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Labor Law and the Right to Disconnect

1. The right to disconnect in agile working

In the Italian legal system, the only legislative acts that mention the right to disconnect are related to agile working: the first dates from 2017 with Law no. 81, Article 19; while the second dates from 2021 with Article 2, paragraph 1-ter, Law no. 61, converting Decree Law n. 30 of 2021. The right to disconnect was introduced by the legislator with Law no. 81 of 2017 with the aim of ensuring an optimal balance between the professional and private life of the worker,¹ as well as to protect the worker's health.²

The legislator obliges the employer to avoid intrusions into the private life of the worker. At the same time, the legislator's intent is to allow the worker to freely enjoy his/her free time and, therefore, not to suffer intrusions into his/her private life outside working hours. These obligations imposed on the parties are set by the legislator because, in agile working, the condition of potential indefinite connection is more pronounced compared to face-to-face work³. Therefore, the right to disconnect – an indispensable tool, within a digitized context, to allow the worker to regain possession

¹ Before the introduction of Law No. 81 of 2017, agile work was regulated through collective bargaining agreements, such as the Nestlé Agreement of 12 October 2012, the Barilla Agreement of 2 March 2015, the Zurich Agreement of 23 September 2015, the Snam Agreement of 26 November 2015, the Euler Hermes Agreement of 15 January 2016, the Axa Agreement of 12 April 2016, and the Eni Agreement of 6 February 2017.

² G. Ludovico, *Nuove tecnologie e tutela della salute del lavoratore* [in:] *Nuove tecnologie e diritto del lavoro*, eds. *idem*, F.F. Ortega, T.C. Nahas, Milano 2021, p. 109.

³ M. Altimari, *Il diritto alla disconnessione: un "vecchio" diritto ineffettivo?* [in:] *Il lavoro e i suoi luoghi*, ed. A. Occhino, Milano 2018, pp. 184–185; M. Avogaro, *Lavoro agile e work-life balance: il diritto di disconnessione alla prova dell'autonomia collettiva*, "Giustiziacivile.com" 2018, no. 7, p. 7.

of his/her free time⁴ – is considered worthy of protection, although not unanimously,⁵ by national⁶ and European jurisprudence.⁷

This goal can be achieved when the worker accesses airplane mode through disconnection, resulting in a situation of total absence of connection from the IT tools that connect him/her to the employer.

Regarding Law no. 81 of 2017, based on an interpretation of Article 19 of the norm, while not providing a definition of disconnection, indirectly leads the legal operator to believe that it pertains particularly to the sphere of non-working time⁸. This thesis can be supported based on the conjunction “as well as,” used in the final part of the first paragraph of Article 19, according to which the individual agile work agreement must identify, in addition to rest times, the technical and organizational measures necessary to ensure disconnection from technological tools.⁹

Based on this analysis, it is possible to argue that the right to disconnect is linked to the macro-theme of working hours, specifically non-working time, but with an additional application profile derived from the etymology of the word.

The term disconnection derives from the Latin root *connexio* (-onis), which describes a union, a bond, or a close interdependence, which from a legal point of view could be understood as a constraint. The opposite term, generated by the addition of the preposition “di” to the Latin root, indicates a separation or a split, in this case, temporary because it pertains to the sphere of non-working hours, related to the constraints of the employment relationship. For these reasons, it is possible to argue, based solely on the content of Article 19, that it is necessary to identify, in the agile working agreement, the technical and organizational measures indispensable to ensure the separation of the worker from technological tools.¹⁰

⁴ R. Di Meo, *Il diritto alla disconnessione nella prospettiva italiana e comparata*, “Labour & Law Issues” 2017, vol. 3, no. 2, p. 31; M. Militello, *Il work-life blending nell’era della on demand economy*, “Rivista giuridica del lavoro” 2019, issue 1, p. 47 ff.; M. Nicolosi, *La disconnessione nel patto di agilità tra legge, contrattazione collettiva e diritto europeo*, “Il Lavoro nelle Pubbliche Amministrazioni” 2022, no. 4, p. 695 ff.

⁵ See: A. Occhino, *Il tempo libero nel diritto del lavoro*, Torino 2010, p. 15 ff.; C. Cester, *Lavoro e tempo libero nell’esperienza giuridica*, “L’orario di lavoro. Quaderni di diritto del lavoro e delle relazioni industriali” 1995, no. 17, p. 9 ff.; V. Leccese, *L’orario di lavoro. Tutela costituzionale della persona, durata della prestazione e rapporto tra le fonti*, Bari 2001; G. Ricci, *Tempi di lavoro e tempi sociali: profili di regolazione giuridica nel diritto interno e dell’UE*, Milano 2005, 74 ff.; M. MC Britton, A. Brandi, L. Ferramosca, M.L. Serrano, *Le dimensioni giuridiche del tempo di lavoro nel quadro costituzionale italiano* [in: *Le dimensioni giuridiche dei tempi di lavoro*, eds. B. Veneziani, V. Bavaro, Bari 2009, pp. 361–366.

⁶ See: Cass. 21 maggio 2008, n. 12962, *Rivista italiana di diritto del lavoro* 2008, II, p. 825 ff.; *contra* Cass., 27 aprile 2011, n. 9422, *Responsabilità civile e previdenza* 2011, p. 1509.

⁷ See: CJEU, 21 febbraio 2018, cause C-518/15; CJEU, 9 marzo 2021, cause C-344/19 and C-580/19.

⁸ C. Timellini, *La disconnessione bussa alla porta del legislatore*, “Variazioni su Temi di Diritto del Lavoro” 2019, no. 1, p. 332.

⁹ M. D’Aponte, *Evoluzione dei sistemi organizzativi nell’impresa e tutela dei diritti dei lavoratori nel quadro della regolamentazione europea: dal diritto alla “disconnessione”, al lavoro “per obiettivi”*, “Massimario di Giurisprudenza del Lavoro” 2022, no. 1, p. 38.

¹⁰ E. Ales, *Il lavoro in modalità agile e l’adeguamento funzionale della subordinazione: un processo indolore?*, “Federalismi” 2022, no. 34, p. 183.

1.1. Follow-up... the urgent measures to address the spread of COVID-19

Decree Law no. 30 of 2021, converted with modifications into Law no. 61 of 2021, entitled "Urgent measures to address the spread of COVID-19 and support measures for workers with minor children in distance learning or quarantine," explicitly addresses the right to disconnect in our legal system for the second time in Article 2, paragraph 1-*ter*. The novelty contained in Article 2, paragraph 1-*ter*, which immediately strikes legal practitioners, lies in the explicit qualification of disconnection as a right, unlike Article 19, Law no. 81 of 2017, eliminating any possible interpretative doubt.¹¹

Even in this new context, the right to disconnect is inseparably anchored by the legislative text to the performance of work in agile mode. In fact, it is clarified that to enjoy the right to disconnect from technological tools and IT platforms, the worker must perform a work activity in agile mode, in compliance with any agreements signed by the parties and subject to any agreed periods of availability.

The legislative text might lead some interpreters to consider the exercise of the right itself legitimate, provided that such agreements are signed between the parties. However, this hypothesis is contradicted by the adjective "possible," indicating that such agreements may or may not be present.

The right to disconnection, to prevent the worker from being reached by solicitations from his/her employer, is realized in the activity of not being connected to "technological tools and IT platforms."

In practical terms, disconnection can be achieved by: turning off, for example, the company telephone during non-working periods¹²; or setting one's devices to offline mode, indicating one's "non-contactability."¹³ Or it could also imply a more specific content and it could prohibit, during disconnection, the sending of work-related communications.¹⁴ Or it could imply the possibility for the employer to send a communication on the condition that the worker does not receive it during his/her disconnection period.

This can be done through two possible options: the first relates to the ability to schedule a send. The most familiar example to everyone is the option provided by Google's Gmail service: scheduled email sending later than when it is concluded. The second is achieved through the installation of a program that prevents communications from reaching the worker while disconnected.

The effect obtained is the same, which is to deliver all communications to the worker once he/she exits their "disconnection" time. To concretely translate the above

¹¹ R. Di Meo, *Il diritto alla disconnessione...*, p. 27.

¹² F. Cannata, *Disconnessione e riservatezza, quali garanzie nel contesto del lavoro agile?*, "Lavoro e previdenza oggi" 2022, no. 3-4, p. 226.

¹³ C. Timellini, *Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale*, "Lavoro Diritti Europa" 2021, no. 4, p. 9; R. Zucaro, *Il diritto alla disconnessione. Nuove modalità di tutela della qualità del tempo di vita nella prospettiva giuslavoristica*, "Lavoro Diritti Europa" 2022, no. 1, p. 9.

¹⁴ S. Magagnoli, *Diritto alla disconnessione e tempi di lavoro*, "Labour & Law Issues" 2021, vol. 7, no. 2, p. 95 ff.

into something anyone can understand, this is what happens when a mobile phone is set to airplane mode to prevent one receiving communications or being reachable during a flight. In the example just given, it is still possible to use the device, but all communications reach the recipient only when they remove the airplane mode and reactivate normal reception. This could be the right solution to interpret the right to disconnect, subject to any agreements that provide for periods of availability.

Following the end of the emergency period on March 31, 2022, the main question regarding the right in question was whether workers could continue to apply Article 2, paragraph 1-ter, and consequently consider it still in force or not.¹⁵ The title of the legislative provision, at least apparently, temporally limits the scope of application until the end of the state of emergency, since that it is aimed at “addressing the spread of COVID-19.”

By this superficial analysis, it seems obvious to state that from 1 April 2022, the only legislative provision addressing the right to disconnect is Law no. 81 of 2017.

However, this statement should not be considered correct for two reasons: the first relates precisely to the interpretation of the legislative title, which does not pertain to the state of emergency, which ended on 31 March 2022, but rather to addressing the spread of the virus; the second, a systematic reason, relates to the lack of a specific expiration provision for paragraph 1-ter, as the emergency legislator usually provided. In particular, Article 2, paragraph 10 lists all measures subject to expiration, even before the end of the state of emergency, which were applied until 30 June 2021, without including paragraph 1-ter about disconnection among them.

Once one has offered this clarification, it is appropriate also to analyze the peculiarities of the content of Article 2, paragraph 1-ter¹⁶.

The right to disconnect implicitly presupposes that unlimited availability is not allowed and simultaneously could be assumed to strengthen the value of a freedom already inferred, negatively, from the current engagement periods or availability.¹⁷

Indeed, the last sentence of Article 2, paragraph 1-ter, is significant as it aims to strengthen the hypothesis that disconnection is a necessary tool to fully protect and enjoy rest periods, not coinciding with them.

In this role, disconnection is designed to ensure the proper enjoyment of rest through the organization of the technical and organizational measures provided, inhibiting the employer's solicitations towards the worker.

This interpretation supports the hypothesis that disconnection reflects an obligation to do, namely, to seek solutions to ensure the proper enjoyment of the

¹⁵ Conversely, see: C. Timellini, *Il diritto alla disconnessione...*, p. 11; M. Nicolosi, *La disconnessione...*, pp. 674–688; R. Zucaro, *Nuove modalità di tutela della qualità del tempo di vita e di lavoro. Il diritto alla disconnessione*, “Il Lavoro nelle Pubbliche Amministrazioni” 2022, no. 2, p. 320.

¹⁶ See D. Calderara, *La disconnessione: evoluzioni e prospettive*, “Massimario di Giurisprudenza del Lavoro” 2022, no. 2, pp. 277–278.

¹⁷ A. Fenoglio, *Una veste digitale per il diritto al riposo: il diritto alla disconnessione*, “Lavoro Diritti Europa” 2021, no. 4, p. 10.

right beyond the agreed time¹⁸ by identifying necessary technical and organizational measures.¹⁹

This would not preclude, even based on the objectives of Law no. 81 of 2017, considering the right to disconnect being also aimed at achieving a work-life balance²⁰.

This would confirm the thesis that the right to disconnect is meant to ensure, on a technical-organizational level, respect for minimum consecutive rest periods, allowing the worker to restore his/her physical and mental energy.²¹

In a different way, some exponents of legal doctrine have argued that the right to disconnect concerns an obligation not to do. This second interpretation, limited to excluding that the employee cannot be contacted outside the agreed hours, would deprive the norm of its innovative scope insofar as it would be absorbed into the already existing legislation on working hours.²²

1.2. Follow-up... the agreement side

Regarding the contractual aspect, at the national level, in addition to the multiple regulations provided by collective bargaining, for the purpose of identifying a notion of disconnection, it is appropriate to consider the National Protocol on Agile Work of 7 December 2021.²³

In detail, its Article 3, paragraph 2, stipulates that work performance can be divided into time slots, but it is also necessary to identify a disconnection slot, during which the worker does not perform the work.²⁴

¹⁸ See: A. Boscati, *L'inquadramento giuridico del lavoro da remoto tra potere direttivo e autonomia della prestazione* [in:] *Il lavoro da remoto. Per una riforma dello smart working oltre l'emergenza*, ed. M. Martone, Piacenza 2020, p. 49 ff.; M. Biasi, *Brevi spunti sul lavoro da remoto post emergenziale, tra legge (lavoro agile) e contrattazione (smart working)*, "Lavoro e previdenza oggi" marzo-aprile 2021, p. 183; S. Magagnoli, *Diritto alla disconnessione...*, p. 92 ff.

¹⁹ See: M.T. Carinci, *Il lavoro agile nel settore privato* [in:] *Licenziamento, subordinazione e lavoro agile tra diritto emergenziale e diritto giurisprudenziale*, eds. eadem, A. Tursi, Torino 2020, pp. 92–93; E. Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, "Lavoro Diritti Europa" 2021, no. 4, p. 1024.

²⁰ D. Calderara, *Diritto alla disconnessione e salute dei lavoratori* [in:] *Lavoro agile e smart working nella società post-pandemica. Profili giuslavoristici e di relazioni industriali*, eds. M. Brollo, M. Del Conte, M. Martone, C. Spinelli, M. Tiraboschi, Bergamo 2022, p. 182.

²¹ A. Preteroti, *Il diritto alla disconnessione nel lavoro agile alle dipendenze della pubblica amministrazione*, "Lavoro Diritti Europa" 2021, no. 3, p. 6.

²² V. Zeppilli, *Disconnessione: un'occasione mancata per il legislatore?*, "Rivista giuridica del lavoro" 2019, no. 2, p. 314; L. Caputo, *Il diritto alla disconnessione: dai contratti collettivi a una possibile tutela generalizzata*, "Giustiziacivile.com" 2020, no. 11, p. 6.

²³ Article 3, National Protocol on Agile Work of 7 December 2021, <https://www.lavoro.gov.it/notizie/Documents/PROTOCOLLO-NAZIONALE-LAVOROAGILE-07122021-RV.pdf> [accessed: 2023.05.16]. See: P. Albi, *Introduzione: il Protocollo nazionale sul lavoro agile tra dialogo sociale e superamento della stagione pandemica*, "Lavoro Diritti Europa" 2022, no. 1, p. 1 ff.; L. Zoppoli, *Il protocollo sul lavoro agile nel settore privato e gli 'altri'*, "Lavoro Diritti Europa" 2022, no. 1, p. 1 ff.; M. Brollo, *Dopo il protocollo: i tre pilastri dello smart working*, "Bollettino ADAPT" 2021, no. 44, p. 2.

²⁴ During the renewal of the National Collective Labor Agreements (CCNL), the Protocol is usually adopted. For example, see the renewal of the CCNL for Mobility/Railway Activities Contractual Area, signed on 22 March 2022.

Based on this reasoning, it can be argued that disconnection is achieved through the adoption of specific technical and/or organizational measures and consists of identifying one or more slots²⁵ in which the worker does not perform work and is not available to the employer. Indeed, according to this reasoning, the worker is disconnected from the technological tools necessary to perform the work. This provision appears to serve as a prototype for developing a concept of disconnection that is not limited to the prescribed cases but also extends to instances when the worker chooses to interrupt his/her work. Therefore, this implies the need to identify one or more disconnection slots and to know their temporal extent.

This choice has raised many concerns regarding the general recognition of the right to disconnection, because of excessive fragmentation primarily caused by a deferral to collective bargaining²⁶ and by the lack of guidelines on daily and weekly time limits,²⁷ as well as by the choice to focus on goal-oriented work.²⁸

Part of the legal doctrine, *de iure condito*, states that, in these terms, connection can instead be understood as an obligation to provide the service,²⁹ while disconnection is identified with rest.³⁰ Other authors, hypothesizing a qualification of the services performed beyond working hours, refer to a third category that does not coincide with working hours or rest but may fall, depending on the circumstances, into one or the other category.³¹

These are some of the most significant issues for which the Protocol has received ambivalent evaluations. For many, this Protocol represents a starting point for an adequate system of worker protection,³² while for others, the document is of lesser importance, despite being an important evolutionary step in the system of industrial relations.³³

In any case, the aim of disconnection, which seeks to ensure that the worker is not reachable or contactable by an employer, seems justifiable and can be achieved primarily in two ways.³⁴ In the first scenario, disconnection is defined as technical when

²⁵ A. Cetrulo, M. Rinaldini, *Lavoro agile e organizzazione del lavoro: quale scenario dopo la pandemia?*, "Lavoro Diritti Europa" 2022, no. 1, p. 6.

²⁶ L. Zoppoli, *Tra linee guida, protocolli e circolari il lavoro agile resta un ircocervo*, "Rivista giuridica del lavoro" 2022, no. 1, p. 5.

²⁷ P. Bozzao, *Lavoro subordinato, tempi e luoghi digitali*, "Federalismi" 2022, no. 9, p. 123.

²⁸ M.T. Carinci, A. Ingraio, *Il lavoro agile: criticità emergenti e proposte per una riforma*, "Labour & Law Issues" 2021, vol. 7, no. 2, pp. 29–33. In this regard, see also: V. Bavaro, *L'orario di lavoro agile "senza precisi vincoli"*, "Lavoro Diritti Europa" 2022, no. 1, p. 10.

²⁹ V. Bavaro, *L'orario di lavoro agile...*, pp. 8–9.

³⁰ R. Di Meo, *Il diritto alla disconnessione...*, p. 30 ff.

³¹ M.T. Carinci, A. Ingraio, *Il lavoro agile...*, pp. 32–33.

³² A. Fenoglio, *Tempo e subordinazione: riflessioni intorno al lavoro agile*, "Labour & Law Issues" 2022, no. 1, p. 187; L. Zoppoli, *Il protocollo...*, p. 2.

³³ P. Ichino, *Un protocollo poco innovativo, ma non inutile*, "Lavoro Diritti Europa" 2021, no. 4, p. 6.

³⁴ C. Spinelli, *Tecnologie digitali e lavoro agile*, Bari 2018, p. 153. The author defines disconnection as "the right of the worker to interrupt contact with the employer (not responding to emails, turning off the phone, etc.), without thereby incurring in non-performance of duties and consequently exposing themselves to disciplinary sanctions" (transl. D.C.).

it involves merely limiting the use of technological tools, preventing responses to calls or emails, to ensure the intended purposes of the institution. In the second scenario, disconnection not only ensures a lack of connection with technological tools but also serves to redirect the worker's attention to something other than work, thereby allowing the achievement of personal goals.

2. Right to disconnect and rest period

It does not seem reasonable to equate disconnection with rest, since even though the purposes of disconnection and rest may appear similar, the ways in which they are utilized differ.

Disconnection, therefore, is excluded from working hours and is part of non-working hours, not overlapping with rest.³⁵

Specifically, regarding daily rest, it is expressly provided for by law that a worker is entitled to "eleven consecutive hours of rest every twenty-four hours [...], excluding activities characterized by fragmented work periods throughout the day,"³⁶ while the legislator says nothing about disconnection.³⁷

Furthermore, the wording of Article 19, paragraph 1, Law no. 81 of 2017 seems to distinguish between the two concepts, requiring both the identification of rest periods and the technical and organizational measures necessary to ensure the disconnection of the worker.³⁸

The fundamental element is the conjunction "as well as," which distinguishes the two concepts and certainly makes them compatible.³⁹

Therefore, it can be argued that the right to disconnect is indeed included within non-working hours but represents a shorter period during which more intense measures are implemented to protect the psycho-physical well-being of the employee and to ensure the balance between work and private life through disconnection from technological tools.⁴⁰

Considering all the above, it is possible to affirm that disconnection and rest may not coincide.

³⁵ M. Altimari, *Tempi di lavoro (e non lavoro) e economia digitale: tra diritto alla disconnessione e ineffettività dell'impianto normativo-garantista* [in:] *Impresa, lavoro e non lavoro nell'economia digitale*, eds. C. Alessi, M. Barbera, L. Guaglianone, Bari 2019, pp. 57–73.

³⁶ Article 7, Legislative Decree no. 66 of 2003.

³⁷ P. Bozzao, *Lavoro subordinato...*, p. 113 ff.

³⁸ R. Santucci, *Notazioni sul diritto alla disconnessione* [in:] *Tecnologie digitali, poteri datoriali e diritti dei lavoratori*, eds. A. Bellavista, R. Santucci, Torino 2022, p. 215 ff.

³⁹ Article 19, paragraph 1, Law no. 81 of 2017.

⁴⁰ G. Calvellini, M. Tufo, *Lavoro e vita privata nel lavoro digitale: il tempo come elemento distintivo*, "Labor" 2018, no. 4, pp. 405–406.

Contemplate the case where the worker and the employer agree on standby arrangements, ensuring in any case the enjoyment of rest time which, however, cannot be continuous.

The coincidence between disconnection and rest is not reasonable.⁴¹ It can be argued that the right is intended to ensure respect for rest times, thus allowing the worker to restore physical and mental energies.

The right to disconnect, while included within non-working hours, is characterized by more intense protection of psycho-physical well-being compared to rest.

The employer cannot, through the technical and organizational measures determined in the agreement, solicit the worker and connect with him/her.

Disconnection is, therefore, likely to be a shorter period compared to non-working time, during which the worker should not suffer intrusions into his/her personal life.⁴²

From these observations, it is possible to infer that rest periods can accumulate, but not overlap, with the right to disconnection, thereby allowing for better flexibility in work performance.⁴³

For instance, to elucidate further differences beyond those already mentioned, the right to disconnection primarily focuses on detachment from technological tools, whereas rest is not limited to this.⁴⁴

This perspective tends to grant a distinct and autonomous legal dimension to the worker's personal free time,⁴⁵ in addition to the already widespread concept of psycho-physical rest.

Such an interpretation of the right to disconnection makes it possible for its application to be extended and interpreted in a more protective manner compared to rest periods. For this reason, it seems possible to argue that disconnection primarily safeguards the worker's personal life from external interferences.

In particular, the comparison should be made with the so-called daily rest periods provided by Article 7, Legislative Decree No. 66 of 2003, which grants the worker the right to eleven consecutive hours of rest every twenty-four hours. The decree outlines

⁴¹ Conversely, see: E. Fiata, *L'iniziativa europea sul diritto alla disconnessione*, "Lavoro Diritti Europa" 2021, no. 4, p. 16.

⁴² See: M.C. Cataudella, *Tempo di lavoro e tempo di disconnessione*, "Massimario di Giurisprudenza del Lavoro" 2021, no. 4, p. 855. The author emphasizes how "it becomes even more difficult to delineate the boundaries between work time and personal time. A concept that illustrates this difficulty well is that of time porosity: work time becomes permeable, leading to a structural overlap between work time and personal time. Organizational flexibility, which should help workers achieve a work-life balance, instead contributes to further blurring their personal life with their work life and their working time with their free time (so-called work-life blending)."

⁴³ R. Perrone, *Il "diritto alla disconnessione" quale strumento di tutela di interessi costituzionalmente rilevanti*, "Federalismi" 2017, no. 24, p. 16 ff.; S. Bellomo, *Forme di occupazione "digitale" e disciplina dell'orario di lavoro*, "Federalismi" 2022, no. 19, p. 19; C. Spinelli, *Tecnologie digitali...*, p. 152 ff.

⁴⁴ G. Proia, *Tempo e qualificazione del rapporto di Lavoro*, "Labour & Law Issues" 2022, no. 1, p. 109; M. Del Conte, *Problemi e prospettive del lavoro agile tra remotizzazione forzata e trasformazione organizzativa*, "Argomenti di Diritto del Lavoro" 2021, no. 3, p. 557.

⁴⁵ A. Occhino, *Il tempo libero...*; R. Santucci, *Tempo di non lavoro* [in:] *Enciclopedia del Diritto*, Annali IV, Milano 2011, pp. 1203–1204.

exceptional cases to which the general rule does not apply but which can be derogated, and these exceptions refer to activities characterized by fragmented work periods, such as, for example, agile work, throughout the day or on-call arrangements.⁴⁶

Availability, understood as the worker's obligation to be connected and reachable, does not seem compatible with the total absence of stimuli from the employer, which should characterize disconnection.

This conclusion does not appear to be undermined by the literal wording of Article 2, paragraph 1-ter, of Decree-Law No. 30 of 2021.

Indeed, according to this provision "the right to disconnect from technological tools and IT platforms is recognized for the worker performing the activity in an agile mode, in compliance with any agreements signed by the parties and without prejudice to any agreed on-call periods."

However, this does not mean that a disconnection agreement can include on-call periods within the disconnection time, but rather that any on-call agreements can coexist with and limit the otherwise agreed-upon disconnection periods.⁴⁷

In other words, as previously noted, the on-call period may or may not be part of the working hours. The issue, therefore, seems to be once again related to the impact of on-call agreements on the right to rest, which may result in a reduction of the time dedicated to attending to one's own interests.⁴⁸ Indeed, if a worker is required, by virtue of these agreements, to respond to calls even during the disconnection period, the employer may be obliged to grant additional compensatory rest periods⁴⁹ or consequently to extend the right to disconnect.

Thus, a worker who is on-call cannot be a disconnected worker.

The disconnection period, therefore, coincides with but does not exhaust the rest period, which is conceptually broader: in terms of set theory, it can be said that disconnection represents a subset of rest.⁵⁰

⁴⁶ Pursuant to Article 7, Legislative Decree no. 66 of 2003. See: V. Leccese, *La disciplina dell'orario di lavoro nel d.lgs. n. 66/2003, come modificato dal d.lgs. n. 213/2004* [in:] *Lavoro e diritti a tre anni dalla legge 30/2004*, ed. P. Curzio, Bari 2006, p. 304 ff.

⁴⁷ S. Cairolì, *Il lavoro agile nell'emergenza epidemiologica Covid-19 (datori di lavoro privati)* [in:] *Lavoro e tutele al tempo del Covid-19*, eds. G. Santoro-Passarelli, A. Maresca, S. Bellomo, Torino 2020, p. 61.

⁴⁸ S. Bellomo, L. Rocchi, *Orario di lavoro, reperibilità, fruizione del tempo libero. La Corte di giustizia e il parziale superamento della sentenza Matzak del 2018*, "Rivista Italiana di Diritto del Lavoro" 2021, no. 2, p. 342.

⁴⁹ S. Bertocco, *La mancata fruizione del riposo compensativo per il servizio di reperibilità passiva non configura un danno in re ipsa*, "Il lavoro nella Giurisprudenza" 2016, no. 3, p. 274 ff.

⁵⁰ More issues could arise in the case of work processes/stages/objectives that truly lack specific time constraints, both in terms of the location and the duration of the work. In these cases, work activities could also be carried out in a disconnected mode. However, the issue seems to arise only in practice, because from a legal standpoint, the distinction between working time and rest time tends to blur. Consequently, the classification of disconnection in either period ends up becoming less relevant. It is difficult, moreover, to imagine obligations of connection (and, thus, rights of disconnection) within a service characterized by genuinely imprecise working hours as indicated above. See: V. Leccese, *Lavoro agile e misurazione della durata dell'orario per finalità di tutela della salute*, "Rivista Giuridica del Lavoro" 2020, no. 2, pp. 438–439.

3. Technical and organizational measures

An agile work agreement, according to the legal provision, represents the ultimate framework for disconnection, as it is functional for the implementation and identification of *ad hoc* measures that can be determined on a case-by-case basis through the agreement of the parties involved.⁵¹

However, this function is also fulfilled equally by all contracts that regulate the right to disconnect in the execution of the employment relationship (remote work, telework).⁵²

The national legislator, with the term “misure,” refers to behaviors that must be adopted to concretely achieve disconnection.⁵³ The concept of a measure evokes multiple semantic contents, among which the most common are related to the field of mathematical sciences, such as, for example, a numerical value attributed to a quantity, a unit of measure, or the dimensions of an object.

In the legal sector, the term encompasses a multitude of meanings, synthesizing them as means adopted with the dual purpose of ensuring the correct exercise of the worker’s rights (technical measures) and the broader fulfillment of the employer’s obligation (organizational measures).

Those measures are understood as practical and concrete tools through which a worker can be isolated from work-related intrusions during their non-working time.

The organizational aspect of the measures, on the other hand, involves setting up what is necessary to correctly achieve disconnection, for example, from the perspective of temporal organization.

In some cases, individual and/or collective bargaining fails to correctly fulfill its function and, consequently, it fails to fulfill the legislator’s intention⁵⁴ when it merely reiterates the text of Article 19 on disconnection without actively intervening.

The same Protocol of 7 December 2021⁵⁵ facilitates the aspect related to the importance of the organizational function by providing for the identification of disconnection periods.

⁵¹ See: A. Tursi, *Le metamorfosi del tempo di lavoro*, “Diritto delle Relazioni Industriali” 2022, no. 2, pp. 471–473.

⁵² D. Calderara, *Garanzia della disconnessione nel rapporto di lavoro*, Torino 2024, pp. 139–144.

⁵³ A. Preteroti, *La disconnessione nel lavoro in modalità agile: diritto del lavoratore, obbligo del datore* [in:] *La trasformazione digitale in Europa. Diritti e principi*, eds. R. Torino, S. Zorretto, Torino 2024, p. 168. Here the author states that the literal text of the regulation “recognizes such technical and organizational measures as necessary to ensure disconnection and consequently requires the parties to specify their determination”. Also: M. D’Aponte, *La tutela dei diritti umani nel rapporto di lavoro*, “Rivista Italiana di Diritto del Lavoro” 2021, no. 4, pp. 398–399.

⁵⁴ For example, the agreement protocol between Fincantieri S.p.A. and FIM CISL; FIOM CGIL; UILM UIL signed on 17 July 2020; or the protocol between IBM Italia S.p.A. and FIM CISL; FIOM CGIL; UILM UIL; RSU signed on 6 April 2021.

⁵⁵ National Protocol on Agile Work of 7 December 2021. See: P. Albi, *Introduzione...*, p. 1 ff.; L. Zoppoli, *Il protocollo...*, p. 1 ff.

For these reasons, an agreement has the essential function, from a legal perspective, of being the ideal platform for the correct implementation of disconnection through the provision of technical and organizational measures agreed upon by the parties on a case-by-case basis.

It should be noted, however, that these measures can be divided into two types of disconnection: vertical and horizontal.

The first type, vertical disconnection, produces effects between workers and employers, while the second type, horizontal disconnection, produces effects only among workers.

This fundamental distinction is important because disconnection must be both vertical and horizontal to correctly function and to prevent attempts at invading the private sphere among colleagues.⁵⁶

In the absence of specified or complete technical-organizational measures, it becomes necessary for the worker to determine the times when it is appropriate to implement disconnection.

Some authors argue that if disconnection times are not specified in the (agile) work agreement, they should necessarily coincide with rest periods.⁵⁷ According to this thesis, disconnection times would correspond *tout court* to non-working times.

This could create a paradox where disconnection would extend to all times outside of working hours.⁵⁸

This might initially seem more advantageous than agreed on disconnection through technical and organizational measures, but it is not necessarily so. This approach could lead to disadvantageous situations.

The first disadvantage is that disconnection is not only about determining temporal extension, but also about the methods of exercising the right. Without these, as seen in the early stages of second-level collective bargaining, the effectiveness of the right would not be guaranteed.⁵⁹

The second disadvantage arises from the lack of measures limiting *sic et simpliciter* the exercise of disconnection strictly to situations outside the workplace, excluding

⁵⁶ A concrete example in the form of a Regulation of the Public Administration of Reggio Calabria, adopted on 16 September 2019, is provided by Article 8, which states: "In implementation of Article 19, paragraph 1, of Law No. 81 of 22 May 2017, the Administration adopts the technical and organizational measures necessary to guarantee the right to disconnect for agile workers from work-related technological tools. The Administration recognizes the right of agile workers not to read and not to respond to work-related emails, phone calls, or messages, and not to make phone calls, send emails, or messages of any kind related to work during the disconnect period. [...] Furthermore, for the practical implementation of the above provisions, the following requirements are adopted: the right to disconnect' applies in a bidirectional vertical sense (towards and from their supervisors), as well as horizontally, meaning also among colleagues."

⁵⁷ S. Cairoli, A. Preteroti, *Dell'obbligo di disconnessione nel lavoro agile: effetti, responsabilità e tutele*, "Massimario di Giurisprudenza del Lavoro" 2023, no. 3, p. 357.

⁵⁸ *Ibid.*, p. 358.

⁵⁹ A. Fenoglio, *Una veste digitale...*, p. 7.

the internal work environment, because of the absence of functional regulations to expand the content and correct exercise of the measures.⁶⁰

When disconnection times are not specified but contactable hours are,⁶¹ the right to disconnect by exclusion pertains to the daily and weekly periods outside these hours, and the minimum rest time must still be respected.⁶²

An additional disadvantage in this case could affect the employer. Without clear measures, in the event of disciplinary issues with any worker's behavior, the employer would not have any valid evidence to present against the allegedly non-compliant worker.⁶³

It could be argued that the measures indirectly or directly, depending on practical cases, make it possible to categorize workers' conduct outside the workplace as potentially disciplinary offenses.

In terms of disciplinary power, this situation constitutes an addendum to the company's disciplinary code, updated to cover the performance of work outside the workplace, in compliance with a continuous update of the principle of legality.⁶⁴

4. Provisional conclusions

For the reasons outlined so far, it is possible to assert confidently that the invocation of the right to disconnect is continuously expanding. This is also demonstrated by the interest from European bodies, as shown by the European Parliament's adoption of a resolution in 2021, containing recommendations to the Commission on the right to disconnect (2019/2181(INL)). Recently, a first phase of consultation with social partners under Article 154 of the TFEU has begun regarding potential EU action on workers' right to disconnect.⁶⁵

In domestic Italian law, based on the combined provisions of Articles 19, Law No. 81 of 2017, and Article 2, paragraph 1-ter, Decree Law No. 30 of 2021, disconnection can be qualified both as a right – for the worker – and as a guaranteed obligation – incumbent on the employer.

Following this observation, it is appropriate to consider the consequences of the lack of specification or omission of measures to regulate disconnection.

The various solutions that will be proposed will also help demonstrate that the right to disconnect is not without sanctions and effectiveness.⁶⁶

⁶⁰ D. Calderara, *La dis-connessione...*, p. 281.

⁶¹ L. Zoppoli, *Il protocollo...*, p. 1 ff.; P. Albi, *Introduzione...*, p. 1 ff.

⁶² A. Tursi, *Le metamorfosi...*, pp. 472–473.

⁶³ For example, for not having logged in and/or having logged out at unfavorable times, according to the employer.

⁶⁴ D. Calderara, *Gli spazi di emersione dell'autonomia individuale nella disciplina legale*, "Rivista Italiana di Diritto del Lavoro" 2023, no. 3, p. 84.

⁶⁵ C(2024) 2990 final.

⁶⁶ G. Calvellini, M. Tufo, *Lavoro e vita privata...*, p. 408; V. Zeppilli, *Disconnessione...*, p. 305 ff.; R. Zucaro, *Il diritto alla disconnessione tra interesse collettivo e individuale. Possibili profili di tutela*, "Labour & Law

It is worth asking whether an entire contract could be considered null and void, under Article 1418, paragraph 2, of the Civil Code, in the event of a lack of specification or omission of measures to regulate disconnection, because of the absence of an essential requirement of the individual agreement.⁶⁷

Technical and organizational measures can seemingly be identified as part of the mandatory contents of the agile work agreement under Article 1325 of the Civil Code.⁶⁸

However, while this approach might seem abstractly feasible, the sanction of contract nullity would not offer the worker any effective and concrete protection.⁶⁹

Such a solution would deprive the worker of the possibility of benefitting from remote work, thus nullifying the individual agreement in its entirety in the case of agile work – though preserving the original employment relationship – and nullifying the contract in other cases.

This potential solution, however, can also be interpreted in a diametrically opposite fashion, leading to quite different conclusions.

According to some authors, disconnection measures may not be considered a mandatory part of the content of the contract, but rather serve an informational/awareness purpose through the agreement.⁷⁰

By explicitly indicating the technical and organizational measures, the worker, for example, in agile work, can understand the conditions and methods for properly disconnecting, as well as the behaviors that the employer is obliged to respect. According to the literal meaning of the norm, the informational/awareness content of the agreement is aimed exclusively at regulating the execution of work performed outside company premises.⁷¹

However, even this second solution does not seem to produce significant protective effects. In these cases, if the contents indicated above are lacking, the employer is subject to both an administrative sanction and the burden of proving the existence of an agile work agreement, as well as all the necessary requirements to conclude such an agreement.

The consequent problem to be addressed following these considerations, concerning any administrative sanction, lies in identifying the sanction that is concretely applicable in the face of prohibited behavior.

Issues" 2019, no. 2, p. 231; E. Fiata, *L'iniziativa europea...*, pp. 16–17; C. Spinelli, *Lo smart working nel settore privato e le sfide per il futuro* [in:] *Smart working: tutela e condizioni di lavoro*, eds. U. Carabelli, L. Fassina, Roma 2021, p. 81.

⁶⁷ M.C. Cataudella, *Tempo di lavoro...*, p. 859.

⁶⁸ M. Cuttone, *Oltre il paradigma dell'unità di luogo tempo e azione: la revanche dell'autonomia individuale nella nuova fattispecie di lavoro agile*, The Working Papers Collection of the Centre for the Study of European Labour Law, "Massimo D'Antona" 2017, no. 6, Collective Volumes, p. 58.

⁶⁹ F. Santoro-Passarelli, *Sull'invalidità delle rinunzie e transazioni del prestatore di lavoro* [in:] *Saggi di diritto civile*, Napoli 1961, p. 1126.

⁷⁰ S. Cairoli, A. Preteroti, *Dell'obbligo di disconnessione...*, p. 354.

⁷¹ C. Spinelli, *Tecnologie digitali...*, p. 114; A. Donini, *I confini della prestazione agile: tra diritto alla disconnessione e obblighi di risultato* [in:] *Il lavoro agile nella disciplina legale, collettiva ed individuale*, a cura di M. Verzaro, WP CSDLE Collective Volumes 2017, no. 6, p. 113.

The sanction for administrative irregularity⁷² is found in the general regulation regarding the employer's obligation to inform the worker of applicable conditions, under Articles 1 and 4 of Legislative Decree No. 152 of 1997,⁷³ as amended by Legislative Decree No. 104 of 2022 on certain and predictable working conditions.⁷⁴

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⁷² E. Gramano, *L'accordo sul lavoro agile: forma e contenuto* [in:] *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, eds. G. Zilio Grandi, M. Biasi, Padova 2018, p. 508 ff.; G. Proia, *L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione di lavoro agile* [in:] *Il jobs act del lavoro autonomo e del lavoro agile – parte seconda*, eds. L. Fiorillo, A. Perulli, Torino 2017, p. 190 ff.

⁷³ S. Cairolì, A. Preteroti, *Dell'obbligo di disconnessione...*, p. 355.

⁷⁴ G. Proia, *Le novità, sistemiche e di dettaglio, del decreto trasparenza*, "Massimario di Giurisprudenza del Lavoro" 2022, no. 3, p. 588.

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Summary

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Labor Law and the Right to Disconnect

In the Italian legal system, the concept of the right to disconnect is specifically addressed within the framework of agile working, beginning with Article 19, Law No. 81/2017, which requires that agile work agreements include technical and organizational measures to ensure the worker can disconnect from technological tools outside working hours. Although Article 19 does not explicitly define disconnection, it implies its relevance to non-working time. Indeed, the term disconnection, from the Latin *connexio*, suggests a temporary separation from the bonds of employment, reinforcing the need for clear measures in agile work agreements to protect workers' private time from work-related interruptions.

To sum up, the right to disconnect is intended to safeguard the worker's balance between professional and private life, as well as to protect his/her health, by ensuring that he/she is subjected to work-related intrusions during non-working hours.

It should be noted that, in Italy, the concept of disconnection has also been referred to in another provision in relation to an event that profoundly affected the entire global community. As a matter of fact, the urgency of addressing work-life balance became more apparent during the COVID-19 pandemic, leading to further legislation. Decree Law No. 30 of 2021, converted into Law No. 61, mentions the right to disconnect, emphasizing it as a distinct right. More precisely, Article 2, paragraph 1-ter, of this law explicitly acknowledges the worker's right to disconnect from IT tools and platforms, provided they are working in an agile mode and in compliance with any agreed periods of availability. Undoubtedly, this law underlines that disconnection is crucial to preventing employer intrusions and ensuring that workers can fully enjoy their rest periods.

At this point, it remains to be ascertained how the right to disconnect can be practically guaranteed. Basically, it may be implemented by allowing workers to turn off work-related de-

vices or to set them to offline modes during non-working periods. This ensures that work communications are not received until the worker reactivates these devices.

Last, the Italian National Protocol on Agile Work, adopted on 7 December 2021, supports this framework by requiring the identification of disconnection slots in agile work agreements. This ensures that workers have clearly defined periods during which they are not expected to engage in work or be available to their employer. The protocol aims to provide a structured approach to disconnection, promoting a better work-life balance and protecting workers from excessive work demands.

Finally, the above-mentioned framework is concluded with the provision of administrative sanctions for employers in the absence of specified technical and organizational measures for disconnection in agile work agreements. However, some scholars argue that these measures should serve an informational purpose, helping workers understand how to exercise their right to disconnect effectively. In other words, more specific measures are necessary to ensure that workers are aware of and can utilize their disconnection rights, protecting them from work-related intrusions during non-working hours. Nevertheless, this is not the only issue addressed by scholars. There are ongoing debates about the scope and implementation of the right to disconnect. Some argue that disconnection should automatically coincide with rest periods, while others believe it should be separately and explicitly defined in work agreements. It is clear that the potential overlap between disconnection and rest periods raises questions about how best to protect workers' personal time and to ensure compliance with legal standards.

Keywords: right to disconnect, remote work, IT tools, work-life balance.

Streszczenie

Dario Calderara

Prawo do pracy i prawo do odłączenia

W artykule poruszono zagadnienie prawa do odłączenia w systemie prawnym Włoch. Artykuł 19 ustawy nr 81/2017 wymaga, aby umowy dotyczące pracy na odległość zawierały techniczne i organizacyjne środki umożliwiające pracownikowi odłączenie się od narzędzi technologicznych poza godzinami pracy. Termin „odłączenie”, wywodzący się z łacińskiego *connexio*, sugeruje tymczasowe zerwanie więzi z pracodawcą, uznając potrzebę ustalenia jasnych granic chroniących prywatny czas pracowników przed ingerencjami służbowymi.

W opracowaniu podkreślono, że prawo do odłączenia ma na celu ochronę równowagi między życiem zawodowym a prywatnym pracownika oraz jego zdrowia, zapewniając brak służbowych kontaktów poza godzinami pracy. W kontekście pandemii COVID-19 kwestia ta nabrała dodatkowego znaczenia, co doprowadziło do wdrożenia dalszych regulacji. Dekret ustawodawczy nr 30 z 2021 r., przekształcony w ustawę nr 61, wyraźnie uznaje prawo pracownika do odłączenia się od narzędzi informatycznych i platform podczas pracy w trybie zdalnym, precyzując z góry okresy dostępności pracownika.

W artykule poruszono praktyczne aspekty gwarantowania prawa do odłączenia, takie jak umożliwienie pracownikom wyłączania urządzeń służbowych lub ustawiania ich w trybie offline poza godzinami pracy. Włoski krajowy protokół dotyczący pracy zdalnej z dnia 7 grudnia 2021 r.

wspiera te działania, wymagając wskazania okresów odłączenia w umowach o pracę. Protokół dąży do strukturalnego podejścia do odłączenia, promując lepszą równowagę między życiem zawodowym a prywatnym oraz chroniąc pracowników przed nadmiernymi wymaganiami zawodowymi. W tekście zwrócono też uwagę na sankcje administracyjne dla pracodawców w przypadku braku określonych środków dotyczących odłączenia w umowach o pracę zdalną. Debata nad zakresem i skutecznością prawa do odłączenia w dalszym ciągu trwa, koncentrując się na wzajemnych zależnościach pomiędzy prawem do odłączenia a prawem do odpoczynku.

Słowa kluczowe: prawo do odłączenia, praca zdalna, narzędzia informatyczne, równowaga między życiem zawodowym a prywatnym.