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Europe Considers the Right to “Switch Off”

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As people head off on their summer breaks, regulators in Europe, particularly Germany, are increasingly focused on the breakdown of the division between home and work life and how this division is changing as mobile devices become used for work-related emails. Regulators are considering new rules that would limit an employer's ability to require employees to respond to work-related requests outside of office hours.

Legislative initiatives in Germany

In 2013, the German Labor Ministry proposed rules to ban its civil servants from calling or emailing their internal ministry colleagues out of hours except in emergencies.² Ministry staff should not be penalized for switching off their mobiles or failing to pick up messages out of hours. Under the new rules, unplanned work-related contact is only permitted if it relates to something that "can't be postponed," has the "character of an exceptional situation" and cannot "wait until the start of the next working period".

The German Government is considering legislative and non-legislative responses to this issue. The German Minister of Labor, Andrea Nahles, has commissioned a study to define work-related stress, with a view to proposing measures to limit out-of-hours emails and calls. In this study, the Federal Institute for Occupational Health and Safety is scientifically examining the types of mental stress faced by employees and what measures (legislative and non-legislative) may help alleviate this stress. German Vice Chancellor and SPD leader Sigmar Gabriel has also called for a "right to free time" ("Recht auf Feierabend").³ The German government's coalition agreement calls for further legislative clarifications to protect the psychological health of workers as well as non-legislative measures.⁴ The German authorities have commented that additional legislation is only an option if it brings added value, is practically enforceable and has a sound legal basis.⁵

Meanwhile in the private sector, Volkswagen adopted a policy in 2011 by which emails sent to workers 30 minutes after their shift ends would not be delivered until 30 minutes before their

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² <http://www.telegraph.co.uk/news/worldnews/europe/germany/10276815/Out-of-hours-working-banned-by-German-labour-ministry.html>

³ <http://www.welt.de/politik/ausland/article131529860/Sigmar-Gabriel-fordert-ein-Recht-auf-Feierabend.html>

⁴ German Coalition agreement, November 27, 2013, Section 2.2 "Gute Arbeit": <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>

⁵ Correspondence with the German Federal Ministry for Labour and Social Affairs (BMAS), July 15, 2015.

next shift.⁶ Similarly, Daimler offers some employees the option to automatically delete mails during their holidays.⁷ Deutsche Telekom, meanwhile, encourages its staff to refrain from work-related calls and messages in their spare time and on vacation. There are also similar limitations at E.ON, Puma and BMW.⁸

Collective agreements in France

Germany is not the only European country focusing on this issue. Employers and trade unions in France are also addressing concerns about new technology allowing work to intrude on private life. In 2013, the concept of a “right to switch off” was included as an element for further discussion in a national collective agreement on the quality of working life.⁹ The parties (both employers’ representatives and unions) agreed in principle that internet connectivity between worker and workplace could be suspended during non-working hours, but will agree on the details at some point in the future. Meanwhile, the principle has been incorporated in several collective agreements at the industry and company level.

On December 11, 2012, employers and trade unions in the French construction sector amended their national collective agreement to clarify that managers or so-called ‘autonomous employees’ have the right to limit their use of communication tools when not on duty.¹⁰ The consulting and engineering sector went a step further, agreeing on an obligation for the employees to switch off remote communication devices for a minimum rest period of 11 hours per day. The agreement requires employers to ensure that employees are able to “switch off”.¹¹ For example, Reunica (an insurance and social security company) announced that it would simply switch off its mail system entirely on weekdays between 20:00 and 07:00.¹²

Do communication devices require a new interpretation of the Working Time Directive?

Essentially, the “right to switch off” is an interpretation of the EU Working Time Directive, which gives every worker the right to have a minimum daily rest period of 11 consecutive hours.¹³ The argument runs that employers’ expectations of constant availability and the excessive use of communication devices intrudes on employees’ private lives. It affects the rest period between two working days to the detriment of the employees’ health, safety and well-being. Therefore the excessive use of mobile devices for work-related purposes could constitute a breach of the Working Time Directive.

This issue has not yet been examined by the European Courts and, based on the jurisprudence of the courts, it is not clear that they would follow this line of reasoning. In interpreting the Working Time Directive as it applies to on-call duty for doctors, the CJEU concluded that time spent at the workplace was the central criteria to distinguish between working time and rest.

⁶ <http://www.inc.com/jayson-demers/feeling-overwhelmed-by-work-how-other-countries-are-beating-us-at-work-life-bala.html>

⁷ [Germany ponders ground-breaking law to combat work-related stress | World news | The Guardian](#)

⁸ <http://www.spiegel.de/international/germany/no-contact-for-german-labor-ministry-employees-after-work-new-guidelines-a-919463.html>

⁹ [France: A legal right to switch off from work | Eurofound](#)

¹⁰ [Convention collective nationale des cadres du bâtiment du 1er juin 2004 - Textes Attachés - Avenant n° 1 du 11 décembre 2012 relatif à la convention de forfait en jours - Article 1er | Legifrance](#)

¹¹ http://www.syntec.fr/fichiers/20140411113248_Avenant_forfait_jours_signe_le_01_04_14.pdf, p4-5.

¹² [Miroir Social - Réunica met en pratique la déconnexion automatique le soir et le weekend](#)

¹³ Directive (2003/88/EC).

Moreover, the Court considered the special circumstances of on-call doctors, yet concluded that although doctors remain contactable when they are on-call, only the time they actually spend working counts as “working time” within the meaning of the Directive.¹⁴

“Even if they are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests.”

Nonetheless, the current generation of mobile communication devices severely limits an employees’ pursuit of their own interests in their rest time and arguably forms an entirely new incursion on their rest period. It could be argued that mobile devices limit employees’ rest periods because even though employees may not be at the workplace, they, like on-call doctors, are always at their employers disposal and expected to respond.

Are mobile devices a cause of work stress?

A second potential challenge to the current lack of regulation on the use of modern communication devices for work purposes could stem from their impact on workers’ stress-levels. While there are no express obligations to manage stress under existing EU legislation, employers have a more general obligation to ensure the safety and health of workers in every aspect related to work under the EU Health and Safety Framework Directive (the “Framework Directive”).¹⁵ The CJEU has interpreted “health” under the Framework Directive” broadly to be a “*state of complete physical, mental and social well-being and not merely the absence of illness or infirmity*’ that does not consist only in the absence of disease”.¹⁶

Regulatory authorities are increasingly categorizing stress caused by overuse of mobile devices for work-related purposes as a type of work-related stress. The European Agency for Safety and Health at Work has defined work-related stress as being experienced by workers “*when the demands of the work environment exceed the workers’ ability to cope with (or control) them*”.¹⁷ The WHO argues that work-related stress is caused inter alia by the absence of control over workflow and hours.¹⁸ Factors that contribute to work stress, such as long working hours and work intensification, can be traced back to the excessive use of communication devices in the modern workplace.

It is difficult to speculate on the extent to which the general obligation to respect the health of employees under the Framework Directive can be a legal ground for restricting the use of communication devices. Nevertheless the existence of this general obligation reinforces the argument that the use of communication devices has inherent legal limits.

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¹⁴ <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45703&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=258348>, para 50.

¹⁵ Article 6, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

¹⁶ Judgment of the Court of 12 November 1996. United Kingdom of Great Britain and Northern Ireland v Council of the European Union. Council Directive 93/104/EC concerning certain aspects of the organization of working time - Action for annulment. Case C-84/94, para. 15.

¹⁷ European Agency for Safety and Health at Work, stress at work — facts and figures, p 16.

¹⁸ http://www.who.int/occupational_health/topics/stressatwp/en/