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Right to be Unavailable during Non-working Time? Necessity, Basic Concepts and Key Elements of a Regulation

Alexander Stöhr *

Abstract. In the digital age, the boundaries between working time and non-working time are becoming increasingly blurred. In today's working world, more and more employees are being contacted by their employers during leisure time, which can have a significant negative impact on health and safety at work, work-life balance and recovery from work. This raises the question of whether there is or should be a 'right to be unavailable' during non-working time, which may be universally defined as the right of employees not to engage in work-related activities or communications by means of digital tools or other communication tools outside working time. This article first highlights the practical need for statutory regulation. The main aim of the article is to identify key elements of a fair and balanced regulatory framework, which is based on an analysis of the basic forms of a regulation, including specific regulatory examples from other countries. The view taken here is that a ban on the employer contacting the employee, including appropriate exceptions for emergencies, is preferable to the more common employee's right to ignore contact from the employer ('right to disconnect' or 'right to be disconnected' respectively). Important regulatory issues are the scope, including small business exemptions; preventive action and information; the duty to reconnect; the level of regulation; the protection against adverse treatment or consequences; monitoring and enforcement; sanctions and non-regression.

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A) Introduction

In the past, the distinction between working time and non-working time was simple: employees went to work, and when they clocked in at the company, their working time began, and when they clocked out in the evening and left the company, it ended. However, these times are over. In the digital age in particular, the boundaries between working time and non-working time are becoming increasingly blurred: no matter where you are, emails, text messages and WhatsApp messages will always reach one. This is now also reflected in working life. In the world of work 4.0 and the rise in remote working, the pressure to be constantly available has increased significantly.¹ An empirical survey conducted by Eurofound showed that over 80% of employees who regularly work remotely receive work-related communications outside their contractual working hours during a typical working week, and almost three-quarters are contacted by colleagues out of hours every day or on some day. Contact is made by email (58%), work phone (44%), private phone (33%) or video calling platforms (22%).² Conversely, another survey showed that over 80% of employees spend up to five hours per week on leisure activities during working hours.³ This indicates that, for certain occupational groups, the boundaries between work and leisure time are generally blurring, rather than work simply being shifted into leisure time.⁴ Although constant availability might not yet be a problem for the vast majority of employees, the phenomenon must nevertheless be taken seriously from a working time law perspective.

As is often the case in labour law, the interests involved are complex and conflicting. With regard to the employers, many reasons may necessitate

¹ K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (44); I. Bokor-Szöcs, *The Right to Disconnect*, Journal of Public Administration, Finance and Law, 2023, vol. 2023, 88; C. Mishra, *Should the Right to Disconnect be Legally Enforced?*, International Journal of Trend in Scientific Research and Development, 2022, vol. 6, 2069.

² Eurofound, *Right to disconnect: Implementation and impact at company level*, 2023, p. 27.

³ IZA/XING-Studie „Arbeiten in Deutschland“, 2019, <https://newsroom.iza.org/de/archive/news/die-grenzen-zwischen-arbeit-und-freizeit-verschwimmen-in-beide-richtungen>.

⁴ M. Dolobáč, K. Skolodová, *The Right to Disconnect in the Context of Employees’ Mental Health*, Adam Mickiewicz University Law Review, 2022, vol. 14, 163 (168).

contacting employees, for example a change to the originally planned working hours in everyday business practice, such as illness of other employees, short-term absences or malfunctions of production facilities or IT systems, changes in weather conditions and externally induced changes in work requirements. Hence, employers have an interest to communicate with employees during their leisure time. But some employees also appreciate the blurring of boundaries. It is widely assumed that those born after 1980 ('Generations Y and Z') have a new understanding of leisure and work, as they read work emails after hours, but use social media at the office and sometimes want to leave at four o'clock to continue working in a café. Especially for employees with children who require care it is advantageous if they can take an early break from work in the afternoon and continue working from home late in the evening. On the other hand, flexibility and constant availability, including the invasion of employee privacy, can have a significant negative impact on health and safety at work, work-life balance and recovery from work. Employees subjected to continuous algorithmic monitoring and availability requirements report higher stress levels, sleep disorders, and burnout.⁵ Against this background, the European Parliament stresses the importance for both mental and physical health of being able to switch off from time to time.⁶

These developments led to a lively debate and a wealth of literature on the question of how employees can be better protected from the intrusion of work-related tasks into their working lives, in particular whether there is or should be a 'right to be unavailable' during non-working time. This question can be classified under the broader topic of 'working hours'⁷ or 'health and safety'⁸ respectively, whilst the issue of remuneration is usually

⁵ M. Dolobáč, K. Skolodová, *The Right to Disconnect in the Context of Employees' Mental Health*, Adam Mickiewicz University Law Review, 2022, vol. 14, 163 (167); K. Dumančić, *Implementation of "the right to disconnect" into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (45); I. Bokor-Szőcs, *The Right to Disconnect*, Journal of Public Administration, Finance and Law, 2023, vol. 2023, 88 (94).

⁶ <https://www.europarl.europa.eu/topics/de/article/20210121STO96103/auch-mal-abschalten-können-parlament-fordert-recht-auf-nichterreichbarkeit>.

⁷ D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (128).

⁸ I. Senatori, C. Spinelli, *(Re-)Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience*, Italian Labour Law e-Journal, 2021, vol. 14, 209 (236 f.).

regarded as a separate matter.⁹ Unavailability is a vague term. In this context it means the temporary interruption of communication between employer and employee. The term ‘disconnection’, which frequently appears in the discussion (‘right to disconnect’), indicating a temporary separation or a split, is largely synonymous with this.¹⁰ In this article, however, the term ‘unavailability’ is preferred, as the ‘right to disconnect’ is understood as a subset of a broader ‘right to be unavailable’, which may be universally defined as the right of employees not to engage in work-related activities or communications by means of digital tools (including inter alia smartphones, tablets, laptops and desktop computers) or other communication tools outside working time.¹¹ Whilst many countries have now established a statutory right to be unavailable (to a greater or lesser extent), indicating a acceptance as a component of modern labour law,¹² there is as yet no explicit provision at European level or in several developed countries like Germany. According to a survey of employees in Vietnam, 75% of the respondents believe that a right to be unavailable should be legally recognised.¹³ Among those in favour of such a regulation, there is disagreement as to whether it should constitute a ‘new’ right with a peculiar content (‘extensive approach’) or whether it should be content to ‘restyle’ established rules on working time (‘minimalistic approach’).¹⁴ The first aim of this article is to highlight the practical need for statutory regulation. The focus here is on the situation in developed countries, which differs fundamentally from that in developing countries. India, for example, is characterised by intense competition in every field due to

⁹ On the relationship between remuneration and the right to be unavailable T. Jochman, *Effects on Employees' Compensation Under the Right to Disconnect*, Marquette Benefits and Social Welfare Law Review, 2021, vol. 22, 209 (217).

¹⁰ On this term in depth D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (128).

¹¹ European Law Institute, *Guiding Principles on Implementing Workers' Right to Disconnect*, 2023, p. 13; K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42; J. Hopkins, *Managing the Right to Disconnect—A Scoping Review*, sustainability, 2024, vol. 16, 4970.

¹² K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (47); see also N.C. Thang, *A Comparative Study of the Right to Disconnect with Policy Recommendations for Vietnam*, Hong Kong Journal of Social Sciences, 2025, vol. 65, 136 (142).

¹³ N.C. Thang, *A Comparative Study of the Right to Disconnect with Policy Recommendations for Vietnam*, Hong Kong Journal of Social Sciences, 2025, vol. 65, 136 (144).

¹⁴ I. Purificato, I. Senatori, *Implementing the European Social Partners Framework Agreement on Digitalization at the Crossroads of Collective Bargaining and Participation*, Diritti Lavori Mercati International, 2024, 285 (289).

overpopulation and by constant fear of being outperformed by other countries.¹⁵ The main aim of the article is to identify the key elements of a fair and balanced regulatory framework, which is based on an analysis of the basic forms of a regulation, including specific regulatory examples from other countries. The view taken here is that a ban on the employer contacting the employee, including appropriate exceptions for emergencies, is preferable to the more common employee's right to ignore contact from the employer ('right to disconnect' or 'right to be disconnected' respectively).

B) Necessity for statutory regulation

Several countries do not formally legislate a right to be unavailable. The following section examines whether statutory regulation is necessary or at least desirable at all.

I. Right to be unavailable without statutory regulation? The debate in Germany

A statutory regulation might be dispensable if a right to be unavailable is already implied by general principles. This will be discussed in the light of the debate in Germany, which concerns the fundamental issues of (European) working time law and could therefore be applied to other countries as well. In Germany, only private autonomous regulations exist at company level. Some companies (e.g., Volkswagen and Daimler) have their own systems for preventing emails from being delivered to employees outside of their standard working hours ('Self-Regularity Model').¹⁶ However, if there is no agreement like this, it has to be figured out to what extent limitations on availability arise from the law. The debate was sparked primarily by the following case:

W is employed by E as an emergency paramedic. A works agreement for duty planning provides for stand-in shifts and for these, among other

¹⁵ Sceptical, therefore, about a right to be unavailable C. Mishra, *Should the Right to Disconnect be Legally Enforced?*, International Journal of Trend in Scientific Research and Development, 2022, vol. 6, 2069 (2071). N.C. Thang, however, advocates for legislation in Vietnam, see *A Comparative Study of the Right to Disconnect with Policy Recommendations for Vietnam*, Hong Kong Journal of Social Sciences, 2025, vol. 65, 136 (143 f.).

¹⁶ P.M. Secunda, *The Employee Right to Disconnect*, Notre Dame Journal of International & Comparative Law, 2019, vol. 9, 1 (29 ff.); J. Hopkins, *Managing the Right to Disconnect—A Scoping Review*, sustainability, 2024, vol. 16, 4970.

things, that – if no specific assignment is possible beforehand – so-called unspecific stand-in shifts are assigned, which can be specified later (for day and late shifts until 8 p.m. on the previous day). If this does not happen, the employee will be present at the assigned place of work at the start of the shift. In this respect, it is sufficient to notify the employee by telephone at 7.30 a.m. that he/she is available for work. An unspecified stand-in shift is entered in the duty roster for W for 8 April 2026. E orders W to work at 7.30 pm the day before by text message at 6 am.

1. Court rulings

The Schleswig-Holstein Regional Labour Court ruled that employees are not obliged to check whether their work schedule has been changed during their leisure time. They are also not obliged to accept a message from their employer – for example, by telephone – or to read a text message. If they do not take note of information about a change to their work schedule, they will only receive this information when they start work. The Court stresses that one of the most fundamental personal rights is that a person can decide for themselves who they want to be available to during this time and who they do not. Therefore, during their non-working time, employees are not obliged to perform work for the benefit of others, even for a very short period of time, but have the right to be unavailable.¹⁷ Similarly, the Labour Chamber of the French Supreme Court had already ruled in 2001 and 2004, prior to the entry into force of a statutory provision, that ‘the employee is under no obligation either to accept working at home or to bring there his files and working tools, and that ‘an employee cannot be reprimanded for being unavailable outside working hours’.¹⁸

However, the German Federal Labour Court did not agree with this: If the employees are aware, based on company regulations, that the employer will specify the time and place of work for the following day, the employees are obliged to take note of such instructions, communicated by text message, even during their leisure time. The Court derives the employee's obligation to take note of the text message in their non-working time as a so-called secondary obligation to ensure performance.¹⁹

¹⁷ Schleswig-Holstein Regional Labour Court of 27 September 2022 – 1 Sa 39 öD/22.

¹⁸ LÉGIFRANCE, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007473856>; on this C. Mishra, *Should the Right to Disconnect be Legally Enforced?*, International Journal of Trend in Scientific Research and Development, 2022, vol. 6, 2069 (2070).

¹⁹ German Federal Labour Court of 23. August 2023 – 5 AZR 349/22

This is not supposed to conflict with working time and occupational health and safety law, since a rest period exists if the restrictions do not reach a significant degree of intensity and allow the employee to dispose of their time and pursue their own interests without major restrictions (de minimis threshold). According to the German Federal Labour Court, such a degree of intensity is not reached by the secondary obligation to take note of the specific details of the service. The employee is free to choose when to take note of the instructions, and the time involved is so minimal that it does not significantly impair the possibility of using leisure time.²⁰ However, the employer must take the employee's interests into account when exercising its right to issue instructions. During illness, the employer must limit instructions to urgent operational reasons, for example, so as not to jeopardise the recovery process.²¹

The ruling of the Court has far-reaching consequences for practice. This is because the grounds of the judgment base the obligation under the employment contract not only on the works agreement in the specific individual case, but also interprets it as part of every employment contract via a secondary obligation to ensure performance. In any case, if there is an existing company practice or foreseeable need for short-term changes, the employee will be obliged to take note of corresponding notifications from the employer. It is not the receipt of an instruction that matters, but the fact that the employee must also accept instructions after the end of the working day.²²

2. Critical evaluation

Some authors agree with the German Federal Labour Court's view: if certain obligations continue to apply during incapacity for work, then nothing else can apply during non-working time.²³ However, it is right to disagree with this and to assume a right to be unavailable in the sense of a 'right to disconnect' without specific legal regulation. This is already supported by the purpose of rest periods, which first and foremost shall promote health by minimising, as far as possible, any risk to the safety and health of employees that may arise from a series of work phases without

²⁰ German Federal Labour Court of 23. August 2023 – 5 AZR 349/22.

²¹ German Federal Labour Court of 2. November 2016 – 10 AZR 596/15.

²² J. Joussen, *Recht auf Unerreichbarkeit außerhalb der Arbeitszeit?*, juris – Die Monatszeitschrift, 2024, 155 (157).

²³ E. Salamon, L. Iser, *Erreichbarkeit des Arbeitnehmers außerhalb der Arbeitszeit – leistungssichernde Nebenpflichten*, Neue Zeitschrift für Arbeitsrecht, 2024, vol. 4, 242 (245).

the necessary rest breaks.²⁴ As the European Court of Justice (hereinafter: ECJ) repeatedly stresses, the right of every employee to a limitation of maximum working hours and to daily and weekly rest periods is not only a rule of Union social law that is of particular importance, but is also expressly guaranteed in Article 31(2) of the Charter of Fundamental Rights of the European Union.²⁵ Therefore, it is of secondary importance that the employee's personal freedom is only slightly impaired by taking note of (and responding to) notifications from the employer during their non-working time. The criterion of significant restrictions is only used by the ECJ for periods during which the employee is not at work but must remain available. If the employee actually performs work, the intensity of the work is not relevant according to the ECJ.²⁶ With regard to the safety and health of employees, any work-related message can impair the value of rest period, as it can cause a brief moment of anxiety ('What does my boss want now?'). The author himself once received an email from his former boss in the evening during watching football in TV, in which the boss asked about a matter in a critical tone, spoiling the evening for the author.

Furthermore, it is incorrect to state that the employee is not required to communicate with the employer, as claimed by the German Federal Labour Court, since receiving instructions also constitutes communication. This also requires the employee to interrupt their rest period. Even if, in this specific case, the employee was able to decide for himself when to take note of the employer's messages, the employee is still required to perform an action at a time when he is not obliged to do so. Even if an employee does not have to look at his smartphone all day long, the mere fact that his employer can contact him and give him instructions at any time means that he is unable to switch off. And what instructions should employees take outside of working hours? What additional work should they do outside of working hours? Although a reply to an email or a text message relating to work might take no more than five minutes, the time adds up quickly.²⁷ Furthermore, the reference to the minimal time required has the potential to get out of hand and blur the boundaries between contractual work obligations and leisure time. Especially in times of increasing digitalisation and blurring of the

²⁴ ECJ of 7. September 2006 – C-484/04.

²⁵ ECJ of 14. May 2019 – C-55/18 (CCOO).

²⁶ ECJ of 21. February 2018 – C-518/15 (Rudy Matzak).

²⁷ T. Jochman, *Effects on Employees' Compensation Under the Right to Disconnect*, Marquette Benefits and Social Welfare Law Review, 2021, vol. 22, 209 (215).

boundaries between working hours and non-working time, a clear distinction is important.²⁸

II. Arguments for and against statutory regulation

Underlying the discussion is the tension between flexibility, industrial democracy and corporate self-regulation on the one hand and legal protection on the other hand: a lack of statutory regulation allows autonomous, tailored and context-specific solutions, whereas, conversely, there is no universal protection.²⁹ Some authors deny the necessity of a statutory regulation on the grounds that the blurring of the boundaries between work and leisure time is not a legal problem, but a mere social one. Being online is commonplace, and constant availability is supposed to be due to a widespread fear of missing out (FOMO), especially among younger people. Legal regulation should not help against this. Rather, what is needed is an awareness that the end of working hours also means the end of availability, and the willingness of the parties to the employment contract to maintain a clear separation here.³⁰ Indeed, studies indicate that even in firms with unavailability policies, a work place culture of availability persists.³¹ However, according to the Eurofound survey, FOMO is an important but by far not the only reason why employees respond to messages during their non-working time. While the respondents indeed stated that they want to “stay on top of things” (75%), they also feel responsible for their assignments (82%), think that this is what is expected from them (75%), fear negative consequences if they don’t respond (61%), are obliged to respond immediately (59 %), or believe that this constant availability will assist with their career

²⁸ J. Joussen, *Recht auf Unerreichbarkeit außerhalb der Arbeitszeit?*, juris – Die Monatszeitschrift, 2024, 155 (157).

²⁹ On this in depth K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (51 ff.).

³⁰ L. Rudkowski, *Abgrenzungsfragen der Arbeitszeit – Zugleich Vorschlag für Anpassungen des Arbeitszeitgesetzes*, Zeitschrift für Arbeitsrecht, 2022, 510 (523); K. Jaworska, *The Right to Disconnect*, Studies on Labour Law and Social Policy, 2022, vol. 29, 51 (57); see also A. Kaishatayeva et al, *Right to Disconnect: Complexities of Legalization (In the Context of International Regulatory Experience)*, Journal of Law and Sustainability Development, 2024, vol. 12, 1 (20).

³¹ A. Ginès i Fabrellas, *How to Ensure Employees’ Well-being in the Digital Age?*, IDP, No. 35, 2022, 7; K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (51).

progression (50 %).³² Against this background, simply changing the attitude or rising awareness do not provide significant protective effects.³³ Only a statutory provision or a private agreement binding the parties to the employment contract to clear rules can provide the certainty that one may safely ignore such messages.³⁴ A right to be unavailable is intended to safeguard the restorative function of leisure time and thus the health of employees by allowing a temporary disconnection from work, protecting against an imperceptible ‘slipping back’ into work, and limiting and changing the ‘always on’ culture.³⁵ In a way, the right encapsulates the demand for time sovereignty in a digital context.³⁶ Furthermore, it is intended to improve the work-life balance.³⁷ Ideally, it could even – just like many other provisions of labour law – offer benefits to the employer themselves, since it should make the employees more productive: they are supposed to be left with a greater sense of physical and mental wellbeing, job satisfaction, lower turnover, as well as a decreased chance of ‘quiet quitting’.³⁸ Legislation is also desirable even if the right to be unavailable is derived from general principles, as advocated above, since general principles cannot take into account the specific circumstances of

³² Eurofound, *Right to disconnect: Implementation and impact at company level*, 2023, p. 30 ff.

³³ D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (128).

³⁴ B. Waas, *Das Recht auf Nichterreichbarkeit*, in: W. Brose et al (Eds.), *Festschrift für U. Preis*, C.H. Beck, München 2021, p. 1427 (1436) f., strongly in favour of regulation M. Dolobáč, K. Skolodová, *The Right to Disconnect in the Context of Employees’ Mental Health*, Adam Mickiewicz University Law Review, 2022, vol. 14, 163 (177).

³⁵ European Law Institute, *Guiding Principles on Implementing Workers’ Right to Disconnect*, 2023, p. 15; K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (43); I. Purificato, I. Senatori, *Implementing the European Social Partners Framework Agreement on Digitalization at the Crossroads of Collective Bargaining and Participation*, Diritti Lavori Mercati International, 2024, 285 (289, 291).

³⁶ I.V. Lagutina, *Right to Disconnect as One of the Employees’ Digital Labour Rights*, *Juris Europensis Scientia*, 2022, vol. 3, 28 (29); K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (43).

³⁷ European Law Institute, *Guiding Principles on Implementing Workers’ Right to Disconnect*, 2023, p. 15; D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (131).

³⁸ G. Golding, *Introducing Australia’s New Right to Disconnect*, *Labour & Law Issues*, 2024, vol. 46, C.1 (C.18). See also L. Lerouge, F. Pons, *Contribution to the study on the ‘right to disconnect’ from work*, *European Labour Law Journal*, 2022, vol. 13, 1 (15); C. Mishra, *Should the Right to Disconnect be Legally Enforced?*, *International Journal of Trend in Scientific Research and Development*, 2022, vol. 6, 2069 (2072).

individual businesses. The legitimate interest in flexibility, industrial democracy and corporate self-regulation can be taken into account by limiting statutory provisions to setting out general guidelines, leaving the details to be determined by the parties to the collective agreement, the employer and the employee.³⁹

C) Approaches to statutory regulation

I. Restriction of the scope of application to non-working time

The right to be unavailable can only be a right that applies to the period before work is performed, because its realisation deprives the employee of the opportunity to even become aware of the existence of work tasks or corresponding instructions from the employer.⁴⁰ Since non-working time and rest do not necessarily coincide, one can argue that the right to be unavailable actually represents an even shorter period than non-working time, namely the period during which more intense measures are implemented to protect the psycho-physical well-being of the employee and to ensure the balance between work and private life through disconnection from technological tools.⁴¹

European working time law is characterised by a strict separation between ‘working time’ and ‘rest period’, which is the same as leisure time, free time, spare time etc. In this article, the term ‘non-working time’ is preferred for the sake of clarity. There is no intermediate category between working time and non-working time, which means that every employee's behaviour must be assigned to one of these two categories in order to apply the provisions of working time law. The Working Time Directive 2003/88/EC defines ‘working time’ any period during which a worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice (Article 2 No. 1), whereas ‘rest period’ is defined as any period which is not working time (Article 2 No. 2). The distinction is sometimes difficult to draw and is handled differently in various jurisdictions. One issue, for example, is

³⁹ For possible details of the legal provisions, see below E).

⁴⁰ D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (133); B. Waas, *Das Recht auf Nichterreichbarkeit*, in: W. Brose et al (Eds.), *Festschrift für U. Preis*, C.H. Beck, München 2021, p. 1427 (1428).

⁴¹ D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (133); see also E. Fiata, *L'iniziativa europea sul diritto alla disconnessione*, *Lavoro Diritti Europa*, 2021, 16.

how to classify on-call duty, where employees must be available to their employer at all times, but they may remain at a location of their own choosing. The employee must only be able to start work in good time if necessary. While working time was previously mostly denied, the ECJ has assumed working time at least if the employee must be able to reach the workplace within 8 minutes.⁴² Hence, all circumstances must be taken into account, in particular the geographical radius of action.

The classification of constant availability is also controversial. This refers to the more or less pronounced expectation that the employee can be contacted via smartphone and will respond to enquiries immediately or at least promptly.⁴³ If this would be considered as working time, there would be no need for a right to be unavailable, as working time regulations would apply and ensure the protection of the employee's health. However, the better arguments speak against the assumption of working time. Constant availability is purely factual in nature.⁴⁴ This is supported not least by the case law of the ECJ, according to which the actual workload of the employee is decisive: it must be examined, taking all circumstances into account, whether the employee's ability to freely organise his or her life is objectively significantly impaired – if so, this constitutes working time.⁴⁵ Furthermore, there would be a contradiction in comparison to on-call duty, which in most cases does not count as working time, even though the employee may actually be called upon to work. If constant availability were to be considered working time due to the associated stress, the category of on-call duty would no longer be tenable and would have to be considered working time in its entirety, just like standby duty. The 'threat' of work is not to be equated with the performance of work itself. It can only be classified as work if the on-call duty reaches a level of intensity that transforms quantity into quality.⁴⁶ Therefore, constant availability is only as a special form of on-call duty.⁴⁷

⁴² ECJ of 21 February 2018 – C-518/15 (Rudy Matzak); ECJ of 11. November 2021 – C-214/20 (Dublin City Council).

⁴³ I. Bokor-Szőcs, *The Right to Disconnect*, Journal of Public Administration, Finance and Law, 2023, vol. 2023, 88 (95).

⁴⁴ L. Rudkowski, *Abgrenzungsfragen der Arbeitszeit – Zugleich Vorschlag für Anpassungen des Arbeitszeitgesetzes*, Zeitschrift für Arbeitsrecht, 2022, 510 (521).

⁴⁵ ECJ of 11.11.2021 – C-214/20 (Dublin City Council).

⁴⁶ H. Hanau, *Zum Flexibilisierungspotenzial der Arbeitszeitrichtlinie*, European Journal of Labour Law, 2019, 423 (429).

⁴⁷ W. Kohte, *Arbeitsschutz in der digitalen Arbeitswelt*, Neue Zeitschrift für Arbeitsrecht, 2015, 1417 (1423).

However, the assessment as working time and the right to be unavailable must be strictly separated from each other. The right to be unavailable is not about classifying a specific activity as working time, but rather about the related question of the extent to which the employer may interrupt contact with the employee during their non-working time. It would be a misunderstanding to derive a right to be unavailable from the limitation of working time. The question is not whether the employee is obliged to work during a certain period of time, but rather whether the employee may even go so far as to prevent the employer from contacting him at all during this period. It is one thing for the employee to no longer be obliged to perform work, but it is quite another to allow them to go ‘underground’ from their employer.⁴⁸

II. Basic concepts

It has already been mentioned in the introduction that right to be unavailable can be universally defined as the right of workers not to engage in work-related activities or communications by means of communication tools outside working time. A right in this sense with its own distinct content is conceivable in three variants: statutory targets, a direct right of the employee to ignore contact from the employer, and a ban on the employer contacting the employee.⁴⁹ The following does not address a mere restyling or reenforcing the existing regulations. This ‘minimalist’ approach, for example, underlies the European Social Partners’ Framework Agreement on Digitalisation of 2020,⁵⁰ according to which unavailability is construed as an updated and reinforced implementation of the traditional right to rest.⁵¹ Even though improving the enforceability of existing labour law is often sufficient and would

⁴⁸ B. Waas, *Das Recht auf Nichterreichbarkeit*, in: W. Brose et al (Eds.), *Festschrift für U. Preis*, C.H. Beck, München 2021, p. 1427 (1429).

⁴⁹ D. Calderara, *Labor Law and the Right to Disconnect*, *Gdańskie Studia Prawnicze*, 2025, vol. 2, 127 (129). An overview of the regulations in 15 countries is provided by C. Pocock, *Right to Disconnect 2026: 15 Countries, 4 Frameworks, 1 Plan*, <https://employsome.com/blog/right-to-disconnect/>.

⁵⁰ Available online under https://www.etuc.org/system/files/document/file2020-06/Final%2022%2006%2020_Agreement%20on%20Digitalisation%202020.pdf.

⁵¹ I. Purificato, I. Senatori, *Implementing the European Social Partners Framework Agreement on Digitalization at the Crossroads of Collective Bargaining and Participation*, *Diritti Lavori Mercati International*, 2024, 285 (292).

certainly be preferable to a situation of constant availability,⁵² the following section explores more extensive solutions.

1. Statutory targets

The weakest form of a right to be unavailable consists of statutory targets, to which legislation in many countries is limited. Such regulations are still characterised by a high degree of restraint and should be regarded more as ‘soft law’.⁵³ In France, since 2016, for workplaces with 50 employees or more, the right to be unavailable must be made a mandatory subject of collective bargaining – and thus, where applicable, of a subsequent collective agreement. Accordingly, annual negotiations must be held on ‘the conditions for the full exercise of the right to be unavailable by the employee and the introduction of measures to regulate the company’s use of digital tools, in order to ensure compliance with rest periods and holiday entitlement, as well as respect for personal and family life’. In the absence of an agreement, the employer must, after obtaining the opinion of the Economic and Social Committee, draw up a charter setting out, among other things, ‘the procedures for exercising the right to be unavailable’.⁵⁴ This approach seeks to combine legal compulsion with contractual flexibility by mandating negotiation without prescribing a specific outcome, thereby preserving sectoral autonomy. It embeds the right to disconnect within participatory workplace governance, rather than treating it as a static statutory entitlement. One advantage of this approach might be that the law ensures that measures are tailored to sectoral and enterprise specific contexts. Conversely, this implies a decentralised and outcome-dependent implementation with the result that the actual content of unavailability agreements varies significantly.⁵⁵

⁵² G. Davidov rightly speaks of an ‘enforcement crisis of labour law’, see *A Purposive Approach to Labour Law*, Oxford University Press, Oxford 2016, p. 224; in depth *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, International Journal of Comparative Labour Law and Industrial Relations, 2010, vol. 26, 61.

⁵³ K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (46 ff); B. Waas, *Das Recht auf Nichterreichbarkeit*, in: W. Brose et al (Eds.), *Festschrift für U. Preis*, C.H. Beck, München 2021, p. 1427, 1431; L. Rudkowski, *Abgrenzungsfragen der Arbeitszeit – Zugleich Vorschlag für Anpassungen des Arbeitszeitgesetzes*, Zeitschrift für Arbeitsrecht, 2022, 510 (522).

⁵⁴ Art. L.2242-17 Code du Travail.

⁵⁵ K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (48, 50 f.).

Under the original 2018 regulation in Belgium, the right to be unavailable has been subject to consultation with employee representatives and collective agreements.⁵⁶ Under Article 16, ‘consultations on the separation from work and the use of digital communication tools must be organised at regular intervals and whenever the employee representatives on the committee so request’. The committee may then, on the basis of these consultations, draw up proposals and submit opinions to the employer. Under Article 17, any agreements resulting from the consultation may be incorporated into the so-called work regulations in accordance with statutory provisions or through the conclusion of a collective agreement. In 2022, more extensive protection was introduced for civil servants, which will be illuminated below.

In Italy, since 2017, the legislature has paved the way for individual agreements on the right to be unavailable by establishing requirements for a written agreement to be concluded between the employer and the employee, which deals with the performance of work outside the workplace. This sets out the employee’s rest periods, as well as the technical and organisational measures required to ensure the ‘separation of the employee from the technical work equipment’.⁵⁷ The right to be unavailable is restricted to work activity in agile mode, in compliance with any agreements signed by the parties and subject to any agreed periods of availability. The characteristic element of agile work, as defined in Articles 18 – 23, is the flexibility in time and space of its execution, consequent to the possibility of carrying it out ‘without strict time and place constraints’. The so-called space and time de-structuring of the work performance is further characterized by mobility.⁵⁸ While not providing a definition of unavailability, the law is supposed to indirectly lead the legal operator to believe that it pertains particularly to the sphere of non-working time.⁵⁹ If the minimum rest period is violated, employees may claim compensation for damage to their physical and mental health.⁶⁰

⁵⁶ Loi du 26 mars 2018 relative au renforcement de la croissance économique et de la cohésion sociale.

⁵⁷ Legge 22 maggio 2017, n. 81.

⁵⁸ I. Senatori, C. Spinelli, *(Re-)Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience*, Italian Labour Law e-Journal, 2021, vol. 14, 209 (231 ff.).

⁵⁹ C. Timellini, *La disconnessione bussola alla porta del legislatore*, in: Variazioni su Temi di Diritto del Lavoro, Giappichelli Editore, Torino 2019, p. 315 (332); D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (128).

⁶⁰ S. Kubiak, K. Magnuska, *The Right to Disconnect: Real relief for employees or just additional obligations for employers?*, 2021, p. 6.

In Spain, since 2018, employees and public sector workers have ‘the right to digital disconnection in order to ensure that their rest periods, holidays and personal and family privacy are respected outside of working hours as defined by law or collective agreements.’⁶¹ In contrast to the French model, the Spanish law frames disconnection primarily as a facet of digital privacy, situating it within the broader context of data protection.⁶² Under subsection 2, the arrangements for exercising this right are subject to ‘the provisions of the collective agreement or, in the absence of such provisions, the agreement between the company and the employee representatives’. Furthermore, under paragraph 3, the employer shall, after consulting the employee representatives, draw up an internal policy for employees setting out, amongst other things, the procedures for exercising the right to be unavailable. In 2021, this law was extended to cover mobile working.⁶³

2. Employee’s right to ignore contact from the employer

More significant is a direct right of the employee to ignore messages from the employer – in other words, to ‘log out’ of the company’s communication system (‘right to disconnect’) or to interrupt the communication channel with the employer (‘right to be disconnected’). This goes beyond a statutory target, which still needs to be implemented through a private agreement. A right to ignore contact may involve a genuine entitlement on the part of the employee, an obligation on the part of the employer to tolerate such behaviour, or simply the absence of a legal obligation on the part of the employee to take note of messages from the employer.⁶⁴ In this case, the employer is free to contact the employee during their free time; however, the employee is entitled to ignore the message unless an exception is made for emergencies.

⁶¹ Art. 88 Ley Orgánica 3/2018, de Protección de Datos Personales y garantía de los derechos digitales.

⁶² K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (48). In depth L. Lerouge, F. Pons, *Contribution to the study on the ‘right to disconnect’ from work*, European Labour Law Journal, 2022, vol. 13, 1 (8).

⁶³ La Carta de Derechos Digitales Española.

⁶⁴ B. Waas, *Das Recht auf Nichterreichbarkeit*, in: W. Brose et al (Eds.), *Festschrift für U. Preis*, C.H. Beck, München 2021, p. 1427 f.

a) Regulatory example: Australia

A widely noted legal example of a right to ignore messages can be found in Australia, which introduced a ‘right to disconnect’ on 26 August 2024, initially for larger companies with at least 15 employees, and subsequently, from 26 August 2025, for all companies.⁶⁵ Accordingly, employees may ignore contact or attempts to contact them by an employer or a third party (e.g. a customer or supplier) relating to their work outside working hours, provided this is not unreasonable. Whether an employee’s refusal to respond to a contact is unreasonable depends on the specific circumstances and is assessed by taking various factors into account: The reason for the contact or attempted contact, in particular the urgency (‘emergency?’); the manner in which contact is made or attempted and the extent of the disruption this causes the employee; the extent to which the employee is compensated for this (through financial or non-financial means); the nature of the employee’s role and their level of responsibility; and the employee’s personal circumstances, including family or caregiving responsibilities. A first Court case concerns a teacher who sued her employer in the Federal Court of Australia for damages amounting to almost AUD 800,000: he is alleged to have infringed her right to be unavailable by asking her, during the school holidays and in the run-up to a planned dismissal, to respond to a series of allegations against her.⁶⁶ Some business representatives consider this regulation as excessive, because it could be more difficult for companies to continue making profits. A commentator in *The Australian Financial Review* stated that ‘the hyper-politicised creation of another source of conflict between employers and employees in an already conflict-based workplace framework underscores how disengaged the political debate is from the cooperative and bargaining-based IR agenda that’s needed to boost productivity’.⁶⁷ Conversely, it is argued that the right to disconnect will ‘contribute to improvements in mental health and work-family balance, and increase productivity’.⁶⁸ Indeed, more than half a year since its

⁶⁵ Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023. On this in depth G. Golding, *Introducing Australia’s New Right to Disconnect*, Labour & Law Issues, 2024, vol. 46, C.1.

⁶⁶ <https://www.gadens.com/legal-insights/first-case-involving-adverse-action-and-the-right-to-disconnect> (Stand: 6.2.2026).

⁶⁷ Quoted from E. Josseland, M. Boersma, *Australia’s right to disconnect from work*, Journal of Industrial Relations 2024, vol. 66, 703 (711).

⁶⁸ D. Pocock, *The Australian Financial Review* of 8 Februar 2024.

implementation, the Australian HR Institute found that 58% of HR leaders in Australia said the legislation either ‘significantly increased’ or ‘somewhat increased’ employee engagement and productivity levels at their organisations.⁶⁹ Ultimately, the economic impact remains to be seen. Irrespective thereof, this legislation is viewed in some academic literature as an important step towards addressing the complex challenges posed by technology-enabled flexible working models. Whilst the right to be unavailable offers a promising framework for protecting employees’ leisure time, its success depends on careful implementation. The experiences of early adopters suggest that a top-down legislative approach, supplemented by sector-specific guidelines and proactive workplace policies, can foster a more balanced and productive working environment. However, even the supporters of the law admit that legislation alone is not enough. Rather crucial are joint efforts to change workplace culture, such as awareness-raising measures, training and the implementation of practical measures that respect employees’ right to disconnect and are tailored to the specific needs of different sectors and roles.⁷⁰ This is consistent with the objection already raised, namely that FOMO can undermine the effective enforcement of the law.⁷¹

b) Critical evaluation

A key objection to the concept of a right to ignore contact from the employer is it does not take sufficient account of the purpose of the right to be unavailable, namely to protect the employees against (imperceptibly) ‘sliding’ into work performance and thus ultimately serves to protect the health of employees. Reading an email is often half the step towards replying to it. Employees should be given the opportunity to switch off from work for a certain period of time without being tempted to resume it. The purpose of a right to ignore contact would be further undermined by an exception for emergencies. For no matter how precisely an emergency is defined, from the employee’s perspective it is almost impossible to tell at the moment the exception is invoked whether an

⁶⁹ <https://www.hcamag.com/au/specialisation/benefits/right-to-disconnect-delivers-benefits-to-business-report/536223>.

⁷⁰ E. Josserand, M. Boersma, *Australia’s right to disconnect from work*, Journal of Industrial Relations 2024, vol. 66, 703 (715 f.). Expressly in favour of the law G. Golding, *Introducing Australia’s New Right to Disconnect*, Labour & Law Issues, 2024, vol. 46, C.1 (C.17 ff.).

⁷¹ See above under B) II.

emergency actually exists or not. As this approach allows the employer to contact the employee at any time, the risk regarding the existence of an emergency is shifted onto the employee, with the result that, when in doubt, the employee will prefer to read the message. Thus, such a right to be unavailable would only offer the employee limited protection from their own actions and could still give rise to expectations on the employer's part, which the employee would then fear disappointing.⁷² Only a genuine interruption in communication eliminates the risk of having to deal with the question of whether it would be better to respond to a particular email after all ('What I don't know won't hurt me'). However, without an exception for emergencies, the employer's interests would in turn be unduly compromised, particularly if the employee can completely block the means of communication.⁷³ Against this background, a right to ignore contact from the employer does not appear to allow for a fair balance of interests.

3. Ban on the employer contacting the employee

This weakness is avoided by adopting a different approach, namely a ban on the employer contacting the employee. According to this concept, the option to make contact remains, although the employer is not permitted to contact the employee during their non-working time at all, unless an exception is made for emergencies. In case of an emergency, the employee must take note of the message and reply if necessary. This approach also includes the requirement for the employer to send a communication on the condition that the employee does not receive it during his non-working time.⁷⁴ In this scenario, the risk of an emergency arising lies with the employer: if the employee receives a message outside working hours, they know (assuming the employer is acting lawfully) that an emergency exists or has at least been deemed to exist by the employer, and that they must therefore acknowledge the message. If it subsequently transpires that a reasonable employer should not have deemed an emergency to exist, the employer has committed a breach of duty.

⁷² I. Bokor-Szöcs, *The Right to Disconnect*, Journal of Public Administration, Finance and Law, 2023, vol. 2023, 88 (95).

⁷³ B. Waas, *Das Recht auf Nichterreichbarkeit*, in: W. Brose et al (Eds.), *Festschrift für U. Preis*, C.H. Beck, München 2021, p. 1427 (1429).

⁷⁴ *On this* D. Calderara, *Labor Law and the Right to Disconnect*, Gdańskie Studia Prawnicze, 2025, vol. 2, 127 (129).

For example, such a right to be unavailable was introduced in Portugal for employees working remotely on 1 January 2022.⁷⁵ According to this, employers are not permitted to contact their employees during their free time, except in cases of force majeure. In Belgium, such a rule has been in place for civil servants since 1 February 2022: they may no longer be contacted outside regular working hours, unless there are ‘exceptional and unforeseen circumstances’.⁷⁶ There are plans to extend this scheme to the private sector.

D) Developments at European level

At European level, an explicitly defined and recognised right to disconnect does not exist. To change this, the European Parliament proposed a directive that would complement Directive 2003/88/EC, Directive (EU) 2019/1152 on transparent and predictable working conditions, Directive (EU) 2019/1158 on work-life balance, and the Framework Directive 89/391/EEC on health and safety at work.⁷⁷

The proposed directive aims to establish a right for workers to disconnect, whereby they shall not be obliged ‘to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time’ (Article 2(1)). Under Article 3(3), it is the responsibility of Member States to ensure the right to disconnection for workers. To this end, they shall, in particular, impose an obligation on employers to ‘set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured’ (Article 3(2)). Furthermore, ‘Member States shall ensure that employers implement the right to disconnect in a fair, lawful and transparent manner’ (Article 3(3)) and guarantee that workers can exercise their right to be unavailable (Article 4(1)), with a catalogue of minimum working conditions being laid down.

While the proposal is welcomed by some authors,⁷⁸ the benefits of such a directive are not entirely clear. Some matters are left to the Member

⁷⁵ Lei n.o 83/2021, on this M. Puchet, A.C. Ribeiro Costa, *Going Beyond the Right to Disconnect in a Flexible World*, *Industrial Law Journal*, 2022, vol. 51, 967.

⁷⁶ Arrêté royal du 2 décembre 2021 modifiant l'arrêté royal du 2 octobre 1937.

⁷⁷ Draft Report with recommendations to the Commission on the right to disconnect (2019/2181(INL)).

⁷⁸ I. Bokor-Szőcs, *The Right to Disconnect*, *Journal of Public Administration, Finance and Law*, 2023, vol. 2023, 88 (95); K. Dumančić, *Implementation of “the right to disconnect” into the EU law*, *EU and Comparative Law Issues and Challenges Series*, 2025, vol. 9, 42 (58).

States, but clear limits are set insofar as, on the one hand, non-availability is to be the rule in future, from which deviations are only possible in very exceptional cases, and, on the other hand, deviations are only to be permitted if they have been agreed in collective agreements.⁷⁹ Critics argue that the European Commission should rather leave the floor to the European Social Partners' Framework Agreement on Digitalisation for the implementation at national level of measures on the right to disconnect.⁸⁰ On 4 December 2025, the European Commission launched a consultation on a Quality Jobs Act, which would also provide for a right to be unavailable.⁸¹

It remains to be seen whether, when and in what form European legislation will come into force. As the proposed directive has not yet progressed beyond this stage, the European Commission concluded its consultation with the social partners in October 2025 and indicated that the directive would be adopted in 2026 or 2027.⁸² As was to be expected, the social partners expressed differing views on the need for additional EU legislation in their responses to the consultation. The ETUC, with the support of most trade unions, advocated for the right to be unavailable to be regulated in a binding manner, further clarified, guaranteed to apply to all workers, and enforced. The employers' representatives called for accompanying and supportive non-legislative measures to clarify existing regulations and ensure practical implementation.⁸³ German employers' organisations have spoken out against a mandatory regulation, citing the resulting financial burden.⁸⁴

⁷⁹ B. Waas, Das Recht auf Nichterreichbarkeit, in: W. Brose et al (Eds.), Festschrift für U. Preis, C.H. Beck, München 2021, p. 1427 (1433).

⁸⁰ L. Battista, *The European Framework Agreement on Digitalisation*, Italian Labour Law e-Journal, 2021, vol. 14, 105 (117).

⁸¹ First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act, C(2025) 9944 final.

⁸² C. Pocock, *Right to Disconnect 2026: 15 Countries, 4 Frameworks, 1 Plan*, <https://employsome.com/blog/right-to-disconnect/>.

⁸³ First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act, C(2025) 9944 final, p. 3.

⁸⁴ <https://arbeitsgeber.de/quality-jobs-act-droht-eu-entlastung-zu-gefahrden> (Stand: 6.2.2026).

E) Key elements of a regulatory framework

A complete regulatory proposal would be well beyond the scope of this article. The following remarks are therefore limited to key elements of a regulatory framework. With regard to the function of the law to ensure occupational health, personal autonomy and work-life-balance, some authors identify three interdependent elements: first, the right to refrain from performing work beyond contractual hours; second, protection from adverse consequences for disconnecting; and third, the employer's proactive duty to establish conditions that ensure disconnection.⁸⁵ These will be examined below, along with other parameters.

A key initial decision concerns the *regulatory level* (statute, collective agreement or employment contract) at which a right to be unavailable is established. Given the aforementioned tension between private autonomy and employee protection, it would be desirable to have legislation that leaves sufficient scope for private, tailor-made solutions.⁸⁶

The *scope of application* should cover all employees, in line with the purpose of the right to disconnect,⁸⁷ even though restrictions are in place in some countries, such as in Spain or Portugal for employees working remotely or in Italy for agile work. However, *size-based exemptions* may be appropriate to protect small businesses.⁸⁸ The threshold could be set at 15 employees – as was originally the case in Australia. In other jurisdictions, higher

⁸⁵ I.V. Lagutina, *Right to Disconnect as One of the Employees' Digital Labour Rights*, Juris Europensis Scientia, 2022, vol. 3, 28 (30 ff.); K. Dumančić, *Implementation of "the right to disconnect" into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (46).

⁸⁶ In favour of a right to disconnect through collective bargaining I. Purificato, I. Senatori, *Implementing the European Social Partners Framework Agreement on Digitalization at the Crossroads of Collective Bargaining and Participation*, Diritti Lavori Mercati International, 2024, 285 (302).

⁸⁷ European Law Institute, *Guiding Principles on Implementing Workers' Right to Disconnect*, 2023, p. 16; K. Dumančić, *Implementation of "the right to disconnect" into the EU law*, EU and Comparative Law Issues and Challenges Series, 2025, vol. 9, 42 (58).

⁸⁸ Critical on this K. Lempen, *Implementing workers' right to disconnect*, in: M. Redinha, C. Carvalho, J. Vicente (eds.), *New Employment Relations: Untying the Knot(s)*, Lisbon 2025, p. 127 (131); see also European Law Institute, *Guiding Principles on Implementing Workers' Right to Disconnect*, 2023, p. 16. For a detailed discussion of size-based exemptions in employment law, see A. Stöhr, *Small Business Exemptions in Labor Law*, Labor Law Journal, 2018, vol. 69, 101.

thresholds are also found, like 25 (Ontario)⁸⁹ 50 (France) or even 100 employees (Quebec).⁹⁰

With regard to the content of the regulation, the basic principles have already been outlined and a *ban on employers contacting employees* has been advocated above. However, *exceptions* should always be provided for emergencies, taking the employer's interests into account.⁹¹ The European Parliament's proposed directive refers vaguely in Article 4 to 'exceptional circumstances, such as force majeure or other emergencies', whereby the employer must provide each affected employee with a written justification of the necessity whenever this derogation is invoked. A clearer definition is desirable. Belgian law refers to 'exceptional and unforeseen reasons requiring measures that cannot wait until the next working period'.⁹² The Spanish collective agreement for credit institutions refers to 'events that may pose a serious threat to individuals or cause potential harm to the company, its customers and/or its shareholders, as well as any other legal and/or regulatory events whose urgency requires the adoption of special measures or immediate responses'.⁹³ Swisscom's policy on remote working refers to 'emergencies that require the employee to be immediately available or to respond'.⁹⁴ According to a proposed provision in an employment contract, an exception shall apply where 'exceptional operational circumstances arise which do not allow action to be deferred until the next working period [...]. Exceptional operational circumstances [...] include, in particular, urgent emergencies and disasters, as well as unforeseeable situations in which there is a risk of disproportionate damage or in which the failure to carry out necessary tasks significantly jeopardises the results of previous work. [...]'.⁹⁵

It must also be ensured that *employees do not suffer any disadvantages* – such as discrimination, being treated less favourably or even dismissal – as a result

⁸⁹ Employment Standards Act, 2000, Part VII.0.1.

⁹⁰ Bill n°799 (Right to Disconnect Act).

⁹¹ On this K. Lempen, *Implementing workers' right to disconnect*, in: M. Redinha, C. Carvalho, J. Vicente (eds.), *New Employment Relations: Untying the Knot(s)*, Lisbon 2025, p. 127 (133 ff.).

⁹² Arrêté royal du 2 décembre 2021 modifiant l'arrêté royal du 2 octobre 1937,

⁹³ Spanish collective agreement for credit institutions, Article 35c.

⁹⁴ Reglement zum mobilen Arbeiten basierend auf Art. 2.3.4 des Gesamtarbeitsvertrages (GAV) Swisscom, Ziff. 7.

⁹⁵ V.D. Dohrmann, *Das Recht auf Nichterreichbarkeit - Notwendigkeit und Gestaltungsoptionen*, Betriebsberater, 2022, 2228 (2331 f.).

of exercising their right to be unavailable.⁹⁶ Italian law, for example, expressly provides that employees must not suffer any detriment in their employment relationship as a result of exercising their right to be unavailable, including disciplinary measures, and that their pay must not be reduced for this reason. In line with the Whistleblower Directive (EU) 2019/1937, a reversal of the burden of proof may apply in that, in cases of doubt, such disadvantage is deemed to be based on an employee's refusal to be available during their free time, unless the employer can prove that the disadvantage was based on other grounds.⁹⁷ Furthermore, compliance with the right to be unavailable should be *monitored*. This should not be left solely to employers, as they can too easily evade their obligations through self-assessment alone.⁹⁸ One internal solution would be to introduce a complaints procedure for employees who's right to be unavailable has been violated by their employer.⁹⁹ Possible external solutions include, for example, state inspections carried out by a public authority or other bodies (in the form of regular reports or inspections) or monitoring by the social partners. Finally, appropriate *sanctions for violations* should provide incentives to respect the right to be unavailable. The best protection is provided by monetary sanctions.¹⁰⁰ In Quebec, for example, the amount of the fine depends on the size of the company and the number of breaches.¹⁰¹

F) Conclusion

Constant availability can have a significant negative impact on health and safety at work, work-life balance and recovery from work. Only a statutory provision or a private agreement binding the parties to the employment contract to clear rules can provide the certainty that one may

⁹⁶ V.D. Dohrmann, *Das Recht auf Nichterreichbarkeit - Notwendigkeit und Gestaltungsoptionen*, Betriebsberater, 2022, 2228 (2331).

⁹⁷ European Law Institute, *Guiding Principles on Implementing Workers' Right to Disconnect*, 2023, S. 26.

⁹⁸ European Law Institute, *Guiding Principles on Implementing Workers' Right to Disconnect*, 2023, S. 27.

⁹⁹ C. Mishra, *Should the Right to Disconnect be Legally Enforced?*, International Journal of Trend in Scientific Research and Development, 2022, vol. 6, 2069 (2072).

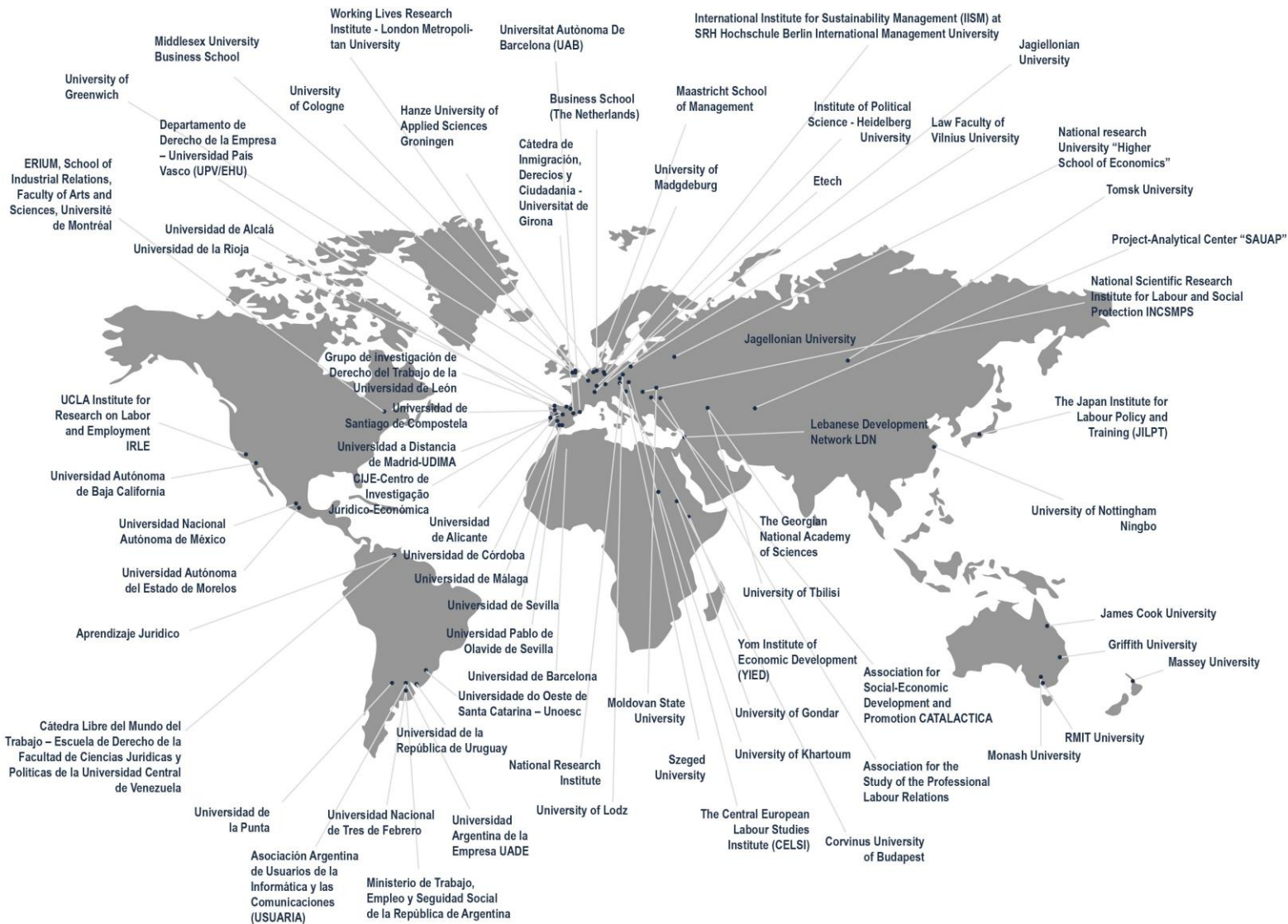
¹⁰⁰ T. Jochman, *Effects on Employees' Compensation Under the Right to Disconnect*, Marquette Benefits and Social Welfare Law Review, 2021, vol. 22, 209 (217); in favour of this N.C. Thang, *A Comparative Study of the Right to Disconnect with Policy Recommendations for Vietnam*, Hong Kong Journal of Social Sciences, 2025, vol. 65, 136 (143).

¹⁰¹ Bill n°799 (Right to Disconnect Act).

safely ignore contact from the employer. One can distinguish three basic concepts: targets, a direct right of the employee to ignore contact from the employer, and a ban on the employer contacting the employee. The main disadvantage of a right to ignore contact is that a right to be disconnected does not allow for contact in emergencies, or that a right to disconnect shifts the risk regarding the occurrence of an emergency onto the employee: if employees are required to take note of messages during their non-working time in emergencies, it is difficult to determine whether such an emergency exists, regardless of how sophisticated the emergency is defined. Therefore, employees will always take note of messages when in doubt. Hence, a ban on the employer contacting the employee is preferable, if it includes adequate exceptions for emergencies. In order to provide flexibility, legislators should limit themselves to the essentials and leave the details to the parties involved. The key regulatory issues are as follows: the scope, including small business exemptions; preventive action and information; the duty to reconnect; the level of regulation; the protection against adverse treatment or consequences; monitoring and enforcement; sanctions and non-regression. Ultimately, one has to bear in mind that even when a right to be unavailable has been enshrined, it should regularly be assessed and viewed as subject to improvements, taking into account the constant evolution of working conditions and the working environment.¹⁰²

¹⁰² K. Lempen, *Implementing workers' right to disconnect*, in: M. Redinha, C. Carvalho, J. Vicente (eds.), *New Employment Relations: Untying the Knot(s)*, Lisbon 2025, p. 127 (143).

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