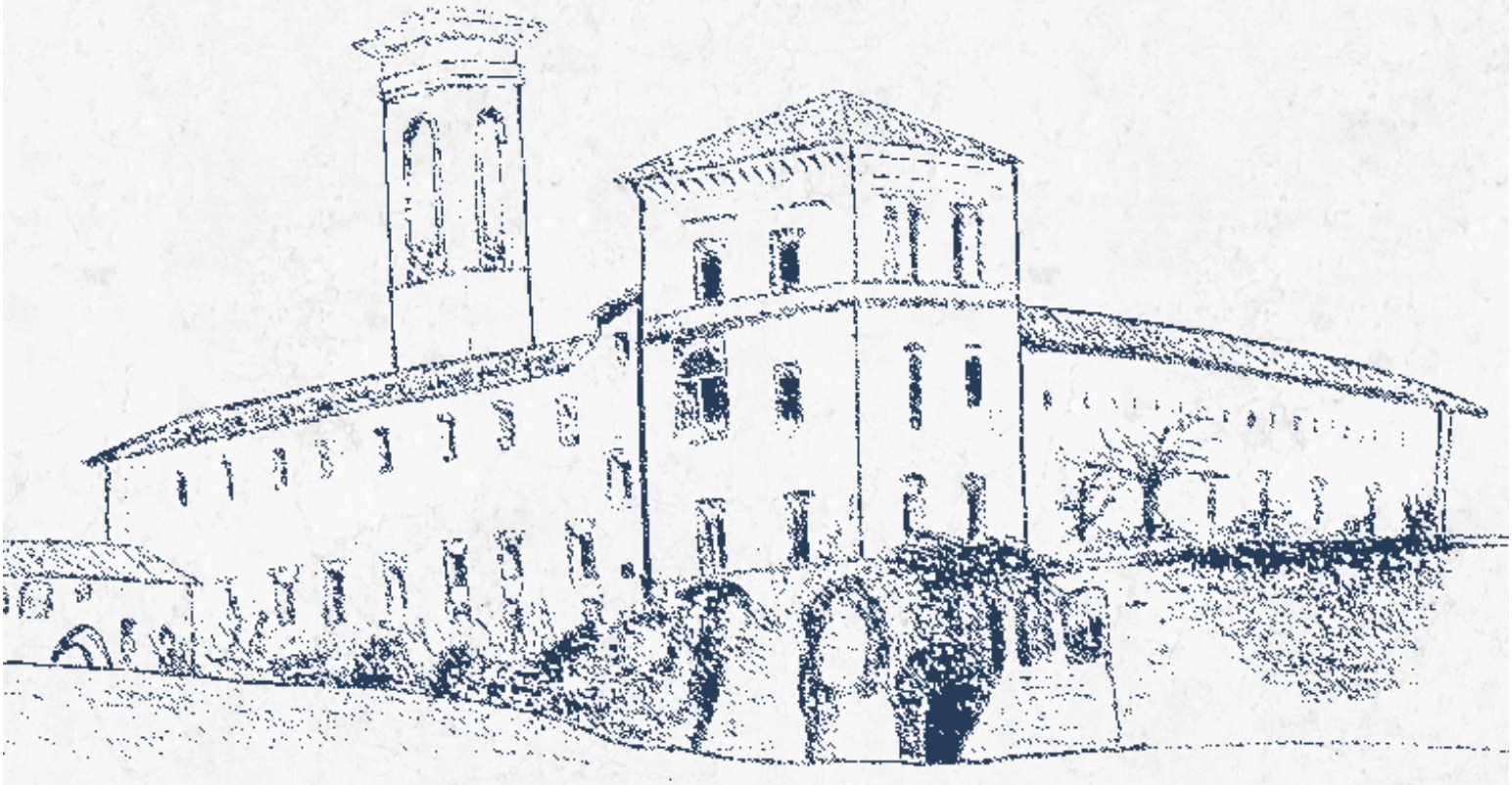
OPEN ACCESS
ISSN 2280-4056

E-Journal of International and Comparative

LABOUR STUDIES

Volume 9, No.3, September-October 2020



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E-Journal of International and Comparative **LABOUR STUDIES**

ADAPT *International School of Higher Education in Labour and Industrial Relations*

E-Journal of International and Comparative

LABOUR STUDIES

Volume 9, No. 3, September-October 2020

ADAPT
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Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

'Working Anytime, Anywhere' and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the Right to Disconnect

Emanuele Dagnino [1]

Abstract

The right to disconnect has been welcomed by those who regarded it as a "new generation right", though many consider it as a mere repetition of the right to rest. Through the analysis of the Italian regulation of *lavoro agile*, and with specific reference to working and non-working time, this paper frames the right to disconnect in the context of the legal system and the transformation of work. In so doing, it identifies different interpretations of the right to disconnect which call for a review of the notion of time in the employment relationship, also in consideration occupational health and safety and privacy.

Keywords – *Right to disconnect; lavoro agile; Right to rest; Private life; Working time.*

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1. Introduction

Thanks to portable technologies (i.e. laptops, tablets, smartphones), the ubiquity of Internet usage and new organizational models, most work can now be performed outside the employer's premises.
An increasing number of workers other than those operating in the service sector can thus work anytime, anywhere. On the one hand, they enjoy more flexibility as they work outside the office and do not have to comply with rigid working time schedules. This state of affairs helps one to better manage working time and the time devoted to other tasks (caring duties, rest periods and leisure activities). On the other hand, they also face the drawbacks of being 'always on', i.e. overworking, stress, blurred boundaries between work and other activities. Consequently, 'working anytime, anywhere' could easily turn into 'working every time, everywhere' ([2]) ([3]). The contradictions of remote work have emerged during the pandemic, when telework was the principal means to tackle COVID-19 at work. Remote work ensured continuity of work in safe conditions in many sectors, giving parents the opportunity to look after children while schools were closed. Yet working from home has increased the risks referred to before, both in terms of scope and intensity, due to the lack of skills among workers and managers and poor organisation. Against this complex background, what is clear is that working time is changing and that spillover effects and time porosity ([4]) have made it increasingly difficult to separate work and personal life. These changes have had an impact on the labour laws governing working time. These regulations have traditionally played a central role in defining the employment relationship and providing workers with adequate protection.

([2]) The expression refers to the title of a paper by Jean-Emmanuel Ray (see Jean-Emmanuel Ray, *Actualité des TIC. Tout connectés, partout, tout le temps?*, (2015) Droit Social, Issue, 6, p. 516. Its English translation could be "*Is everyone connected, everywhere and in every moment?*". On this topic, see also Rudiger Krause, *"Always-on": The Collapse of the Work–Life Separation in Recent Developments, Deficits and Counter-Strategies*, in Edoardo Ales et Al. (eds.), *Working in Digital and Smart Organizations. Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, (2018), Springer, pp. 223-248.
([3]) A complete analysis of promises and perils of *working anytime, anywhere* is contained in Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, (2017) Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva. See also Jan Popma, *The Janus face of the 'New Ways of Work': Rise, risks and regulation of nomadic work*, (2013) Working Paper ETUI.
([4]) Émilie Genin, *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, (2016) 32 International Journal of Comparative Labour Law and Industrial Relations, Issue 3, pp. 280–300.

These changes are generating tension between current regulations and the new world of work, as evidenced by some recent rulings handed down by the Court of Justice of the European Union (CJEU), specifically Case C-55/18 of 14th May 2019 concerning the calculation of daily working time ([5]). Legislators and scholars worldwide are trying to deal with the transformation of work and its impact on working time ([6]). In the EU context, following some unsuccessful attempts to revise the EU Working Time Directive ([7])([8]), attention is being paid to the right to disconnect on the national ([9]) and supranational level. Though with some differences in its scope of application, this right has been introduced in France ([10]), in Italy, in Spain ([11]) and, at least in principle, in Belgium ([12]), and other

([5]) CJEU, Judgment in Case C-55/18, Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank, 14 May 2019 establishing that "*in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured*" (§ 60).

([6]) For an overview of the challenges raised by digitalization with a special reference to working time regulation, see Manfred Weiss, *Digitalisation: challenges and perspectives for labour law*, in in Lourdes Mella Méndez, Pilar Nuñez-Cortés Contreras (eds.), *Nuevas tecnologías y nuevas maneras de trabajar: estudios desde el derecho español y comparado*, (2017) Dykinson, pp. 22-31 and Wolfgang Däubler, Challenges to Labour Law, (2016) Pravo. Zhurnal Vysshey shkoly ekonomik, Issue 1, pp. 189-203.

([7]) Reference is made to Directive 2003/88/EC that, notwithstanding the opt-out mechanisms, represents a fundamental document for EU Member States as regards working time regulation. See, inter *alios*, Alan Bogg, *The regulation of working time in Europe*, in Alan Bogg, Cathryn Costello and Anne C.L. Davies (eds.), *Research Handbook on EU Labour Law, Edward Elgar*, 2016, pp. 267. It is noteworthy that European regulation concerning working time is adopted by the European Union according to article 153 of the Treaty on the Functioning of the European Union because of the competence regarding "*the improvement in particular of the working environment to protect workers' health and safety*".

([8]) See Tobias Nowak, *The turbulent life of the Working Time Directive*, (2018) 25 Maastricht Journal of European and Comparative Law, Issue 1, pp- 118-129.

([9]) Notably, the right to disconnect entered the academic debate thanks to Jean-Emmanuel Ray in 2002 (see Jean-Emmanuel Ray, *Naissance et avis de décès du droit à la déconnexion: le droit a la vie privée du XXI siècle*, Droit Social, Issue 11, pp. 939-944) and only in recent years been recognized by collective agreements and laws.

([10]) In France, the right to disconnect has been introduced by article 55 of *Loi Travail* of 2016 (*LOI n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*)

([11]) In Spain, the right to disconnect has been introduced by article 88 of LOPD (*Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales).* Moreover, specific provisions concerning the right to disconnect have also been

countries are also considering its implementation ([13]). Recently, the European Parliament has promoted the diffusion of the right to disconnect by approving a Resolution on 21 January 2021, recommending the introduction of a European Directive on the matter ([14]). The actions taken at the national level seem to be the most effective ones, even if they are not supported by a clear definition of 'time' in the working relationship, since limited attention is paid to the notion of 'working time' itself ([15]). This reasoning also applies for the European Resolution that, while promoting the right to disconnect as a fundamental right (Recital h), expressly confirmed the notion of working time established in the Directive 2003/88/CE. In Italy, the right to disconnect is set forth in Law n. 81/2017 governing "*lavoro agile*" ([16]), a form of salaried employment characterized by flexibility as regards working time and place and the use of technological devices. In this context, the right to disconnect is understood as a peculiar way of regulating working time. Although some inconsistencies exist, this provision offers some interesting insights which can be used as a starting point for reviewing the notion of working time.

introduced in the context of the *Real Decreto-ley 28/2020, de 22 de septiembre, de trabajo a distancia*.

([12]) In Belgium, the disconnection and the regulation of the use of technological working tools have been introduced following negotiations in the context of the Health and Safety Committee by articles 15-17 of the *Loi relative au renforcement de la croissance économique et de la cohésion sociale* in 2018.

([13]) See, Eurofound, *Regulations to address work–life balance in digital flexible working arrangements*, Research Report, passim.

([14]) See *European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL))*.

([15]) An exception was contained in the above-mentioned *Loi Travail* of 2016 which not only introduced the right to disconnect, but also required the government to produce a report to be delivered to the Parliament regarding the adaptation of the legal framework concerning the notions of 'workplace', 'workload' and 'time' in the context of technological transformation (art. 57).

([16]) While the notion of *lavoro agile* is often translated into English as *smart working*, in this paper a different choice has been made in order to distinguish smart working from what is internationally known with this expression, i.e. "*an approach to organising work that aims to drive greater efficiency and effectiveness in achieving job outcomes through a combination of flexibility, autonomy and collaboration, in parallel with optimising tools and working environments for employees*" (CIPD, *HR: Getting smart about agile working*, (2014) Research report CIPD, pp. 3-4), from the form of work introduced in Italy to support this managerial philosophy (*lavoro agile*). Regarding the distinction between *smart working* and *lavoro agile* see also Carla Spinelli, *Tecnologie digitali e lavoro agile*, (2018) Cacucci, pp. 17 and ff. A comprehensive analysis of *smart working* in managerial terms is provided by Teresina Torre and Daria Sarti, *Into Smart Work Practices: Which Challenges for the HR Department*, in Edoardo Ales et Al. (eds.), *supra* note 1, pp. 249-275.

Drawing on the analysis of the regulation of *lavoro agile*, and with special reference to the provisions on working time, this paper will deal with the challenges posed by the *working anytime, anywhere* approach and with the shortcomings of traditional regulations adopted to addressing these challenges. The paper will be structured as follows: Section I will briefly present the regulation of *lavoro agile*, while Section II will provide some reflections in relation to traditional working time regulations. Finally, some conclusions will be drawn regarding the need to rethink working time regulation in the context of digitalization.

Section I – Working Time and the Regulation of *Lavoro Agile*

Provisions regulating *lavoro agile* were introduced by Law n. 81/2017 (Section II) with the aim of improving work-life balance, fostering the competitiveness of companies through time and space flexibility ([17]) and regulating salaried employment to tackle the challenges of the Fourth Industrial Revolution ([18]).
According to article 18, *lavoro agile* is "*a peculiar way of performing work*". Therefore, it is not a type of employment contract, in that this way of working is agreed upon in a separate agreement which integrates the contract of employment stipulated by the parties ([19]). This form of work is characterized by:
- the fact that work is carried out both inside and outside the business premises. *Lavoro agile* is usually organized on a day-per-week basis, though it could also be arranged in different ways (week per months; the duration

([17]) See article 18 paragraph 1 of the Law n. 81/2017. In the academic debate, see, *inter alios*, Rosa Casillo, *Competitività e conciliazione nel lavoro agile*, (2016) 69 Rivista giuridica del lavoro e della previdenza sociale, Issue 1, pp. 115-126 and Francesca Malzani, *Il lavoro agile tra opportunità e nuovi rischi per il lavoratore*, (2018) Diritti lavori mercati, Issue 1, pp. 17-36.
([18]) Maurizio Del Conte, *Premesse e prospettive del "Jobs Act"*, (2015) 25 Diritto delle relazioni industriali, Issue 4, pp. 939-960. See also Gaetano Zilio Grandi and Marco Biasi, *Introduzione: la "coda" del Jobs Act o la "testa" del nuovo diritto del lavoro?*, in Gaetano Zilio Grandi and Marco Biasi (eds.), *Commentario breve allo Statuto del lavoro autonomo e del lavoro agile*, (2018) Cedam, pp. 3 and ff. and Michel Martone, *Lo smart working nell'ordinamento italiano*, (2018) Diritti lavori mercati, Issue 2, p. 294.
([19]) According to article 19 paragraph 2 of the Law n. 81/2017 the agreement of *lavoro agile* could be conducted temporarily or permanently, irrespective of the duration of the employment contract which integrates. This agreement could potentially be applied to any kind of employment contract and employment relationship: open ended and fixed term contracts; full time and part-time contract; apprenticeships and, even, job on call and agency-work.

of a specific project; some hours of the working day);
- the fact that it could "*also be organized into phases, working cycles and objectives and without specific requirements regarding working time and the workplace*", yet complying with "*(only) the maximum limits of daily and weekly working hours*", as established by law and collective agreements;
- the (possible) use of technological devices.

As such, *lavoro agile* could be regarded as an evolved version of telework as defined by the 2002 European Framework Agreement on Telework ([20]) and by the relevant regulations provided by Member States and by collective agreements at national level ([21]). In this context, *lavoro agile* can be regarded as a form of remote working that must be alternate and occasional in nature. The first feature is coherent with the definition provided by the European Framework Agreement, but it is more limited in scope ([22]). The second feature goes beyond the traditional definition of telework, since the latter expressly requires that "*work, which could also be performed at the employers' premises, and is carried out away from those premises on a regular basis*" ([23]).
While there was a need for a regulation responding to the peculiarities of third-generation teleworking ([24]), where remote working can be occasional and performed in any place, the decision to provide specific rules in addition to the one governing teleworking raises some doubts regarding lawmakers' intentions. Compared to the regulation of teleworking, the one

([20]) See Framework Agreement on Telework signed by UNICE/UEAPME, CEEP and ETUC, 16 July 2002.
([21]) See the Comparative Labor Law Dossier, titled Teleworking and Labor Conditions, (2017) Ius Labor, Issue 2 available at https://www.upf.edu/documents/3885005/58976718/CLLD/7cd690f2-1def-373e-7ff5-477db437f464. It is to be noted that very important developments have interested the regulation of telework as a consequence of the pandemic crisis. While in some cases the regulations introduced specifically addressed the use of remote working during the *Coronavirus* emergency (see, for example, the *Convention collective de travail concernant le télétravail recommandé ou obligatoire en raison de la crise du coronavirus*, stipulated in Belgium by the social partners in date 26 January 2021), in other cases, the reform regarded the whole regulation of remote working (as it has been, for instance, in the case of Spain, with the introduction of the RD-Ley 28/2020 mentioned above).
([22]) According to the definition of telework provided by article 2 of the European Framework Agreement, telework can be either full time or alternating.
([23]) Id. Emphasis added.
([24]) See Jon Messenger and Lutz Gschwind, (2016) *Three generations of telework: New ICT and the (r)evolution from home office to virtual office*, 31 New Technology, Work and Employment, Issue 3, pp. 195–208.

governing *lavoro agile* provides fewer obligations and economic costs for employers. Since some degree of overlapping exists between *lavoro agile* and teleworking, the former is being used more frequently than the latter. Arguably, promoting remote working without reviewing telework was one of the tacit aims of the new regulation ([25]). At any rate, the regulation of this flexible form of work highlights the increasing gap between the new world of work and working time regulation. This aspect emerges from the definition contained in Article 18 and from the other provision regarding working time, i.e., par. 1 of Article 19, which regulates individual agreement establishing rest periods and ensuring disconnection.

A. Working Time Regulation and the Definition of Lavoro Agile

Analysing Article 18, it could seem contradictory that it provides for the scope of organizing work without requirements in terms of working time as well as the obligation to comply with maximum daily and weekly working hours. This concern is even more valid if one considers that telework in Italy features high levels of derogation ([26]). In this sense, these regulations implemented according to Directive 2003/88/EC – do not apply when it comes to normal working hours ([27]), maximum weekly working hours ([28]), overwork ([29]), daily rest ([30]), breaks ([31]) and night work

([25]) Michele Tiraboschi, *Tradition and Innovation in Labour Law: The Ambiguous Case of "Agile Working" in Italy,* in Frank Hendrickx and Valerio De Stefano (eds)., *Game Changers in Labour Law. Shaping the Future of Work*, (2018) 100 Bulletin of Comparative Labour Relations, Wolters Kluwer, § 2.
([26]) See article 17 paragraph 5 letter d) of Legislative Decree n. 66/2003.
([27]) Article 3 of Legislative Decree n. 66/2003 states that the normal weekly working time is 40 hours and that the exceptions laid down in collective agreements can take place only to improve current working conditions.
([28]) According to article 4 of Legislative Decree n. 66/2003 the maximum weekly working time is established by collective agreements but, in any case, the average duration of the weekly working time cannot exceed 48 hours calculated on a maximum time-period of 4 months (with possible derogations).
([29]) According to article 5 of Legislative Decree n. 66/2003 overwork shall be used within the limits provided by collective agreements or, absent collective regulation, within the maximum limit of 250 hours per year.
([30]) Minimum daily rest is defined, coherently with the Directive, in 11 consecutive hours per 24-hour period (article 7 of the Legislative Decree n. 66/2003).
([31]) Employees are entitled to a minimum break of 10 minutes if their working time exceeds 6 hours (article 8 of the Legislative Decree n. 66/2003).

([32]). According to the derogations allowed Directive 2003/88/EC, it regards workers whose working time "*is not measured and/or predetermined or can be determined by the workers themselves*" ([33]).
In the case of *lavoro agile*, this derogation does not seem applicable, since it is the law itself through the obligation to respect maximum daily and weekly working time that imposes compliance with the regulation regarding daily rest periods and breaks. In Italy, no specific provision exists concerning maximum daily working time ([34]). Consequently, this notion is defined by subtracting minimum daily rest periods and minimum daily breaks from 24 hours ([35]). This circumstance, therefore, implies time measurement ([36]). Consequently, working without specific working time should normally be intended as a way for the employee to distribute their working hours agreed in the employment contract in their working day. A different perspective – called "maximalist", which opposes the previous one, known as previous "minimalist"([37]) – interprets the provision as a derogation to normal working hours and overwork. This should be intended as contrary to European regulation, since the rationale required by the Directive seems to be missing in *lavoro agile* when implemented by companies. An additional interpretation has also been supported, according to which the derogation to working time regulations only applies when work is organized in order to ensure workers' full autonomy in the management of working time. Conversely, this derogation cannot

([32]) According to article 13 of the Legislative Decree n. 66/2003, and to article 8 of the Directive 2003/88/EC, the average duration of night work cannot exceed 8 hours in a 24-hour period.
([33]) See article 17, paragraph 1 of the Directive 2003/88/EC.
([34]) Despite the Italian Constitution expressly states that the maximum daily the law should regulate working time, the Italian legal system lacks a provision introducing this limitation and, as a consequence, it could be calculated only referring to the minimum rest periods and the minimum breaks.
([35]) The maximum daily working time is thus 12 hours and 40 minutes.
([36]) See, inter alia, Marco Peruzzi, *Sicurezza e agilità: quale tutela per lo smart worker?*, (2017) 3 Diritto della Sicurezza sul Lavoro, Issue 1, pp. 15-17; Gabriella Leone, *La tutela della salute e della sicurezza dei lavoratori agili*, in Domenico Garofalo (eds.), (2018) *La nuova frontiera del lavoro: autonomo – agile – occasionale*, ADAPT University Press, pp. 479-480 and Carla Spinelli, *Tempo di lavoro e di non lavoro: quali tutele per il lavoratore agile?*, (2018) Giustizia civile, 31 August 2018, § 2.
([37]) Anna Donini, *I confini della prestazione agile: tra diritto alla disconnessione e obblighi di risultato*, in Matteo Verzaro (eds.), *Il lavoro agile nella disciplina legale collettiva ed individuale. Stato dell'arte e proposte interpretative di un gruppo di giovani studiosi*, (2018) Jovene, pp. 114 ff.

apply when autonomy is limited or non-existent at all ([38]). While the first situation might take place rarely, the second one occurs frequently when work is carried out in the context of *lavoro agile*. In this sense, and as already outlined by some authors, the contradiction is only apparent ([39]). Lawmakers – even if with some systematic incoherencies in terms of the legislative technique – decided to reaffirm the importance of those limitations in order to ensure employees' health and safety. Notwithstanding the fact that the employee herself enjoys some degree of autonomy regarding the distribution of working time ([40]), some limitations on the duration of working time are needed in order to prevent exploitation and self-exploitation.

B. Rest Periods and the Right to Disconnect

The regulation of working time for *lavoro agile* laid down in Article 18 is complemented by further provisions contained in Article 19 which, along with Article 21([41]), defines the mandatory terms of the individual agreement of *lavoro agile*. According to par. 1 of Article 19, the agreement must contain the regulation regarding how work should be performed outside employers' premises also with reference to the exercise of the directive power and the use of ICTs as working tools. In addition, par. 1 expressly states that "*the agreement also indicates the employee's rest periods and the technical and organizational measures needed to guarantee the disconnection of the employee from technological working tools*" ([42]).
As such, the 'agile' worker is not only entitled to the safeguards regarding working time as regulated by Legislative Decree n. 66/2003, but the law provides necessary tools to ensure compliance with those rights.

([38]) Vito Leccese, *Lavoro agile e misurazione della durata dell'orario per finalità di tutela della salute*, Rivista Giuridica del Lavoro e della Previdenza Sociale, 2020, 3, 441.
([39]) Anna Fenoglio, *Il tempo di lavoro nella "New Automation Age": un quadro in trasformazione*, (2018) 37 Rivista italiana di diritto del lavoro, Issue 4, p. 646.
([40]) Certain limitations to this autonomy are usually included in the agreement not only in compliance with the requirements of Article 19 in terms of rest periods and disconnection, but also for employers' interests, since in many cases work is needed for organizational reasons only in certain periods of the day (for example, when team work is required).
([41]) Article 21 of Law n. 81/2017 requires that the agreement of *lavoro agile* includes specific provision regulating how the employer can exercise the power of monitoring work carried out outside of the employer's premises and which are the violations that can be sanctioned by the employer in the exercise of the disciplinary power.
([42]) Article 19 paragraph 1 period 2 of Law n. 81/2017.

The reference to rest periods in the individual agreement is intended to prevent an overlap between work and family time. It also ensures that parties are aware of the time the employee is on standby, so that rests be provided. In line with Directive 2003/88/EC, rest periods in Italian legislation are defined as "any period not referred to as working time" ([43]). In the case of *lavoro agile* the difference is that the distribution of working time – intended as "any period in which the worker remains available to the employer and carries out his/her duties"([44]) – could be partly (or totally) decided upon by the employee. Therefore, rest hours cannot be determined in a precise way. Yet the employer and the employee shall determine at least certain rest periods, in order to comply with some minimum requirements, e.g. minimum consecutive hours of rest. In this sense, company-level collective agreements providing a common regulation for *lavoro agile* ([45]) often include a provision specifying that work could be distributed over a limited time frame (for example, between 8 a.m. and 8 p.m.) in order to ensure the minimum consecutive hours of rest without performing night work. The timeframe is, in turn, detailed in the individual agreement. Obviously, limitations regarding this timeframe to perform work ì cannot always be included – e.g. this is the case when tasks require one to connect with different areas – and even when the provision is applied, it cannot alone protect employees from the health-related risks resulting from connectivity and over-working. This is one of the reasons why emphasis is provided on both individual and collective agreements to a statement reasserting that *lavoro agile* does not involve any change regarding the number of hours agreed between the parties. Clearly, a statement cannot provide effective protection: not only do remote workers tend to work more hours than their peers onsite ([46]), but it is also difficult to draw a distinction between work and family life.

Against this backdrop, it is possible to understand the right to disconnect and why it was introduced in legislation regulating *lavoro agile* ([47]). It should

([43]) See article 1 paragraph 2 letter b) of Legislative Decree n. 66/2003.

([44]) See article 1 paragraph 2 letter a) of Legislative Decree n. 66/2003.

([45]) While the regulation of *lavoro agile* contained in the Law n. 81/2017 does not expressly provide a specific role for collective agreements, it is quite common that, before stipulating individual agreements of *lavoro agile* with their employees, companies stipulate a collective agreement with workers' representatives in the company in order to establish a common reference for the stipulation of individual agreements.

([46]) See Eurofound and the International Labour Office, *supra* note 2, p. 25.

([47]) It should be noticed that, while most Italian scholars regard disconnection as a right of the employee, some commentators, drawing on a literal interpretation, express doubts about the nature of the disconnection in terms of a subjective right of the employee (see

be noted that – as well as in France and Spain and in keeping with the goals outlined by its first proponent and the European Resolution – the right to disconnect is aimed at protecting employee health and safety by ensuring compliance with rest periods and preserving their work-life balance and private life ([48]). While these purposes are expressly established in the law ([49]) in France and Spain, a similar interpretation of this right is provided in the legal framework of Italy's *lavoro agile*. On the one hand, this way of working is intended to improve employees' work-life balance. On the other hand, the regulation of the right to disconnect is contained in the same provision requiring one to indicate rest periods in the individual agreement.

This regulation neither provides for a definition of the right to disconnect nor includes specific measures to fulfil these purposes. It only requires the parties to specify the technical ([50]) and organizational ([51]) measures that will be applied. The implementation of the right to disconnect could vary significantly and at times might prove inefficient ([52]), as the rationale of this legislative technique should consider work organization in companies and sectors. Given that the right to disconnect should be applied in different contexts and to many employment relationships, a common standard could have been inefficient, and the decision regarding the measures to be put in place for the implementation of this right could be better taken by those who better know the company and the specific employment relationship.

Andrea Allamprese and Federico Pascucci, *La tutela della salute e della sicurezza del lavoratore agile*, (2017) 68 Rivista giuridica del lavoro e della previdenza sociale, Issue 2, pp. 314-315. Against this position, *inter alios*, M. Lai, *Innovazione tecnologica e riposo minimo giornaliero*, Diritto delle relazioni industriali, 2020, 3, 678.

([48]) As early as in 2002, Jean-Emmanuel Ray understood the right as a measure needed to address the risks posed by *tele-disponibilité* (availability via ICTs) to the health and safety of workers (with regard to the effective enjoyment of one's right to rest) and to work-life balance (because of the overlap between work and personal life moments) (see Ray, *supra* note 8, p. 941). The Resolution states that «

([49]) See article L2242-17 of the French Labour Code and article 88, paragraph 1 of the LOPD.

([50]) Examples of technical measures include the adoption of pop-up windows, out-of-office messages and the server deactivation in certain periods of the day.

([51]) Organizational measures relate to mechanisms put in place in order to avoid that the employee is required to work during certain times, such as policy on the use of ICTs, guidelines regarding who to call when the employee is not available, etc. However, they can also refer to awareness-raising campaigns and training.

([52]) See, for example, Anna Fenoglio, *Il diritto alla disconnessione del lavoratore agile*, in Gaetano Zilio Grandi and Marco Biasi (eds.), *supra* note 14, p. 561.

Without a clear definition and due to the flexibility needed in terms of disconnection from technological working tools in the new world of work, it is thus fundamental to put forward a possible interpretation of this right in working time regulation in *lavoro agile*.

C. A Possible Interpretation of the Right to Disconnect when performing Lavoro Agile

When regulating *lavoro agile,* the right to disconnect is mostly concerned with rest periods and the protection of work-life balance. The first aspect led some commentators to consider the right to disconnect only as a revival of the right to rest established by working time regulation and, accordingly, as something superfluous ([53]).
Contrariwise, when considering the notion of working time, rest periods and the time concerning the disconnection from technological working tools do not fully coincide. On the one hand, an employee could be connected with technological working tools but not working, because she is not technically at the employer's disposal or she is not carrying out her working activities or duties. This is the reason why, usually, the time of connection outside working hours is not considered as overtime. Moreover, it is often time spent voluntarily by the employees in order to move forward with work, while they are doing other activities. On the other hand, even when not connected, it is still possible to carry out job-related activities.
Since there is no full equivalence between disconnection and rests, it is important to understand the interrelations between the different notions provided in working time regulation (including, of course, working time). Taking into account the notion of 'minimum consecutive rest periods', the right to disconnect increases employee protection since, without the connection with working tools and the "virtual office" ([54]), it is more difficult for the employee to remain at the employer's disposal and to carry out working activities. A disconnection between 8 p.m. and 7 a.m. would be enough to guarantee that no interruption is made to enjoy 11

([53]) The doubts regarding the overlap of the right to disconnect and the right to rest are analyzed, *inter alios*, by Maria Rosa Vallecillo Gamez, *El derecho a la desconexiòn ¿"Novedad digital" o esnobismo del "viejo" derecho al descanso?*, (2017) Revista de trabajo y seguridad social, Issue 408, pp. 167-178, Valeria Zeppilli, Disconnessione: un'occasione mancata per il legislatore?, Rivista giuridca del lavoro e della previdenza sociale, 2020, 2, 314-315 and M. Russo, *Esiste il diritto alla disconnessione? Qualche spunto di riflessione alla ricerca di un equilibrio tra tecnologia, lavoro e vita privata*, Diritto delle relazioni industriali, 2020, 3, 688-690.
([54]) A comprehensive description of the "virtual office" is provided by Messenger and Gschwind, *supra* note pp. 199–201.

hours of rest. When possible, it would be better to understand the right to disconnect as also a duty to disconnect ([55]).
However, the right to disconnect could also be used to avoid overtime, if strictly implemented outside normal working time. This would imply a limitation to flexibility which could damage both parties. While it could be applied in a traditional time pattern, it seems not to be consistent with *lavoro agile* and other forms of smart working.
Since the time spent 'connected' outside working hours could be valuable for both parties to the contract ([56]), it could be reasonable to leave a certain degree of autonomy regarding the time one can connect outside the agreed working hours. Using the 'occupied' or 'absent' status available in many platforms (e.g., Skype) could help define when the employee is available for working. Since the time one is connected cannot be considered working time, the traditional limitation provided by working time regulation may not apply, unless some work is performed (if so, it should also be paid and comply with relevant legislation). The limitation should be put in place in order to avoid being connected for too much time. To this purpose, the 11 hours of disconnection would not be enough. While the promises of a *connexion choisie* ([57]) should be taken into account, limitations to the autonomy given to employees could be a reasonable measure to address its issues.
This interpretation seems to be consistent with the second aim of the right to disconnect, since it permits only a partial overlap between working and leisure time. While it primarily reaffirms the importance of a distinction between work and private life in terms of work-life balance, it may also pave the way to a regulated form of work-life blending promoted

([55]) A duty to disconnect was already advocated by the *Rapport Transformation numerique et vie au travail* (known as Rapport Mettling) an independent report regarding the new world of work requested by the Labour Minister to a group of researchers led by Mettling in 2015, while preparing the above-mentioned reform of the Labour Code. In the scholarly debate see, inter alios, Chantal Mathieu, *Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l'employeur)*, (2016) Revue de Droit du Travail, 2016, Issue 10, pp. 592-595; Allamprese and Pascucci, *supra* note 42, p. 314 and Giovanni Calvellini and Marco Tufo, *Lavoro e vita privata nel lavoro digitale: il tempo come elemento distintivo*, (2018) Rivista Labor, p. 412.
([56]) Many authors outline that millennials have a different understanding of work and the relationship with their devices, which highly impacts on the willingness to disconnect from them. See, *ex multis*, Ray, *supra* note 1, p. 520.
([57]) Grégoire Loiseau, *La déconnexion. Observations sur la régulation du travail dans le nouvel espace-temps des entreprises connectées*, (2017) Droit Social, Issue 5, pp. 469-470.

by management theorists ([58]). However, while management theorists refer to blending as a way to overcome the traditional distinction between working and non-working time, the dynamics can be contextualized in a world of work that still requires that distinction: it could be regarded as a controlled and employee-managed form of time porosity.

Therefore, this interpretation allows one to enjoy the flexibility of the right to disconnect, which can be put in place in terms of a mandatory disconnection – that guarantees, at least, the consecutive rest periods and the needed time free from any connection to work – and in terms of flexible disconnection – when the employee retains stays connected after normal working hours ([59]).

Before further examining the interpretation in the context of the separation between working time and non-working time, it is worth noting that another function of the right to disconnect has been individuated. While still related to employees' health and safety, there is a use of the right to disconnect that does not consider working time. In some cases, the right to disconnect is also implemented as a means to contrast *infobesity* and hyper-connection during working time, since it is detrimental to the employee that is, consequently, less productive and more stressed ([60]). While this interpretation of the right to disconnect is interesting and promising, the next section will focus on the one described above.

([58]) For an overview of the theory regarding work-life blending in the context of labour law studies see Tatsiana Ushakova, *Del work-life balance al work-career blend: apuntes para el debate*, in Mella Méndez and Nuñez-Cortés Contreras (eds.), *supra* note 5, pp. 245 and ff. and Mariagrazia Militello, *Il work-life blending nell'era della on-demand economy*, (2019) 70 Rivista giuridica del lavoro e della previdenza sociale, Issue 1, pp. 52-58).

([59]) Again, it is worth noticing that in France few collective agreements provide two different times for disconnection: *haute deconnéxion* (high disconnection) and *basse deconnéxion* (low disconnection). While the distinction is based on the possibility to contact the employee under certain exceptional conditions, which are limited to low disconnection periods, these examples demonstrate that a distinction between periods of mandatory and flexible disconnection (or, better, employee-managed connection) is possible. See, again, Dagnino, *supra* note 49.

([60]) This happens in France where the most innovative collective agreements regarding the right to disconnect integrate the right to disconnect outside working hours (*droit à la déconnexion en dehors de temps de travail effectif*), with a right to disconnect during working hours (*droit à la déconnexion pendant les temps de travail*). See Emanuele Dagnino, *The Right to Disconnect viewed through the Prism of Work-life Balance. The Role of Collective Bargaining: A Comparison between Italy and France*, (2018) in Giuseppe Casale, Tiziano Treu (eds.), *Transformations of work: challenges for the national systems of labour law and social security*, (2018) Giappichelli, p. 441.

Section II – The Interpretation of the Right to Disconnect in consideration of Working and Non-working Time

Since the rationale for the promotion of the right to disconnect is not limited to *lavoro agile* and seems to be pervasive also in traditional working patterns affected by the digitalization of work ([61]) – i.e. France, Spain, and Belgium ([62]) have provided a broader scope of application to the right and that Italian scholars advocate for its extension ([63]) – the interpretation put forward should be tested with reference to the overall system of working time regulation in order to understand how it fits with the new reality of work.

In this broader context, mandatory disconnection and flexible disconnection/employee-managed connection could prove to be an interesting way to address the problems related to the always-on culture for traditional employees as well. Even outside a traditional 9-to-5 working schedule employees and employers could have an interest in connectivity and employees may suffer from strict limitations on their possibility of being connected to technological working tools. Simultaneously, they are also interested in adequate protection concerning a full disconnection during certain times in order to guarantee rest periods and to better manage work-life balance.

If this is true, it is necessary to identify specific connection time in the context of a regulation traditionally based on a binary distinction between working time and rest periods.

In this context, the interpretation put forward concerning the right to disconnect can establish a period of rest preserved by the risk of spillovers. In addition, and even more relevant in systematic terms, the interpretation can serve to bring out the productive nature of some

([61]) For a thorough analysis, see Eurofound and ILO, *supra* note 2, passim.

([62]) In France, the right to disconnect is regulated both with reference to a peculiar form of work – *forfait en jours sur l'année* – which presents a features of time flexibility comparable to those of *lavoro agile* and with reference to all the workers employed by companies where one or more trade union sections are established: generally, companies employing more than 50 employees (see articles L2242-17 and L2121-64 of the Labour Code). In Spain, according to article 88 of the LOPD, the right to disconnect is applied to all the employees (including public employees). Finally, in Belgium the negotiation regarding disconnection is promoted in the context of companies of a certain size (the ones that has to set up an Health and Safety Committee, thus normally those with more than 50 employees).

([63]) See, inter alios, Gisella De Simone, *Lavoro digitale e subordinazione. Prime riflessioni*, (2019) 70 Rivista giuridica del lavoro e della previdenza sociale, Issue 1, p. 16

periods that do not fall within the concept of working time, though generating some gains for the employer ([64]). Examples include the time spent by the employee with co-workers and managers of the company and, more generally, engaged in work outside working hours. This time – which somehow recalls an on-call time – is regulated in Italy by collective agreements ([65]) – and has economic value for the employer, since it enhances work organization.

This broader notion of "productive time" ("*tempo-lavoro*" in Bavaro's terms) and, as a consequence, a stricter notion of rests (non-working time, i.e., "*tempo del non-lavoro*") can lead, thanks to the implementation of the right to disconnect, to re-establish rest periods as "personal time free from the ties of production/subordination" ([66]) in accordance with the new reality of work characterized by the "*laisse electronique*" (electronic leash) ([67]). In the meantime, it could serve to recognize the economic value of the time one is potentially up for work. It cannot be treated as working time or rest periods, so there should be room to determine the value of this time in terms of a percentage of a working hour and according to the economic assessment recognized in a given sector.

Obviously, this interpretation of the right to disconnect and of its role in new working time regulation should be promoted by adequate legislative reform in order to be enforced. While this room for innovation can already be envisioned, it cannot be left to the parties (even if collective parties through collective agreements) to determine such an important revision about how time should be considered in the context of the employment relationship. As said, individual and collective parties should implement an updated legal framework, since they better know the

([64]) According to Vincenzo Bavaro "*the time needed for production, the time that satisfies the creditor's organizational interest, that is, the time that produces economic value and economic utility ("tempo-lavoro"), is not only the actual working time ("tempo-orario")*". (see Vincenzo Bavaro, *Tesi sullo statuto giuridico del tempo nel rapporto di lavoro subordinato*, in Bruno Veneziani and Vincenzo Bavaro (eds.), *Le dimensioni giuridiche dei tempi del lavoro*, (2009) Cacucci, pp. 22-23). Own translation.

([65]) Notably, on-call time has been one of the most recurring issues in the CJEU case law and one of the most disputed aspects by Member States. See recently CJEU, Judgment in Case C-518/15, Ville de Nivelles v. Rudy Matzak, 21 February 2018, containing references to legal precedents. For an overview of case law concerning on-call see also Nowak, *supra* note 7.

([66]) Bavaro, *supra* note 59.

([67]) Already in 2002, Christophe Radé identified the constant connectivity to work due to ICTs as one of the "*nouvelle forms de subordination*" (new forms of subordination) (see Christophe Radé, *Nouvelle technologies de l'information et de la communication et nouvelles forms de subordination*, (2002) Droit Social, Issue 1, p. 29.

specific features and characteristics of the sector or employment relationship.
Moreover, this kind of revision cannot be efficient if it does not consider the role that should be recognized to the notion of a workload. This is especially valid in the context of *working anytime, anywhere* and with reference to work organized into phases, cycles and objectives, where the measurement of working hours proves difficult. Compliance with working time limitations and rest periods cannot be effective, even when the right to disconnect is applied to the employment relationship, if the workload is not consistent with working hours agreed in the contract of employment ([68]). In this case, no disconnection from work is possible even if a connection with co-workers and managers is not in place ([69]). For this reason, effective mechanisms to determine, monitor and revise the workload according to the working hours agreed should be put in place and they should be regarded as one of the preconditions for the implementation of the right to rest and the right to disconnect ([70]).

Conclusions

This paper considered the new features of working time in the Fourth Industrial Revolution, starting from the analysis of working time regulation in *lavoro agile*. It was possible to question how regulation can address the drawbacks of hyper-connectivity and how it can promote autonomy in the employee's time management. In so doing, it was acknowledged that a distinction between working and non-working time is still needed. Even inconsistently, the choice of the Italian legislator to apply to *lavoro agile* the limitations to working hours and the duty to respect rest periods and breaks as regulated for the standard employees should be welcomed. While it can seem to be an outdated model if compared to the derogations granted by law in the case of teleworking (*supra* section I, A), this regulation could be made compatible with the flexibility required by the new world of work and preserve from the perverse effects of the always-on culture. To this end, the Italian legislator,

([68]) See Mathieu, *supra* note 51 and Laetitia Morel, *Le droit à la déconnexion en droit français. La question de l'effectivité du droit au repos à l'ère du numérique*, (2017) 3 Labour & Law Issues, Issue 2, pp. 12-16.
([69]) Jean-Emmanuele Ray, *Grande accélération et droit à la déconnexion*, (2016) Droit Social, Issue 11, pp. 916-917.
([70]) Morel, *supra* note 63. As already said *supra* note 11, the same law introducing the right to disconnect in France also pays specific attention to a reconceptualization of the notion of a workload.

following the French example, decided to introduce the right to disconnect, a right that should be intended as linked to different, though intertwined purposes: the protection of employees' health and safety and the safeguard of their private life (*supra* section I, B).

Against this backdrop, building on the traditional notions relevant for working time regulation, it has been possible to demonstrate that the right to disconnect is neither a duplication of the traditional right to rest and nor only a prohibition to contact the employee outside agreed working hours. While it is intended to strengthen the enjoyment of the right to rest and the respect of the employee's private sphere, it does so by providing a right that should be concretely implemented by measures that better address the conditions of the sector and of the employment relationship. Not contacting the employee outside working hours would not be enough if she were bond to the project assigned because of the workload.

The analysis of how disconnection can help one to reach the mentioned purposes led to put forward a distinction between mandatory disconnection and flexible disconnection/employee-managed connection. This distinction seems to be useful in order to establish some periods where clear boundaries exist, allowing for 'chosen' connection (*connèxion choisie*) (section I, C).

This interpretation of the right to disconnect has been tested in relation to working time regulation also outside remote work. By doing this, some interesting effects were highlighted, which helped to better understand the nature of time in the new world of work. Framing the time one should be connected when working could serve to assess this time both for the protection of employees' health and safety and for the economic value it produces (section II).

Notwithstanding these possible positive outcomes, it has to be said that in employment and industrial relations, the problems of this pattern of evolution of working time can be difficult to see, except for few agreements stipulated in France, which is the country where the right to disconnect was established. While a thorough reform of working time regulation has proved to be particularly difficult both at the European and national level, this interpretation of working time can be promoted by an adaptation of existing rules, since it requires a revision without neglecting the distinction between the time used for production purposes and devoted to personal life.

Addendum

After this contribution had been submitted for publication, Italian lawmakers decided to further regulate the right to disconnection in agile work. Art. 2, paragraph 1-ter, of Legislative Decree no. 30/2021 converted into law through Law no. 61 of 2021, stated that: "the right to disconnect from technological instruments and computer platforms is recognised to agile workers, in compliance with any agreements signed by the parties and without prejudice to any periods of availability agreed upon. The exercise of the right to disconnection, which is necessary to protect the worker's rest time and health, cannot have implications on the employment relationship or on remuneration". This provision resolves once and for all the doubts on disconnection as a right. Yet, it does not clarify the role of disconnection with reference to working and non-working time. In this sense, two interpretations are possible. If these periods are within the agreed limits of possible daily working hours, nothing can be objected. We refer to agreements in which a flexible management of working hours is provided (e.g. between 7 am and 7 pm). This is also considering a timeframe within which workers need to be on call (e.g. between 10 am and 12 am), which limits the freedom of choice of working time, yet without implications in economic or regulatory terms. The second hypothesis concerns the definition of periods of availability other than the timeframe referred to above. While not affecting compliance with the EU rules on daily rest (11 hours every 24), except for the request for work that as such will be treated, these periods can only be compensated according to the collective agreement in force. And this in compliance with the principle of equal treatment, already enshrined in art. 20 co. 1 of Law no. 81/2017 and reiterated by the comment. In addition, there are two additional problems. First, the legislator speaks of any agreements between the parties, forgetting that – except for interventions on the law. n. 81/2017 – the agreement between the parties is a necessary step for adopting this way of working. Secondly, although it correctly recalls the importance of the right to disconnection for health and safety and for the protection of the right to rest, the function of protection of privacy and distinction between living and working time is not taken into account. In conclusion, the most likely effect of this intervention on the right to disconnect will be the need for further clarification and expansion of the law.

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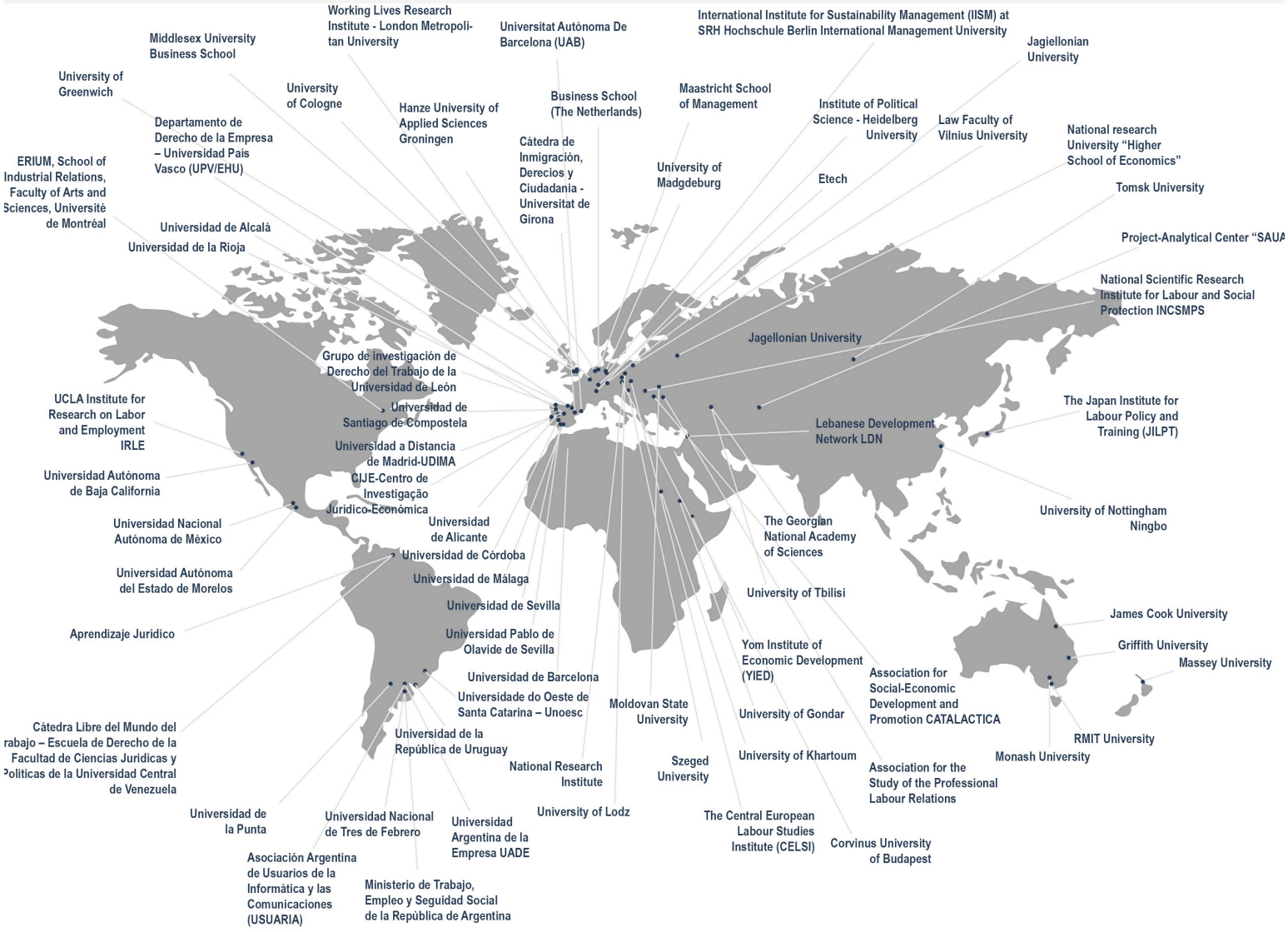

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