The Right to Disconnect, the EU Strategy and Gender Equality

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Abstract Disconnection has undoubtedly taken on a central role in the debate on remote work and the need to rethink the regulations dictated for "work in the enterprise," which are inadequate for remote work because of the absence of space-time constraints on performance.

It is well known that digitization has brought economic advantages to employers and allowed workers greater autonomy and a better work-life balance. On the other hand, the widespread use of digital tools in the workplace has given rise to the culture of "working anytime, anywhere," which has reduced the advantages related to the use of new technologies, leading people to remain constantly connected.

At the same time, the constant connection coupled with the high stresses at work and the growing expectation that workers be reachable at all times can negatively affect workers' fundamental rights, work-life balance, and physical and mental health and well-being.

This phenomenon, as highlighted by the European Parliament's Resolution of January 21, 2021, on "Recommendations to the Commission on the right to disconnect (2019/2181(INL)," has affected fundamental workers' rights and gender equality, given the disproportionate impact of these tools on workers with care responsibilities, who are generally women.

Therefore, the right to disconnect should be considered an important social policy tool at the Union level to protect workers' rights, particularly for the most vulnerable and those with care and nursing responsibilities.

This paper analyzes the European initiatives on disconnection. Mainly it focuses on the Resolution of the European Parliament of January 21, 2021, that affirms the need to consider disconnection as a fundamental right of the workers in the digital era. Thus, the Resolution calls for the adoption of the proposed directive.

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The paper, starting from the opportunity to introduce minimum levels of protection at the EU level, argues that, even though the Italian law appears "over-compliant" with the EU provisions in the matter, under other aspects, the proposed directive brings about applicable provisions to protect and force the right to disconnection. In particular, according to the author, disconnection should be guaranteed beyond the boundaries of remote work and represents a helpful tool for achieving gender equality.

In this vein, we can formulate our research questions:

RQ1: How relevant is the right of disconnection for gender equality?
RQ2: How will adopt the proposed Right to Disconnect Directive impact gender equality?

Keywords Right to disconnect · Gender equality · Remote work · Technostress · Work-life · Interface · Workaholism

1 Introduction

Disconnection has undoubtedly taken on a central role in the debate on remote work and the need to rethink the regulations dictated for "work in the company," which are inadequate for agile work in view of the absence of spatial and temporal constraints on performance (On the debate regarding the interpretative problems posed by the emergency legislation, see Martone 2020; Persiani 2020, according to which "when the work, while continuing to be, or to be considered, subordinate does not take place within the company, but in the worker's own home or in the place chosen by this, it is inevitable that the discipline dictated for" work in the company" proves inadequate. Inadequate because, on the one hand, the traditional powers of the employer and, on the other hand, the rights and obligations of the worker cannot have the same content and the same limits that they have when the work is performed within the company"; Brollo 2020; Caruso 2020; Albi 2020; Biasi 2021; Romei 2020; Del Conte 2021. On the regulation of remote work contained in Law no. 81 of 2017 see Martone 2018; Ricci 2018; Spinelli 2018. On the right to disconnection in agile work, see Maio 2020, p. 85 e ss.; Altimari 2019; Dagnino 2017; Di Meo 2017; Fenoglio 2018; Russo 2020; Preteroti 2021).

It is well known that digitization has brought economic benefits to employers and allowed workers greater autonomy and a better work-life balance. On the other hand, the widespread use of digital tools in the workplace has given rise to a culture of "working anytime, anywhere," which has reduced the benefits of using new technologies, leading people to remain constantly connected.

At the same time, constant connectivity coupled with high stress at work and the growing expectation that workers are reachable at all times can negatively affect workers' fundamental rights, work-life balance, physical and mental health and well-being (On the risks related to "time porosity" see Dagnino 2017; Fenoglio 2018) .

This phenomenon, as highlighted by the European Parliament Resolution of January 21, 2021, on "Recommendations to the Commission on the Right to Disconnect (2019/2181(INL)," has affected fundamental workers' rights and gender equality, given the disproportionate impact of these tools on workers with care responsibilities, who are generally women.

Therefore, according to the Resolution, the right to disconnect should be considered an important social policy tool at the Union level to protect workers' rights, particularly for the most vulnerable and those with caregiving responsibilities.

The following pages will focus on the Resolution of January 21, 2021, entitled "Recommendations to the Commission on the right to disconnect (2019/2181 (INL)", in which the European Parliament affirmed the need to consider the right to disconnect as a fundamental right of the individual in the work of the digital age and called for the adoption of the proposal for a directive.

As regards, the Italian legal system, art. 19, paragraph 1, of Law no. 81 of 2017 establishes that the individual agreement, which regulates the performance of work carried out outside the company premises, "also identifies the rest times of the worker as well as the technical and organizational measures necessary to ensure the disconnection of the worker from the technological instruments of work"

2 The Resolution of January 21, 2021, and the Proposed Directive: Purpose and Definition of Disconnection

The European Parliament with Resolution of January 21, 2021, calls on the Commission to submit a proposal for a Union Directive on minimum standards and conditions to ensure that workers can effectively exercise their right to disconnect.

The Resolution starts from the premise that the "always connected" culture can come at the expense of "fundamental workers' rights and fair working conditions, including fair pay, working time limitation and work-life balance, physical and mental health, occupational safety and well-being, and gender equality, given the disproportionate impact of these tools on workers with caregiving responsibilities" (Recital C of the Resolution).

The Resolution defines the right to disconnection as "a fundamental right that is an inseparable part of the new work patterns of the new digital age," and considers it "an important tool of social policy at the Union level to ensure the protection of the rights of all workers," particularly those who are "most vulnerable" and have "caring responsibilities" (See recital H of the Resolution).

Exercising this right "allows employees to refrain from performing electronic work tasks, activities, and communications, such as phone calls, emails, and other messages, outside of their working hours, including rest periods, official and annual holidays, maternity, paternity, and parental leave, as well as other types of leave, without adverse consequences" (See n. 16 of the Resolution).

Therefore, the European Parliament calls on Member States to ensure protection from "negative repercussions for workers who invoke the right to disconnect" and the establishment of "mechanisms for dealing with complaints or violations of the right to disconnect" and asks the Commission to include the right to disconnect "in its new strategy on health and safety at work and to explicitly develop new psychosocial measures and actions in the framework of health and safety at work." (See n. 16 of the Resolution).

Turning to the examination of the proposed directive, after the reference in the recitals to the principles of protection affirmed in the Nice Charter, the European Pillar and international conventions, Article 1 defines the object and scope of the directive.

The measure, which aims to "establish minimum requirements for workers to use digital tools for work purposes and to exercise their right to disconnect, which must be guaranteed by employers," applies "to all sectors, both public and private, and to all workers, regardless of their status and working arrangements."

Thus, the proposal applies not only to workers who perform remotely, but also to "onsite" workers in both the private and public sectors, demonstrating that the risk of hyperconnectivity is now general in scope (Fenoglio 2018).

From the point of view of definition, art. 2 of the proposal identifies the discussion to the "non-exercise of work activities or communications by means of digital tools, directly or indirectly, outside working hours," referring, as regards the definition of working time to art. 2, point 1, of Directive 2003/88/EC, that is, "any period during which the worker is at work, at the disposal of the employer and in the exercise of his or her activity or duties, in accordance with national legislation and/or practice."

Recital 16 of the proposal also emphasizes that the right to disconnect allows workers "to refrain from performing work-related electronic tasks, activities and communications, such as telephone calls, emails and other messages, outside of their working hours, including rest periods, official and annual holidays, maternity, paternity and parental leave as well as other types of leave, without adverse consequences."

Of note is the expanded scope of the right to disconnect, which covers all periods of non-work, outside of work hours, and not just minimum consecutive rest periods.

It should be pointed out that the opposite is not true. The connection, in fact, is not sufficient to qualify a given period of time as "working time," since it is necessary to verify the existence of all three elements that, pursuant to art. 2, point 1, of Directive 2003/88/EC, as interpreted by the Court of Justice, and implemented by art. 1, paragraph 2, of Legislative Decree no. 66 of 2003, constitute this notion: being at work, at the disposal of the employer and in the exercise of the activity or duties. In this regard, see ECJ. EU September 9, 2003, Jaeger, cited above, paragraph 70.

Article 3 of the proposal requires Member States to ensure that employers "take the necessary measures to provide workers with the means to exercise their right to disconnect," including through the establishment of an "objective, reliable and accessible system for measuring the duration of each worker's daily working time, while respecting workers' right to privacy and data protection."

3 The Implementation and Regulatory Arrangements

The implementation measures for the right to disconnect are contained in Article 4 of the proposal, which requires Member States to ensure that the detailed arrangements for the exercise of this right are established, after consultation with the social partners, and that employers "implement this right in a fair and transparent manner."

In particular, a number of working conditions will need to be guaranteed, some of which echo the wording used by the European Framework Agreement on Digitization for measures to exercise this right.

These include practical ways to disconnect from digital tools, a system for measuring working time, health and safety assessments, including psychosocial risk assessments, and awareness-raising measures, including on-the-job training, that employers are required to take regarding working conditions.

There will also have to be "criteria for granting a waiver to employers from the obligation to implement workers' right to disconnect," which will only be possible in exceptional circumstances, such as "force majeure or other emergencies, provided that the employer provides in writing to each affected worker the reasons demonstrating the need for a waiver whenever one is used" (See Art. 4 of the proposed directive).

Article 4(2) of the proposal further provides that Member States may, "in accordance with national times national, regional, sectoral or employer level which establish or complement the terms and conditions of employment referred to in paragraph 1."

See also Recital 21 of the proposed Directive which states that "the practical arrangements for the exercise of the right to disconnect by the worker and for the implementation of that right by the employer should be agreed by the social partners by means of a collective agreement or at the level of the employer." See also point 21 of the Resolution which "stresses the importance of the social partners in ensuring effective implementation and enforcement of the right to disconnection, in accordance with national practices, and emphasises that it will therefore be important to take into account the work they have already done in this area; considers that Member States should ensure that workers can effectively exercise their right to disconnection, including through collective agreement."

4 The Protection of the Right to Disconnect

Important is the provision on the burden of proof contained in art. 5 of the proposed Directive (See also recital no. 29) , aimed at discouraging retaliatory acts of the employer against workers for exercising the right to disconnect.

According to this provision, in fact, if workers believe that they have been dismissed or have been subjected to other adverse treatment, for having exercised or attempted to exercise the right to disconnect (art. 5, paragraph 1) or for having

made a complaint to the employer or initiated a procedure to ensure the respect of the rights (art. 5(2)), and allege in court facts that give rise to a presumption that they were dismissed or otherwise treated unfavorably for that reason, the burden of proof is on the employer to show that the dismissal or unfavorable treatment was based on different reasons.

This is an important mitigation of the burden of proof along the lines of what is observed in equal opportunity (See art. 40 of Legislative Decree no. 198/2006, according to which the plaintiff "provides factual evidence, also taken from statistical data relating to recruitment, remuneration schemes, assignment of duties and qualifications, transfers, career progression and dismissals, which are capable of establishing, in precise and concordant terms, the presumption of the existence of acts, agreements or conduct that are discriminatory on the grounds of sex"; the defendant is required to demonstrate the "non-existence of discrimination") and whistleblower protection (See art. 54-bis, paragraph 7, of Legislative Decree no. 165 of 2001 provides that "it is the responsibility of the public administration or the body referred to in paragraph 2 to demonstrate that the discriminatory or retaliatory measures taken against the reporter are motivated by reasons unrelated to the report itself", providing that "the discriminatory or retaliatory acts adopted by the administration or the body are null and void." On the subject be allowed to refer to Fiata 2018).

In the same vein, Article 6 of the proposal, in order to make the protection of the right to disconnect effective, requires Member States to ensure that workers "whose right to disconnect has been infringed have access to a prompt, effective and impartial dispute resolution mechanism and have a right of recourse" in the event of a breach of their rights under the Directive.

In addition to identifying how the right to disconnect is to be exercised, Art. 7 of the proposal states that this right should be the subject of adequate and timely information, either in writing or in a digital format that is easily accessible to workers, indicating, specifically, the practicalities of disconnecting from digital tools for work purposes, including any monitoring tools; the employer's system of recording working time Of the employer's health and safety assessment related to the right to disconnect, including psychosocial risk assessments; of the criteria for granting employers a waiver from the obligation to implement the right to disconnect and the criteria for establishing compensation for work performed outside of working hours; of measures to protect workers from adverse treatment; and of measures to implement workers' right to appeal.

5 Sanctions

Article 8 of the proposal introduces a system of sanctions for breaches of the right to disconnect. According to this provision, Member States "shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive or of the relevant provisions already in force concerning the rights

falling within the scope of this Directive, and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate and dissuasive."

The important provision, de jure condito, is not foreseen in our legal system and which could assume some relevance in terms of the effectiveness of the protection of the right to disconnection.

A sanctioning mechanism that recalls the one provided for by the abovementioned delegated bill no. 1883 which, among the principles and directive criteria, at art. 2, letter c) identifies "the application in case of violation of the right to disconnection of art. 615 bis cod. penal, unless the fact constitutes a more serious crime."

In this way, the desired increase in effectiveness would be entrusted to the provision of an obligation of supervision by the employer combined with the criminal sanction in case of violations.

In this regard, it has been correctly pointed out that, in addition to the doubts regarding the applicability of the criminal hypothesis of the "crime of illicit interference in private life" (See art. 615 bis c.p. according to which "Whoever, through the use of visual or sound recording instruments, unduly obtains news or images pertaining to private life taking place in the places indicated in art.614, is punished with imprisonment from six months to four years") to the case in question, what is not convincing about this approach is that, in the bill, the identification of the times and ways of exercising the right to disconnect remains entrusted to the individual agreement instead of the collective agreement.

From the point of view of sanctions, it would be more appropriate to include in art. 18 bis of Legislative Decree no. 66 of 2003 and subsequent amendments, specifically dedicated to offences for violations of working time regulations, a provision to sanction violation of the right to disconnection (Maio 2020).

6 Disconnection Tools for Gender Equality

Article 19, paragraph 1, of Law No. 81 of 2017 establishes that the individual agreement, which governs the performance of the work carried out outside the company premises, "also identifies the rest times of the worker as well as the technical and organizational measures necessary to ensure the disconnection of the worker from the technological instruments of work."

One possible interpretation of this provision is that the rest periods coincide with the disconnection period, which, however, could be much wider than the rest period, coming to coincide with the entire period outside working hours, also by virtue of the provision contained in art. 18, paragraph 1, of the abovementioned law, according to which work is carried out "only within the limits of maximum daily and weekly working time, deriving from the law and collective bargaining."

It follows that "there can be no 'connection'—i.e. work activity—beyond these hours" (Del Conte 2021). It follows that "there can be no 'connection'—i.e. work

activity—beyond these hours," with the consequent centrality of the function of the time of disconnection, preordained not only to the recovery of psychophysical energies, but also to the recovery of private life and "free and dignified existence" of the worker (Luciani 1995, according to which "It should be emphasized that the constitutional norm [Art. 36, paragraph 1, Const, n.d.r.] imposes the limitation of the duration of the working day not so much to allow the reproduction of the labor force (and that is to ensure that the worker recovers their energy and then resume work), but in order to reserve workers the availability of sufficient time to devote to themselves, their families, leisure, cultural enrichment, etc. In a word: to live that "free and dignified existence" of which the first paragraph of the same art. 36 speaks, indicating to the interpreter the key to understanding this whole matter. Finally, the same logic inspires the third paragraph, which provides for the right to weekly rest and paid vacations". See also Occhino (2010).

If this reading is accepted, the Italian legislation appears to be in line with the proposed directive which, as seen, embraces a notion of disconnection coinciding with the period outside working hours.

See Article 2 of the proposal, which identifies disconnection as the "failure to engage in work activities or communications by means of digital tools, directly or indirectly, outside of working hours." See also recital 13 of the attached proposal for a directive Resolution of the European Parliament of January 21: "and periods of on-call time, during which the worker is obliged to spend on-call time in his or her home and to keep himself or herself at the disposal of the employer, must fall within the notion of working time." The same Parliament in recital 20 of the proposal "emphasizes that employers should not require workers to be directly or indirectly available or reachable outside of working hours and that workers should refrain from contacting colleagues for work purposes outside of agreed-upon working hours; recalls that periods during which the worker is available or reachable to the employer are work periods."

The disconnection, as formulated in art. 19, paragraph 1, of Law n. 81 of 2017, still appears to be lacking in terms of effectiveness and concreteness, lacking the provision of an implementation process or a sanctioning system, appropriately provided for in the proposed directive.

This is the most delicate profile and, for this reason, rather than leaving it to the parties to identify the measures to make the right to disconnection effective, a legislative intervention would be appropriate, preferably in support of collective autonomy (Biasi 2021, according to which "bargaining has the fundamental function of ensuring the effectiveness of the rights of agile workers, especially with regard to the new instances of protection of remote work") , as, moreover, advocated by the European Framework Agreement on Digitization of June 22, 2020, and the proposed Directive under comment.

It is also clear that the right to disconnect is not only relevant in remote work and another of the merits of the proposed Directive is its scope, extended to all public and private workers.

Recognition of the right to disconnect in the context of all employment relationships that are characterized by a constant use of technological tools would in fact

have the effect of discouraging the employer from contacting the employee outside the agreed time and strengthen the protection of workers' privacy.

Disconnection could also be the tool to achieve gender equality and avoid exacerbating the unequal burden sharing of unpaid care and domestic work between women and men.

This is in implementation of the Sustainable Development Goals (SDGs) set out in the United Nations 2030 Agenda aimed at "eliminating all forms of discrimination and eliminating all forms of violence against women and girls" and in recognizing and valuing "unpaid care and domestic work through public service provision, infrastructure and social protection policies, and the promotion of shared responsibility within the family and at the national level."

The annual EU Gender Equality Report for the year 2021 confirmed how during the pandemic women took on the bulk of unpaid care and household work, including the new task of supervising online education.

The same report cites data suggesting that the pandemic crisis may have exacerbated the pre-existing gender gap: on average, during the pandemic women devoted 62 h/week to childcare (compared with 36 h for men) and 23 h/week to housework (15 h for men).

In addition, surveys taken during the pandemic showed that 29% of women with young children had difficulty focusing on work because of family responsibilities. Only 16% of men in the same situation complained of similar difficulties (Marinelli 2021).

Against this backdrop, making the right to disconnect effective is also critical to overcoming gender inequality.

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