

**RIGHT TO DISCONNECT:****FRENCH AND ITALIAN PROPOSALS FOR A GLOBAL ISSUE****MATTEO AVOGARO**Graduated in Law at the University of Trento, Italy  
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In recent years, the increasing process of digitization has gradually blurred the boundaries between work and private life. Therefore, new issues concerning workers' protection arose. One of the main topics on this matter is related to employees' tendency to utilize technological devices, as smartphones and tablets, to remain "connected" to their job outside ordinary business hours. In relation to this aspect, the paper addresses the debate and juridical solutions proposed and developed in France, through the *Loi El Khomri*, and in Italy, with the law No. 81/2017 recently approved by Parliament, to introduce a right (and/or an obligation) to disconnect in favour of digitized employees, and in order to protect workers' private life, preventing diseases related to risk of burnout and the augmentation of stress. Furthermore, the analysis will be focused on the social debate related to the abovementioned topic. In particular, it will concern the positions assumed on this matter by main workers' and employers' organizations of the said countries, and their reactions to the initiatives undertaken by legislators, in order to realize a first evaluation concerning the impact of the solutions proposed. Afterwards, the attention will be centered on praxis and tools introduced by collective agreements, in order to verify whether social partners have been able to find more efficient methods to balance work and private life, than the ones suggested by legislators. The outcome of the paper is referred to the actions that ILO could assume, on the base of the experience developed in France and in Italy, to address the future global issue of protecting employees' work-life balance.

**KEYWORDS:** Digitization, right to disconnect, work-life balance, smart working, collective bargaining.

## 1. Right to disconnect: a new form of protection for an evolving labour market?

The labour market of the two first decades of XXIst century is highly influenced by the evolution of the social context, towards the so called “information society”. Therefore, it is characterized by a growing role of technology and informatics that, gradually, are modifying its nature and structure, undermining principles that were, in the past, consolidated.

In this context, some highly skilled workers have already – through the spreading diffusion of smartphones, tablets and internet mobile connections – the possibility to realize part of their performance, irrespectively, from their office or remotely.

At the same time, the increasing role of new tools – as integrated geo-localization devices, bring your own device (BYOD) policies<sup>1</sup>, big data<sup>2</sup>, cloud technology<sup>3</sup> and a new generation of robots, able to adapt to the surrounding environment or to modify the behaviour on the base of precedent experiences<sup>4</sup> – is going to deeply transform job rhythms and work organization, even in fields, as manufacturing, previously not highly influenced by digitization.

The abovementioned transformation does not affect only traditional contexts, but is one of the main premises of new rising forms of work organization, as Industry 4.0<sup>5</sup>, crowdsourcing or work-on-demand-via-app<sup>6</sup>, where the increased possibilities to work from remote and the relevant role of workers’ flexibility underline the risk of a tendential reduction of pauses and rest time.

The background described above is not futuristic, but it represents, in some cases, an upcoming mutation destined to be completed within the next decade. As a consequence, new issues concerning organization and quality of work arise.

Traditional models of organization of work are, gradually, losing their relevance: in the meantime, results and contents, instead of time spent at work, become criteria to assess a

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<sup>1</sup> M. WEISS, *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, DRI, 2016, 3, 651 ff.

<sup>2</sup> T. LESTAVEL, *Les promesses très commerciales du “big data”*, *Alternatives économiques*, 2015, 350, 70-73.

<sup>3</sup> G. VALENDUC, P. VENDRAMIN, *Work in the digital economy: sorting the old from the new*, ETUI - European Trade Union Institute, Brussels, 2016, 20.

<sup>4</sup> M. TIRABOSCHI, F. SEGHEZZI, *La fine del lavoro? No, un nuovo inizio*, in E. DAGNINO, M. TIRABOSCHI (edited by), *Verso il futuro del lavoro. Appunti e spunti su lavoro agile e lavoro autonomo*, ADAPT University Press, 2016, 8 ff.

<sup>5</sup> M. BENTIVOGLI, *Sindacato futuro nell’era dei big data e Industry 4.0: la smart factory necessita della smart union*, in *#SindacatoFuturo in Industry 4.0*, ADAPT University Press, 2015, 3 ff.; K.G. DAU-SCHMIDT, *Labor Law 2.0: The impact of new information technology on the employment relationship and the relevance of the NLRA*, *Emory Law Journal*, 2014, 64; J. PAI, *Industry 4.0. The vision for advanced manufacturing*, Central Tool Room & Training, Centre Min of MSME, India, 2014.

<sup>6</sup> T. KALANICK, *The future of work: independence and flexicurity*, 15 October 2015, link: <https://psmag.com/the-future-of-work-independence-and-flexibility-c2d711255dbd#.gpjjhddb> (last consultation: 26 October 2017); M. WEISS, *Digitalizzazione: sfide e prospettive*, op. cit., 652-654.

working performance<sup>7</sup>. Therefore, is the worker's role itself which is moving from the position of an executor to one of a collaborator of the employee<sup>8</sup>. The described modification of the working scenario raises new issues concerning some relevant labour law topics, as work-life balance and protection of health and safety of employees.

With reference to working time, digitization, and the consequent process of “autonomization” of employees, risks to overcome the traditional barriers to the daily working time represented – even if in a context of growing flexibilization – by the maximum number of business hours per day or per week and by mandatory workers' rest periods, regulated by law and/or by collective bargaining<sup>9</sup>. As an example, workers may be requested to remain connected to their company devices, in the evening or during holidays, to reply to e-mails or telephone calls. In the same way, digitization could encourage auto-exploitation of workers, in order to reach or overcome objectives fixed by the employer<sup>10</sup>.

Said working conducts could potentially provoke serious effects on employees' health and on their family life. In the light of above, technological evolution urges a reconsideration of the consolidated concepts of working health and safety. New jobs require new protections, more concentrated in the area of psychosocial disturbs and in preventing stress and its consequences.

The increasing relevance of the link between digitization and work-life balance is highlighted also by recent statistics.

The results of the Sixth European Working Conditions Survey, conducted by Eurofound between February and September 2015, through 35,765 interviews of dependent and autonomous workers located in 35 European countries, show that 14% of consulted workers admit being concerned “always” or “for the most part of time” of their jobs during the rest period; 21% affirms to be “always” or “in most cases” too tired to get involved in housework and 11% denounces that their own jobs do not allow them “always” or “in most cases” to commit enough time to their family.

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<sup>7</sup> ADAPT (edited by), *Audizione informale nell'ambito della discussione congiunta delle risoluzioni 7-00449 Cominardi e 7-00808 Tinagli, concernenti iniziative in materia di occupazione in relazione agli sviluppi dell'innovazione tecnologica*, in E. DAGNINO, M. TIRABOSCHI (edited by), *Verso il futuro del lavoro. Appunti e spunti su lavoro agile e lavoro autonomo*, ADAPT University Press, 2016, 14 ff.

<sup>8</sup> G. DAL PONTE, D. PANDOLFO, G. ROSOLEN, *The future is agile*, 6 June 2016, link: <http://www.bollettinoadapt.it/the-future-is-agile/> (last consultation: 26 October 2017).

<sup>9</sup> M. TIRABOSCHI, *Una regolazione agile per il lavoro che cambia*, in E. DAGNINO, M. TIRABOSCHI (edited by), *Verso il futuro del lavoro. Appunti e spunti su lavoro agile e lavoro autonomo*, ADAPT University Press, 2016, 3 ff.; F. TADDEI, *Il lavoro è cambiato anche nei suoi orari*, *L'Unità*, 29 November 2015, 9.



As to the time spent at work, 45% of workers that participated to Eurofound interviews admitted that they worked – in last 12 months – during free time to reach the objectives fixed by the employer; 7% retains to be obliged to renounce to part of their odd moments several times each week, and 13% several times in each month<sup>11</sup>.

To reply to the abovementioned instances, experts, social partners and MP of some of the most relevant European countries – in particular, France and Italy – started reasoning on the way to assure to employees a certain and protected rest period from working activity: the different techniques identified by legislators or collective bargaining are generally addressed as “right to disconnect”.

## **2. The “*droit de déconnexion*” in France, between the *accord Syntec* and the *Loi El-Khomri***

France was the first European country to enact a bill concerning right to disconnect, as a consequence of the debate started at the beginning of 2000s<sup>12</sup>.

The matter has been addressed, initially, at company level. In particular, several industries, as Canon and Sodexo, experimented, between 2009 and 2013, internal praxis called “working days without e-mail”, in order to encourage workers to prevent diseases connected to burn-out and dependency conditions related to the mobile devices utilized during their job. In any case, the attempt to introduce these praxis on workplaces did not lead to relevant results<sup>13</sup>. During the same period, in addition, the French Cour de Cassation excluded the possibility to introduce, through case law, a right to disconnect as a legal instrument to protect workers’ health and safety<sup>14</sup>.

Notwithstanding, the effort to provide a right to disconnect in favour of French digitized workers obtained a relevant echo at national and international level, and captured also the attention of the legislator and of social partners.

### **2.1. The legislative point of view: the *Loi El-Khomri***

As to the legislative level, the interest concerning a better protection of digitized employees was expressed by French Government during the preliminary studies concerning the reform of labour law then approved in 2016.

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<sup>11</sup> EUROFOUND, *Sixth European Working Conditions Survey*, 2015, link: [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication-/field\\_ef\\_document/ef1568en.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication-/field_ef_document/ef1568en.pdf) (last consultation: 9 October 2017).

<sup>12</sup> J.-E. RAY, *Le droit à la déconnexion, droit à la vie privée du XXIe siècle*, *Droit Social*, 2002, 939 ff.

<sup>13</sup> C. MORDANT, *Droit à la déconnexion: ce que font (ou pas) les entreprises pour lutter contre l’invasion des mail professionnels*, *Le Monde*, 14 March 2016, link: [http://www.lemonde.fr/economie/article/2016/03/14/les-premiers-pas-des-drh-contre-l-invasion-du-mail-professionnel\\_4882136\\_3234.html](http://www.lemonde.fr/economie/article/2016/03/14/les-premiers-pas-des-drh-contre-l-invasion-du-mail-professionnel_4882136_3234.html) (last consultation: 2 November 2017), 1 ff.

<sup>14</sup> Cass. soc., 29 June 2011, n° 09-71.107; Cass. soc., 24 April 2013, n° 11-28.398.

The precedent year, indeed, the Ministry of Labour Myriam El-Khomri collected, among numerous experts, a series of reports concerning the labour condition in France<sup>15</sup>, also with reference to the upcoming digitization. The goal was to prepare a wide reform of local labour law.

Of particular pertinence is the report entitled “*Transformation numérique et vie au travail*”, drafted by Bruno Mettling, General director of human resources and internal communication of Orange group<sup>16</sup>. The analysis was, in particular, aimed to assess the impact of digitization on work organization, management and employees’ conditions.

In general, Mettling highlights the need for a more effective definition of autonomous work, insists for the specification of eligibility criteria and main contents of the *forfait-jours* regime<sup>17</sup> and for the introduction, among the parameters to appraise the quality of the employees’ performance, of workload, near to the already considered criterion of working time. More specifically, the author of the report focuses its attention on the right to disconnect<sup>18</sup>.

On the base of the analysis of several company collective agreements<sup>19</sup>, the report advise the legislator to safeguard a correct work-life balance suggesting, *inter alia*, to enact rules bestowing to workers the right to disconnect from devices and services utilized during their performance. To guarantee the effectiveness of this right, Mettling underlined also the advisability of a parallel obligation to disconnect bearing on the workers<sup>20</sup>. This expedient would have split the liability concerning the breach of the rule between worker and employer, encouraging the worker not to follow illicit employer’s request to remain connected after the

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<sup>15</sup> Among them, the *Rapport Badinter* on the fundamental principles of French labour law, see G. IMPERATORI, *Francia: il Rapporto Badinter, un primo passo verso la riforma del Code du travail* in L. CASANO, G. IMPERATORI, C. TOURRES, (edited by), *Loi travail: prima analisi e lettura. Una tappa verso lo “Statuto dei Lavori” di Marco Biagi?*, ADAPT University Press, 206, 87 ff.; and the *Rapport Combrexelle*, on the local condition of collective bargaining, see A. ORAZI, *Contrattazione collettiva, lavoro e lavoratore. Commento al c.d. “Rapporto Combrexelle”*, Working Paper ADAPT No. 182/2015.

<sup>16</sup> B. METTLING, *Transformation numérique et vie au travail*, 2015, link: [http://travail-emploi.gouv.fr/IMG/pdf/rapport\\_mettling\\_transformation\\_numerique\\_vie\\_au\\_travail.pdf](http://travail-emploi.gouv.fr/IMG/pdf/rapport_mettling_transformation_numerique_vie_au_travail.pdf) (last consultation: 5 November 2017).

<sup>17</sup> *Forfait-jours* agreements, regulated from articles L. 3121-53 of *Code du travail*, are a special labour relationship allowing the parties not to respect the ordinary weekly or daily working time. In the derogatory regime, the new limit is represented by the number of days spent at work by the employee during the year; for an outline of recent case law on collective agreements concerning *forfait-jours* see J.-B. COTTIN, *Forfait jours : état des lieux du contrôle jurisprudentiel des accords collectifs*, JCP E 2015, 1080.

<sup>18</sup> A. DOUTRELAU, *Le rapport Mettling veut mesurer l’impact du numérique sur le travail*, *Dalloz actualité*, 17 September 2015, link: <http://www.dalloz.fr/pros.lib.unimi.it/documentation/Document?id=ACTU0174473> (last consultation : 9 October 2017), 1 ff.; C. TOURRES, F. NESPOLI, *Il percorso della Loi travail tra proteste e proposte*, in L. CASANO, G. IMPERATORI, C. TOURRES (edited by), *Loi travail: prima analisi e lettura. Una tappa verso lo “Statuto dei Lavori” di Marco Biagi?*, ADAPT University Press, 2016, 9 ff.

<sup>19</sup> L. FAUVARQUE-GOBIN, *La conciliazione vita-lavoro nella Loi travail*, in L. CASANO, G. IMPERATORI, C. TOURRES (edited by), *Loi travail: prima analisi e lettura. Una tappa verso lo “Statuto dei Lavori” di Marco Biagi?*, ADAPT University Press, 2016, 76 ff.

<sup>20</sup> A. DOUTRELAU, *Le rapport Mettling, op. cit.*, 1 ff.

allowed time<sup>21</sup> and not to auto-exploiting himself to attempt to improve his performance. Finally, to complete the package of measures concerning work-life balance, Mettling proposed to introduce incentives to push companies to adopt internal policies on the correct and safe utilization of mobile and smart devices, and to include digitization between the parameters concerning the assessment of professional risks<sup>22</sup>.

On 27 February 2016, the French Government published the first draft of its general reform of labour law denominated “*Loi relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*”, alleged “*Loi Travail*”<sup>23</sup>. The project of reform, strongly contested by trade unions and street protests, was finally approved by French National Assembly in August 2016<sup>24</sup>. It is composed of 6 titles: the third one, named “*Sécuriser les parcours [des salariés] et construire les bases d’un nouveau modèle social à l’ère du numérique*”, comply with the right to disconnect.

The *Loi Travail* adds, in particular, the paragraph 7 to article L. 2242-8 of the French *Code du travail*.

This new rule – in force from 1 January 2017 – prescribes that the mandatory collective bargaining on professional equality between men and women and on quality of work will have to deal with, *inter alia*, “*les modalités du plein exercice par le salarié de son droit à la déconnexion et la mise en place par l’entreprise de dispositifs de régulation de l’utilisation des outils numériques, en vue d’assurer le respect des temps de repos et de congé ainsi que de la vie personnelle et familiale*”.

The domain of the new regulation is wide, and it is referred, from one side, to company with, in general, at least 50 employees and, in any case, to workers subject to *forfait en heures* or *forfait en jours* regime.

To embrace all these different contexts, the legislator introduced only a general provision, delegating the detailed discipline of the right to disconnect to social partners. According to the first opinions expressed by local experts, the collective agreements concerning right to disconnect may set forth both mandatory provisions and sanctions in case of illegal conduct,

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<sup>21</sup> H. GUYOT, *L’adaptation du droit du travail à l’ère numérique*, *JCP S*, 2016, 1310, 2.

<sup>22</sup> AA. VV., *Comment réussir la transformation numérique en entreprise?*, *JCP S*, act., 2015, 341, 1 ff.

<sup>23</sup> E. BARRIOT, B. DOMERGUE, A. BARIET et al., *Projet de loi travail: le renvoi à la négociation d’entreprise est généralise*, *Dalloz actualité*, 19 February 2016, link: <http://www.dalloz-actualite.fr/flash/projet-de-loi-travail-renvoi-negociation-d-entreprise-est-generalise#.WB3-3vnhDIU> (last consultation: 5 November 2017).

<sup>24</sup> A. BARIET, *L’essence de la Loi Travail*, *Dalloz actualité*, 29 August 2016, link: <http://www.dalloz-actualite.fr/flash/l-essentiel-de-loi-travail#.WB39FvnhDIU> (last consultation: 5 November 2017); E. BARRIOT, *Projet de loi Travail: les mesures sur la durée du travail*, *Dalloz actualité*, 26 July 2016, link: <http://www.dalloz-actualite.fr/flash/projet-de-loi-travail-mesures-sur-duree-du-travail#.WB391fnhDIU> (last consultation: 5 November 2017); J.-E. RAY, *La loi qui libère...*, *Droit Social*, 2015, 10, 752 ff.

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and programmatic declarations, aimed to introduce, in workplaces, policies directed to sharpen the attention on work-life balance and on risks represented by work from remote.

In the light of above, the rules of collective agreements concerning right to disconnect might be directed both to employees and to employers. At the end of each working day, for example, workers may be obliged to leave in office company devices, and/or employers might have to turn off servers; another tool could be to add, to internal e-mails or messages sent outside the ordinary working time, a disclaimer indicating that an immediate reply is not requested. In addition, the company workforce could be requested to use indicators showing the relevance and urgency of the topic, at least in relation to internal communications<sup>25</sup>.

Conversely, from the bill approved by the French Parliament has been removed, through an amendment voted by the National Assembly, the statement introducing a legislative obligation, for the employee, to respect the disconnection periods.

Finally, the new law provides solutions also in case the social partners should not reach an agreement about the tools to be used to guarantee the right to disconnect. In this case, paragraph 7 of article L. 2242-8 of the *Code du travail* delegates the employer, unilaterally, to issue a code of conduct in order to assure to the employees the right to disconnect and to enhance attention on a careful utilization of digitized devices. In case the employer should intend to introduce obligations bearing also on employees, the code of conduct will become part of the internal company regulation and, therefore, shall be subject to provisions of French law imposing the involvement of trade unions.

The introduction of the right to disconnect in the list of matters concerned by mandatory collective bargaining could be considered a relevant improvement of local labour law. Of particular importance is the wide field of application of this new right, which reasonably concerns all the companies subject to mandatory collective bargaining, and not only workers which executed a contract *forfait-jours*. Conversely, the exclusion from the reform of the concurrent employees' obligation to disconnect, raised a debate: some experts criticised this choice, arguing that this tool would have increased the effectiveness of the reform. On the other side, trade unions underlined the risks concerning the introduction of the said workers' obligation, intended as a mean to free employers from the duty to assure by themselves that the agreed business time would be respected, discharging this encumbrance on employees.

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<sup>25</sup> H. GUYOT, *L'articulation du droit du travail*, op. cit. 3, Rev. Bras. Prev., Curitiba, Paraná, v.9 n.1, p.97-115, Janeiro-Junho. 2018.



## 2.2. The position of social partners and the “obligation to disconnect” in the *accord* SYNTEC

French social partners – as representing the organisations closer to the new issues concerning labour market – for first started reasoning about the right to disconnect, paving the way for the intervention of the legislator.

The introduction of the right to disconnect was supported, in principle, by trade unions. CGT and CFDT indeed, with different strategies, requested to the legislator to assure a better work-life balance and an effective limitation of the working time.

In particular, in 2014 Ugict-CGT launched a campaign to affirm a right to disconnect<sup>26</sup>,

basically in favour of the categories of engineers, executives and technicians. The goal of this initiative was to prevent employers, through digitization, to overcome the limits imposed by law and/or collective bargaining to the daily/weekly working time and to oppose the possibility that disconnection would be declined only as a workers’ obligation.

The campaign partially succeeded<sup>27</sup> and Ugict-CGT firstly obtained the introduction of the right to disconnect in the Mettling report and the execution of several collective bargaining providing for the abovementioned right. In addition, even if the first draft of the *Loi Travail* contained only a minimal version of the right to disconnect, the bill was modified in June 2016, under the pressure of trade unions, introducing the current paragraph 7 of article L. 2242-8 requesting the employer to arrange with workers’ representatives the measures to exercise this right, with the possibility to act unilaterally only in case reaching an agreement were not possible.

Notwithstanding, Ugict-CGT still underlines that the protection assured by the right to disconnect could be improved. The aforementioned organisation contests, *inter alia*, that the tools individuated to enforce the right should be defined directly by law, clearly indicating that the employer cannot address requests to the employee during the rest periods. In addition, according to this trade union, the duration of the daily or weekly time slot of disconnection should correspond to the number of hours of rest currently assured to the employee by law or collective bargaining<sup>28</sup>. Furthermore, another request, based on best practices adopted in Germany<sup>29</sup>, concerns the

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<sup>26</sup> S. BINET, *Pour un droit à la déconnexion et une réduction effective du temps de travail*, in *Lettre Économique*, 2014, 7, 1.

<sup>27</sup> CGT, *De nouveaux droits pour garantir la réduction du temps de travail et la santé à l’ère numérique*, 25 November 2015, link: [http://www.ugict.cgt.fr/doc\\_download/413-propositions-redigees-fj-et-deconnexion-25112015](http://www.ugict.cgt.fr/doc_download/413-propositions-redigees-fj-et-deconnexion-25112015) (last consultation: 27 October 2017).

<sup>28</sup> CGT, *Laissez-nous bien travailler toutes et tous*, 18 December 2015, link: <http://www.ugict.cgt.fr/publications/cadres-infos/laissez-nous-bien-travailler-toutes-tous> (last consultation: 27 October 2017).

<sup>29</sup> Reference is made to the internal policy of the German company Daimler, see M. KAUFMANN, *Deutsche Konzerne Kämpfen gegen den Handy-Wahn*, 17 February 2014, link: <http://www.spiegel.de/karriere/erreichbar-nach-dienstschluss-massnahmen-der-konzerne-a-954029.html> (last consultation: 5 November 2017), 1 ff. and I. ODDO, *ADAPTability/14 – BYOD: la nuova frontiera del lavoro “mobile”*, link:

introduction of specific instruments providing for the automatic erase of e-mails received by the workers during the period of absence, to allow them to reply to unread correspondence without suffering stress.

In relation to other main trade unions, CFDT shared the positions of CGT with reference to the importance to limit the working time also through a right to disconnect, even if with a less conflictual behaviour with reference to the legislator<sup>30</sup>.

From the employers' side, main doubts have been raised by the representatives of small and medium enterprises. In detail, CPME underlined that the introduction of the right to disconnect in a troubled economic phase, together with other innovations provided by *Loi Travail*, represents a supplementary obligation bearing on employers<sup>31</sup>, that could augment the number of claims before the local Courts and endanger the economic recovery<sup>32</sup>.

From a practical point of view, a first relevant attempt to discipline right to disconnect through collective bargaining was made in 2013, with the *Accord National Interprofessionnel* (ANI) executed on 19th June, that invited employers to experiment new initiatives to warn employees and managers about the importance of the safe utilization of company devices, even introducing periods of disconnection aimed to facilitate a better work-life balance<sup>33</sup>.

From 2014, the increasing diffusion of BYOD policies<sup>34</sup> among several companies, and the growing number of digitized workers, imposed the topic referred to a better protection of work-life balance on the top of the agenda of social partners, and, afterwards, of Government and Parliament.

Hence, several agreements executed in last years tried to introduce a right to disconnect. Among them, one of the most relevant is the one concerning the *contrat forfait-jours*, referred to professional firms, executed on 1st April 2014 by the trade unions CGT-CFDT and the employers' organization Fédération SYNTEC.

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<http://www.bollettinoadapt.it/adaptability13-byod-la-nuova-frontiera-del-lavoro-mobile/> (last consultation: 5 November 2017), 2014, 1 ff.

<sup>30</sup> CFDT, *Arrêtons de penser la durée de travail sur une base hebdomadaire*, 3 Juin 2016, link: [https://www.cfdt.fr/portail/actualites/vie-au-travail/-arretons-de-penser-la-duree-de-travail-sur-une-base-hebdomadaire-srv1\\_367768](https://www.cfdt.fr/portail/actualites/vie-au-travail/-arretons-de-penser-la-duree-de-travail-sur-une-base-hebdomadaire-srv1_367768) (last consultation: 27 October 2017) and CFDT, *Forfait-jours: un relevé déclaratif assure santé et sécurité du salarié*, 28 Septembre 2016, link: [https://www.cfdt.fr/portail/theme/droits-des-salaries/forfaits-jours-un-releve-declaratif-assure-sante-et-securite-du-salarie-srv1\\_384157](https://www.cfdt.fr/portail/theme/droits-des-salaries/forfaits-jours-un-releve-declaratif-assure-sante-et-securite-du-salarie-srv1_384157) (last consultation: 27 October 2017).

<sup>31</sup> A. TONNELIER, *Les petites entreprises entendent peser sur le scrutin présidentiel*, 28 February 2017, link:

[http://www.lemonde.fr/economie-francaise/article/2017/02/28/les-petites-entreprises-entendent-peser-sur-le-scrutin-presidentiel\\_5086759\\_1656968.html](http://www.lemonde.fr/economie-francaise/article/2017/02/28/les-petites-entreprises-entendent-peser-sur-le-scrutin-presidentiel_5086759_1656968.html) (last consultation: 25 October 2017).

<sup>32</sup> T. DUBOIS, *Loi Travail: le droit à la déconnexion à l'épreuve de la réalité*, 6 January 2017, link: <http://www.paris-normandie.fr/actualites/economie/loi-travail--le-droit-a-la-deconnexion-a-l-epreuve-de-la-realite-XH7977198> (last consultation: 27 October 2017).

<sup>33</sup> H. GUYOT, *L'adaptation du droit du travail*, *op. cit.*, 2.

<sup>34</sup> J.-F. FUNKE, *La pratique du BYOD* ("Bring Your Own Device"), *JCP S, act.*, 2015, 36, 1 ff.; P. LUBET, S. CULLAFROZ-JOVER, *La souplesse du droit face à l'usage croissant du BYOD: étude sur la gouvernance des*

*données au sein de l'entreprise connectée*, 18 March 2015, link: <https://www.altanalaw.com/medias/la-souplesse-du-droit-face-a-lusage-croissant-du-byod> (last consultation: 2 November 2017).

The *accord* SYNTEC – concerning a professional sector of about 910,000 workers in France, 76% of them belonging to the category of office workers – prescribed a number of safeguards aimed to protect health, safety and social life<sup>35</sup> of employees who entered in the derogatory regime of *contrat forfait-jours*: in particular, article 4.8.1 deals with an obligation to disconnect.

This article, named “*Temps de repos et obligation de déconnexion*”, bestows to workers who have executed a *contrat forfait-jours* a right to a minimum and essential rest, to be guaranteed in case of exceptional extension of the working day, of 11 consecutive hours per day and of 35 consecutive hours every two weeks.

To assure that the rest periods will be respected, the *accord* SYNTEC introduces, with article 4.8.1, paragraph 5, a worker’s obligation to disconnect from company devices, and the possibility for the employer to verify its fulfilment through specific monitoring instruments. In addition, paragraph 7 prescribes that the employer shall be obliged to introduce, in the company regulation, rules and policies directed to guarantee to the employee the freedom to disconnect from the abovementioned tools.

The discipline contained in the *accord* SYNTEC represents one of the most relevant attempts made by social partners to assure to workers a better work-life balance. Notwithstanding, it raised also some objections.

First of all, the *accord* is a collective agreement referred to only one specific category of workers. Besides that, the number of beneficiaries is further reduced because the possibility to disconnect is conferred only to employees who accepted the special regime of *contrat forfait-jours*. Moreover, the collective agreement substantially does not guarantee to workers a general and wide right to deactivate company devices after work, but it only imposes to the employee an obligation to disconnect, in order to respect the minimal daily and weekly rest periods. For this reason, finally, the wording of the rule is not detailed and does not specify time and methods to exercise it, as appear from article 4.8.1, paragraph 7<sup>36</sup>.

### 3. “Lavoro agile” and the “Italian way” to right to disconnect

#### 3.1. A right for agile workers: the point of view of the Italian legislator

With reference to Italy, the debate about a law concerning the right to disconnect<sup>37</sup> and smart working concretely started in 2016, partially as a result of the initiative taken by the French

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<sup>35</sup> A. D’ALANÇON, J. MARTINEZ, *Mise en oeuvre du nouvel accord relatif aux forfaits-jours dans la branche des bureaux d’études (SYNTEC)*, JCP S, 2014, 1479, 4.

<sup>36</sup> *Ibidem*.

<sup>37</sup> M. MASCHKE, *Digitalisation: challenges for company codetermination*, ETUI Policy Brief, 2016, 7, 1 ff.; contra F. ROTONDI, *Diritto alla disconnessione: perché vietare ciò che è già vietato?*, 12 September 2016, link: <http://formiche.net/2016/09/12/diritto-alla-disconnessione-perche-vietare-cio-che-e-gia-vietato/> (last consultation: 9 October 2017), 1 ff.

legislator. Until last year, indeed, the respective regulatory framework appeared to be limited to collective bargaining and company practices.

In 2016, the Government, and in the meantime a group of members of Parliament, advanced two proposals to regulate this phenomenon, still enclosed in the more general framework of the discipline of smart working (in Italy, “*lavoro agile*”). These bills, identified as No. 2229 and 2233, were introduced in the Italian Senate.

The bill No. 2229, proposed by MPs Sacconi, D’Ascola, Marinello and Pagano, explicitly recognized the right to disconnect through article 3, paragraph 7, which indicated that the worker “*have right to disconnect from technological devices and from on-line platforms without bearing any consequence on the prosecution of the labour relationship and on compensation*”. In any case, the measures to benefit of the right to disconnect would have to be adopted respecting: i) the objectives agreed with the employer; ii) the implementing criteria set by the occupational health physician; and iii) the possible period of availability of the worker.

Following the scheme of bill No. 2233<sup>38</sup>, introduced by the Government, the right to disconnect was regulated by article 16: this provision, concerning in general the form of the mandatory agreement to be executed between a worker and an employer to accede to smart working regime, established, for the parties, an obligation to indicate the technical and organizational measures functional to assure to the worker the right to disconnect from technological devices utilized to realize the performance.

The bills No. 2229 and No. 2233 of 2016 were then joined in a common proposal – bill No. 2233-B – passed by the Parliament as part of Law No. 81/2017<sup>39</sup>.

In particular, Law No. 81/2017 deals with “*lavoro agile*” from article 18 to article 24 and represents a general reprisal of contents of bill No. 2233.

Article 18, paragraph 1 of Law No. 81/2017 confirms that smart working is not intended as a new labour agreement, but as a particular kind of dependent work, aimed to enhance competitiveness of companies and ease conciliation between work and private life. The agreement to accede to the smart working regime must be in written form and, as per article 19 of Law No. 81/2017, must regulate the activity that the worker could carry on outside the premises of the

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<sup>38</sup> V. PINTO, *La flessibilità funzionale e i poteri del datore di lavoro. prime considerazioni sui decreti attuativi del “Jobs Act” e sul lavoro agile*, RGL, 2016, 2, 345 ff.; E. DAGNINO, *Lavoro agile: una questione definitoria*, 25 November 2015, link: <http://www.bollettinoadapt.it/lavoro-agile-una-questione-definitoria/> (last consultation: 29 October 2017), 1 ff.; M. SACCAGGI, *Primo commento al “lavoro agile”: finalità e ipotesi regolatorie*, 2 November 2015, link: <http://www.bollettinoadapt.it/primo-commento-al-lavoro-agile-finalita-e-ipotesi-regolatorie/> (last consultation: 29 October 2017), 1 ff.

<sup>39</sup> In particular, the first part of Law No. 81/2017 is referred to measures to improve social and juridical protection of autonomous workers, while the second part deals with the discipline of smart working. With reference to the latter, see D. POLETTI, *Il c.d. diritto alla disconnessione nel contesto dei “diritti digitali”*, *Resp. Civ. e Previd.*, 2017, 1, 8 ff.

factory, also with reference to instruments and devices needed to realize the performance and to the way in which the employer can exercise his power of direction. Finally, the law passed on 10 May

2017 introduces other rights and guarantees for the smart workers, as the ones concerning formation

(article 20), limits to the employer's power of control (article 21), workers' health and safety (article

22) and the extension of the mandatory assurance against injuries or professional illnesses also to the activity performed outside the factory (article 23).

The right to disconnect is dealt with by article 19 of Law No. 81/2017. The provision specifies that the written agreement between worker and employer must also regulate the rest periods of the employee and indicate the technical and organizational measures taken by the parties to assure to the worker the right to disconnect from company devices.

The Italian legislator – partially following the French example – has drafted the rule concerning the right to disconnect only as a cornice: no mention is made to time slots that might have to remain free from employer's solicitations, or to specific instruments to ensure worker's rest periods<sup>40</sup>. The right to disconnect is a mandatory element of the agreement that the parties of the labour relationship have to execute to accede to smart working regime, therefore its field of application is limited to smart workers, and less extended from the French rule. The content of the right, in any case, may be implemented by collective agreements. In addition, also in Italy the legislator excluded to enact an employee's obligation to disconnect, embracing trade unions' instances and in the light not to undermine the principle enshrined on article 2087 of Italian Civil Code, ascribing exclusively to the employer the duty to adopt all needed means to assure the protection of employees' health.

### **3.2. Italian social partners: first collective agreements and the request of involvement of workers' organizations**

The bill concerning smart working was, in general, appreciated by main social partners. As to workers' organizations, the proposal met the positive reaction of CISL, that through the metalworkers' federation FIM stressed the importance of the provisions introducing an obligation of written form for the agreement to accede to the smart working regime, and to whom the bill represents a first step to adapt Italian labour law framework to the upcoming new technological revolution<sup>41</sup>. Even CGIL, that initially criticised the proposal highlighting the risks connected to an

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<sup>40</sup> E. DAGNINO, I. MOSCARITOLLO, *Diritto alla disconnessione: un diritto di nuova generazione?*, 19 September 2016, link: <http://www.bollettinoadapt.it/diritto-alla-disconnessione-un-diritto-di-nuova-generazione/> (last consultation: 19 October 2017).

<sup>41</sup> CISL, *Audizione della Cisl presso la Commissione lavoro, previdenza sociale del Senato della Repubblica*, 8 **Rev. Bras. Prev., Curitiba, Paraná. v.9 n.1, p.97-115, Janeiro-Junho. 2018.**



undeclared augmentation of the working time, then recognised some positive aspects of the of the Law No. 81/2017, as the provisions allocating smart workers in the domain of dependent work.

In any case, both CISL and CIGL – in the memories presented, respectively, during the auditions before the Labour Commission of the Senate in March 2016, and before the Labour Commission of the Chamber of Deputies at the beginning of 2017, demanded to improve the bill, without achieving the consent of the Parliament.

With specific reference to the right to disconnect, CISL, being concerned to risks that attain to an individual agreement setting the conditions of smart work, insisted for the introduction of a provision expressly recognising at least the priority regulative role of collective agreements, to be executed by the most representatives trade unions according to criteria of art. 51 of Legislative Decree 81/2015<sup>42</sup>. CGIL demanded to provide for specific rules to protect the smart workers' privacy and personal data that could be revealed when the employee exercise the right to disconnect, and to prevent the employer to utilize specific tools to survey workers when they are outside their offices. Both workers' organisations, finally, requested to the Parliament to provide for stronger tax incentives for employers accepting to regulate smart work and right to disconnect through collective bargaining, and to provide for more guarantees concerning the workers' possibility to leave from the smart working agreement without the interruption of the labour relationship<sup>43</sup>.

With reference to employers, Confindustria generally appreciated Law No. 81/2017, and in particular agreed with trade unions about the importance of the expressed indication that “agile workers” are employees, in order to avoid any ambiguity of law that could increase the number of juridical proceedings. As to right to disconnect, Confindustria does not directly deal with the topic, but suggests two amendments that could endanger its effectiveness<sup>44</sup>. The first one is the request to modify the aforementioned law, in order to provide for a general equivalence between a working day spent to the employer's premises and one passed under the smart working regime, consequently excluding the employers' liability in case the worker should overcome the maximum daily time while working under the smart regime. The second concerns the introduction of time slots of workers' availability, during which the employee is obliged to promptly reply to employer's requests while, outside these periods, he could be contacted by telephone or e-mail but not compelled to be immediately available. This ambiguous suggestion could reveal itself as an overturning of the goal pursued by the proposers of the right to disconnect, entailing its substitution

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<sup>42</sup> *Ibidem*.

<sup>43</sup> CGIL, *Audizione Cgil su ddl lavoro autonomo e lavoro agile*, 10 January 2017, link: <http://www.cgil.it/audizione-cgil-ddl-lavoro-autonomo/#> (last consultation: 28 October 2017).

<sup>44</sup> CONFINDUSTRIA, *Audizione su disegno di Legge AC. 4135*, 10 January 2017, link: <http://www.confindustria.it/wps/wcm/connect/www.confindustria.it5266/94504d61-6747-458b-8621-11319022b1c0/Audizione+AC+4135+-+10.01.2017.pdf?MOD=AJPERES> (last consultation: 26 October 2017).

with an employee's right not to promptly fulfil employers' assignments outside normal working time.

As to collective bargaining, from 2015 the number of agreements essaying to regulate the right to disconnect – even before the introduction of the bill finally approved in 2017 by the Parliament – gradually increased.

In particular, most relevant examples are referred to bank sector and, recently – also in the light of the upcoming technological improvement brought by Industry 4.0 – to the field of mechanical engineering industry.

In relation to bank clerks, the right to disconnect has been included in some agreements concerning the adoption of different smart working regimes, and referred to protection of employees' health and work-life balance. A relevant example is the agreement (the "Unicredit agreement") reached on 22 April 2016 between the bank Unicredit S.p.A. and the Commission composed by representatives of trade unions, among them FISAC/CGIL and FIRST/CISL<sup>45</sup>.

In particular, article 5 of the abovementioned agreement provides that communications between the company and employees, through telephone, e-mail, chat or other functional devices, shall have to be realized respecting the rules about working time provided by the national collective agreement applicable by the employer. Therefore, the parties, even if did not regulate the possibility for the worker to exercise a specific right not to be contacted outside the ordinary working time, imposed on the employer the obligation to respect workers' rest periods.

As indicated above, the issues concerning right to disconnect involved, recently, also manufacturing. In particular, the national collective agreement executed in November 2016, through its section IV, title III, article 5, encourages the workers' and employers' organizations to find, at company level, solutions to promote the conciliation between working time and private life. The same article, also, expressly makes reference to smart working, specifying that, once the Italian Parliament will have adopted a general law on this matter, the social partners will consider whether integrate the collective agreement. A similar provision, unusual for an agreement concerning workers of manufacturing, if considered together with the bill about smart working recently approved by the Italian Parliament, seems to open a new phase for employees of mechanical engineering industry.

In the light of above, even if the positive conditions of the Unicredit agreement cannot be reasonably reached in all fields, the positive outcome of first experimentations made by collective bargaining about right to disconnect encourage to retain that the provisions of Law No. 81/2017

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<sup>45</sup> CGIL, *Il diritto alla disconnessione*, 13 May 2017, link: <http://www.fisac-cgil.it/63000/internazionale-il-diritto-alla-disconnessione> (last consultation: 28 October 2017).



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could be well implemented by social partners, hopefully without delegating the regulation of this relevant legal institute to individual agreements.

#### **4. Conclusions: an updated protection of work-life balance as a global issue**

The social and political debate developed in France and in Italy, and the efforts of social partners to update collective agreements, highlight that technological evolution urges the introduction of a “second generation” of rights, protecting aspects of workers’ life previously not deeply influenced by labour obligations.

One of them is the protection of employees’ work-life balance, declined *in concreto* also through the right to disconnect.

On this point, the solutions individuated are both relevant and partially different.

In France, the regulation of the right to disconnect is, in principle, delegated to social partners, with the possibility of unilateral employer’s intervention only when an agreement on that aspect cannot be reached. In Italy, conversely, the legislator made reference directly to an individual agreement between workers and employers, even if this provision does not seem to prevent collective agreements to discipline right to disconnect.

The French solution, then, is directed to a wider number of workers and not limited – as in Italy – to employees’ that joined the smart working regime.

At the same time, both in France and in Italy the legislator did not provide for a strict regulation of this right, without indicating means to reach the goal of a better workers’ protection, or time slots to be respected: these elements, therefore, will have to be analysed and disciplined case by case.

From their side, trade unions urge that the matter is definitively delegated to collective bargaining, without space for unilateral employer’s initiatives, and request the legislator to detail limits to the possibility to solicit workers outside ordinary business hours.

Data concerning the increasing role of technology in work organization underline that the issue related to protection of employees’ work-life balance and rest periods is destined to become, in few years, a global issue. To address it and find a positive balance between different instances, also the role of international bodies, as ILO, appears fundamental.

With reference to this aspect, the main issue seems to be updating Conventions referred to working time and rest periods, according to the new instances deriving from technological evolution. On this point, even if differences between national approaches are still wide, the common element emerging from the described debate is the need to impose to parties of a labour relationship, possibly through collective bargaining, the obligation to respect minimum workers’ rest periods, without admitting employees’ solicitations outside the agreed working time. Furthermore, member

States have to be encouraged to provide for specific instruments to protect employees' work-life balance – also outside the area of smart working and even of traditional dependent work –, and to promote campaigns to warn employees about risks for health deriving from digitization, to face the relevant changes in work organization brought by technological evolution.

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