THE RIGHT TO DISCONNECT

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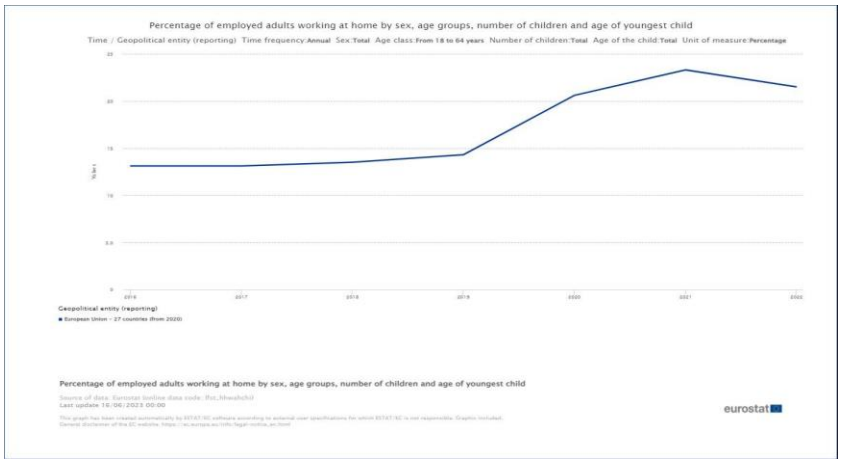
Abstract: *The right to disconnect is an increasingly urgent issue in the context of labor law and human resources, because in the digital age connectivity often has negative effects on the mental health of employees. The phenomenon is not new, but in the 1990s what started naively with an urgent telephone conversation once a week between the employer and the employee outside working hours, quickly progressed into dozens of e-mails or conversations on WhatsApp groups between the company's employees, the pursuit of which is of course not a contractual obligation, but rather an expectation from the employer. This paper is focusing on the existing legal framework on the European Union level, Romania and other member states and the directive proposal regarding the right to disconnect.*
Keywords: *right to disconnect, Directive 2003/88/EC, working time, directive proposal*

Introduction

The right to disconnect of employees has become a widely discussed issue since the introduction of electronic devices that allowed remote work. We all heard of exceptional situations when the employer asks the employee for just a small favor by phone or calls him just to ask him something at 9 pm. But if the situation in which it becomes a habit, and the employee no longer has the possibility to refuse the employer, everything changes. The issue of disconnecting after working hours has become more and more pressing in the context brought by the COVID-19 pandemic, when a large number of employees had to work from home. Working from home or teleworking often also resulted in the flexibility of working time, so that the boundary between work time and rest time became more and more transparent. In my opinion, the spread of working from home has a major influence on the issue of the right to disconnect. In Europe, according to Eurostat statistics, in 2016 13.1% of the active population (18-64 years old) worked from home, in 2021, the year in which the effects of the pandemic were felt most strongly, this number increased to 23.3% and in the following year, 2022 it dropped slightly to 21.5%.



There is the category of employees whose work schedule is hybrid 1. The individual employment contract stipulates the periods in which the employee works from home and the periods in which he must be present at the employer's headquarters.

In my view, the two mentioned situations (those who work from home and those who have a hybrid program) would be the most vulnerable categories from the perspective of the right to disconnect, precisely because the space in which they operate does not change at the end of working hours 2.

Of course, the need for the right to disconnect also persists in the case of other employees, who work from the employer's headquarters. The technology which allows the employee to check their e-mails or messages on the mobile phone is a temptation for employers, who have the possibility to contact their employees practically at any time 3.

This introduction is the brief reflection on the presented problem, which of course can be and is developed in numerous studies in the field of psychology and human resources. Starting from the hypothesis that there is a social problem that would require an appropriate legislative framework, in the next part of the paper I want to present the current national and European regulations that fall within the spectrum of the right to disconnect, then some regulations from the states of the European Union, where the legislature is concerned with this topic, and at the end I will formulate de lege ferenda proposals.

European regulation

At the level of the European Union, a legislative procedure started in 2019 to regulate the right to disconnect. Specifically, a report was formulated in the European Parliament 4in order to adopt a directive in this field. The report mentions the risks associated with the increasing use of digital tools for work purposes: higher workloads, longer or unpredictable schedules and a culture of always being available. These can violate workers' fundamental rights, fair working conditions, health and safety at work, work-life balance and gender equality. The report points out that the greater the use of digital tools, the greater the incidence of psychosocial risks such as anxiety and burnout. The COVID-19 health crisis has forced a quarter of EU workers to work remotely. This compares to a figure of only around 10% who worked from home before lockdown. There is, as yet, no specific EU legislation on the right of workers to disconnect from the digital tools they use for professional purposes.

The next step was to present the report to the Parliament in January 2021, and it was adopted with 472 votes in favor, along with the guidance to the European Commission to formulate a proposal for a directive, under its competence. At the same time, the report itself contains a proposal for a directive, which has not been adopted and is not currently in the sights of the European legislature, because the Commission should in turn formulate a proposal for a directive, which could be voted on in Parliament 5. However, the proposal in the report, in my opinion, could indicate the main ideas of a future adopted directive.
Basically, there are three key elements in the text. The first is the definition of the term "disconnect", which means that "the employee does not engage in work-related activities or communication, with the help of digital tools, outside of working hours." This would be the right guaranteed by the concept of "disconnecting from work". The second key element is an obligation on the part of the employer to establish an objective, reliable and accessible system that allows the measurement of the time worked each day by each worker, in accordance with the worker's right to privacy and protection personal data. Workers will be able to request and obtain records of their working time. In the Romanian Labour Code, this obligation already exists in art. 119, which I will detail in the context of the analysis of national legislation. The third, and most important, element in the text is the listing of minimum measures that should be implemented by employers: the practical arrangements for turning off digital tools for work purposes, including any work-related monitoring tools; the working time measurement system; health and safety assessments, including psychosocial risk assessments, in relation to the right to opt out; the criteria for any waiver by the employer from the employee to implement the employee's right to disconnect; in the case of a derogation, the criteria for determining how compensation for work performed outside working time should be calculated; awareness measures, including on-the-job training, to be taken by employers regarding the working conditions outlined above. In what follows, the text resumes the general and specific protection measures that belong to workers and in the other regulatory areas. As an observation, this text, of course, is a proposal, which in the future will most likely look different in an adopted version. Having said that, however, we can consider it as a starting point (there being no other draft at the moment) of any regulation that will be adopted at the European level. The most important ideas in this text are turning off digital tools after working hours, having a well-defined record of working hours, and if the employee has to respond in his free time, this period should be considered as additional work and rewarded in a fair way. Having this information, I will analyze the national rules, checking if there are correspondences in the current form of domestic legislation with the "future directive". However, before this analysis, I will review the currently existing European regulations, which, even if they are not aimed at regulating the right to disconnect, tangentially touch on the topic addressed. These would be: Directive 2003/88/EC concerning certain aspects of the organisation of working time Directive 2019/1158 on work-life balance for parents and carers s and The 20 principles on the European Pillar of Social Rights.
Directive 2003/88/EC concerning certain aspects of the organisation of working time has the main purpose of defining the different forms of rest and the minimum time that must be granted on a case-by-case basis. In the context of the right to disconnect, we are looking for norms that would define the quality of this time. That is, the fact that the employee cannot be requested to work during these periods. The directive only contains the definition of rest time, which means any period that is not working time, and working time means

any period during which the worker is at the workplace, at the disposal of the employer and performs his activity or functions, in accordance with national laws and practices. At the same time, the Nicușor Grigore case is also related to this directive 6, through which the Court of Justice of the European Union defined and explained the conditions that should be met in order for a certain period of time to be considered working time. The Court states that there cannot be an "intermediate" category between working time and rest time, because the two are mutually exclusive. If the above mentioned criteria are met, it does not matter the output or intensity of the work, that period is considered working time. In its reasoning, the European court does not continue the dissemination of the problems related to this "intermediate" period, although it would be very interesting from the point of view of the right to disconnect. The factual situation, which requires the regulation of the right to disconnection, is precisely this "intermediate" period, when the employee really works with a lower yield and with a minimum intensity (he answers a phone, an e-mail, a message). In any case, if we accept the Court's view and interpret this decision stricto sensu, we could draw the conclusion that the right to disconnect is no longer of interest, because working time and rest time are mutually exclusive, and any activity performed by the employee is considered working time. In my view, however, we cannot interpret the Court's decision in this way, and it would add to the legislation to accept this simplistic idea. Moreover, in favor of this statement, we can bring the Simap decision 7, in which the doctors who provided a "permanently accessible" type of guard, i.e. they are at home, but must be accessible, and in case they are requested to intervene in a patient, they must ensure this activity. In this case, the Court ruled that the possibility for workers to manage their time without major constraints and to dedicate themselves to their own interests is an element that shows that the respective period does not constitute working time within the meaning of the Directive 8. In the spirit of this decision, we could conclude exactly the opposite, that the obligation to be accessible and to act when needed in favor of the employer represents rest time, so the right to disconnection does not exist and does not have its place. The obligation to answer the phone, messages or through other means of communication is not likely to affect the management of time with major constraints and to devote to one's own interests. In my view, this interpretation is also much too radical.

In conclusion, in the two cases presented, the Court had to decide, based on the specific facts, whether it is work time or rest time. Probably in both cases we are dealing with an intermediate variant, but this cannot exist from a legal perspective, so the European court had to choose, even if solutions were reached, which interpreted ad literam could lead us to wrong conclusions.

Directive 2019/1158 on the balance between the professional and private life of parents and carers and the 20 principles on the European Pillar of Social Rights are two normative acts that tangentially touch on the issue of quality rest time. The part of the Directive that could be relevant is about flexible working arrangements for parents with children under eight, but this option could create even more problems related to the right to disconnect, given the surveys presented in the introduction, especially those that refers to workers who carry out their professional activity from home. The 20 principles on the European Pillar of Social Rights refer to the mentioned Directive. Principle number 9 ensures the balance between private and professional life, but only from the perspective of gender equality in the case of leave related to the birth of a child and the flexibility of labor relations in this

case. These two normative acts, which apparently could be relevant from the perspective of the right to disconnect, in fact do not essentially touch the analyzed issue.
In conclusion, at the European level, Directive 2003/88/EC on certain aspects of the organization of working time indirectly defines rest time, but the two analyzed cases can help us outline a vision of what rest time should mean in reality. However, there is a lack of specific and concrete regulation regarding the right to disconnect. The social phenomenon exists and is as widespread as possible, but the European legislator has not yet managed to intervene with an appropriate regulation. The adoption of the proposed directive that I mentioned before would be a genuine solution, but until that moment we will have to be guided by the legislation in force.
In what follows, I will analyze from the perspective of Romanian labor legislation the aspects related to the right to disconnection.

National legislation and doctrine

The regulation of working time and rest time can be found in the Labor Code from art. 111 to art. 158. The legal text first concerns the various forms of distribution of working time, then rest periods, the categories being similar to those in Directive 2003/88/EC.
At the beginning of the two large chapters, we can see the definition of working time, respectively rest time, compared to how they were defined by the Directive, the national norm approaches a broader vision, using the phrase, "the employee performs work" instead of "he is at work". The transposition into Romanian law is more up-to-date, because the provision of work does not necessarily mean physical presence at the workplace 9, precisely where the right to disconnect comes in play.
Referring strictly to the Labor Code, in 2022 there was an important change in terms of the right to disconnect, respectively art. 119. This article imposes the obligation towards the employer to keep track of the hours worked, highlighting the start and end time, respectively the obligation to establish in writing with mobile employees and employees who work from home the method of counting working hours. This provision is very similar to the first provision in the proposed directive on the right to disconnect. Of course, the first condition to be able to establish the extent of the right to disconnect is knowing and counting the exact working time, then the rest time. Several provisions that would give us clues about the quality and characteristics of rest time do not exist in the national positive law. However, the doctrine highlights some important aspects in refference to the decisions of the Court of Justice of the European Union, which answer the question: In reality, what should rest time look like? As it is defined in European and national rules, it is the opposite of working time. In order to qualify a certain period of rest time, three cumulative conditions must be met: 10 the spatial critera, which means that the employee should be at work, the authority criteria, that is to be at the employer's disposal, and the professional criteria, which refers to exercising their activity or functions. 11Regarding the cumulative fulfillment of the three conditions, currently a large part of employees do not meet these conditions, by the simple fact that they work from home. Indeed, if the workplace, also mentioned in the individual employment contract, is the domicile of the employee, this condition can be met, but in this case it no longer qualifies as a criteria for differentiating between working time and rest time. Going further, the professional criteria is a clear one, it answers the question whether at the time of the analysis the employee is working or not. The criteria of authority, however, is the one that poses problems under the aspect of the

right to disconnect. The very right to disconnect presupposes the exclusion of the obligation to be available to the employer. Per a contrario, if the employee answers the phone or reads and reacts to e-mails, he is at the disposal of the employer, the authority criteria is met, the professional criteria as well, because he actually works, but the spatial criteria is not. Thus only two of the three conditions, which should be met cumulatively, are present.
In conclusion, following the idea of the Advocate General, in the case of the preexisting state of facts to analyze the right to disconnect, the time in which the employee is at the disposal of the employer, but is not at work, is considered rest time. In my view, this conclusion would be unfair to the employee from all points of view.
On the occasion of dealing with the situation of mobile workers, the Court of Justice of the European Union and the doctrine highlighted aspects related to working time and rest time, which could be clues in determining the content of the right to disconnect. The court ruled that in the case of workers who travel at the beginning of the program directly to a client and at the end of the program travel home from the last client, the time spent on the route is considered working time 12. The first argument is that travel is a necessary tool for the performance of work, without which it could not be done. Then, the court states that in order for a worker to be considered to be at the disposal of the employer, he must be placed in a situation where he is legally obliged to obey the instructions of that employer, during the execution of an activity for the employer. The worker cannot dispose of his free time, even if it was claimed that he could solve personal problems during these periods. Although this decision has been intensively criticized in the doctrine, we can conclude that this travel period, intermediate between working time and rest time, is qualified by the European court as working time 13. Indeed, this form implies a greater effort and coercion on the part of the employee than a simple answer to the phone or e-mail, but we can observe that the idea that a so-called intermediate period is considered working time is revisited, and the three aforementioned conditions were not met cumulatively in this case either.
In conclusion, the Romanian legislator has not yet addressed the issue of the right to disconnect, there are no specific provisions in this regard. However, it can be observed that the obligation to count working hours is present in the Labor Code, and working time is defined more broadly than in Directive 2003/88/EC. These two specific aspects will probably help us to implement a future directive in the national legislation, but at the moment it would be necessary to include the right to disconnect in the Labor Code.
In the next chapter I will present some member states of the European Union where the decision to regulate the right to disconnect was taken.
Ways of regulating the right to disconnect by other member states of the European Union
Some member states of the European Union have decided to implement legal provisions regarding the right to disconnect, in others there are legislative or soft-law measures to implement appropriate measures to protect employees' rest time. In the next section I will present some examples, which could serve as a model in the context of Romanian regulations, possibly until the date of adoption of an appropriate European directive, which will be able to react appropriately and uniformly to the phenomenon underlying the right to disconnect.

Belgium
In 2018, the first rules regarding the right to disconnect were adopted, but in 2022 (it became mandatory from April 1, 2023) the legislation was amended 14.

From the perspective of the new version, every employer with a minimum of 20 employees is obliged to implement rules regarding the right to disconnect by collective labor agreement or by internal regulation. As minimum expectations, the employer must take measures so that employees cannot be accessed after working hours, give instructions to employees in order to use digital tools so that rest periods are guaranteed and organize information for employees and those working in management regarding the correct use of digital tools, such as drawing attention to the risk of excessive connectivity.

France

In France, on January 1, 2017, a provision regarding the right to disconnect came into force 15. This provision applies to employers with more than 50 employees. The obligations laid down are essentially consulting with the employee's representatives and trying to reach an agreement on the use of digital tools intended for work during rest time. This negotiation must be resumed annually with the employee representatives. If an agreement is not reached, the employer must adopt a "charter of good conduct" that includes measures regarding the right to disconnect 16.

Luxembourg

In Luxembourg the regulation appeared in an interesting context, in the sense that the Court of Appeal of Luxembourg decided in a case 17that the employee cannot be disturbed by telephone during a holiday. As a consequence of this judicial action, the Chamber of Deputies took measures to amend the Labor Code, in the sense in which it introduced a new section (Section 8 of Book III, Title I, Chapter II, consisting of articles L 312-9 and L312- 10) which is called "Respecting the right to disconnect" and is in force from July 4, 2023 18. The regulation refers to employers who have more than 15 employees, and the stipulated main obligation is to negotiate and introduce through the collective labor contract a scheme of rules regarding the right of disconnect, which includes concrete technical and practical measures, the organization of trainings and awareness raising campaigns, as well as how to reward the periods in which the employee must stay connected.

Portugal

Portugal decided to amend the Labor Code by Law no. 83/2022, thus a provision regarding the right to disconnect were introduced in the chapter where the law deals with teleworking. This norm is much more succinct and concrete than the ones analyzed previously, respectively it imposes the obligation of employers not to contact their employees outside of working hours. Of course, the question was raised, what does "contact" from the employer mean, or does this provision refer exclusively to employees who work in a teleworking system?

This way of regulating the right to disconnect has been intensively criticized and is a novelty in this aspect 19.

Conclusion

The right to disconnect is an increasingly urgent issue in the context of labor law and human resources, because in the digital age connectivity often has negative effects on the mental health of employees. The phenomenon is not new, but in the 1990s what started naively

with an urgent telephone conversation once a week between the employer and the employee outside working hours, quickly progressed into dozens of e-mails or conversations on WhatsApp groups between the company's employees, the pursuit of which is of course not a contractual obligation, but rather an expectation from the employer. Precisely for this reason, the urgent regulation of this social reality is indispensable. As I presented in the paper, the efforts at the European level started and progressed in a good direction, even developing a proposal for a corresponding directive, the implementation of which in the legislation of the member states would be the most qualitative solution. First of all, because there would be a supranational legislative framework, which rewards the quasi-uniform application of the provisions in each member state. Secondly, in the context of the spread of teleworking, labor relations have become internationalized, so that the employee and the employer often come from different countries, so a directive, which proposes similar solutions for the member states of the European Union, ensures a minimum level of protection for each employee. Moreover, at the European level, the existing rules and the jurisprudence of the Court of Justice of the European Union regarding the subject of work and rest time do not cover the facts discussed in the context of the right to disconnect. Positive Romanian law is in line with the European norms in force and as I highlighted, with the exception of the two differences regarding the definition of working time and the addition of the article regarding the obligation to count the hours worked, it does not expressly or indirectly regulate the right to disconnect.

As a De lege ferenda proposal at the European level, the adoption of the proposed directive or a modified form of it would be the most appropriate solution, with the preservation of the central ideas formulated, and at the national level, until the adoption of the directive, the inclusion of an article in the Labor Code, which imposes on the employer the obligation to address the topic of the right to disconnect in collective negotiations or, in the absence thereof, to introduce measures in the internal regulations regarding the rules for contacting employees during free time, respectively to define rest time as a qualitative one, in which the employer may or may not intervene, and to what extent.

References

1 Eurofound, The rise in telework: Impact on working conditions and regulations , Publications Office of the European Union, Luxembourg, 2022.
2 Moarcăș Claudia-Ana, Dreptul la deconectare, Curierul Judiciar, no. 6/2021, Vol. XX, pp. 319
3 https://www.eurofound.europa.eu/en/blog/2022/do-we-really-have-right-disconnect , accessed 12.10.2023
4 2019/2181(INL) – 08/12/2020, on the right to disconnect, Employment and Social Affairs Committee
5 Septimiu Panainte, Dreptul individual al muncii. Curs universitar, editura Hamangiu, București, 2017, pp. 253
6 Nicusor Grigore v Romsilva National Forest Directorate - Bucharest Forest Directorate. Case C-258/10.
7 Case C-303/98 Sindicato de Medicos de Asistencia Publica
8 Septimiu Panainte, Drept european al muncii, editura Hamangiu, București, 2017, pp. 246
9 Costel Gîlcă, Codul Muncii comentat și adnotat. Volumul II, editura Rosetti, București, 2022, pp. 13
10 Felicia Roșioru, Dreptul individual al muncii, editura Universul Juridic, București, 2017, pp. 412
11 Conclusions of Advocate General Yves Bot, EU:C:2015:391, case C-266/14

12 Case C266/15 Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) c. Tyco Integrated Security SL,
13 Coord. Dr. Florin Ludușan, Dreptul muncii. Teorie și practică judiciară, editura Universul Juridic, București, 2017, pp. 278
14 https://iuslaboris.com/insights/the-right-to-disconnect-which-countries-have-legislated/ , accessed 11.10.2023
15 Article 55 under Chapter II "Adapting the Labor Law to the Digital Age", Article L2242-8 of the Labor Code
16 Pansu, L., "Evaluation of 'Right to Disconnect' Legislation and Its Impact on Employee's Productivity", International Journal of Management and Applied Research , Vol. 5, No. 3, 2018 pp. 99-119.
17 CA, 3rd Chamber, 2 May 2019, n° 45230 of the docket
18 https://insightplus.bakermckenzie.com/bm/employment-compensation/luxembourg-new-law-on-the-right-to-disconnect-outside-working-hours_1 , accessed 11.10.2023
19 https://global-workplace-law-and-policy.kluwerlawonline.com/2022/03/09/the-right-to-disconnect-or-as-portugal-calls-it-the-duty-of-absence- of-contact/ , accessed 11.10.2023

Bibliography:

Gîlcă C., Codul Muncii comentat și adnotat. Volumul II, editura Rosetti, București, 2022,
Ludușan F., Dreptul muncii. Teorie și practică judiciară, editura Universul Juridic, București, 2017
Moarcăș C.-A., Dreptul la deconectare, Curierul Judiciar, nr. 6/2021, Vol. XX,
Panainte S., Drept european al muncii, editura Hamangiu, București, 2017
Panainte S., Dreptul individual al muncii. Curs universitar, editura Hamangiu, București, 2017
Pansu, L., "Evaluation of 'Right to Disconnect' Legislation and Its Impact on Employee's Productivity ", International Journal of Management and Applied Research, Vol. 5, No. 3, 2018
Roșioru F., Dreptul individual al muncii, editura Universul Juridic, București, 2017
https://iuslaboris.com/insights/the-right-to-disconnect-which-countries-have-legislated/
https://insightplus.bakermckenzie.com/bm/employment-compensation/luxembourg-new-law-on-the-right-to-disconnect-outside-working-hours_1
https://global-workplace-law-and-policy.kluwerlawonline.com/2022/03/09/the-right-to-disconnect-or-as-portugal-calls-it-the-duty-of-absence- of-contact/