MALTA IT LAW ASSOCIATION

MITLA POSITION PAPER – RIGHT TO DISCONNECT

INTRODUCTION

Today's working realities and increased adoption of new information and communications technologies have introduced new challenges into our working environments. The boundaries between work and private life have been blurred. Since workers are constantly connected through digital tools, employers' expectations have changed.

A local discussion was recently sparked on the employees' right to disconnect. This is a proposed right ensuring the ability of people to detach from work and choose to not engage in work-related electronic communications, such as e-mails, calls, or messages, beyond work hours and during their designated rest periods, including vacations.

MITLA believes that a wider discussion is required on the introduction of further protections to workers against the growing realities of digital advances and in favour of greater flexibility in working arrangements, to benefit both the employer and the employee. This would have to be weighed against the nature of the work, the professional competence of an individual, the skill of the employee, the employee's preferences, and the philosophy adopted in their work-place environment. In this position paper, MITLA questions whether the introduction of the right to disconnect, as proposed so far before the European Parliament, is necessary once legislative solutions and employment practices are already in place to guarantee employees their freedoms.

LITERATURE AND STAKEHOLDERS' POSITION SO FAR

The right to disconnect is not unknown in some parts of Europe. We all benefit from pre-existing fundamental human rights which cover elements of the right to disconnect. The European Convention of Human Rights widely guarantees our right to respect for private and family life. Another notable right is the right to rest and leisure found in Article 24 of the Universal Declaration of Human Rights. The Council of Europe's Revised European Social Charter provides for a right to just working conditions, including reasonable working hours and rest periods (Article 2), a right to safe and healthy working conditions (Article 3), a right to collective bargaining (Article 6), and a right to protect workers with family responsibilities (Article 7).

Several European countries have introduced some form of a 'right to disconnect,' albeit through different means. In some cases, this was introduced as a provision in employment law which caters for the maximum hours of work to which an employee can be subjected to, whilst in other instances, self-regulation has taken over through company policies and contract negotiations guaranteeing employee's privacy and freedoms.

Given the guarantees provided by French laws to employees, it is not surprising that the concept of a 'right to disconnect' first emerged in France in 2001 following a decision of the French Supreme Court. The Court generally held that an employee could not be placed under any obligation to accept work at home or

to carry with them work tools outside their place of work outside work hours.

France proceeded to enshrine this right in what is today known as the El Khomri law with a chapter dedicated specifically to "Adapting Labour Law to the Digital Age" (Adaptation du droit du travail à l'ère du numérique). The law, which entered into force in 2017, provides that: "(7) The procedures for the full exercise by the employee of his right to disconnect and the establishment by the company of mechanisms for regulating the use of digital tools, with a view to ensuring respect for rest periods and leave as well as personal and family life.

Failing agreement, the employer shall draw up a charter, after consultation with the works council or, failing that, with the staff delegates. This charter defines these procedures for the exercise of the right to disconnect and furthermore provides for the implementation, for employees and management and management personnel, of training and awareness-raising activities on the reasonable use of digital tools."[1]

Other countries, such as Germany and Italy, have also introduced some form of a right to disconnect either through good practices or as part of employment guarantees (as opposed to a stand-alone right per se).

More recently, in January 2021 the European Parliament, through a strong favourable vote, adopted a resolution with recommendations to the EU Commission on the right to disconnect. Maltese MEP Alex Agius Saliba pushed the agenda for this proposal which sparked a wider discussion on the potential further recognition of such right to disconnect mechanisms. The proposal is for a directive on the right to disconnect where it is recognised that digitisation and digital tools have presented the paradox of increased productivity but also gave rise to a number of ethical, legal, and employment-related challenges, such as intensifying work and extending working hours, thus blurring the boundaries between work and private life. High level principles are adopted within this Proposed Directive so that Member States are to ensure that employers take the necessary measures to provides workers with the means to exercise their right to disconnect. Amongst the measures proposed, employers should set up an objective, reliable, and accessible system that measures the duration of time worked each day by each employee, in accordance with workers' right to privacy and to the protection of their personal data. Workers should have the possibility to request and obtain the record of their working times.

A minimum set of working conditions was proposed consisting of:
(a) practical arrangements for switching off digital tools for work purposes, including any work-related monitoring tools;
(b) a system for measuring working time;
(c) health and safety assessments, including psychosocial risk assessments, with regard to the right to disconnect;
(d) the criteria for any derogation by employers from their requirement to implement a worker's right to disconnect;
(e) in the case of a derogation under point **(d)**, the criteria for determining how compensation for work performed outside working time is to be calculated; and
(f) awareness-raising measures, including in-work training, to be taken by employers with regard to the working conditions referred to in this paragraph. Penalties have been suggested as enforcement measures in the case of infringements.

MITLA notes that following the announcement of the proposed directive, various local stakeholders voiced their concerns in local media. The Malta Employers' Association, the Malta Chamber of Commerce, and the Malta Business Bureau insisted that government should not introduce national legislation on the right to disconnect.

[1] **French Labour Code, Chapter II, Article 55.**

The Malta Chamber of Commerce commented that existing labour rules are adequate, and no further legislation is required. The Malta Business Bureau indicated that a space for dialogue ought to be created where employers and workers, together with their representatives, would find flexible solutions relevant to their workplace (as opposed to rigid legislation). Finally, the Malta Employers' Association deemed the legislative initiative as premature and stated that it would be unreasonable to rush things locally in respect of this right.

MITLA'S POSITION

MITLA has been following closely the proposals submitted before the European Parliament, the proposed directive, as well as the opinions and articles submitted in the local media in relation to the right to disconnect.

Following its studies of the available information, the position of MITLA is that implementation of a right to disconnect: (i) should be based on balancing the rights and interests of all those participating in the digital economy, and (ii) its introduction should be assessed in the light of existing legislative guarantees that already safeguard the right of employees to enjoy their private life and disconnect.

MITLA embraces the principles surrounding the right to disconnect as an important step to increase the adoption of information technology and to push the digital economy, whilst at the same time protecting workers' rights. However, whether the introduction of a legal right as provided in the proposed directive is merited and how this right should be introduced would need to be assessed against a number of factors.

A reasonable balance should be reached between the interests of employers and employees participating in the digital economy. It is understandable that a right to disconnect offers a better work–life balance for employees. Nevertheless, before the introduction of any such right consideration should be given to different business models, for instance businesses that operate outside normal business hours, and to what constitutes sufficient reason for a business to contact its employees, particularly those classified as professionals, outside working hours, during work-related emergencies or disruption of services. In other words, an employer might have a legitimate expectation, depending on the nature of the work and under specific circumstances, to be justified in reaching out and communicating with its employees outside working hours. MITLA believes that a balance between the rights of the employee to disconnect and the reasonable expectations of the employer not to disrupt business can only be achieved if there is sensible dialogue and negotiations between the stakeholders in introducing this right. Working arrangements and accommodating a right for employees to be able to disconnect should benefit both employer and employee, as enabled by the nature of the work, the skills and professional competences of the employee, and the technological means available.

Furthermore, MITLA questions whether a fundamental right to disconnect as a 'one-size-fits-all' intervention, through a proposed directive, is required when it appears that there are already legislative safeguards and industry practices in place to cater for employees' privacy and disconnection beyond working hours.

This right in fact shares similarities with several pre-existing fundamental human rights.

Where elements of the right to disconnect were introduced in other European countries, such elements tend to have been either adopted as part of employment law or left up to the industry to self-regulate. It would appear, therefore, that in such countries, the right to disconnect was not treated as a one-size-fits all EU-wide solution but rather as a principle that can be adapted to suit the needs of each entity or workplace in order to accommodate the realities faced by each business. To name a few specific examples, the El Khomri Law introduced in France does not attempt to define a 'right to be disconnected' but rather allows companies to choose the most practical ways to implement the right taking into consideration the nature of the business (for example, whether it operates across time zones, or whether the employees work nights or weekends). This law encourages self-regulation and the provision of internal company policies to employees that serve to outline best practices to ensure that the employees are afforded a right to privacy and to disconnect. The obligation applied at law is therefore more akin to a 'negotiation process' with each individual employee, rather than a mandatory requirement.

Similarly in Germany, whilst no 'right to disconnect' exists per se, industry has a history of implementing best practices through the norm of adopting policies which cater for a limit on the amount of digital connection with employees after work hours. Companies such as Volkswagen, Henkel, Daimler, Bayer, and Allianz appear to have all embraced this form of self-regulation. As another example, Italy introduced elements of this right in sector-specific employment legislation which identified that the contract of employment would also need to identify a worker's rest period, as well as technical and organisational measures necessary to ensure that the worker can disconnect from work technological equipment.

Another instance how the benefits of the rights to disconnect can be guaranteed is by having employees and trade unions negotiating terms so that, depending on the employees' desires, the nature of the work involved, and the individuals represented, the right becomes a human resource management best practice. Labour laws are, in fact, already rife with various rights granted to workers through various directives and regulations including those relating to working time, collective redundancies, and part-time work conditions. Workers are guaranteed a right to working conditions which respect the individual's health, safety, and dignity, as well as the right to a maximum working time, to daily and weekly rest periods, and to annual periods of paid and vacation leave. European legislation such as the Working Time Directive, which is transposed into national law, already set out rules on working and rest time.

Without diminishing the importance of such debate, MITLA is therefore proposing that the guarantees and benefits deriving from a 'right to disconnect' are applied without necessarily introducing an EU-wide rigid concept within a directive. Balance between work and private life is essential to workers; that knowing how to disconnect is a skill which needs to be supported by employers. MITLA observes that greater benefits may be derived if the stakeholders discuss and design together how these benefits are to be implemented, keeping in mind a fair balance between employee needs and industry requirements.

To this end, MITLA considers that the position currently taken by the EU Commission, especially through the pronunciations and statements made by EU Commissioner for Jobs and Social Rights Nicolas Schmit during the same debate in parliament leading to the vote, should serve as the example for further explorations on the right to disconnect where social dialogue, the participation of

social partners as key stakeholders, as well as discouraging one-size-fits-all EU-wide solution could be the ideal route.

Finally, MITLA observes that in the majority of the jurisdictions and institutions which have assessed the introduction of some form of a right to disconnect, and before any legislative or industry norms were introduced, studies backed by scientific evidence and surveys were conducted on the mental health and preferences of employees in the work place, and the viability of legislation to target it.

CONCLUSION

In light of the complex nature of the right to disconnect, MITLA proposes that rushing directly towards legislative solutions, at EU or national level, without exploring non-legislative paths should be avoided.

MITLA agrees that progress in recognising and introducing a right to disconnect should be propelled through the leadership all stakeholders and social partners, and that progress in this field, as is the case with many other issues affecting employee rights, can be realised through routes other than legislative intervention, such as sector specific regulations, industry self-regulation, stakeholder agreements, and negotiations.

MITLA believes that at this stage, a general public debate and consultation is required to determine the public sentiment towards the introduction of this right with all stakeholders, including employees, employers, trade unions, and professionals. As a first step, MITLA shall bring together experts from all sectors to discuss this right during a free webinar taking place on 23 March 2021 at 4pm. Interested contributors are encouraged to visit https://www.eventbrite.com/e/webinar-right-to-disconnect-tickets-142873012025 for more information.

Following the event, MITLA shall gather, assess, and publish the stakeholders' position on this right, and revise this position paper if and where needed on the basis of its studies. Finally, MITLA shall collaborate with international organisations and entities in publishing this position paper to seek feedback from other member states.

THE MALTA IT LAW ASSOCIATION