



The effect of digitalisation on workers' right to rest periods

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Abstract

Ensuring workers' right to rest periods is a core issue of labour law and a significant element of just working conditions. Therefore, working hours have been limited and minimum rest periods have been ensured by rules established on international and EU level. However, the concept of rest period and the rules securing this right are challenged by digitalisation and the use of ICT tools at the workplace which changes how working time and rest periods are perceived by blurring the line between them. Constant connectivity makes it difficult to distinguish working time from rest periods. While employees require a certain amount of flexibility in organising their working hours, it is important to provide them continuous and uninterrupted rest periods. In this paper, I will attempt to analyse the definition of the right to rest period and the risks of digitalisation on such periods as well as the responses to these risks on national and EU level.

Keywords: rest period, digitalisation, time porosity, right to disconnect

1. Introduction

How we define working time, rest periods and the organization of work has always been a central issue of labour law as it has a great impact on the (family) life of workers as well as on employees' health and safety.¹ It is a result of recognising employees as human beings with the same right to dignity as others. Even though workers sell their time and skills to the employer, their right to dignity

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¹ Ensuring decent working time for the future. International Labour Conference, 107th Session, 2018. General Survey concerning working-time instruments, Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Office, Geneva, 2018. 2. (hereinafter: *Ensuring decent*); Tammy KATSABIAN: It's the end of working time as we know it: new challenges to the concept of working time in the digital reality. *McGill Law Journal*, Vol 65., No. 3. (2020) 385.

must be preserved, and one way to do that is to regulate working time and rest periods accordingly. The first convention² of the International Labour Organization (ILO) in 1919 already issued a limit on the hours of work, and the regulation of working time and rest periods has stayed a crucial objective of labour law since then,³ partly because technical changes always brought on new challenges to the concepts of working time and rest periods as employers always tried to enhance productivity and reduce costs by introducing technological innovations and changing the organization of work and lengthening working time.

The Fourth Industrial Revolution (4IR) brought significant technological changes into all areas of life and work, revolutionising the tools of work through digitalisation. Under digitalisation, I mean every and all solutions whether of a technical or software-based nature or the combination of these which enables the employer to reach and instruct the employees to work even outside of working hours or when the employees are not on the employer's premises and which also enables the employees to reach the resources of the employer (such as workplace e-mail system or workplace server) and conduct work with them regardless of where the employees are or what time of the day it is. It is often referred to as ICT^{4,5}. Due to digitalisation, employers are able to operate continuously⁶ and at lower financial costs⁷ since employees are now able to work anytime and practically all the time which enhances efficiency.

Digitalisation thus clearly brought new challenges regarding the concept of working time and rest periods as it became much more difficult to distinguish them from one another in certain cases. However, it must not be forgotten that the need to regulate working time and rest periods arose in order to limit working time and provide statutory rest periods which is not possible without determining whether a certain duration shall be considered to be working time or rest period. Therefore, the question arises whether the answers to these challenges are also quite new or an already acknowledged solution with a new cover.

First, I will shortly analyse the meaning of the right to rest periods in connection with relevant regional (European) and EU standards, then summarize the risks brought by the digitalisation of work and workplaces in relation to rest periods. As the right to disconnect is one response to mitigate such risks, and both the EU and some Member States have been in the process of recognizing or introducing this right, a brief explanation about the notion of the right to disconnect in the EU will

² Hours of Work (Industry) Convention, 1919 (No. 1), International Labour Organization.

³ KATSABIAN op. cit. 386.

⁴ ICT enables employees to easily receive information and transfer it to the workplace, as well as be available for work tasks outside of the workplace at considerably lower financial cost. KATSABIAN op. cit. 386.

⁵ Jon MESSENGER – Oscar Vargas LLAVE – Lutz GSCHWIND – Simon BOEHMER – Greet VERMEYLEN – Mathijn WILKENS: *Working anytime, anywhere: The effects on the world of work*. Geneva, Eurofound – International Labour Office Luxembourg, 2017. 1. (hereinafter: MESSENGER et al.).

⁶ *Ensuring decent* op. cit. 3.

⁷ ICT is the technological infrastructure that enables people to access, transfer, use, and store information on the internet. KATSABIAN op. cit. 386.

follow. Lastly, I intend to draw a conclusion on whether digitalisation affects the right to rest period, and whether the right to disconnect is a new institution to ensure the protection of employees' rest.

2. The right to rest period

The right to specific rest periods has long been recognised, though mainly by regional conventions instead of universal human rights conventions. The ILO recognised the need and the right to weekly rest periods comprising at least twenty-four consecutive hours in every period of seven days, and, in case of suspension or diminution, a compensatory period of rest shall be granted if possible.⁸ According to the European Social Charter of 1961 (hereinafter: ESC), the right to just conditions of work may be achieved by providing, among others, reasonable daily and weekly working hours, public holidays with pay, a minimum of two weeks annual holiday with pay and a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest.⁹

The minimum of two weeks annual holiday with pay has been risen to a minimum of four weeks by the Revised European Social Charter of 1996 (RESC), while the rest were left unchanged. It must be noted, that in regard to working time and resting time, these conventions aimed to limit the daily and weekly working hours to a reasonable amount while providing minimum weekly and annual rest periods at the same time. Thus, minimum rest periods may be considered as prerequisites to reasonable working hours as well as just working conditions.

Pursuant to Article 31 of the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter), every worker has the right to fair and just working conditions which encompasses two rights: the first is workers' right to working conditions which respect their health, safety and dignity; the second is workers' right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. Again, limiting working hours and providing certain types of rest periods are a part of just working conditions which ensure the dignity of employees as humans. There is also a clear indication that defining and determining working time will affect what kind of rest periods are needed as well as their expected length.

It can be concluded that providing daily and weekly rest periods as well as annual paid leave may be an important element of just working conditions. It is also noticeable that the right to certain types of rest periods is mentioned in conjunction with the right to limited or reasonable working hours. With the exception for paid annual leave, daily and weekly rest periods are not paid, however, providing such rest periods cannot result in the decrease of weekly (daily) pay.

⁸ ILO Convention No. 14 (1921), Art. 2. Para. 1. and Art. 5.

⁹ ESC, Part I.2. and Part II, Art. 2, 1–3. and 5.

In contrast to the EU Charter, the Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (*Working Time Directive*) refers to the improvement of workers' safety, hygiene and health at work as the basis for providing adequate rest periods and limiting weekly working hours (Working Time Directive, Preamble, Para. (4)–(5) and Art. 1. Para. 1.).

Pursuant to the Working Time Directive, working time means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice, while any period which is not working time will be considered as rest period.¹⁰ Determining rest period as any period not considered to be working time means that the different types of rest periods established by the Working Time Directive (daily rest, breaks, weekly rest period, annual leave). Pursuant to the Directive, 'adequate rest' means 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.¹¹ Therefore, rest periods shall be continuous and uninterrupted by work.

3. Constant connectivity and its effect on the organisation of working time and rest periods

Due to digital technologies, the temporal and spatial limits on working activities decreased as employees are mostly able to carry out their work anytime (constant connectivity) and from anywhere (remote work).¹² Since customers and business partners expect fast and flexible responses at all times,¹³ it is a matter of competitive advantage whether the employer has the means to answer such demands through workers who are available to complete the necessary tasks even outside working hours. Thus, employers have both the possibility and the need to operate 24/7. Digital technologies provide access to information at all levels and points of the economic process, providing the potential for a very high level of flexibility and availability in work organisation. Internet connection and smart phones make the storage, access and transfer of data almost limitless in terms of time and space.¹⁴ Therefore, workers are able to perform work regardless of time and location, making them constantly available

¹⁰ Working Time Directive, Art. 2. Para. 1–2.

¹¹ Working Time Directive, Art. 2. Para. 9.

¹² Oscar Vargas LLAVE: *Digitalisation and working time*. <https://tinyurl.com/yf5y745f>

¹³ *Foundation Findings – Working Time in the EU*. Belgium, European Foundation for the Improvement of Living and Working Conditions, 2012. 4. (hereinafter: *Working Time in the EU*)

¹⁴ MESSENGER et al. op. cit. 23.

from a technical point of view.¹⁵ By using internet connectivity and a smartphone, a work e-mail may be easily drawn up and sent by an employee while he/she is sitting on the bus from work to home.

It became possible and easier to call employees at any time of the day, even outside of working hours or on a short notice to complete assignments irrespective of the urgency of the matter.¹⁶ Technical availability brought on employers' expectation towards employees to actually be available at all times¹⁷ in case work is needed to be carried out as it could be crucial in a competitive market. Employees either abide by this expectation despite not wanting to extend their working hours or are rather motivated to organise their (work) life in a flexible manner in order to reach a better work-life balance.¹⁸

However, the use of ICT is not only a need from the employer's part – employees often choose jobs where it is possible to work from home partly (hybrid workplace) or entirely. There are several reasons for that: some want to enjoy a less stressful environment in order to be more efficient,¹⁹ some want to avoid commuting for many hours a day or move farther away for the job, while others such as parents or those caring for a relative want to align their private responsibilities with work and thus facilitate a better work-life balance.²⁰ Such personal needs require more flexibility regarding the allocation of tasks and working time arrangements which is attainable by the use of ICT.²¹

Constant connectivity has the advantage of enabling a more flexible and thus more efficient organisation of working time, e.g. through reducing wasted time between tasks, introduction of algorithms (such as automation), adjusting work to private matters, decreasing task complexities and workload as well as commuting time.²² With a more efficient organisation of working time it becomes easier for workers to reach a better work-life balance as they are able to better adjust their working time to their familial tasks. Thus, it would be expected that the efficiency digitalisation can provide help to reduce working hours and making work less straining for workers. However, constant connectivity also means that not only workers, but work tools and materials are also accessible for workers at all times which makes work more straining to employees as they tend to work long hours regardless whether the employer expects them to do so or it is from their own volition.²³ Employees

¹⁵ David SPENCER – Matt COLE – Simon JOYCE – Xanthe WHITTAKER – Mark STUART: *Digital automation and the future of work*. Brussels, Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament, European Union, 2021. 38.

¹⁶ LLAVE op. cit.

¹⁷ Ibid.

¹⁸ Caroline FROGER-MICHON: Switching on to switching off: Disconnecting Employees in Europe? *CMS Law-Now*, 05. 09. 2018. <https://tinyurl.com/bdhhtume>

¹⁹ KATSABIAN op. cit. 388.

²⁰ Irene MANDL: *Employment impact of digitalisation*. <https://tinyurl.com/mww3ryfd>

²¹ LLAVE op. cit.

²² Ibid.

²³ Ibid.

using ICT often end up working extra hours which seem to supplement 'regular' working time,²⁴ making the work basically endless.²⁵

The use of ICT also means that the employer may exercise a lower level of control compared to those working in the office²⁶ as it becomes harder and more costly to supervise such employees directly,²⁷ even if surveillance tools are applicable to some extent.²⁸ Reduced control requires a higher autonomy²⁹ from the employees, not only while carrying out specific tasks but in organising their own work and working time as well (working time autonomy³⁰ or time sovereignty³¹). While in traditional forms of work it is mainly the employer who organises work and thus working time, digitalisation³² gives employees a higher degree of discretion in that regard with a higher level of self-organisation and a perceived control over how and when they work.³³

However, increased autonomy – and thus flexibility – is a double-edged sword as the task to monitor working time is also shifted towards the employees themselves which means more responsibility even for workers of non-managerial positions as well as additional work since the task to allocate and (re)organise assignments will also need to be addressed by the employees more often than before, making time management ever more complex.³⁴ While it is the workers who should limit their own daily working time, it is also them who need to complete the task, often under tight deadlines,³⁵ making them choose between having enough rest time by finishing work at the end of regular office hours or risking to miss a deadline. When efficiency and flexibility highly increases work intensity, autonomy may be lost as work becomes unlimited³⁶ and the choices of the employee will be limited to the order of the tasks to be completed. Also,

Even if workers who use ICT tools do not work after regular office hours, they are still practically on a stand-by mode all the time, even outside working hours.³⁷ Due to the technical possibility of constant connectivity, employees are in fact often available continuously either by their own volition or because the employer expects them to do so. Therefore, it also makes it hard for them to set a limit

²⁴ MESSENGER et al. op. cit. 21. and 25.

²⁵ *Working Time in the EU* op. cit. 15.

²⁶ MESSENGER et al. op. cit. 25.

²⁷ LLAVE op. cit.

²⁸ Though surveillance is certainly considered a threat to this autonomy. LLAVE op. cit.

²⁹ Under autonomy I mean the ability to choose or change the order of tasks, methods and speed of work, as well as the start and end of working time to a small degree and the ability to take the break time required by law when desired. This definition is based on the interpretation of: MESSENGER et al. op. cit. 24., 36.

³⁰ Ibid. 24.

³¹ Ibid. 24., Footnote no. 12.

³² Digitalisation has the potential to influence the way work is assigned, managed, coordinated and controlled within and across organisations. MANDL op. cit.

³³ MESSENGER et al. op. cit. 34. and 36.

³⁴ Ibid. 23.

³⁵ LLAVE op. cit.

³⁶ *Working time and work-life balance around the world*. International Labour Office, Geneva, 2022. 134. [hereinafter: ILO (2022)].

³⁷ LLAVE op. cit.; KATSABIAN op. cit. 389.; SPENCER–COLE–JOYCE–WHITTAKER–STUART op. cit. 38.

on their daily working time or determine whether they must be available in order to switch back to ‘work mode’ if necessary or it would be better to entirely ‘switch off’ work.³⁸ Their availability is often required not due to a possibly urgent work, but because the employer provides relevant information which would affect next day’s work in some way (e.g. a call with a client or co-worker the next day is rescheduled earlier on that day, hence the e-mail message the previous day to inform the worker about it in order for not to miss the readjusted appointment). What makes it different from actual stand-by or on-call time is the fact that employees are only implicitly required to be available even during their free time and conduct work regardless of its urgency or amount.³⁹ This leads to porosity between working time and rest time, and blurs the line between work and private life as it becomes harder to determine what is working time and what are rest periods.⁴⁰ Repeated switch between rest and working mode also diminishes the chance to take a good rest by transforming free time to working time and may increase the stress level of workers, hence rest periods lose their purpose.⁴¹ That is why, despite expecting working hours to shorten since the use of ICT enables workers to complete work in a shorter duration, it rather turns out that employees who use ICT often work longer hours. If workers tend to work extra hours frequently, rest periods shorten systematically.

Employees also tend to check e-mails on their smartphones, respond to professional texts and messages or schedule meetings and software or chat programs even during leisure time, lasting only for a few minutes, thus enhancing the stand-by nature of ICT work⁴² which results in the fragmentation of their rest periods despite the fact that rest periods are usually constitute one unit and should stay as such. Daily rest, weekly rest and annual leave ensure that workers recuperate from work and work-related stress, therefore it is of importance that these rest times are uninterrupted.⁴³ Otherwise, workers will be unable to enjoy their rest time in a relaxing manner, without being on the edge whether they need to reply to a message or conduct work. If being available causes work-related stress, then the aim of rest periods is lost. Therefore, fragmentation of rest periods erodes the institution itself as the line between work and private life becomes blurred and employees tend to constantly and repeatedly switch on and off work⁴⁴ even during a day.⁴⁵ It is commonly accepted that work conducted during rest periods is neither counted nor paid making it into a normal course of action. Work consisting only a few minutes a day are usually not counted as a few minutes of work seem insignificant. However, on

³⁸ SPENCER–COLE–JOYCE–WHITTAKER–STUART op. cit. 38.

³⁹ KATSABIAN op. cit. 416.

⁴⁰ LLAVE op. cit.

⁴¹ FROGER-MICHON op. cit.

⁴² KATSABIAN op. cit. 390.

⁴³ ILO (2022) op. cit. 19.

⁴⁴ It is also called autonomy paradox when work and private life overlaps (SPENCER–COLE–JOYCE–WHITTAKER–STUART, op. cit. 38.). Since working time autonomy would allow employees to determine their own working time schedule to some extent, but then it may turn into a situation where workers autonomy is reduced and while it seems to be their choice to work in their free time in order to adjust their work to their private schedule, in fact the amount of work or the tight deadlines would leave them with no choice but to work during their rest periods.

⁴⁵ MESSENGER et al. op. cit. 23.

the longer term, such working time can add up to a greater amount which is left uncompensated. This also erodes the right to rest periods.

If working in one's free time on a regular basis is commonly accepted, it quickly becomes an expectation which has the potential to erode the definition of rest time and the respect for rest periods.⁴⁶ Undoubtedly, in order to have enough rest to recuperate and enjoy the right to family life, a distinct line needs to be drawn between working time and private life which may only be crossed in rare and urgent cases.⁴⁷ Therefore, guarantees must be provided to protect rest periods while ensuring that the advantages employees as well as employers enjoy due to the use of ICT are not diminished.⁴⁸

4. The right to disconnect

Since the EU provided the minimum standard rules of rest periods in the Working Time Directive, it is inevitable that the EU also tries to address, in some way, the challenges digitalisation poses on the rest periods protected by EU law. Since the Working Time Directive was based on the right to occupational health and safety, the resolution of the European Parliament on the right to disconnect (Resolution) also refers to OHS, though it emphasizes the importance of the right to just working conditions of the RESC as well.⁴⁹ It seems that the EU also recognizes that the right to disconnect is not only a health and safety issue anymore, but it is related to just working conditions, human dignity, the limitation of working hours and the right to rest periods. Which means, that the foundation of establishing the right to disconnect is also connected to just working conditions.

Parliament stressed that 'interruptions of workers' non-working time and the extension of their working hours can increase the risk of unremunerated overtime, work fatigue, psychosocial, mental and physical problems, such as anxiety, depression, burnout and technostress, and can have a negative impact on their health and safety at work, their work-life balance and their rest from work'.⁵⁰ The Parliament also emphasizes that 'the right to disconnect allows workers to refrain from engaging in work-related tasks, activities and electronic communication, such as phone calls, emails and other messages, outside their working time, including during rest periods, official and annual holidays maternity, paternity and parental leave, and other types of leave, without facing any adverse consequences' and this right ensures that such protection is possible without losing a certain degree of flexibility.⁵¹

⁴⁶ Ibid. 50.

⁴⁷ Not to mention that lack of enough rest may extinguishes the benefits of using ICT. Ibid. 28.

⁴⁸ KATSABIAN op. cit. 393.

⁴⁹ European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), Preamble.

⁵⁰ Ibid. 6.

⁵¹ Ibid. 16.

The Resolution contains a proposal for a directive on the right to disconnect. This proposal defines working time in accordance with the working time definition of the Working Time Directive,⁵² emphasizing this way that work – and thus working time – does not need to be reinterpreted only because the tools and channels of work changed. The proposal defines the term ‘disconnect’ as well – it means not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time.⁵³ It must be noted that the EU chose to address specifically the disadvantages of digital tools at the workplace and establish the right to disconnect, instead of reinterpreting the already existing working time and rest period definitions or leaving such interpretation to the courts.

The newest instrument on EU level is the European Declaration on Digital Rights and Principles for the Digital Decade (Digital Rights Declaration) which emphasizes that all values and fundamental rights of the EU applicable offline should be applied in the digital environment. It is an important statement, that whatever is illegal offline, shall be illegal online.⁵⁴ If the employer is restricted by maximum weekly working time and is prohibited to instruct employees to work even for a few minutes during their statutory rest periods, at least without compensation, then it is also prohibited through ICT tools. Work conducted on the employer’s premises and work carried out online are equally considered work and shall be counted as such when providing rest periods. That is why the Digital Rights Declaration clearly states that everyone has the right to not only just working conditions, but to appropriate protection in the digital environment as in the physical work place.⁵⁵ It also commits to ensuring that everyone is able to disconnect and benefit from safeguards for work-life balance in a digital environment, ensuring besides that, in the working environment, digital tools do not put workers’ physical and mental health at risk in any way.⁵⁶ It greatly differs from the Resolution in such a way that the leading sentence – what is illegal offline, shall be illegal online – would give room to reinterpret the already existing institutions of the Working Time Directive in relation to work conducted with digital tools.

However, so far, there are no binding rules on EU level, though there are examples in some Member States. While several of them already introduced the right to disconnect in order to reduce the disadvantages of digitalisation, though with different approaches and rules, it was France to first recognize this right. In its decision of 17 February 2004, the Cour de Cassation indirectly recognised the right to disconnect.⁵⁷ Its conclusion was based on its interpretation on resting time which is a time when the employee is totally exempted, directly or indirectly, except in exceptional cases, from

⁵² Ibid. Annex to the Resolution, Art. 2(1).

⁵³ Ibid. Annex to the Resolution, Art. 2(2).

⁵⁴ European Declaration on Digital Rights and Principles for the Digital Decade (2023/C 23/01), Preamble, Para. (3)

⁵⁵ Ibid. Fair and just working conditions, Para. 5.

⁵⁶ Ibid. Fair and just working conditions, Para. 5.a)-b)

⁵⁷ Cour de Cassation, Chambre sociale, du 17 février 2004, 01-45.889, Inédit.

performing work for his/her employer even if it would be only probable or occasional.⁵⁸ Therefore, rest period must be respected by the employer,⁵⁹ hence not being able to be reached by the employer on personal cell phone does not constitute a serious misconduct. A failure to respect rest period provided by law inevitably causes damage to the employee which must be compensated by the employer.⁶⁰ After the decision, France became the first state in the EU to incorporate the right to disconnect (le droit à la déconnexion) in the Labour Code (le Code du travail) by the Law of August 8, 2016. Article L. 2242-17 of the Labour Code attempts to limit workers availability outside of working hours in order to ensure work-life balance.⁶¹

The law does not define the right itself, but some describe it as ‘the employee’s right to disconnect from any digital device or tool used for professional purposes such as Smartphones, email or the internet during, his or her free time and vacation’.⁶² According to the law, companies with a workforce of at least 50 employees subjected to the annual mandatory negotiation on professional equality and quality of life at the workplace and companies implementing ‘convention de forfait jours’ (day-off agreement) must regulate the use of IT devices in order to ensure compliance with mandatory rest periods including vacation and the employee’s personal and family life.⁶³ Since the law leaves it up to the employer and the social partners to decide the measures best suited for their specific situation and business interests (such as the technical measures and training of managers on the reasonable use of digital tools⁶⁴), it is also ensured that employees are granted the flexibility in terms of working time they need.

In case the negotiation fails, the employer must implement an internal policy after consulting about it with the works council. Therefore, it is not only a right for the employees, but also an obligation on the employer’s part to ensure through sufficient measures that employees rest periods are in fact respected,⁶⁵ while flexibility is still provided for employees – unless the initiative completely prevents electronic communication activities at certain times or it fails to adjust the employees’ needs and the specific features of the company’s operation.⁶⁶ It is important that the law emphasizes the significance of ensuring rest periods. The EU instruments have not emphasized the connection between the right to disconnect and the right to rest period.

⁵⁸ Cour de Cassation, Chambre sociale, du 10 juillet 2002, 00-18.452, Publié au bulletin.

⁵⁹ Laetitia MOREL: Le droit à la déconnexion en droit français – La question de l’effectivité du droit au repos à l’ère du numérique. *Labour & Law Issues*, vol. 3, no. 2. (2017) 11.

⁶⁰ Cour de cassation, civile, Chambre sociale, 17 février 2016, 13-28.791, Inédit.

⁶¹ MESSENGER et al. op. cit. 49.

⁶² FROGER-MICHON op. cit.; KATSABIAN op. cit. 394.

⁶³ 7° of Article L. 2242-17 of the Labour Code; FROGER-MICHON op. cit.; KATSABIAN op. cit. 394.

⁶⁴ Digitalisation may have a harmful effect on working time and rest periods if workers, including managers, do not have the skills or information on how to handle technologies and workflows. MANDL op. cit.

⁶⁵ FROGER-MICHON op. cit.

⁶⁶ KATSABIAN op. cit. 397.

After France, other European countries introduced similar regulation such as Germany or Belgium.⁶⁷ However, on the EU level, the regulation of a right to disconnect or a similar solution has not yet been introduced, though based on the 2003/88/EC Directive Member States can and should implement national rules in order to ensure the minimum rest periods required by the Directive.⁶⁸ Describing the French model which was the first to recognize the right to disconnect, and the newest interpretation on EU level, it can be seen that there may be different approaches, depending on whether the challenges posed by digitalisation are perceived as entirely new or similar that of the problems arising offline.

However, the right to disconnect should not be a general prohibition on the availability of employees during rest periods. Even though the right to disconnect aims to prevent workers from being available even during their rest times, employees' need for flexibility and the employers' interest in solving urgent problems must be considered as well. Therefore, it is not acceptable to generally prohibit or prevent availability and work during rest periods. However, in order to prevent both employees and employers to make such arrangements commonly acceptable and the standard way of organising working time, regulation on its remuneration could be an additional tool to keep such work on a healthy level.

First, it is important that the time spent with work outside of regular hours is counted, even if it only takes mere minutes within the day. Transparency⁶⁹ can help reduce the amount of such work as well as restore the lost resting time. Different ways of remuneration could be offered, based on the need of the employees and the employers. One way is to add together such working time and make a payment after the total amount, or half an hour could be counted for every work lasting for a few minutes per day.⁷⁰ Since the aim is to prevent both the employer and employees to conduct such work during rest period, working time conducted outside of working hours could be paid by providing equal amount of resting time.

Another possible solution is to compensate employees for time porosity in general instead of remunerating the exact minutes spent with work during their rest periods, and with a higher value than the basic working time unit, just like overtime pay.⁷¹ It could also deter the employer to encourage employees either explicitly or implicitly to be on stand-by mode all the time and conduct work even if it takes only a few minutes but are of no urgency. Compensation could be either monetary or additional resting time in exchange for the interrupted rest period. In the latter case it could be guaranteed that, at the end of the day, workers have the chance to enjoy their resting time without work-related interruptions which would be the original aim of such rest periods. According to the

⁶⁷ Lorraine CHARLES – Shuting XIA – Adam P. COUTTS: *Digitalization and Employment*. Geneva, International Labour Organization, 2022. 29.

⁶⁸ FROGER-MICHON op. cit.

⁶⁹ KATSABIAN op. cit. 418.

⁷⁰ The right to be paid for one's work is linked to human dignity. KATSABIAN op. cit. 385.

⁷¹ KATSABIAN op. cit. 416.

ILO, a reduction of hours of work may be achieved via – among others – additional days of paid annual leave.⁷² Employees compensated with additional rest periods in exchange for porous time or overtime, work less in the long run compared to those who are compensated with pay. However, it should be the employees to make a choice between additional resting time and extra pay, since it could be an essential part of the payment of workers with lower salaries.⁷³

5. Conclusion

Limiting working hours and providing uninterrupted rest periods have been an important aim of labour law and regional treaties. Working time legislation is directly linked to the employees' health and safety as well as their right to human dignity⁷⁴ by ensuring their well-being at the workplace and at home.⁷⁵ However, digitalisation poses a threat on such achievements, as employees are expected to answer calls and messages of the employer even outside of working hours, which blurs the line between work and private life.⁷⁶ Therefore, legislation may be required⁷⁷ in order for workers to achieve a more healthy work-life balance despite the disadvantages of using ICT at work,⁷⁸ possibly even on EU level.⁷⁹ While the negative effects of the use of digital tools may be decreased by introducing new instruments such as the right to disconnection, it may be equally possible to reach such a result by adapting the already existing definitions of working time a rest period to the new circumstances. Fragmentation of rest periods and uncompensated work during one's breaks (rest periods) infringe the already existing laws when it happens in the offline world. In this respect, online work only differs in the tool with which employees conduct their work. Therefore, whatever work would infringe the working time laws if it was conducted in the offline work, then it may infringe the law regardless of the fact that it was conducted through online channels. From this perspective, the right to disconnect is not necessarily an entirely new concept, but the already existing working time rules adapted to those working with digital tools, emphasizing that online work is not different from offline work when examining whether the relevant rest period was uninterrupted. However, as working time and rest periods needed to be regulated on EU level in order to ensure at least the minimum standard rules, the right to disconnect and its minimum standard rules shall equally be regulated on EU level since this right is necessary in

⁷² ILO (2022) op. cit. 144.

⁷³ *Working Time in the EU* op. cit. 21.

⁷⁴ KATSABIAN op. cit. 385.

⁷⁵ ILO (2022) op. cit. 136.

⁷⁶ The 24/7 availability blurs the boundary between paid work and personal life. MESSENGER et al. op. cit. 36.

⁷⁷ Ibid. 59.

⁷⁸ ILO (2022) op. cit. 1.

⁷⁹ LLAVE op. cit.

the digital age.⁸⁰ Until then, the already existing legal framework may be reinterpreted by courts along the right to rest periods and the right to just working conditions.

⁸⁰ Loïc LEROUGE – Francisco Trujillo PONS: Contribution to the study on the ‘right to disconnect’ from work. Are France and Spain examples for other countries and EU law? *European Labour Law Journal*, Vol. 13., No. 3. (2022) 456.