Going beyond the Right to Disconnect in a Flexible World: Light and Shadows in the Portuguese Reform

1. Introduction

The rapid development of Information and Communications Technology (ICT) has revolutionised employment relationships, particularly in relation to working time. Working time regulations have long contributed to setting boundaries between work time and personal/leisure time with one of the aims being to safeguard workers' health.[1] It is not a coincidence that the very first Convention adopted in 1919 by the International Labour Organization (ILO) aimed to limit working hours.[2] The importance of the physical workplace as the main criterion to determine what constitutes working time and rest time, however, seems to have diminished in recent years. ICT and mobile technologies have contributed to the 'dematerialisation' of the office. Thus, workers, or at least some of them, can perform their tasks anywhere, anytime.[3]

ICT can certainly enhance both employers' and workers' autonomy. This may result in improved productivity, reduced stress, and curtailed commuting time, all of which allow workers to better reconcile their personal and professional lives. However, there are also risks in the deficient use of ICT and mobile devices, such as psychological exhaustion, lack of solidarity, and impoverishment of the collective dimension of work. These technologies can also contribute to blurring the boundaries between personal and professional life, affecting workers' (mental) health, and contributing to work exploitation.[4] Furthermore, ICT increases the employer's power over workers in two respects: first, instant communication means that the former can contact the latter anytime, including outside of working hours; second, employers can increasingly monitor their employees' work performance, which may encroach upon worker privacy.[5]

Telework has been one of the biggest ICT-propelled changes in the workplace in the past two decades. It has accentuated two recent labour market trends: the individualisation of the employment relationship and the increasing need for flexibility.[6] Telework has been exponentially accelerated by the Covid-19 pandemic, which compelled governments to advise workers to work from home, with the notable exception of 'essential workers'.[7] These interventions ensured continuity of work in relatively safe conditions in many sectors of the

[1] Alain Supiot, *Au-delà de l'emploi : transformations du travail et devenir du droit de l'emploi en Europe* (Flammarion 1999) 96; A. C. L. Davies, 'Getting More Than You Bargained for? Rethinking the Meaning of 'Work' in Employment Law' (2017) 46 ILJ 477, 480.
[2] ILO Hours of Work (Industry) Convention, 1919 (No. 1).
[3] Émilie Genin, 'Proposal for a Theoretical Framework for the Analysis of Time Porosity' (2016) 32 IJCLLIR 280; Emily Roe, 'The New Politics of Time' (2018) 34(4) IJCLLIR 373–394.
[4] Sandra Fredman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 (4) ILJ 299; Eurofund and the International Labour Office, *Working Anytime, Anywhere: The Effects on the World of Work* (Publications Office of the European Union and the International Labour Office 2017); Mark Bell, 'Responding to the 'Rapidification' of Working Life: the Right to Disconnect' (2021) 110 IQR 425, 427; Loïc Lerouge & Francisco Trujillo Pons, 'Contribution to the Study on the 'Right to Disconnect' from Work. Are France and Spain Examples for Other Countries and EU Law?' (2022) 13(3) ELLJ 450, 451.
[5] C. W. Von Bergen, Martin Bressler & Trevor Proctor, 'On the Grid 24/7/364 and the Right to Disconnect' (2019) 45(2) Employee Relations Law Journal 1, 2.
[6] Koen Nevens, 'Home Work, Telework and the Regulation of Working Time: A Tale of (Partially) Similar Regulatory Needs, in Spite of Historically Rooted Conceptual Divergence' (2010) 26 IJCLLIR 193, 195.
[7] Bell, *n4,* 425, 427.

economy. This benefit should be qualified, however, since teleworkers are twice as likely to exceed the 48-hour working time limit than workers who are onsite.[8] Telework can make it difficult to distinguish between work and personal life, thus increasing the risks of overwork and related jeopardy to workers' health and safety.[9]

The negative consequences of the digital transformation require interventions that reinforce its positive impact upon the world of work and ensure the protection of workers' rights. The introduction of a 'right to disconnect' in domestic and international legal orders may constitute such a response, safeguarding workers' health, particularly by averting psychosocial risks such as technostress.[10] The challenge, though, is to ensure that the flexibility cherished by a majority of employers and (certain) workers is preserved while safeguarding workers by preventing the intrusion of work into their personal lives.[11]

This note briefly discusses the rationale of the right to disconnect in the context of excessive working hours and fragmentation/casualisation of working time (Section 2). It then touches upon comparative experiences in Europe (Section 3). This sets the stage for an analysis of the Portuguese Remote Work Framework, reformed in December 2021 (Section 4), which has attracted considerable global attention because of the introduction of a duty on employers to refrain from contacting workers outside of their normal working hours (Section 5). The note concludes that this reform is a step in the right direction towards strengthening workers' rights. However, some challenges have emerged, primarily due to broad and ill-defined concepts used in the legislation.

2. The Right to Disconnect: A bulwark against excessive and fragmented working time

Post-industrial production models and new models of work organisation – characterised by the just-in-time organisation of production, immediate communication, and diversification of employment statuses – have made the organisation of working time more flexible.[12] These developments have reinforced productivity, whilst allowing workers to enjoy greater autonomy to decide, to some extent, when and where they perform their duties.

Although the physical workplace remains important, more and more workers can perform their activities beyond the premises of the company. ICT has contributed to the rapid development of telework. As pointed out by the ILO, in our current context it is important to provide workers with greater 'time sovereignty,' since temporal flexibility can improve workers' health and well-being and generate a better work-life balance.[13] Flexible working arrangements can,

[8] Eurofund, *Right to disconnect: Exploring company practices* (Publications Office of the European Union 2021) 5.
[9] Emanuele Dagnino, 'Working Anytime, Anywhere' and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the Right to Disconnect' (2020) 9(3) E-Journal of International and Comparative Labour Studies 1, 2.
[10] Oriol Cremades Chueca, 'Impacto teórico-práctico del BYOD en el derecho del trabajo' (2018) 423 Estudios financieros. Revista de trabajo y seguridad social: Comentarios, casos prácticos: recursos humanos 116.
[11] Roe, *n3*.
[12] Guylaine Vallée, 'Employees' Obligation to Be Available to Employers: A (New) Pathway to Precariousness or a Source of Flexibility' (2016) 32 IJCLLIR 275.
[13] ILO, *Work for a Brighter Future. Global Commission on the Future of Work* (2019) 40.

equally, enhance individual and firm productivity and can further reduce unnecessary costs.[14] It is worth noting, though, that flexibility, bolstered by ICT and mobile devices, is a 'double-edged sword'.[15] Digital communication and 'the non-ethical use of ICT 'has jeopardised basic rights like the right of employees to rest, to a private life and to health at work'.[16] This affects women more heavily, given the distribution of household chores and women's larger share of care work.[17] These new modes of work organisation can lead to overwork, which entails serious psychosocial risks that can harm workers' health. This can, in turn, negatively affect employers due to the lower productivity of injured, sick, or absent employees.[18] Furthermore, the heightening of workers' autonomy is making factors other than time more relevant as a measure of productivity. Paradoxically, workers have not been freed from labour; on the contrary, they often have to work longer hours.[19]

For labour law regimes, being at the employer's disposal outside the workplace presents a major challenge to determining when somebody is working and limiting their hours. 'On call' or standby workers have been a paradigmatic example of these difficult cases.[20] Telework can be another challenging area. As Genin points out, the particular spatial nature of telework may lead to time porosity, which can create an interference between working time and domestic life.[21] This can cause disputes over whether these periods are counted as working time, including in litigation. Furthermore, the development of an informal, irregular, occupational telework that takes place in the evenings, on weekends, or during vacations may result in incursions by the employer into what are clearly rest periods and/or neglect of overarching hours limits, both of which generate excessive working hours.[22] These are also examples of employer strategies in recent times, that have favoured temporal casualisation by excluding certain time periods, including those spent at home, from the working day.[23] This fragmentation of working time constitutes a considerable challenge to the effectiveness of working time regulations that do not recognise that certain jobs can be partially or totally performed without the physical presence of the worker in the workplace. The difficulty in establishing the exact limits of working time has directly hindered the effectiveness of the right to rest.

It seems indisputable that any sort of regulation needs to embrace the autonomy requested by workers and fostered by companies and to provide enough security to ensure the protection of workers' rights. The question arises, though, as to what kind of regulatory response would ensure both flexibility and security. It has been suggested that the distinction between working

[14] Tammy Katsabian, 'It's the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality' (2020) 65(3) McGill LJ 379.
[15] Von Bergen, *n5*, 2.
[16] Lerouge & Trujillo Pons, *n4*, 451.
[17] See: European Parliament, 'Teleworking, unpaid care and mental health during Covid-19', https://www.europarl.europa.eu/news/en/headlines/society/20220303STO24641/teleworking-unpaid-care-and-mental-health-during-covid-19 (last accessed 23.8.2022).
[18] Paul Secunda, 'The Employee Right to Disconnect' (2019) 8 Notre Dame Journal of International and Comparative Law 1.
[19] Eurofund, *n8*; Genin, *n*3, 290.
[20] Case C-518/15, *Ville de Nivelles v. Rudy Matzak*, ECLI: EU: C:2018:82; Case C-344/19 *DJ v Radiotelevizija Slovenija* ECLI:EU:C:2021:182; Case C-580/19 *RJ v Stadt Offenbach am Main* ECLI:EU:C:2021:183; Case C-214/20, *MG v Dublin City Council*, ECLI:EU:C:2021:909.
[21] Genin, *n3*, 287.
[22] On this form of telework, see Genin, *n*3, 287.
[23] Deirdre McCann, 'New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms' (2012) 34 CLLPJ 167, 175; Deirdre McCann & Jill Murray, 'Prompting Formalisation Through Labour Market Regulation: A "Framed Flexibility" Model for Domestic Work' (2014) 43(3) ILJ 319.

time and rest periods is too 'strict', and 'does not always meet the requirements of the current labour market'.[24] Therefore, an intermediate category could be helpful to cover these grey area situations.[25] However, as appealing as it may sound, it has been convincingly argued that a reform of the bipartite legal model of working time is not necessarily the most robust response to the work/life interference caused by the non-appropriate use of ICT. An intermediate category could backfire and further contribute to the fragmentation of working time, erosion of rest periods, and loss of waged time. In this vein, McCann and Murray have put forward a response - the *framed flexibility model* - that could reconcile flexibility and security.[26] They argue that a unitary approach, which dismisses the activity-inactivity bifurcation,[27] and focuses on the notion of availability,[28] could avoid the employer-driven fragmentation of working time. Regardless of the location – be it the company's premises, the worker's home, or elsewhere, the crux of this approach is the restriction of workers' autonomy.[29] Workers should be recognised and compensated because of the time they spend away from their families or other dimensions of their lives rather than because of the arduousness of labour.[30]

One regulatory strategy that is increasingly being tested to limit remote working hours is to introduce a 'right to disconnect.' The skyrocketing evolution of telework during the Covid-19 crisis, which seems to have sped up a workplace revolution that was already underway, has significantly increased the proportion of people working remotely. Despite the return to a 'new normal', remote work seems to be one of the main features of the post-pandemic labour market in relatively advanced economies. This change has led some governments and social partners to recognise a right to disconnect, which aims 'to prevent workers from being overworked, to ensure the right to rest and the right to private life, and also to promote work-life balance'.[31] In a bipartite working time and rest model, the right to disconnect can be understood as a mechanism that channels working hours into a formal schedule, with the potential to ensure that rest time is carefully delineated and preserved.

3. The Right to Disconnect: European Experiences

The European Union (EU) has been at the forefront of the regulation of telework and working time. On 16 July 2002, the European social partners adopted a pioneering autonomous

[24] Leszek Mitrus, 'Potential Implications of the Matzak Judgment (Quality of Rest Time, Right to Disconnect)' (2019) 10(4) ELLJ 386, 393.
[25] Marta Glowacka, 'A Little Less Autonomy? The Future of Working Time Flexibility and its Limits' (2021) 12(2) ELLJ 113, 116; Mitrus, *n24*, 394; Catarina de Oliveira Carvalho criticises the Portuguese option to follow the dichotomous construction of the Directive 2003/88/EC without recognising a third type of time: 'O impacto da jurisprudência do Comité Europeu dos Direitos Sociais em matéria laboral no ordenamento jurídico português' (2017) 1 Revista Jurídica de los Derechos Sociales – Lex Social 228.
[26] Deirdre McCann & Jill Murray, *The Legal Regulation of Working Time in Domestic Work* (Geneva, ILO, 2010), at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_150650.pdf (last accessed 4.10.2022).
[27] McCann & Murray, 'Prompting …', *n23*, 341.
[28] Working time 'is characterised as being at the disposal of the employers and includes availability' in McCann & Murray, 'Prompting …', *n23*, 343.
[29] *Ibid.*, 343.
[30] Deirdre McCann, 'The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Work Debate' (2005) 23 Law in Context 127-147.
[31] Lerouge & Trujillo Pons, *n4*, 452.

framework agreement on telework[32] that has informed the subsequent debates on the subject, such as the recent Council of the EU Conclusions on telework and the planned revisions to health and safety Directives.[33] No reference, however, was made to the right to disconnect. The Working Time Directive (Directive 2003/88/EC), adopted in 1993 and reformed in 2003, aims to safeguard workers' health and safety. The Directive defines working time in Article 2 as 'any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice.' 'Rest period' is defined as a period that is not working time (Article 2(2)). This distinction is crucial because it anchors the Directive in a binary approach to working time.[34]

'Grey areas' would remain an issue within the framework of the Directive and, therefore, legislative intervention may be necessary.[35] However, the Court of Justice of the European Union (CJEU) does not seem to be deviating from the binary working time/rest divide in its recent case law. By emphasising that the importance of the right to rest safeguards workers' health and safety,[36] the CJEU has adopted a unitary approach of working time, which includes periods of activity and periods of availability during which workers are at the disposal of the employer.[37] In the same vein, in *Tyco,* the CJEU rejected a 'productivity regulation' model, considering that 'neither intensity of work nor output are relevant to the definition of working time'.[38]

In a Resolution of 21 January 2021, the European Parliament called on the European Commission to prepare a Directive that 'enables those who work digitally to disconnect outside their working hours'.[39] This resolution considers the right to disconnect to be both 'a fundamental right which is an inseparable part of the new working patterns in the new digital era' and 'an important social policy instrument at Union level to ensure protection of the rights of all workers.'[40] The proposal emphasises the need for a fair, lawful and transparent implementation of the right to disconnect. It also requires the establishment of an objective, reliable and accessible system to measure the duration of time worked each day by each worker. Furthermore, the proposal recognises the relevance of the social partners to the exercise of the right to disconnect. Specifically, it suggests that Member States should ensure that the social

[32] On 16 July 2002, the European social partners ETUC, UNICE, UEAPME and CEEP signed a framework agreement on telework. Nuria Ramos Mart & Jelle Visser, 'A More 'Autonomous' European Social Dialogue: The Implementation of the Framework Agreement on Telework' (2008) 24 IJCLLIR 511-548.
[33] See: Communication from the EU Commission on the 'EU strategic framework on health and safety at work 2021-2027 Occupational safety and health in a changing world of work' COM(2021) 323 final, Brussels, 28.6.2021.
[34] Mitrus, *n24*, 389.
[35] Christina Hießl, 'Standby Time under European Law: Difficult Prospects for a "Right to Disconnect"' (2021) 7 International Labor Rights Case Law 358, 362.
[36] Case C-266/14 *Federación de Servicios Privados del Sindicato Comisiones Obreras v Tyco Integrated Security* EU:C:2015:589; Deirdre McCann, 'Travel Time as Working Time: Tyco, the Unitary Model and the Route to Casualisation' (2016) 45(2) ILJ 244, 248.
[37] Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* ECLI:EU:C:2000:528; Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003]ECLI:EU:C:2003:437; Case C-14/04 *Dellas and Others v Premier Ministre and Another* ECLI:EU:C:2005:728; Case C-437/05 *Jan Vorel v Nemocnice Český Krumlov* ECLI:EU:C:2007:23; Case C-258/10 *Nicuşor Grigore v Regia Naţională a Pădurilor Romsilva* ECLI:EU:C:2011:122.
[38] McCann, 'Travel Time…', *n36*, 248. This approach has been upheld in more recent cases: Case C-55/18, *Federación de Servicios de Comisiones Obreras v Deutsche Bank SAE*, ECLI: EU: C:2019:402; Case C-518/15, *Ville de Nivelles…,* n19.
[39] European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).
[40] *Ibid*.

partners are directly involved in the establishment of collective agreements to implement the Directive (Article 4). The fate of this ambitious directive will depend on the intervention (or lack thereof) of the European Commission.

At the national level, collective agreements have been pioneering in recognising the right to disconnect. Agreements signed by Volkswagen in Germany (2011); Areva (2012), Thalés (2014) and Orange (2016) in France; and by AXA (2017) and Philips Ibérica (2018) in Spain have all enshrined a right to disconnect prior to domestic legislative intervention. Social dialogue, then, constitutes a key mechanism for ensuring the effective regulation of the right to disconnect.[41]

Legislative intervention has been an alternative at the domestic level. In 2016, France introduced a legislative revision establishing that workers have the right to disconnect once the working day is over, although without defining this right or its content.[42] This legislation was later reformed through the adoption of Article 2242-17 (7) of the *Code du Travail*. This provision established that the right to disconnect is one of the topics that can be addressed by the social partners in annual negotiations on 'equality between women and men in the workplace, and the quality of life and working conditions.' If an agreement is not reached, the employer must issue a unilateral charter, which must be submitted to the works council, that establishes the conditions under which this right to disconnect is exercised. It is worth noting that no penalty is specified for the failure to issue a charter. Since there is a penalty for non-compliance with the obligation to negotiate, of up to one year's imprisonment and a fine of 3,750 Euros, the implementation of a right to disconnect depends on the success and goodwill of the social partners.[43]

Similarly, in 2018 Spain implemented, through the *Ley Orgánica* 3/2018, the EU General Data Protection Regulation (GDPR).[44] Article 88 of this instrument, which aims to support a more effective work-life balance,[45] provides that workers are entitled to a right to digital disconnection that ensures respect for the rest time, leave or holidays to which they are entitled under legislation or collective agreements, and to a right to privacy. Sectoral collective agreements or agreements between an individual firm and workers' representatives define the scope of the right. This gives flexibility to the social partners to decide how to regulate the right to disconnect. Prior to consulting with workers' representatives, employers are required to design a company policy that defines the methods of exercising the right to disconnect and training and awareness-raising actions that will ensure a reasonable use of technological tools to reduce the risk of digital fatigue. Furthermore, the *Ley Orgánica* 3/2018 introduced a specific provision into the *Estatuto de los Trabajadores* which governs the employment relationship in the private sector. Article 20 bis specifically recognises a worker's right to digital disconnection under the terms of the legislation on the protection of personal data and the guarantee of digital rights. In the same vein, relying upon Article 88 *Ley Orgánica* 3/2018, *Ley 10/2021* on remote work, which was adopted on 9 July 2021, recognises the right to disconnect as a crucial tool to limit the use of a company's technological/IT tools. This right is also

[41] Arturo Montesdeoca Suárez, 'El eterno debate sobre la desconexión digital en las relaciones laborales' (2022) Rivista Politica.eu 77, 94-95.
[42] Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels.
[43] Sophie Garnier, 'Temps de travail et qualité de vie au travail' (2022) Droit Social 43; Lerouge & Trujillo Pons, *n3*, 460.
[44] Regulation (EU) 2016/679 on the protection of natural persons regarding the processing of personal data and on the free movement of such data [2016] OJ L119/1.
[45] See Lerouge & Trujillo Pons, *n4*, 455.

significant to ensuring the rights to rest and to work-life balance. *Ley 10/2021* includes a requirement that collective bargaining agreements establish the appropriate means, measures, and work organisation to guarantee the effective exercise of the right to disconnect in remote work.

The right to disconnect has also been recognised in Italy, in Article 19 *Legge* 81/2017 of 22 May 2017, which states that agreements for *smart working/lavoro agile* – a way of work characterised by working time and workplace flexibility – should identify workers' rest times as well as the technical and organisational measures necessary to ensure disconnection from technological work equipment.[46] This protection has been further strengthened by Article 2(1) of Legislative Decree 30/2021 (*Legge* 61/2021), which clarifies that the exercise of this right, which has the aim of protecting workers' rest time and health, cannot have any negative impact on the employment relationship, specifically in relation to remuneration.

4. The Portuguese Remote Work Framework

The latest development in the trend towards recognising a legal right to disconnect is the recent legislation in Portugal that has attracted worldwide attention.[47] In Portugal, an existing special regime for remote work was modified by the Portuguese *Assembleia da República* (the country's Parliament) through Law 83/2021 – amending the Labour Code (*Código do Trabalho* - CT) – and Law 98/2009 on work-related accidents and occupational diseases. The new legislation was passed on 6 December 2021 and entered into force on 1 January 2022. The Portuguese regime provides an overarching framework for the regulation of remote work (Section 4.1) and incorporates a new duty on employers to refrain from contacting workers during rest periods (Section 4.2).

4.1 Regulating Remote Work

The Portuguese legislation on remote work regulates 'the performance of the activity of an employee for an employer under legal subordination, in a place not determined by the latter, through the use of information and communication technologies'.[48] It applies to jobs that are entirely remote or that alternate with in-person work.[49] It requires employers and employees to reach an agreement that identifies the place in which the employee habitually performs his work.[50]

The legislature emphasised the role of the social partners in protecting and strengthening workers' rights. The legislation set a floor of rights for remote work that can only be improved by collective bargaining.[51] Despite that, there are few collective agreements that address

[46] Other European countries including Belgium, Ireland, Slovakia, Greece and Luxembourg have also adopted provisions related to a right to disconnect.
[47] Financial Times https://www.ft.com/content/fdedbf6e-5844-45b0-b53a-7ee2fce6b969, New York Times, available at https://www.nytimes.com/2021/11/13/world/europe/portugal-remote-work-law-pandemic.html, both last accessed 4.10.2022.
[48] Art 165 (1) CT.
[49] Art 166 (3) CT.
[50] This agreement must be concluded even where the employee has selected the workplace. See: Joana Vicente, 'A nova disciplina do acordo para a prestação de teletrabalho – comentário aos artigos 166º e 167º do Código do Trabalho' (2022) 60 Questões Laborais 68.
[51] Art 3(3)(k) CT. This provision is an important element of the reform as in Portuguese labour law collective agreements, can generally depart from legislative standards.

telework and reach beyond the requirements of the CT.[52] This has not changed in the aftermath of the new legislation. A clause worth mentioning, though, is clause 13 of the *Company Agreement between Generali Seguros SA and Sindicato Nacional dos Profissionais de Seguros e Afins and others*, in which the parties agreed that the company may introduce internal rules on remote work that shall be disclosed to the signatory trade unions prior to their entry into force. It is worth pointing out that prior approval by the unions is not required.[53]

The framework outlines a set of obligations on the employer and employee that are tailored to the features of remote work. The agreement between the parties is required to define a work schedule for the employee and the frequency and method of the employee's in-person contact with the employer.[54] Regarding work equipment, the reform requires it is either provided by the employer or purchased by the employee but approved and reimbursed by the employer.[55] Employees must be fully compensated for the expenses which they incur as a direct consequence of acquiring or using a computer or telematics equipment and systems necessary for the performance of the work. These include the additional costs of energy and network installation as well as maintenance costs.

The legislation governs the employer's power of direction and control by requiring that advance notice be given for the scheduling of both remote and in-person work meetings. It also requires that the provision of work by the employer must respect the principles of proportionality and transparency, and forbids the imposition of a permanent connection during the working day by means of image or sound.[56]

The reforms pay special attention to workers' health.[57] Employers have a duty to make all necessary efforts to reduce their workers' isolation by promoting face-to-face contact between workers and their superiors and other workers at a frequency established in the telework agreement or, where not specified, at intervals not exceeding two months.[58] However laudable this objective is, it is highly debatable whether employers can mandate regular visits by employees to the company's premises, or to any other locations, for in-person meetings if the employees do not wish to do so. The question arises as to which sanctions or penalties could be imposed on workers for not obeying the employer's rules on visits. The legislation does not provide an answer.

On the other hand, the legislature has adopted specific rules on visits by the employer to the employee´s location, including visits for health and safety purposes. If telework is carried out at a worker's home, they are required to give access to their employer and to occupational safety and health (OSH) services. An employer´s visit to the workplace requires 24-hours' notice and the employee's consent. The visit should only take place during normal working hours and its

[52] For an illustration of some of these clauses from collective agreements concluded in 2019 and 2020, see Direção-Geral do Emprego e das Relações de Trabalho, Divisão de Promoção do Diálogo Social, 'Teletrabalho no contexto da negociação coletiva', Negociação coletiva em foco, Nº 1 de 2020, available at https://www.dgert.gov.pt/wp-content/uploads/2020/10/DGERT-Teletrabalho-em-FOCO-1-de-2020.pdf, last accessed 4.10.2022.

[53] *Boletim do Trabalho e Emprego*, nr 8, dated 28-02-2022, available at http://bte.gep.msess.gov.pt/documentos/2022/8/07140737.pdf, last accessed 03.10.2022

[54] Art 166 (4) CT.

[55] Art 168 (2) CT.

[56] Art 169-A CT.

[57] On the new OSH provisions, see Ana Cristina Ribeiro Costa, 'A saúde e segurança no novo regime do teletrabalho: reflexões sobre o «sentido mais favorável aos trabalhadores»' (2022) 60 Questões Laborais 153-179.

[58] Art 169-B (1) (c) CT.

only aim should be to govern work activities, work equipment and tools. Respect for workers' privacy rights is paramount. When accessing the worker's home, the employer's control activities must be appropriate and proportionate to the objectives and purpose of the visit. The employer cannot under any circumstances capture and use images,[59] sound, written text or computer history,[60] or use any other means of control that might affect the worker's right to privacy.[61] Regarding OSH visits, employees must give access to their place of work to the professionals who are responsible for ensuring safety and health at work during a previously agreed period between 9 am and 7 pm and within working hours.[62] There are doubts, however, about the practicality and feasibility of these OSH visits, given the distances that can separate a company from their workers' homes.

The new Portuguese legislation also requires that workers observe the employer's instructions on OSH.[63] This requirement is inspired by Law 102/2009 on the promotion of health and safety at work, and particular its Article 17. The remote work reform has, though, introduced some novel provisions, such as a prohibition of remote work in activities that involve use or contact with substances and materials dangerous to a worker's health (except if carried out in facilities certified for that purpose). Another interesting provision is the introduction of mandatory occupational health examinations before the introduction of remote work and subsequent annual examinations to evaluate the physical and mental aptitude of the worker to carry out the activity, the impact of the activity on the worker's health, the conditions under which it is performed, and the appropriate preventive measures.[64] It is worth mentioning that mandatory health exams are still quite a controversial measure that the Portuguese legislature adopted some years ago.[65] These exams can prove particularly challenging where workers are based in different countries, which can place a heavier burden on employers in organising them.

It is worth noting that the personal scope of the legislation is also fairly extensive. Portugal has a tripartite status system for the coverage of employment law, which extends to employees, autonomous workers with economic dependency, and contractors or autonomous workers. CT provisions are applicable to employees with the exception of certain topics where the legislature has extended protection to the second category, contractors with economic dependency.[66] Although the coverage of the remote work law is exclusively of employees, the Portuguese legislature has mandated that the protections related to work equipment and tools, organisation, direction and control of work, privacy rights, and OSH also apply to the intermediate category of autonomous workers with economic dependency.[67]

4.2 The Employer's Duty to Refrain from Contacting Workers

[59] The wording of the legal provision is, surprisingly, cumulative rather than alternative.
[60] The wording of this article is not clear, but it is safe to assume that it refers to web history or any electronic device history that may be captured.
[61] Art 170 (2-5) CT.
[62] Art 170-A (4) CT.
[63] Art 169-B (2)(d) CT.
[64] Art 170-A CT.
[65] Art 108 of Law 102/2009.
[66] Art 10 CT states that provisions regarding personality rights, equality and non-discrimination, and health and safety apply to situations in which work is provided by one person to another, without legal subordination, whenever the provider of the work is to be considered economically dependent on the beneficiary of the activity.
[67] Arts 168, 169-A, 170 and 170-A CT, pursuant to Art 165 (2) CT.

The new reforms to the Remote Work Framework introduced earlier this year are striking in illustrating a model of regulating telework that extends beyond a right to disconnect. A few bills aiming to introduce a right to disconnect were debated in 2018. It was considered, though, more appropriate to introduce a duty on employers to refrain from contacting workers.[68] The aforementioned Law 83/2021 introduced a new duty on the employer to refrain from contact (*dever de abstenção de contacto,* Article 199-A CT). This provision was introduced into the CT under the section on working time, rather than the remote work section, which mean that its application reaches beyond the telework regime.[69]

This legal provision imposes a duty on the employer to refrain from contacting an employee during their rest periods except in situations of *force majeure*.[70] Furthermore, to ensure equality between remote and on-site workers, employers cannot treat less favourably, specifically in terms of working conditions and career progression, any employee who has decided to exercise their right to a rest period.[71] This would constitute a discriminatory action.[72] The breach of this duty may also entail a serious administrative offence, though it is arguable whether it allows the employee a right to refuse to work.[73]

The new Portuguese regime is in line with the European Parliament's proposals for a Directive on the right to disconnect. Nevertheless, unlike the Parliament's model, the Portuguese legislation requires employers to carry out specific actions and embodies a positive duty to refrain from contacting workers rather than a negative right to disconnect.[74] Despite the legislature's plain language and good intentions, however, it is possible to identify several challenges in the twenty-two words of Article 199-A CT. It could be argued that the legislature should have been less modest and reached for greater clarity on the scope and extent of the duty to refrain from contacting workers.

Firstly, it is not entirely clear who "the employer" is for the purpose of this duty. Consequently, some questions have emerged regarding who must respect this duty. In complex organisational structures, many people may enjoy some managerial powers, such as directors or line managers. Does the legislation mean that any hierarchically superior worker should respect this duty vis-a-vis other hierarchically subordinate workers? It remains to be seen.

Secondly, another question arises in relation to the means through which this contact could (and should not) be done. Employers contact workers via phone calls, emails, SMS, WhatsApp,

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[68] See Amorim Pereira, 'Há vida para além do trabalho: notas sobre o direito ao repouso e a desconexão profissional' (2018) 53 (XXV) Questões Laborais 139.

[69] See Liberal Fernandes, 'O dever de o empregador se abster de contactar o trabalhador' (2022) 60 Questões Laborais 152.

[70] Art 199-A (1) CT. Mariana Ramos has argued that this duty to refrain from contacting workers does not apply between co-workers, 'The right to disconnect - or as Portugal calls it - the duty of absence of contact', *Global Workplace Law and Policy*, 09-03-2022, available at http://global-workplace-law-and-policy.kluwerlawonline.com/category/portugal/ last accessed 4.10.2022.

[71] The Portuguese legislation recognises the right to 11 hours of rest between two consecutive working periods, a mandatory weekly rest, usually on Sundays, and an additional optional one on Saturdays - Arts 214 and 232 CT.

[72] Art 25 CT.

[73] Fernandes, *n69*, 150.

[74] It is notable that the Parliament's proposals, Art 4 of the proposed Directive, set out a list of specific measures that Member States, with the active involvement of the social partners, must implement to ensure the effectiveness of the right to disconnect. The Portuguese framework is also in line with Directive (EU) 2019/1158 on work-life balance for parents and carers, which enshrines a right to telework for parenting reasons and for people with caring responsibilities. Directive 2019/1158, whose transposition deadline was on 2 August 2022, has not yet been fully incorporated into Portuguese law, [2019] OJ L188.

slack, and other forms of contact, in person and through technological means. Some of these modes of contact are certainly more intrusive than others. Hence, this complexity requires a case-by-case analysis. Rui Valente has argued that if an employer sends an email to a professional account, the employee should not be expected to read it outside of their working hours, unless they wish to.[75] The case of an employer who calls or texts an employee on their personal phone number would be quite different. That is certainly an intrusion which the latter cannot reject or control. The duty to refrain from contact, then, should be interpreted broadly to ensure its effectiveness.

Thirdly, another question arises: is the content of an employer-worker communication relevant, or does it suffice merely to have contacted an employee for there to have been a violation of the law? This issue has been addressed in the public sector. Article 5 of Law 83/2021 extends the new legal regime on remote work to central, regional and local public administration in Portugal. The Directorate General of Administration and Public Employment has issued guidelines that apply to remote work in the public administration, which clarifies that an email sent by the employer during a rest period that does not require an immediate response or action from the employee will not be considered a violation of the duty to refrain from contacting workers.

Fourthly, relying upon a binary approach, a rest period in Portuguese law is defined as any period which is not working time.[76] Despite the clarity of this definition, its effectiveness may be hindered for those who perform remote work, for whom work schedules may be blurred and flexibility an important advantage. The duty to refrain from contacting workers may be a good first step, but not necessarily enough to ensure that the right to rest is respected. Despite this right, workers may feel tempted to be connected as much as possible. This requires a consideration of workload, since the enforcement and effectiveness of the right to disconnect, and consequently the duty to refrain from contacting workers, is partially dependent upon a worker's 'desire' to disconnect, and not only on the employer fulfilling a duty not to disturb the employee.[77]

Fifthly, the duty to refrain from contacting workers may be seriously undermined in the case of 'nomadic workers' and international companies whose staff, clients and suppliers are scattered around the world in different time zones. If a manager were to send an email during their working time, but during the rest time of an employee based in a different country, would that entail an infringement of the duty enshrined in Article 199-A CT? Probably not. To overcome these challenges, several proposals have been suggested, such as the establishment of time slots during which no emails should be sent or meetings arranged, or the adoption of a 'holiday mode', in which senders receive an out-of-office warning informing them that the email is to be deleted. It can be suggested that establishing a monitoring system that allows an assessment of the quantity and content of messages received outside of working hours would help to recognise the seriousness of the challenge and would help employers and OSH services to act accordingly.[78]

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[75] 'Desconexão "ma non troppo"' (2021), available at https://hrportugal.sapo.pt/desconexao-ma-non-troppo/ last accessed 4.10.2022.
[76] Art 199 CT.
[77] We note that workers cannot be understood to make entirely free choices. Their 'desire' to work longer hours is better understood as usually determined by the imposition of excessive workloads, although it may also result from 'workaholism.' José Antonio Fernández Avilés & others, *Estudio. El trabajo en la economía colaborativa y la prevención de riesgos laborales* (Borpi S.L. 2018) 99.
[78] Teresa Moreira, 'O direito à desconexão dos trabalhadores' (2016) 49 Questões Laborais 20-25.

Finally, it is worth noting that Article 199-A provides an exception to the duty: that is, when *force majeure* occurs. Although there are some references to *force majeure* in Portuguese labour laws, including as a valid reason to request workers to work overtime[79] and as a cause for temporary closure or temporary reduction in a firm's activity,[80] this concept is not defined anywhere in the CT or related labour regulations. The Directorate General of Administration and Public Employment has taken the view that *force majeure* should be identified on a case-by-case basis and that the urgency of a contact made to prevent or repair serious damage to a body or service due to a risk of imminent accident should be assessed. Labour law scholars consider *force majeure* those cases that are inevitable and unpredictable, of sudden occurrence, not controlled by the employer's will nor anticipated by him, unavoidable, when immediate contact is essential to prevent or repair serious damage to the company or its viability.[81] It is also usually taken to include situations that do not result from employers' actions or omissions.

5. Conclusion

The development of ICT and new models of work organisation has caused a blurring of work and rest time. These phenomena have enhanced employers' and workers' autonomy, which has contributed to the development of flexible working arrangements, allowing, in principle, a better work-life balance. Nonetheless, the other side of the coin of this greater autonomy and flexibility has been excessive working hours, in some cases involving workers being available 24/7. This outcome has negatively affected employees' health and work-life balance.

The blurring of work and rest time, then, requires the intervention of legislation and/or the social partners. There is an increasing consensus across Europe on the need for a right to disconnect to safeguard workers' health. The EU and European governments and social partners at the national level, are considering and implementing the right to disconnect, as a way to ensure the effective enjoyment of the right to rest. There are differences in regulatory methodologies. While some countries prefer direct legislative intervention, others prefer to give more power to the social partners. Furthermore, while a bold European Parliament proposal considers the right to disconnect a fundamental right, other systems conceive of this right instrumentally.

In line with this trend, a 2021 Portuguese reform has introduced a duty on employers to refrain from contacting workers outside of their working hours. The recent adoption of this measure prevents us from making a definitive assessment of it. That being said, and though the trade unions and employer's associations have not yet gone beyond what the legislation provides, it seems likely that the new regime will strengthen employees' rights and help them to enjoy their rest time. This does not mean, however, that this is a perfect legal framework. As outlined in this article, the rather modest and vague wording of Article 199-A CT raises significant questions about its effectiveness, which remain to be settled.

[79] Art 227 (2) CT.
[80] Art 309 (1) (a) CT.
[81] António Monteiro Fernandes, 'The "duty to refrain from contacting workers" the worker in Law 83/2021' (2021) available at https://direitocriativo.com/the-duty-to-refrain-from-contacting-the-worker-in-law-83-2021/ last accessed 4.10.2022; Leal Amado, 'Teletrabalho: os deveres especiais das partes' (2022) 60 Questões Laborais 135.