

90€
69-7.

Faculdade de Direito de Lisboa
Alameda da Universidade, Lisboa



ABDT

ESTUDOS APODIT 9

TRABALHO NA ERA DIGITAL: QUE DIREITO?
WORK IN A DIGITAL ERA: LEGAL CHALLENGES

ABDT

Associação Portuguesa de Direito do Trabalho

ESTUDOS APODIT 9

TRABALHO NA ERA DIGITAL: QUE DIREITO? WORK IN A DIGITAL ERA: LEGAL CHALLENGES

COORDENAÇÃO:

MARIA DO ROSÁRIO PALMA RAMALHO
CATARINA CARVALHO
JOANA NUNES VICENTE



FUNDAÇÃO
CALOUSTE



THE RIGHT TO DISCONNECT: A RESPONSE TO ONE OF THE CHALLENGES RAISED BY THE DIGITAL TRANSITION? EUROPEAN AND BELGIAN PERSPECTIVES¹

Fabienne Kéfer²

Summary: Introduction; I. Minor causes and major effects of a modern calamity; II. The legal treatment of a modern pathology, Conclusion.

1. Digital technology facilitates communication, is time-saving and provides opportunities for economic growth. It transforms our lives and our social interactions and redefines our private and professional spheres. Digital transition raises a number of issues. A pressing challenge stems from the effects of information and communication technologies (ICT) on working conditions. A portion of the knowledge workers has always been working outside the contractually defined working hours. Even if the work overload varies from one occupation to another, it has become a commonality that the worker's brain is seldom switched off. Inspiration does not choose the moment when it comes, and if an idea is not immediately grasped (sometimes in the middle of the night), it becomes irretrievable. For a long time, work overflows have been somewhat limited by physical constraints; the limited number of books or files one is able to bring home was a natural limit to the overflow of work in the worker's private sphere, even though a change had already been observed from the 1980s onwards with the arrival of laptops and the development of telework³. Internet, with its

¹ I would like to express my warmest thanks to Dr. Ljupcho Grozdanovski, post-doctoral researcher at the University of Liège (Belgium), for his invaluable assistance.

² Full Professor at the University of Liège (Belgium).

³ "Long before cellular phones, laptop computers, and other wireless devices transformed hotels and airport lounges into workspaces for a force of mobile employees, teleworkers were completing work away from the office. In the process, they redefined our images of

many developments, has transformed the world of work. Digital technologies make it possible to relocate work geographically and temporally, thus blurring the natural boundaries to working outside the contractual framework it is now possible to work anywhere and at any time.

The “home invasion” triggered by new technologies, the lack of discipline in the use of electronic messaging and digital addiction challenge the right to privacy, the right to rest and the health of the employees (I) Based on the Fordist model of labour organisation, labour law seems, in some regards, to have been overtaken by events. The issue that arises is whether this law is still able to govern the workers whose place of work and working time are no longer defined as clearly as they were in the past (II).

I. Minor causes and major effects of a modern calamity

2. Digital technologies not only affect the content of work but the very dynamic of work performance.⁴

At first glance, digital technologies provide an opportunity to achieve better work-life balance, since workers are able to spatially and temporally reconfigure their work,⁵ meaning that, through the use of new technologies, they are no longer imperatively required to execute their tasks in the employer's premises.⁶

how and where work can be performed, and caused managers to re-examine how they evaluate performance and supervise employees. Additionally, telework presaged changes in the labour contract between employees and firms. Clerical workers, in some of the first telework programmes, reported a loss in benefits and corporate affiliation that mirror what legions of contract workers face today” (D. E. BAILY AND N. B. KURLAND, “A Review of Telework Research: Findings, New Directions, and Lessons for the Study of Modern Work”, *J. Organiz. Behav.*, 2002/23, pp. 383-400, p. 384)

⁴ See Eurofound and the International Labour Office (2017), *Working anytime, anywhere. The effects on the world of work*, Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva, p. 3, available at <https://www.eurofound.europa.eu/publications/report/2017/working-anytime-anywhere-the-effects-on-the-world-of-work>.

⁵ M. HILBRECHT, S. M. SHAW, L. C. JOHNSON AND J. ANDREY, “Remixing work, family and leisure: teleworker's experiences of everyday life”, *New Technology, Work and Employment*, vol. 28, No. 2 (2013), pp. 130 seq.; S. HALFORD, “Hybrid workspace: re-spatialisations of work, organisation and management”, *New Technology, Work and Employment*, vol. 20, No. 1 (2005), pp. 19 seq.

⁶ There is extensive literature regarding the impact of new technologies on the organisation and dynamic of work. New technologies do provide the possibility for a worker to take his/her work wherever he/she goes, be it in the employer's premises or elsewhere. This type of ‘worker-on-the-go’ was named the ‘e-nomad’. See Eurofound (2012), Fifth European Working

Conditions Survey, Publications Office of the European Union, Luxembourg, p. 96, available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1182en.pdf; J. C. MESSENGER AND L. GSCHWIND, “Three generations of Telework: New ICTs and the (R)evolution from Home Office to Virtual Office”, *New Technology, Work and Employment*, vol. 31, No. 3 (2016), pp. 195-208, p. 202.

In addition, ICTs have produced other positive effects such as the reduction of the travel and commuting time to and from work, entailing a reduction in traffic and CO₂ emissions.⁷

There are, however, drawbacks that stem from the (over)use of ICTs. The underlying cause for these drawbacks is the workers' constant state of connection. Given that digital devices (PCs, smart phones, tablets) make it possible to be connected anytime and anywhere, workers are able to dedicate small portions of their time, throughout the day, to social media, online payment of personal bills, etc. and answer e-mails in response to superiors and clients, even in the evenings and on week-ends.⁸ Several inconveniences result from the omnipresence of work, facilitated by digital technologies. Private and family life invasion by work gave way to “tele-availability”⁹ which places the worker under a quasi-permanent scrutiny of the employer and erases the dividing line between work and rest, the quality of which is diminished.¹⁰ Moreover, tele-availability upsets personal and family relationships. E.g. a corporate executive may negotiate, from a hotel room at a ski resort and via Skype, the amount of a bonus to be given to a collaborator. He may also regularly answer e-mails received during periods of “family vacation”, for the purpose of avoiding having to answer the huge amount of received e-mails on the Monday of his return in the office. This is not all. Due to the inappropriate or excessive use of ICT,

⁷ J. POPMA, “The Janus face on the ‘New Ways of Work’ Rise, risks and regulation of nomadic work”, ETUI Working Paper 2013 07, pp. 5-6, available at <https://www.etui.org/Publications2/Working-Papers/The-Janus-face-of-the-New-ways-of-Work-rise-risks-and-regulation-of-nomadic-work>.

⁸ *Idem*, p. 6. “the drawbacks of this trend are also clear: Homeworking can blur the division between work and private life, at the cost of private time”

⁹ According to the expression by J.-E. RAY, « Les astrentes, un temps du troisième type », *Droit social*, 1999, p. 253.

¹⁰ See Eurofound (2017), Sixth European Working Conditions Survey – Overview report (2017 update), Publications Office of the European Union, Luxembourg pp. 52 seq., available at <https://www.eurofound.europa.eu/fr/publications/report/2016/working-conditions/sixth-european-working-conditions-survey-overview-report>.

workers' health has become increasingly threatened.¹¹ Cardio-vascular and musculoskeletal issues have been on the rise, as well as the use of sleeping pills and anxiolytics. It has become quite common that workers suffer from back or shoulder pain, due to the hours spent huddled in front of a computer screen, or that they suffer from epicondylitis, caused by intensive use of the computer mouse. However, the most deleterious and frequently reported effects of hyper-connection are psychosocial in nature. stress and mental overload (sometimes called 'cognitive overflow syndrome'¹²), 'high-tech anxiety' or 'techno-stress.'¹³ or even burnout are the result of intensified work efforts and the emergency work culture, characterised by 'integral immediacy'.¹⁴ As the 'Metting' Report from 2015, commissioned by the French Minister of Labour, points out, a worker at a meeting does, on average, four things simultaneously: he/she answers texts, makes decisions through e-mail, while listening to what is being said at the meeting and reflecting on it after the latter. This enhances the risk of cognitive and emotional overload, accompanied by a sense of fatigue, agitation, along with an increase of psychosocial troubles, given the number of issues that compete for one's attention.¹⁵

The interconnection between these inconveniences related to digitalization is not fortuitous. The workers' physical and mental health can, first, be threatened by extremely long work days, as experiences from the 19th century have shown. It is also threatened by the work conditions which generate a risk of accidents, stress and professional illnesses. Historically, the law has been a guardian of

¹¹ S FANTONI-QUINTON ET C LEBORGNE-INGELAERE, « L'impact des TIC sur la santé au travail », *JCP S*, 2013, 1452

¹² For more detail, see M-M PÉRETÉ et A PICAULT, « Le droit à la déconnexion . une chimère ? Le droit à la déconnexion répond à un besoin de régulation », *Revue de droit du travail*, 2016, pp 592 et s

¹³ "The existence of ubiquitous techno-stress is like a soldier in the camp. Even if he is not working his shift, he still feels the stress from intangible sources all the time as long as he is there" (J POPMA, "The Janus face on the 'New Ways of Work'. Rise, risks and regulation of nomadic work", *op cit*, p 10). See also C MELLNER, "After-hours availability expectations, work-related smartphone use during leisure, and psychological detachment. The moderating role of boundary control", *IJWHM*, vol. 9, No. 2 (2016), pp. 146-164.

¹⁴ According to the expression by F. OST, *Déployer le temps Les conditions de possibilité du temps social*, p. 46, available at <http://www.dhdi.free.fr/recherches/theoriedroit/articles/osttpsoc.htm>.

¹⁵ B METTLING, *Transformation numérique et vie au travail*, septembre 2015, p. 52, available at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/154000646.pdf>

employees' health through provisions limiting working hours of women and children (1889)¹⁶ before the Workers' Safety and Health Act was adopted ten years later (1899)¹⁷. In a similar vein, the EU's Directive 2003/88 of 4 November 2003 concerning Certain Aspects of the Organisation of Working Time, regulates working time in so far as the stretching of the working hours pose a threat to the workers' health¹⁸.

It follows that the factors that cause and enhance these disturbances of the workers' private life, rest time and health are numerous and entangled; among them, the freedom provided by ICT, the volume of exchanged information and digital addiction.

3. ICT did, indeed, give rise to a freedom culture, it enhanced the workers' autonomy in organizing their work and allocating their time. The freedom-enhancing effect of ICT primarily suits the aspirations of white-collar workers. This type of freedom is, however, not the privilege of employees such as cashiers, call centre workers, Amazon's warehouse workers, the workers whose vehicles and parcels they transport are equipped with track and trace devices, allowing one to trace their whereabouts at all times; for these employees, digital technologies usually translate to intensified monitoring from superiors and reduced autonomy in their work performance.¹⁹ Alternatively, for the employees whose activities include knowledge and creativity - engineers, consultants, computer scientists, lawyers, economists etc. - ICT undoubtedly offers opportunities for a flexible organisation of their working time and to achieve a greater balance between professional and personal duties.²⁰ The result, however, is that the workers

¹⁶ Work of Women and Children Act of 13 December 1889

¹⁷ Safety and Health of Workers in Industrial and Commercial Companies Act of 2 July 1899

¹⁸ As such, it is unrelated to any concerns on e.g. paid overtime. The legal basis for Directive 2003/88 is Article 153 of the Treaty on the Functioning of the European Union, which excludes, in paragraph 5, remuneration from its scope of application (*inter alia* ECJ, 1 December 2005, case C-14/04, *Dellas*; ECJ, 11 January 2007, case C-437/05, *Vorel*; ECJ, 4 March 2011, case C-258/10, *Grigore*)

¹⁹ C DEGRYSE, *Digitalisation of the economy and its impact on labour markets*, Working paper 2016 02, ETUI, Bruxelles, p. 41, available at <https://www.etui.org/fr/Publications2/Working-Papers/Les-impacts-sociaux-de-la-digitalisation-de-l-economie>, F WILLEMS, « Track & trace van internationaal mobiele werknemers. privacy-aspecten », *Expat News*, 2017, liv. 10, pp. 8-9.

²⁰ H. FOGARTY, P SCOTT and S WILLIAMS, "The half-empty office: dilemmas in managing locational flexibility," *New Technology, Work and Employment*, vol 26, No 3 (2011), p 184

are permanently available online, they answer work-related e-mails already at breakfast, only to connect for the last time right before going to bed. The work day is thus stretched out, interspersed with private occupations, which are in turn interrupted by digital connection times for professional reasons.

The autonomy that ICT provide also suits young workers, in particular those of 'Generation Y' or 'Millennials', also called 'digital natives', born between 1980 and 2000 *i.e.* in an already digitalized world. Having grown up with Internet, these workers live in a constant state of connection and are prone to ATAWAD (*any time, anywhere and any device*) communication. In addition, they do not appear to be accustomed to formal authority, which is one of the essential traits of an employment contract.

The ICT-related freedom is further reinforced by BYOD (*Bring your own device*) which translates to the use, for professional purposes, of the worker's own digital devices (smartphone, PC, digital watch, etc.) This is of interest to both the employee and the company. The former uses devices that he/she is familiar with and that are, often, more sophisticated than those that the employer could provide, so that the worker is more productive. He/she is constantly reachable on his/her phone number, which serves both personal and professional purposes. Once back home, the worker has all the necessary devices that allow him/her to pursue work at home. At the office, the worker can be regularly logged on his/her social media, answer personal messages or follow the news through his/her technological jewels. The disadvantages of this practice are not non-existent: increased risk of information hacking, particularly if the worker safeguards sensitive data in clouds, risk of information leakage, namely in case of theft of his/her smartphone or data interception information when using public WIFI terminals;²¹ difficulty in legally justifying that an employer access the content safeguarded on the worker's PC in order to control the loyal performance and to protect his/her sensitive data;²² risk for the employee to answer all the questions that reach him/her once he/she has returned home and to be overwhelmed by the extra work.

ICT also reinforces the method of management by objectives. The workers are assigned a goal to be achieved in a given deadline. They are left to independently

decide on the allocation of the working periods and the means to achieving the assigned goal. Although, legally, the workers are bound by an obligation of means, ICT gives rise to an obligation of result.²³ The number of hours spent working is no longer counted; what matters is the attaining of the assigned goal which naturally leads the workers – as their remuneration and work progress depend on it – to use their free time and the digital devices at their disposal, to make work progress²⁴.

4. Another pernicious factor resulting from ICT use is the remarkably large volume of information exchanged at the work place. According to the findings in a study performed by the Radicati Group, a worker exchanged about 125 e-mails per day (95 received, 30 sent).²⁵

Information overload, called 'infobesity' by some sociologists²⁶, is becoming oppressive for the workers, faced with an acceleration of expected response time,²⁷ – as they consider themselves obliged to read, assess and give quick answers to received mail – and are unable to prioritize, through distinguishing urgent from important messages. Workers thus fall in the temptation to answer without delay their work e-mails from fear of being overwhelmed²⁸.

They are victims but also aggressors as some become "compulsive mailers, obsessed with 'answering to all'"²⁹.

²¹ L. BALLARIN, « Télétravail – travail à domicile – travail à distance et flexibilité », *Le contrat de travail dans la nouvelle économie*, Bruxelles, Jeune Barreau, 2001, p. 254

²⁴ L. GRATTON, « Révolution numérique et négociation collective », *Droit social*, 2016, p. 1050; R. KRAUSE, « Numérisation du monde du travail : défis et besoin de réglementation en droit allemand », *Revue de droit du travail*, 2016, p. 640

²⁵ THE RADICATI GROUP, *Email Statistics Report*, 2014-2018, p. 4, available at: <http://www.radicati.com/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf>; THE RADICATI GROUP, *Email Statistics Report*, 2015-2019, p. 3, available at: <https://fliphtml5.com/uteh/jwtn>; THE RADICATI GROUP, *Email Statistics Report*, 2017-2021, available at: <http://www.radicati.com/wp-content/uploads/2017/01/Email-Statistics-Report-2017-2021-Executive-Summary.pdf>. More statistics reports at <http://www.radicati.com/>.

²⁶ C. SAUVAJOL-RIALLAND, « Infobésité, gros risques et vrais remèdes », *L'Expansion Management Review*, 2014/1, pp. 110 seq.; C. BOURJON, S. PERSSON et S. TRÉBUCQ, « L'irrationnel dans l'organisation du temps de travail », *Revue Internationale de Psychosociologie*, 2013, Vol 19(48), pp. 223 seq.

²⁷ B. METTLING, *Transformation numérique et vie au travail*, *op. cit.*, p. 31

²⁸ J.-E. RAY, « Vie professionnelle, vie personnelle et TIC », *Droit social*, 2010, p. 44 seq.

²⁹ J.-E. RAY, « Grande accélération et droit à la déconnexion », *Droit social*, 2016, p. 912

²¹ COMMISSION DE LA PROTECTION DE LA VIE PRIVÉE, *Dossier thématique La vie privée sur le lieu de travail BYOD*, available at: <https://www.privacycommission.be/fr/byod-fr>

²² J.-F. FUNKE, « La pratique du BYOD ("Bring Your Own Device") », *J C P S*, 2015, 36; L. PEETERS, « Bring your own device », *Orientate*, 2015, No 10, pp. 254 seq.; C. BURNET, « Le "BYOD" ou comment le droit au respect de la vie privée du travailleur peut être limité dans l'utilisation de son propre matériel ? », *Cah Jur.*, 2016, pp. 16 seq.

5. Finally, this state of information overdose may stem from the difficulty, or the incapacity, of the worker to operate otherwise. A worker competes with co-workers³⁰ who are constantly available and have the habit of answering their e-mails at 11 p.m. or while on vacation, even though they are not formally required to do so. The major underlying cause for such behaviour is digital addiction: workers do not manage to disconnect, perhaps because they suffer from what is known as FOMO (Fear of missing out), “a form of social anxiety that triggers an obsessive approach to means of professional communication.”³¹ Consequently, it is no longer needed for the employer to provide such instructions in order for tasks to be performed at any time

Quite subtly, subordination dissolves. Does the worker who, during his leisure time, consults his work e-mail only to spend time or because he cannot help it and answers e-mails that do not require a great deal of concentration “because it does not bother him”, still perform work in a subordinate state³²? One is reluctant to include such activity in working time; can we even still talk about work?

In a digitalized context, the traditional markers of work, within the meaning of labour law, are slowly being erased...

II. The legal treatment of a modern pathology

6. In light of the above mentioned excesses and malfunctions, the ILO points to the need to establish a right to digitally disconnect³³. One must wonder if

³⁰ “Peer pressure, negative stigmatization, technology fatigue, the network scale effect, a sense of (dis)empowerment, the need for socio-economic security, or the distress over violating personal and professional relationships, for example, are seen to play a role in both people’s engagement with and disengagement from digital technologies. Complicating matters even further, people’s disengagement from technology is rarely total, but often situational, specific to the medium (e.g. one may opt out of using a cell phone but use a computer), to the time and place of (non)use (e.g. only during work, not during dinner or in the library) and to the purpose of one’s abstinence (e.g. privacy concerns may trigger different types of non-use than productivity concerns).” (P HESSELBERTH, « Discourses on disconnectivity and the right to disconnect », *New Media & Society*, vol. 20, n° 5 (2018), pp. 1994-2010, p. 1997)

³¹ B METTLING, *Transformation numérique et vie au travail*, *op. cit.*, p. 35.

³² R. KRAUSE, « Numérisation du monde du travail. défis et besoin de réglementation en droit allemand », *op. cit.*

³³ Global Commission on the Future of Work, International Labour Office, *Work for a brighter future*, ILO, Geneva, 2019, p. 40, Eur Parl., EU and ILO. *Sharing the Future of Work*, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/638407/IPOL_STU\(2019\)638407_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/638407/IPOL_STU(2019)638407_EN.pdf), p. 105

labour law is apt to grasp the situation of workers whose work place and working time are no longer clearly defined. I shall focus on two aspects in particular: the Belgian and European provisions on working time and rest time (A) and on well-being at work (B).

A. Provisions on working time and rest time

7. In labour law, time is sequenced: working time and rest time follow one another in binary rhythm. Any period that is not working time is rest time.³⁴ This concept of working time is found in Directive 2003/88,³⁵ which regulates working time in relation to the threats to the workers’ health. Under the terms of this Directive, Member States are required to take the necessary measures to ensure that the weekly working time does not exceed 48 hours and that any worker is entitled to 11 hours’ daily rest period, and a weekly rest period of 24 hours in addition to the 11 hours of daily rest. Derogations are allowed under the Directive, “with due regard for the general principles of the protection of the safety and health of workers”.³⁶ Member States are held to require from employers “to set up a system enabling the duration of time worked each day by each worker to be measured in order to ensure effective compliance with maximum weekly working time and minimum daily and weekly rest periods”³⁷

The Belgian Working Time Act (16 March 1971) limits the daily and weekly working time *i.e.* the period during which the worker is available to the employer. The duration of the services provided by the worker should be of a minimum of three hours each and, for every 24h period, the worker is entitled to rest for 11 consecutive hours between two work periods. Sunday work and night work are, as a rule, prohibited although a number of derogations are allowed.

The absence of working time restrictions, as a consequence of digitalisation, challenges the cited provisions. The hyper-connected worker’s activities go

³⁴ According to L. MITRUS, one could infer from the *Matzak* judgment, in particular from the Opinion of AG Sharpston, an acknowledgment of the right to disconnect under Directive 2003/88. See, L. MITRUS, “Potential implications of the *Matzak* judgment (quality of rest time, right to disconnect)”, *EL LJ*, vol. 10, No. 4 (2019), pp. 386-397

³⁵ Directive 2003/88, *cit. supra.*

³⁶ Art. 17 seq.

³⁷ ECJ, 14 May 2019, *CCOO*, case C-55/18, EU C 2019:402 (para. 56). See Th. KLEIN and D. LEIST, “EU law requires working time recording. Consequences of the ECJ-ruling in the case ‘CCOO’ for member states and especially Germany”, *Comparative Labor Law & Policy Journal*, 2019, Dispatch No. 19, available at <https://cllpj.law.illinois.edu/dispatches>.

beyond the legally defined frame. The worker is available to the employer at all times, except when asleep. The minimal rest periods are regularly interrupted by work activities and each such interruption should, in principle, give way to an 11-hour rest period which is, in turn, likely to be interrupted by work. The aspirations for greater autonomy of some workers during their working hours and those of their employers to communicate with the employees without any time restrictions are incompatible with the current state of the law, which does not legally classify the short or “inoffensive” interruptions of the rest periods. In order for these to be regulated, the relevant legal provisions would have to be revised.³⁸ Such changes to the minimum daily rest periods should either fall within the exhaustive list of derogations, set out in Article 17 of Directive 2003/88, or be made by a collective agreement, since Article 18 of this Directive reserves to the social partners the power to derogate to from Article 3 on daily rest.³⁹ For such a collective agreement to be validly concluded, it must be expressly empowered by law; should this not be the case, this collective agreement would be in conflict with the imperative provisions of the Working Time Act.

8. Directive 2019/1158 on Work-Life Balance lays down minimum requirements for achieving greater equality between men and women, by facilitating a reconciliation of work and family life. Parents and carers have the right to suitable leave, flexible working arrangements and access to care services. However, the personal scope of application of Directive 2019/1158 is limited to parents and carers. Furthermore, it does not set out rules from which a right to disconnection could be derived.

9. The legal framework on telework⁴⁰ appears to be ill-suited to regulate the interruptions of the workers’ rest periods. This framework was evidently not intended to govern such cases; it rather addresses employees who work from home for one or several days per week.

³⁸ R. KRAUSE, « Numérisation du monde du travail défis et besoin de réglementation en droit allemand », *op cit*.

³⁹ The same reasoning can be applied to Article 5 on weekly rest.

⁴⁰ Regular telework is governed by the collective agreement no. 85, of 9 November 2005, concerning telework, made compulsory by a Royal Decree of 13 June 2006, implementing the European Framework Agreement on Telework of 16 July 2002. Occasional telework is the subject of Articles 22 seq. of the Feasible and Manageable Work Act of 5 March 2017.

The point that raises some difficulty is not the hour-counting of scheduled telework, as the latter is determined through an agreement exchanged between the parties indicating its frequency, the times at which it is held.⁴¹ The difficulty rather stems from the repeated connecting made outside of the working hours, however short or long, and which does not – or no longer – only concern executives and CEOs.

The redefining of the concept of working time and of the methods of measuring “workload” - a new legal concept which seeks to replace that of working time for certain employees - may be an avenue worth exploring by the social partners and policy makers. In a context of intensified work brought about by digitalisation, management by objectives and increased autonomy of the workers are such that working time is no longer always an adequate instrument for measuring the employees’ workload.⁴² Yet, the workload, whether physical, mental or psychological, influences the quality of life, work performance and worker’s well-being.

B. Prevention of psycho-social overload

10. The European provisions on health and safety at work are of little help in combating the phenomenon of hyper-connection. Directive 89/391 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work establishes the general principles concerning the protection of safety and health, as well as general guidelines for the implementation of these principles. In 1990, the individual Directive 90/270 on Identification and Prevention of Risks related to Work on Screen Display Equipment was enacted on the basis of Article 16(1) of Directive 89/391. However, it is not the aim of this Directive to regulate the hyper-connection of workers.

11. Big corporations did not rely on legislative intervention in order to take measures aimed at reducing the psycho-social load triggered by the infobesity phenomenon. They drafted charters designed to restrict connections beyond a certain hour on work days, or during week-ends and vacations. The content of these

⁴¹ On the feasibility of digital scoring, see O. RIJCKAERT, « Travailleurs à domicile, télétravailleurs et travailleurs nomades », *La loi sur le travail 40 ans d’application de la loi du 16 mars 1971*, Limal, Anthemis, 2011, pp. 328-329.

⁴² B. METTLING, *Transformation numérique et vie au travail*, *op cit*, pp. 18-20, 33-34 and 53

charters varies: some contain e-mail-free days; automatic disconnecting after a certain hour; deletion of e-mails sent to workers while they are on vacation; etc.⁴³

For its part, in 2019, the Luxembourg Court of Appeal recognized the right to disconnect, by stating that a worker had a right to disconnect when on vacation.⁴⁴

In order to vanquish the “digital addiction”⁴⁵ and the over-engagement culture, would the proclamation of a right to disconnect in a legal provision be of any added value?

12. Proclaiming such a right was the route chosen in France where, in October 2016, a legal provision recognized the right to disconnection,⁴⁶ articulated around collective negotiation. French law requires companies of a certain size to annually meet with workers’ representatives in order to negotiate the quality of their work life. In view of separating working time from rest time, this negotiation must include “the modalities of the full exercise, by the worker, of his/her right to disconnect and the establishment of regulatory provisions on the use of digital devices.” If an agreement is not reached, the employer is required to elaborate the conditions for the exercise of the right to disconnect and set out, in favour of the workers and their superiors, “training programs and raise awareness on the reasonable use of digital devices.”⁴⁷ This is a right, which the employee may or may not assert, the effectiveness of which is not guaranteed by any particular provision⁴⁸ – at least not yet – and the purpose of which is to make up for the ineffectiveness of another right, *i.e.* the right to rest.⁴⁹

⁴³ For example, in Germany at Daimler (<http://www.bbc.com/news/magazine-28786117>, <http://www.dailymail.co.uk/news/article-2725228/No-office-Staff-German-car-giant-Daimler-incoming-emails-automatically-deleted-time-guarantee-peaceful-holidays.html>) or at Volkswagen (https://www.challenges.fr/entreprise/volkswagen-bannit-les-e-mails-propres-le-boulot_424).

⁴⁴ Court of Appeal of Luxembourg, 2 May 2019, case No 45230, *Infos juridiques de la Chambre des salariés Luxembourg*, No 5/2019, p. 1.

⁴⁵ J.-E. RAY, « Vie professionnelle, vie personnelle et TIC », *op. cit.*

⁴⁶ Act of 8 August 2016 relating to work, the modernisation of social dialogue and the securing of professional careers (known as the “El Khomri Act”). See C. FROUIN, « L’entreprise face au numérique : incidences de la loi Travail et de la loi pour une république numérique », *Gaz Pal*, 2017, No 10, pp 81 seq.

⁴⁷ Article L2242-17 of the French Labour Code, as amended by the ordinance No 2017-1385 of 22 September 2017.

⁴⁸ It is, in other words, a “right to, without real substance” (L. GRATTON, « Révolution numérique et négociation collective », *op. cit.*)

⁴⁹ T. DAILLER, « L’émergence du droit à la déconnexion en droit du travail », *Petites Affiches*, 1^{er} mars 2017, No 43, pp. 3 and 4; C. MATHIEU, « Le droit à la déconnexion : une chimère?

13. French law has inspired legislators in other countries⁵⁰, notably Italy and Belgium. In Italy, Law No 81/2017 introduces a right to disconnect but is limited to “smart workers” (*lavoratori agile*). The protection designed by this law is based on an individual agreement between workers and employers. The right to disconnect may be implemented by collective agreements⁵¹.

14. In Belgium, a first law proposal, also inspired by the French law, was presented to the Chamber in December 2016.⁵² This proposal is based on the Well-Being at Work Act (1996). It aims to establish a coordinated experimentation, on a national level, on the proper use of e-mails. It also aims to encourage companies to pursue studies based on the results of this experimentation for the purpose of drafting company charters on the exercise of the right to disconnect. By virtue of the law proposal, a company would be required to regulate the use of digital devices, in view of guaranteeing the effective exercise of the right to rest and private and family life. The discussion would be conducted within the Committee for Prevention and Protection at Work. Should this entity fail to reach an agreement, the employer would make a unilateral decision. In the absence of such a Committee, a charter would be negotiated, by the employer, with Union representatives and, should this not be the case, directly with the workers; a power of reconciliation would be given to the Labour Inspectorate in charge of monitoring the application of the Well-Being at Work Act (1996); the employer would preserve the power of unilateral decision within this framework.

The law proposal had the merit of opening the debate and bringing attention on the phenomenon of hyper-connexion. It probably would have benefitted from more clarity and precision in some regards. The main objection that can be addressed is that the law proposal excludes from its personal scope of

« Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l’employeur) », *Revue de droit du travail*, 2016, pp. 592 seq.

⁵⁰ See also C. W. VON BERGEN, M. S. BRESSLER and T.L. PROCTOR, “On the Grid 24/7/365 and the Right to Disconnect”, *Employee Relations Law Journal*, vol. 45, No. 2 (2019), pp 3-20.

⁵¹ M. AVOGARO, “Right to Disconnect: French and Italian Proposals for a Global issue”, *Revista Brasileira de Previdência*, I-2018, pp 106-110 available at http://www.revistabrasileiradeprevidencia.org/wp-content/uploads/2018/04/AVOGARO_RIGHT_TO_DISCONNECT.pdf

⁵² Law proposal amending the Law of 4 August 1996 on well-being at work and the Social Penal Code, aiming to create a right to disconnection, *Doc Parl*, Chambre, Session 2016-2017, No 54-2203.

application management and trusted personnel, who are the first to be affected by digital intoxication. If it is a matter of increasing the well-being of employees oppressed by quasi-permanent connectivity – and executives are listed at the top of the list of victims of the phenomenon by the proposal – it would have, no doubt, been helpful if the reflection had concerned all members of staff, including sales representatives, executive secretaries, engineers etc., so that they can reclaim their free time and better preserve their mental health.

Thereafter, the Minister of Labour declared that he would also like to include, in Belgian labour law, the right to disconnect.⁵³ Articles 16 and 17 of the Reinforcement of Economic Growth Act (26 March 2018) fall far short of the stated objective. Given that the scope of the cited Articles is limited to the companies included in the scope of application of the Collective Agreements and Joint Committees Act (1968) (i.e. mainly private sector companies), the cited Articles merely encourage employers to adopt what the Minister of Labour called a “good staff policy.” In light of the reluctance to proclaim a right to disconnect, the Minister opted for a “right to discuss on the matter” within a “forum *par excellence*” for this purpose, the Committee for Prevention and Protection at Work (or, in the absence thereof, a Union delegation, or directly the workers themselves, in the order set out in Articles 52 and 53 of Well-Being at Work Act), at a pace to be set according to “the needs of each company.”⁵⁴ In this context, as per Article 16 of Reinforcement of Economic Growth (2018), employers are encouraged to set up a concertation within the Committee for Prevention and Protection at Work, on the topic of “disconnection and the use of digital devices”, at “regular intervals”, at the request of staff representatives. No further detail is given. The workers’ representatives are allowed to make proposals and give recommendations, based on this concertation. The agreements reached as a result may, according to the Reinforcement of Economic Growth Act, be incorporated in the working rules or take the form of a collective agreement.⁵⁵

⁵³ Interview of 20 June 2017 on the RTBF (available at https://www.rtbf.be/info/belgique/detail_kris-peeters-veut-des-coaches-anti-stress-et-burn-out-dans-chaque-secteur-d-activites?id=9639057) ; see also *QRVA*, Chambre, No. 54-124, 7 July 2017, Question No 1354 of the Member of Parliament, F Winckel of 13 March 2017, p 144

⁵⁴ *Doc parl*, Chambre, Session 2017-2018, No. 54-2839/01, p 138

⁵⁵ « *It may be desirable that certain agreements on disconnection or the use of digital means of communication be laid down in a collective agreement or in the working rules* » (emphasis added) (*Ibid*).

The goal of the cited Act is, on the one hand, to guarantee “the observance of rest periods, annual leave and other leaves” and, on the other hand, “to fight against excessive stress at work and burn out” However, by choosing not to enshrine these provisions in Working Time Act, the Belgian legislator extended the personal scope of application of the latter to, namely, members of management and trusted staff members. By choosing not to enshrine them into Well-Being at Work Act, the legislator avoided the enforcement of executive measures, destined to ensure the effectiveness of this Act⁵⁶

With a preference to leave it to the companies to decide on the recognition and enforcement of a right to disconnect through the exercise of their freedom to conduct a business,⁵⁷ this Act does not have a great chance at regulating hyper-connexion. The new provisions are more akin to a basic, Human Resources management recommendation than to a binding law.⁵⁸ These provisions rather appear as the result of a “legislative exorcism, implying [...] that the law has an incantatory value”⁵⁹

15. At the European level, there is currently no specific Union legislation on the worker’s right to disconnect from digital tools. However, on 23 June 2020, the social partners have concluded a European Framework Agreement on Digitalisation, which includes arrangements for connecting and disconnecting; the Framework Agreement provides for the social partners to take implementation measures within the next three years. On 21 January 2021, the European Parliament passed a Resolution with recommendation to the Commission on the right to disconnect⁶⁰. Recital H states that: “the right to disconnect is a fundamental right which is an inseparable part of the new working patterns in the new digital era; that right should be seen as an important social policy instrument at Union level to ensure protection of the rights of all workers”; “disconnect” means “not to engage in work-related activities or communications by means

⁵⁶ Namely, Article 128 of the Social Penal Code

⁵⁷ *Doc parl*, Chambre, Session 2017-2018, No 54-2839/01, p 138.

⁵⁸ In so far as law is understood as a desire the fulfilment of which is encouraged through the use of threats (of punishment) See L. FRANÇOIS, *Le problème de la définition du droit*, Liège, Faculté de droit, 1978

⁵⁹ Compare, on incantatory criminal law, M. DELMAS-MARTY, « L’enjeu d’un Code pénal (réflexions sur l’inflation des lois pénales en France) », *Mélanges offerts à Robert Legros*, Université de Bruxelles, 1985, pp 168 seq

⁶⁰ Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).

of digital tools, directly or indirectly, outside working time". The European Parliament calls on the Commission to put forward – after the end of the three-years implementation period of the Framework Agreement – a proposal for a Union directive on minimum standards and conditions to ensure that workers are able to effectively exercise their right to disconnect (n° 13). It includes that co-workers should refrain from contacting their colleagues outside the agreed working hours for work purposes (n° 20). It also includes that workers who invoke their right to disconnect are protected from negative repercussions (n° 22). The recommendation provides for that "The practical arrangements [.] should be [.] agreed by the social partners by means of collective agreement or at the level of the employer undertaking".

However, this Resolution is limited to the disconnection after working time. It doesn't cover the disconnection during working time.

16. To envision disconnection through the prism of the separation between periods of work and periods of rest would be reductionist. The right to disconnect should be examined, not only outside, but also within the working time.⁶¹ how to set up periods during which workers could work while being disconnected, how to allow them to not feel obliged to answer phone calls or e-mails, while they attend an Executive Board meeting, etc.? In other words, how to humanize work so that the worker be freed from digitalisation and its emergencies?⁶² The right to health is important for all workers. All of them, should, therefore be able to press the 'off' button.

From this perspective, the Reinforcement of Economic Growth Act is, no doubt, less efficient than the provisions of the Code on Well-Being at Work and the Well-Being at Work Act. Article 32/1 of the latter defines the psycho-social risks at work such as "the likelihood that one or more workers will suffer psychological, which may also be accompanied by physical harm, as a result of exposure to components of work organisation, work content, working conditions, living conditions at work and interpersonal relations at work, on which the employer has an impact and which objectively entail a danger"⁶³ The

key element is the organisation of work.⁶⁴ The employer has the obligation to identify situations that entail certain risks, as well as to assess them, while taking into account, namely, causes of stress, of burnout, triggered by the workload or of mental harassment.⁶⁵ The employer shall then take the necessary measures to prevent these situations, prevent damage or limit them.⁶⁶ When appropriate, the employer shall carry out an analysis of the specific risks in view of preventing, eliminating or limiting these specific risks, and the consequences thereof.⁶⁷

The information overload is one of these risks; stress, burnout and digital harassment are included in the mental harm category.

Given that the employer is required to take preventive measures against psycho-social risks, it may be expected that he enforces a policy destined to fight against mental oppression stemming from the digital omnipresence; that he investigates on the possibility and the feasibility of setting up organized disconnection, whether this be legally required or not,⁶⁸ and raise staff awareness as regards the reasonable use of digital devices. The absence of such actions would be considered a failure to meet a general obligation of security that the employer must fulfill, as well as a failure to meet specific obligations related to the assessment and prevention of psycho-social risks.

As regards Article 6 of the Well-Being at Work Act, the workers are required to monitor the health of their co-workers, in accordance with the instructions given by the employer. They should, *inter alia*, make proper use of their work material such as digital devices and e-mail services and, of course, refrain from harassing their co-workers. The compliance with the rules of digital courtesy is an integral part of these obligations. It is for the employer to define them, to train the staff on them and to monitor their observance.

Finally, along the lines of collective labour agreement No 100 on the Implementation of an Alcohol and Drug Policy, one may imagine that companies could be given an explicit obligation to adopt a policy to prevent and remedy dysfunctions at work due to digital addiction. Such a policy could be negotiated

⁶¹ L. GRATTON, « Révolution numérique et négociation collective », *op cit.* ; J.-E. RAY, « Grande accélération et droit à la déconnexion », *op cit.*

⁶² A. SUPLOT, « Préface », *Au-delà de l'emploi*, Paris, Flammarion, 2^d ed., 2016, p. xvii

⁶³ Art. 32/1 of the Well-Being at Work Act of 4 August 1996

⁶⁴ P. BRASSEUR et J.-P. CORDIER, « La prévention des risques psychosociaux au travail : des origines à la réforme de 2014 », *Actualités en matière de bien-être au travail*, Bruxelles, Larcier, 2015, p. 146

⁶⁵ Art. 32/2, § 1^{er}, of the Well-Being at Work Act of 4 August 1996.

⁶⁶ Art. 32/2, § 2, of the Well-Being at Work Act of 4 August 1996

⁶⁷ Art. 32/2, § 4, of the Well-Being at Work Act of 4 August 1996

⁶⁸ S. BENZ, « Le droit à la déconnexion, c'est maintenant », *L'expansion*, juillet-août 2016, p. 59, available at www.lexpansion.com.

with employees' representatives or, in the absence of such representatives, with employees directly. The formal working rules could include such measures.⁶⁹ The idea would be to both educate staff in digital courtesy, through the adoption of a code of good practices as regards, namely, compulsive electronic correspondence and to develop a learning to disconnection. Such a learning would be doubly beneficial, since it would concern disconnection as such on the one hand, and would deploy its effects in both professional and personal environment on the other hand; indeed, most of the time, digital addiction is an inseparable whole, like alcoholism or drug use

Conclusion

17. The digital transition has blurred the spatial and temporal boundaries of work. The hyper-connection of employees calls for new regulatory responses which, without deconstructing labour law, would be better adapted to life in modern society.

The rules on working hours and the respect thereof are, in fact, based on the industrial work model. They are ill-suited for various modern forms of work organisation, particularly those linked to the intensive use of digital devices. Under the current legal framework, many, albeit not all, workers have the legal tools to disconnect once they have left their place of work. However, practice shows that the efficiency and effectiveness of these legal tools are somewhat frayed. The employees most exposed to digital invasion are precisely those who are not protected by the Working Time Act. Is it therefore necessary to go as far as the express legal proclamation of a right to disconnect? This is not the option chosen by Belgian law. In any case, if the proclamation of such a right is not accompanied by measures that would ensure its effectiveness, this proclamation would be merely symbolic. It is, then, better to turn to the standard law on well-being at work, which can be more usefully exploited in order to contribute to the improvement of the quality of one's work life in a more satisfactory way.

⁶⁹ A similar invitation was made in a law proposal, presented in 2012 to the Senate (Law proposal on the use of new information and communication technologies in industrial relations, *Doc. Parl.* 2011-2012, No 5-1525/1) and to the Chamber, in 2014 (*Doc. Parl.*, Chambre, session extr. 2014, No 54-130). One of its merits is that it is aimed at workers in both the private and public sectors. The proposal is, however, too succinct in its present form

Nevertheless, the right to escape digital invasion must not be limited to the right to cut oneself off from one's professional world once the work day is over; it must also be considered during working hours in view of protecting the workers against information overload and allowing them to preserve the quality of life at work and their overall psycho-social well-being.