March 1 of that year, ensure it has a written policy in place for all employees with respect to disconnecting from work that includes the date the policy was prepared and the date any changes were made to the policy. 2021, c. 35, Sched. 2, s. 3.

Copy of policy

(2) An employer shall provide a copy of the written policy with respect to disconnecting from work to each of the employer's employees within 30 days of preparing the policy or, if an existing written policy is changed, within 30 days of the changes being made. 2021, c. 35, Sched. 2, s. 3.

Same

(3) An employer shall provide a copy of the written policy with respect to disconnecting from work that applies to a new employee within 30 days of the day the employee becomes an employee of the employer. 2021, c. 35, Sched. 2, s. 3.

Prescribed information

(4) A written policy required under subsection (1) shall contain such information as may be prescribed. 2021, c. 35, Sched. 2, s. 3.

Guiding Principle 8: DATA PROTECTION

Guiding Principle 8: DATA PROTECTION

1. The treatment of data concerning the exercise of the R2D by individual workers must respect the principles laid down in European, EU and national regulations on data protection. Such data shall not be used for any purpose other than for the control of working time and the correct exercise of the R2D.
2. Workers and their representatives have the right to access data collected by employing entities in connection with the exercise of the R2D and to control how such data are used and with whom they are shared.

Commentary

Indicators for monitoring the operationalisation of the R2D should be defined with the participation of workers' representatives, giving them access to monitoring data in accordance with the general principles of data protection.

In monitoring and controlling the implementation of the R2D by employing entities, compliance with data protection rules remains essential as it determines and limits possible control methods.

Connection or disconnection data shall not be used for any adverse treatment of the employee (see Guiding Principle 6). In general, the data concerning the use of the R2D shall not be used for any purpose other than for the control and correct exercise of the R2D (see a similar provision in Article 12 of the Directive (EU) 2023/970 on pay transparency).

The European Parliament's proposed Directive on the R2D has a similar provision, linking the act of processing personal data exclusively to the purpose of 'recording an individual worker's working time. They shall not process such data for any other purpose' (Article 12, EP 2021).

Online surveillance tools shall not prevent the exercise of the R2D.

In accordance with Article 88 General Data Protection Regulation (GDPR), Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of employees' rights and freedoms in respect of the processing of their personal data in the employment context, also in connection with the R2D.

The rules implemented by the Member States shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the workplace.

In line with the European Declaration on Digital Rights and Principles for the Digital Decade, workers have the right to the protection of their personal data, including the right to control how their data are used and with whom they are shared. Workers shall not be subjected to unlawful online surveillance or interception measures.

To the extent that the systems put in place for monitoring the operationalisation of the R2D involve the processing of personal data, these should be processed in accordance with Regulation (EU) 2016/679 (GDPR), Directive (EU) 2002/58/EC (Directive on privacy and electronic communications), Convention 108+ of the Council of Europe (2018) and applicable national regulations.

Guiding Principle 9: SANCTIONS

Guiding Principle 9: SANCTIONS

1. A violation of the R2D shall lead to specific sanctions, including administrative fines that are effective, proportionate, and dissuasive.

Commentary

Breaches of the R2D must lead to specific (effective, proportionate and dissuasive) sanctions for the employer violating their duty of due diligence, including administrative sanctions enforced by labour inspectorates. These sanctions supplement those relating to non-compliance with working time (such as the payment of overtime) and/or those relating to infringements of health and safety rules.

In the case of absolutely extraordinary situations that demand a duty to reconnect, pursuant to Guiding Principle 4, sanctions are not due, provided that the employee has received agreed compensation.

The employer is not necessarily the only target of sanctions, as the R2D entails multiple obligations and breaches that affect the employer, the employee and social partners. These multiple obligations must be detailed (obligation of the employee to disconnect and to respect the R2D of their colleagues, obligation of the hierarchy to verify that this is the case, obligation of social partners to negotiate a disconnection policy and for the employer to adopt and implement it, etc). The related sanctions must be specified in order to promote the implementation of the R2D to the greatest extent possible.

The nature of the sanctions (public, administrative or criminal, or private, contractual penalty) should be clarified in each case.

At national level, Portuguese law does not provide for a specific fine relating to the violation of the R2D, as the usual rules on violations of working conditions

apply and can lead to a fine of up to EUR 9,690.²¹ The Belgian draft law takes a similar approach.²² Also, in the case of Spain, there are no specific sanctions linked to the infringement of the R2D and the generic sanctions provided for labour law infringements are applicable.

The bill currently under consideration in Quebec provides for specific pecuniary sanctions for employers who fail to establish an out-of-hours disconnection policy applicable to all employees and to review the disconnection policy after no more than two years and transmit the new version to the competent authority. The law in **Luxembourg** also provides specific sanctions, namely pecuniary fines ranging from EUR 251 to EUR 25,000 in cases of non-compliance.

Box 8: Sanctions

Extract of the Quebec Bill n°799 – or ‘Right to Disconnect Act’

Article 24

An employer commits an offence and is liable to a fine if he:

1. contravenes section 2 or 23
2. fails to produce the annual balance sheet provided for in Article 9.

The minimum and maximum amounts of the fine are:

1. for an employer who has fewer than 100 employees, at least \$2,000 and not more than \$20,000
2. for an employer with between 101 and 499 employees, at least \$5,000 and not more than \$30,000
3. for an employer with 500 or more

²¹ Law No 83/2021 of 6 December 2021, art 199(3); Annex to the Labour Code, Law 7/2009 of 12 February 2009, Book II, Chapter II, art 554.

²² Law No 83/2021 of 6 December 2021, art 199 A; Royal Decree of 2 October 1937 on the status of state employees, modified by the Royal Decree of 2 December 2021.

employees, of not less than \$10,000 nor more than \$50,000.

In the event of a repeat offence, the amounts provided for in the second paragraph shall be doubled.

Extract of Law n° 7890 Luxembourg

Article L.312-10

If an employing entity, whose employees use digital tools for professional purposes, fails to set up the system referred to in Article L.312-9, it is punishable by an administrative fine of between 251 and 25,000 euros imposed by the Director of the Labour Inspectorate and Mines, who shall determine the amount, taking into account the circumstances and gravity of the infringement [Si l'employeur, dont les salariés utilisent des outils numériques à des fins professionnelles, ne met pas en place le régime visé à l'article L.312-9, il est passible d'une amende administrative de 251 à 25000 euros prononcée par le Directeur de l'inspection du travail et des mines qui en fixe le montant en prenant en compte les circonstances et la gravité du manquement]

Guiding Principle 10: NON-REGRESSION

Guiding Principle 10: NON-REGRESSION

1. Nothing in the regulation of the R2D shall be construed as diminishing workers' existing rights and entitlements.

Commentary

In line with the idea of social progress, the Directive on the R2D shall not undermine workers' existing rights and entitlements.

The non-regression clause is a typical provision in social directives. The underlying idea is that directives are tools aiming at harmonising social regulations at EU level, but this harmonisation cannot result in a rollback of social rights at national or EU level and cannot, therefore, constitute valid grounds for reducing the general level of worker protection in the fields covered by particular directives.²³

Even if the effectiveness of such clauses in preventing reductions of national employment law standards has been debated,²⁴ they are nevertheless an important interpretative tool of the Directive's aim and purpose.

Since the specific implementation and modalities of the R2D are to be determined by collective agreements (see Guiding Principle 5), the guarantee of a non-regressive operationalisation of the R2D will be subject to the agreement between the social partners that must consider the overall balance of interests when regulating the R2D and its application.

²³ Kilpatrick, C, 'The European Court of Justice and Labour Law in 2009' [2010] 39 ILJ 287.

²⁴ Peers, S, 'Non-regression Clauses: The Fig Leaf Has Fallen' [2010] 39, ILJ, 436.

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