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Big Boss is Watching You!

The Right to Privacy of Employees in the Context of Workplace Surveillance

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

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Term: Spring 2020

CONTENTS

SUMMARY

Workplace surveillance is a necessity which was prompt by the development of information communication technologies that offered huge opportunities to employers to monitor their employees at work and even out of work. This made employee monitoring quite complex and widely prevalent practice. Surveillance in the workplace is not limited to watching the movements of employees through video cameras, but it extends to monitoring the computers at disposal of employees, the files stored on these computers, and even the employees' correspondence through different communication means and internet activities as well. Such extensive and intrusive surveillance measures cause strict concerns for the privacy of employees. The lack of detailed and effective norms regulating employee privacy in national legislations aggravates the situation of the employees; they are left with no choice but to obey the invasive policies of the companies.

The present thesis examines the privacy concerns of employees arising out of workplace surveillance. The workplace surveillance phenomenon is elaborated on, and the reasons underlying the surveillance are studied. By elaborating on the term "privacy", the possible extent of privacy in the workplace is clarified. Moreover, the legal protection of privacy within certain systems, particularly, within the European Convention on Human Rights is considered. After examining the substantive matters of the right to respect for private life under the Convention, four cases of the European Court of Human Rights concerning employee privacy at work are studied thoroughly, and an analysis of each case is provided. By such an examination, the scope of protection of the right to privacy of employees in the context of workplace surveillance is expounded. Furthermore, certain specific problems regarding the protection of privacy are highlighted and where relevant, possible solutions are presented.

Although there are still problems with the proper protection of the right to respect for private life of employees in the State parties to the Convention, particularly in the context of workplace surveillance, it is accepted that the employees enjoy the right to respect for private life just like anybody else. The European Court of Human Rights acknowledged that the employees' privacy expectation extends, but not limited to, to their calls made and received from/in the workplace, personal files stored on the computer provided by employers, correspondence, including, e-mails, and instant messages transferred from work computers, social media accounts, and materials obtained through video recordings regardless the excessive and intrusive privacy policies of employers, which cannot eliminate the right to privacy of employees completely.

Keywords: employee privacy, workplace surveillance, fair balance, reasonable privacy expectation, ECHR, ECtHR

ACKNOWLEDGEMENT

First and foremost, I want to present my enormous gratitude to the Swedish Institute for awarding me with the Visby Programme Scholarship which made it possible for me to pursue master degree in International Human Rights Law here at Lund University. Otherwise, it would probably stay as a dream. ☺

Special thanks to my supervisor Dr Vladislava Stoyanova whose valuable and constructive comments and feedback helped me to go ahead and improve this work.

Many thanks to the academic and administrative staff at the Faculty of Law for their continuous support during this journey. Lund University, especially, the Faculty of Law will always have a special place in my heart and memory because of you!

My classmates! Brilliant people from all over the world! I am so happy that our path crossed in Lund. None of you will be forgotten! You made this adventure much more interesting and memorable. Big thanks to those whose comments assisted me to structure my thesis in a better way.

Tons of thanks to my mother Gulnara and my father Idris, also to my parents-in-law Aida and Ibrahim, for all their never-ending support and care from miles away that I felt in each message and call during this period!

Special gratitude to the members of Azerbaijani community in Skåne, particularly to those in Lund who never let us feel as an alien here and always created home atmosphere for us.

Last but not least, millions of love to my hubby Azad! Even though you were busy as a bee with your thesis at the same time just a meter away from me behind the desk, you never stopped encouraging me to complete this work. Thanks to the moon for your pushes, motivation, endless trust, advice and patience (!) which I felt not only during the thesis term but throughout two years (well, almost 9 years), especially during take-homes! Finally, thanks for all your time you spent to review and help me to improve my writings! ☺ If it were not for you, I would repeat more frequently "*La vie est difficile!*" ☺

May 2020
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ABBREVIATIONS

AMA	American Management Association
CCTV	Closed-circuit television
CMWC	Computer-mediated workplace communication
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
GPS	Global Positioning System
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
OECD	Organization for Economic Co-operation and Development
SNCF	Société Nationale des Chemins de Fer
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States

I. INTRODUCTION

1.1. Background

Privacy is a value that each human being needs regardless of the place; either in the public or private sphere, and everyone has interests in its proper protection. For a long time, privacy was limited with the walls of homes of individuals which were deemed a private sphere, though still, hot discussions are conducted in scholarship around the existence or absence of an expectation of privacy in public space. The vagueness of the notion of "privacy" caused questions regarding the infringement of private life to arise in different contexts, especially within the employment relationships. As working activity is a combination of individual values and professional assignments, it is not easy to sharply distinguish 'professional actions from those having a personal nature'.[1] Employers enjoy the power stemming from the nature of employment relations to monitor workplace and employees and therefore, the latter is in a more disadvantaged position.

Although the ambit of the protection of the right to privacy is subject to different regulations in different national legal systems, a number of international and regional human rights documents recognize this right and ensure its protection as well. Article 8 of the European Convention on Human Rights (the 'ECHR' or the 'Convention') provides for the right to respect for private and family life. In addition to private and family lives, also home and correspondence are protected objectives of the Convention against arbitrary interference by governmental authorities. In spite of the fact that the European Court of Human Rights (the 'ECtHR', or the (Strasbourg) Court) in *Niemietz* extended the protection of the right to privacy to the workplaces and concluded that business premises fall under the notion of home and is protected under Article 8, changing societal norms and continuous entrance and deployment of the advanced information communication technologies at the workplaces generate unusual threats for the protection of privacy of employees there. The employers combine advantages of technology with their policies and use them to watch their workers. Workplace surveillance is not a recently emerged concept, and thousands of employees are monitored through different surveillance means around the world. American Management Association in 2007 revealed that 66 per cent of employers monitor the internet connection of employees.[2] This figure demonstrates only one form of monitoring and only in America. 30% of employers who fired workers for internet misuse referred to the following reasons: 'viewing, downloading, or uploading inappropriate/offensive content (84%); violation of any company policy (48%); excessive personal use (34%); other (9%)'.[3] Given that day by day, new smart devices and gadgets are presented to the market, most probably now these figures are higher. All these facts necessitate modernized and even different approaches to and interpretation of the right to privacy by the Court.

[1] Evisa Kambellari, 'Employee email monitoring and workplace privacy in the European perspective' (2014) 5 Iustinianus Primus Law Review 1

[2] AMA, 2007 Electronic Monitoring & Surveillance Survey, 1 <http://www.plattgroupllc.com/jun08/2007ElectronicMonitoringSurveillanceSurvey.pdf> Accessed 2 May 2020

[3] ibid

1.2. Purpose

The employers carry out surveillance at the workplace usually for the protection of their business interests, the prevention of crimes, and for security reasons. Though, often monitoring practices are conducted in an arbitrary and disproportional way by exceeding the pursued aims.

A few years ago, when I was working in a state company, I witnessed an incident that ended up with an unpleasant outcome. The employer without giving prior notice to the employee and without his presence monitored the computer at his use on the ground of suspicion of misuse of position. The monitoring covered not only the files stored on the computer of the employee but also extended to his correspondence with another person under his subordination. The monitoring uncovered their romantic relations and soon co-workers began to talk about the messages. What triggered the spread of the correspondence in a scandalous way was that the monitored employee was already a married one. When I was informed by one of my colleagues about this event, as a lawyer, the first thing I thought to myself was "But what about his right to secrecy of correspondence?" Unfortunately, in my home country privacy of individuals, especially in the workplace context, is not protected effectively. The monitored employee did not launch a proceeding against the company claiming the infringement of his privacy (most probably, he was afraid of losing his job); he continued his work at the company at a lower position.

In the present work, by analyzing the literature and case-law of the Court I will explore the extent of the protection of the right to privacy in the workplace, particularly, in light of workplace surveillance. My initial research of the case-law of the Court revealed that the Court has changed its approach in determining whether the infringement of privacy could be considered under Article 8. I will explore how this change in approach has affected the protection of the privacy of employees at work. Furthermore, I will critically examine how the ECtHR determines whether a balance between the interests at stake had been struck by the national courts. Last but not least, I will highlight the problems with the current legal protection of employee privacy in the workplace surveillance context and note possible solutions where relevant.

1.3. Research questions

To achieve the purpose of the thesis, I will focus on the following research questions:

- What is the scope of protection of the right to privacy under the European Convention on Human Rights and to what extent is it applicable in the workplace?
- How can a fair balance be struck between the competing interests in the context of workplace surveillance?

1.4. Delimitations

The right to privacy is protected both at regional and international levels. The European Convention on Human Rights is not a sole regional instrument that guarantees the right to privacy; American Convention on Human Rights is another regional document which provides for this right. For the aims of the current thesis, I will focus on the ECHR. The main reason why I chose specifically the ECHR is that as a citizen of a

state member to the Council of Europe I have a deep interest in examining the employee privacy, particularly, in the context of workplace surveillance within the jurisdiction of the Court. I believe that this thesis will make me capable of doing further research about the situation in my home country and a comprehensive comparative analysis. In the end, I will be able to investigate whether and to what extent the protection of employee privacy in Azerbaijan is compatible with the standards set forth by the Convention and the Court.

Besides the ECHR, I refer to the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) regarding the protection of privacy. I think these two instruments are worthy of mentioning when talking about the protection of privacy. The UDHR is the first international human rights instrument that officially declares the right to privacy of individuals even before it was reflected in the national laws of the states. Also, having a look at the language of the specification of the right to privacy in the UDHR will let the reader understand how the ECHR was influenced by the UDHR. As to the ICCPR, it is the first international document with a binding effect safeguarding the right to privacy of individuals. Although none of these documents talks about the right to privacy of employees specifically, which is understandable, it is not an exception that the claims concerning employee privacy might be brought before the Human Rights Committee (a monitoring body of the ICCPR) by individuals in future.

In addition to the international and regional human rights documents that provide for the right to privacy, specific regulations and guidelines are available issued by international organizations, such as the International Labour Organization (ILO) or the Organisation for Economic Co-operation and Development (OECD), and a supranational body, such as the European Union (EU).

The ILO's Code of Practice on Protection of Workers' Personal Data is a document without binding force. The purpose of the document is to guide public and private employers on the protection of personal data of employees. It is characterized as recommendations. The document provides information about general principles applicable to protection, storage, collection and use of personal data of employees, and individual and collective rights regarding the personal data. Although it might be a good source to develop the national laws and policies in this sphere, I will not stay on this document as it has a non-binding effect. However, in some parts, I will refer to it to make the arguments clearer.

The OECD Revised Guidelines on the Protection of Privacy and Transborder Flows of Personal Data is an updated version of the Privacy Guidelines of the Organisation. The Guidelines contain two lines of themes: 'the practical implementation of privacy protection through an approach grounded in risk management' and 'the need for greater efforts to address the global dimension of privacy through improved interoperability'.[4] As the guidelines will not be helpful necessarily for answering the research questions of this thesis, it will be overlooked here.

Last but not least, the EU General Data Protection Regulation (GDPR), which is a successor of the EU directive 95/46/EC, is a hugely remarkable document in the protection of the personal data of natural persons. The GDPR is rather a comprehensive and detailed as well as a complex instrument. It stipulates the provisions about the principles relating to the processing of personal data, the rights of the data subjects, the

[4] The OECD, Revised Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 2013, 4

controller and processor, liabilities and remedies, and other relevant issues. Given that the protection of privacy under the GDPR is in the capacity of being a separate thesis topic, and there is a space limit for the present work, I will not consider the GDPR when examining the protection of privacy.

Furthermore, I limited the study of case-law of the Court to four cases concerning workplace surveillance. The cases to be studied are *Halford v. the United Kingdom*, *Bărbulescu v. Romania*, *Libert v. France*, and *López Ribalda and others v. Spain*. Although the heard cases by the Court on employee privacy in the context of monitoring by employers are limited in number, I considered different factors while choosing the cases for the aims of this thesis. So, the employers in those cases represent both private and public sectors. While in the *Bărbulescu* and *López Ribalda* cases the impugned surveillance practices were performed by private sector companies, in the *Halford* and *Libert* cases, the public entities executed monitoring. Additionally, while the Court found a violation of Article 8 in two of those cases, in the other two, the Court concluded that there was no violation of the right to respect for private life of the employees. Also, the judgments, where the Court found a violation of Article 8, included the cases in which the employers were from private and public entities. This is the same for the judgments where the Court did not find a violation of Article 8. The purpose of choosing these cases specifically was to cover the issues stemming from Article 8 as widely as possible in the context of workplace surveillance. As the employers, who performed surveillance, operate in both public and private sectors, it will be possible to examine positive and negative obligations of the respondent states, and find clear answers to the research questions.

1.5. Methods and materials

The principal method employed in this thesis is a classic legal doctrine, namely 'studying law as a normative system, limiting its empirical data to legal texts and court decisions'.[5] Relying on the doctrinal legal research I will study various legal literatures theoretically and analyze the case-law of the Court critically. The methods used will not be limited only to legal doctrinal research; where appropriate, the descriptive approach and elements of comparative legal method will be referred to. These methods will be used while examining the legal protection of privacy under human rights documents, the role of the reasonable expectation of privacy in the United States (the "US") legal system and the Court's jurisprudence, and further while analyzing the cases of the Court in the final chapter.

Moreover, in Chapter II where the workplace surveillance will be elaborated on, an interdisciplinary approach will be taken. Because this approach offers an opportunity to bridge different studies, in this thesis it will help to connect the elements from the legal studies and psychosocial sciences, particularly when exploring impacts of workplace surveillance on both monitored employees and employers who perform surveillance.

For the purpose of this thesis, many different materials will be used. The primary source will be the European Convention on Human Rights, under which I will examine the right to privacy. The judgments of the Strasbourg Court will be the main materials to analyze the cases. Additionally, other human rights instruments are worked with. Also as the secondary sources of law, an ample number of doctrinal publications by remarkable

[5] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed) *Methodology of legal research* (Hart Publishing 2011) 2

authors, authoritative documents of the international organizations, etc., will be referred to elaborate the key issues that are addressed in the content of the thesis and are useful for further analysis. The material will be complemented by information gathered from online resources.

1.6. Existing research and contribution to the scholarship

The initial study of relevant literature before starting to write this thesis and the research made during the process let me note that workplace surveillance and the right to privacy is a trendy topic in the literature of different disciplines in addition to legal scholarship. However, the scholars who studied workplace surveillance discussed very specific questions, namely, either implications of surveillance, or workplace surveillance in a general sense, or the problem with a specific type of monitoring, or legal protection of privacy in a broad sense, or concrete principles that are used in cases, or analysis of concrete cases. Often these studies do not give background and relevant information about the questions behind the surveillance, and the reader needs to look at the other sources to have a complete view.

The main contribution of the current thesis to the existing scholarship is that it covers important and interrelated matters which complete each other and gives substantial and through information to the reader about the workplace surveillance and employee's right to privacy at work. The thesis, so to say, brings together the outcomes of the studies on workplace surveillance and employee privacy and clarifies the extent of privacy at work by examining the doctrine and analyzing the case-law of the Strasbourg Court. As mentioned above, the thesis does not discuss one case but examines four cases. All these cases bring the different points of employee privacy at work to light and help to clear up its extents more apparent. Lastly, by critically analyzing the cases, where relevant, the thesis comes up with ideas on how to strike a fair balance between the competing interests at stake and tackle the general problems.

1.7. Structure of the thesis

The first introductory chapter provides information on the work, its purpose, research questions, and delimitations of the study. The chapter also contains information about the used methods and materials, the existing scholarship and contributions thereto as well as the outline of the thesis.

The second chapter investigates “workplace surveillance” conception and answers to questions such as why employers monitor their employees and what impacts it has on both sides of employment relations, totally on the work environment.

The third chapter explores what privacy means as a legal and social term in general. Then, I briefly have a look at the protection of privacy under the legal framework of several systems. Next, the privacy in the workplace is elaborated on mostly from a theoretical angle with some examples from the case-law to present a big picture. Furthermore, the reasonable expectation of privacy principle is examined there.

The fourth chapter explores the procedural issues of privacy under Article 8 of the Convention, elaborates on the protected aspects of privacy and legitimate aim standard, namely the interests for the protection of which the interference with the protected

objects is allowed. Also, the relevance of these conceptions to the workplace surveillance context is stated. Additionally, the obligations of states, the margin of appreciation, the justifications for limitations, and the fair balance principle are explored with the explanation of their role for the ends of the thesis.

The case-law of the ECtHR concerning workplace surveillance is reviewed in the fifth chapter, and four cases of the Court are examined. In addition to describing the facts and reasoning of the Court, the chapter analyzes the judgments of the Court and highlights the problems in conclusion. Where relevant, it is examined how the Court assessed whether a fair balance had been struck by the domestic courts and noted the shortcomings of the approach of the Court.

In the final chapter, the concluding notes are stated by summarizing the problems and findings of the research. Additionally, the development of the case-law, namely how the attitude of the Court has been changed since the early cases regarding privacy at work is stated shortly and personal opinions on the highlighted problems are presented.

II. WORKPLACE SURVEILLANCE

2.1. "Big Brother"* in the workplace

In God we trust. Others we monitor.[6]

> The instrument (the telescreen, it was called) could be dimmed, but there was no way of shutting it off completely. […] The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it […] There was, of course, no way of knowing whether you were being watched at any given moment. […] It was even conceivable that they watched everybody all the time. But at any rate, they could plug in your wire whenever they wanted to. You had to live […] in the assumption that every sound you made was overheard, […] every movement scrutinized.[7]

This excerpt from the famous novel "1984" by George Orwell well describes the situation regarding surveillance conducted by employers in the modern workplaces. The employers watch their workers; the communication of employees is heard and read, and their behaviour is monitored by Big Brother – the employer during working hours, even out of office.

The reader will see later in this thesis that one of the main questions before the Court is to determine the competing interests and justifications behind the surveillance in the chosen cases. Given that even the method of the surveillance and the impacts of monitoring have a substantial role in concluding whether there is a violation of Article 8 or not, it is necessary to have a chapter addressing these matters. Therefore, the current chapter will elaborate on the essence of workplace surveillance. Further, it will provide information about the motivations behind the surveillance, the techniques of monitoring, and its implications on both parties of the employment relations.

Workplace surveillance is considered a normal and necessary element of work life. Surveillance is accepted as a good management practice because employees know that their performance should be reviewed, and targets should be set for them. But, when the surveillance gets complicated, then the conflict begins. This happens in three cases: 1) when unnecessary and unreasonable intrusive surveillance is carried out; 2) when employers require precise information about how employees spend their time; 3) when monitoring affects autonomy, trust, and control.[8] Surveillance in the workplace generates threats to both the right to privacy of employees and the interests of employers. Hence, dozens of arguments for and against the surveillance from the perspective of both sides are presented and discussed in the literature.

Surveillance or monitoring?

Before exploring workplace surveillance in the next section, there is a need to clarify "surveillance" and "monitoring" terms to avoid conceptual ambiguity later. Although these two concepts are used alternately in literature, some authors try to draw a line between them and emphasize the differences in the meaning of these notions.

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*Big brother is a character in the novel "1984" by George Orwell. He exists simultaneously everywhere. He watches and hears almost everything. In this thesis it is used as a metaphor to describe employers who carry out surveillance of employees or workplace.

[6] Robert G. Boehmer, 'Artificial monitoring and surveillance of employees: the fine line dividing the prudently managed enterprise form the modern sweatshop' [1992] 41 DEPAUL L. REV. 739, 770

[7] George Orwell, 1984. (Planet e-book) 4-5

[8] Kristie Ball, 'Workplace surveillance: An overview' (2010) 51(1) Labour History 87, 89

Mujtaba marks that monitoring is a tool for employers to watch employees' behaviours using equipment of companies within the working hours.[9] However, it turns to surveillance when such monitoring is conducted to uncover the illegal deeds of employees.[10] While monitoring, as a generic term, covers the collection of information about work,[11] surveillance, narrowly, expresses the relation between the controller and those whose actions are controlled.[12] The ILO in Code of Practice on Protection of workers' personal data described the term "monitoring" with following language:

> The term "monitoring" includes, but is not limited to, the use of devices such as computers, cameras, video equipment, sound devices, telephones and other communication equipment, various methods of establishing identity and location, or any other method of surveillance.[13]

As seen from this definition, "monitoring" and "surveillance" terms overlap, and it is difficult to clearly define the limits of each notion.

Despite the efforts to distinguish "surveillance" and "monitoring" in scholarship, the Strasbourg Court seems like not interested in separating them, as it uses both terms interchangeably even within the same judgments.[14] However, sometimes it is possible to observe that the Court used 'monitoring' when describing a general control while preferring to employ "surveillance" to describe the covert video monitoring for the investigation purposes.[15]

Depending on the definitions of both terms provided in the national laws, the requirements for their execution might be different. Stricter and detailed regulations might be required to conduct secret surveillance, while preconditions of general monitoring might be softer. Considering the approach of the ECtHR to the usage of these concepts, I will not highlight the difference between the meanings of these words, too. I will use them interchangeably and refer to both terms meaning the employers' act of watching the employees using various techniques during different stages of employment relations.

2.2. Why are employees monitored?

Surveillance in the workplace is a hotly debated concept within the different disciplines, such as ethics, law, social sciences, and even medical sciences. Surveillance was always there throughout humankind's history since slavery, just in other designs. Where, the human labour, there, the surveillance. Over time the forms, intensity, and availability of surveillance changed, but not its essence: to protect something from

[9] Bahaudin Mujtaba, 'Ethical implications of employee monitoring: What leaders should consider' (2003) 8(3) Journal of Applied Management and Entrepreneurship 22

[10] Scott D'Urso, 'Who's watching us at work? Toward a structural–perceptual model of electronic monitoring and surveillance in organizations' (2006) 16(3) Communication Theory 281, 283

[11] Carl Botan and Mlhaeta Vorvoreanu, 'Examining electronic surveillance in the workplace: A review of theoretical perspectives and research findings' (Conference of the International Communication Association, Acapulco, Mexico, June 2000) 14

[12] Sam Sarpong and Donna Rees, 'Assessing the effects of 'big brother' in a workplace: The case of WAST' [2013] European Management Journal 216

[13] The ILO Code of Practice on Protection of workers' personal data. International Labour Office, 1997, para.3.3.

[14] See, *Antovic and Mirkovic v. Montenegro*, no. 70838/13, §8 ECHR 2017, *Bărbulescu v. Romania*, app no 61496/08, ECHR 2017; *Halford v. the United Kingdom*, app no 20605/92, 25 June 1997

[15] See, *López Ribalda and Others v. Spain*, nos. 1874/13 and 8567/13, ECHR 2019

something. If in Slavery era, it was a slave-owner to protect his property from the 'danger of theft' by slaves, in Capitalism, a capitalist (employer) is interested in secure of his/her property from the possible theft, business from the unproductive labour or the risk to its security. This time in another eye of the scale, no slave but an employee stands.

In any discussion regarding workplace surveillance, it is possible to see the arguments about the hand-in-hand character of surveillance and organization. As a hierarchy is inherent to business premises, there is a subordination; higher controls below in the hierarchy. Development of information and communication systems changed the manner of surveillance; before it was the gaze of the supervisor on the performance of the worker in abstract time, now this job is realized by the assistance of electronic means and not only in the workplace, but sometimes also in off-duty time.[16]

There are several supporting arguments for workplace surveillance. Proponents note that the main ends of surveillance are to protect the assets of the company and provide security. In the time of industrialization 'employee monitoring is carried out to track general productivity, production, and inventory'.[17] Besides these well-known and widespread objectives of monitoring, employers monitor employees also to assess the performance of employees, to control employees' compliance with contractual obligations, to prevent a leak of business secrets or confidential information, to control quality, to prevent cyber-attacks, to assist in the selection process for employment, to protect the reputation of the company, to increase work efficiency, etc. Additionally, some authors approach the issue from a different aspect, for example, Kushner argues that the companies surveil employees just because they can do it; managers use the weakness of legal protection of privacy at work.[18]

Protection of property

Protection of a company property against possible theft and from fraudulent activities is among the primary purposes behind workplace monitoring. The property does not cover only physical assets, but also the intellectual property of the organizations. While CCTV cameras are used to uncover asset thefts, monitoring of internet activity aims at preventing the illegal use or dissemination of intellectual properties by employees.

Productivity

Employers argue that monitoring is a way to increase productivity. They think that monitoring will keep internet use of employees minimal because every spent minute while surfing on the internet for personal purposes reduces the employee productivity and decreases revenue.[19] Since employers pay for the time the employees work, they should be productive; otherwise they 'thieve' the paid time but do not use it for the benefit of the company.[20] But this argument is open to discussion in itself: for example, employees may, by using the internet, reduce the time for doing their personal matters (e.g., booking a flight ticket) which they would otherwise have to do by leaving the office. Also, studies show that the physical and psychological problems, such as stress, depression, and

[16] Ivan Manokha, 'New means of workplace surveillance; From the gaze of the supervisor to the digitalization of employees' (2019) 70(9) Monthly Review, Oxford University 25, 26
[17] Michael R. Losey, 'Workplace privacy: issues and implications' [1994] USA Today Magazine 76, 77
[18] David Kushner, 'Big brother at work' [2004] IEEE Spectrum 57
[19] Kirsten Martin and R. Edward Freeman, 'Some problems with employee monitoring' (2003) 43(4) Journal of Business Ethics 353
[20] Michael Foutouchos, 'The European workplace: The right to privacy and data protection' (2005) 4(1) Accounting Business & the Public Interest 35, 39

anxiety that surveillance at work causes, affects productivity negatively because workers get sick, take leaves, and heal slowly. As a result, productivity decreases.[21]

Security

To ensure the security is another argument defended by the entities for monitoring. They assert that the internet and content monitoring allow them to determine when there is a breach of security. Thus, companies can prevent the dissemination of trade secret or confidential documents to the third parties. Monitoring impedes employees from such wrongdoings, also from visiting prohibited web pages. Some organizations argue that surveillance for security reasons is important to preserve the physical safety of the organization or even the nation.[22]

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Protection of co-employees and the third parties

Employers justify the workplace surveillance by arguing that they have contractual obligations to protect workers from violations of human rights and wrongdoings, the violence of co-workers and the third parties.[23] Moreover, employers think that, in addition to fighting against a hostile work environment, surveillance offers advantages in sexual harassment proceedings; often companies use the materials obtained through monitoring to prove misbehaviours. Therefore, managers see surveillance as a risk management tool.[24]

2.3. Forms of the surveillance

Techniques and ambit of surveillance in our days differ significantly from the types of surveillance existed in last century. Now, companies benefit to the fullest from the advancement of technologies which offers them tremendous capabilities to employ tens of new devices to watch their workplaces and employees. Today it is quite easy to record conversations of employees, to track their movements, or to gather and use their biometric data for identification, or register and assess their performance.[25]

I would conditionally classify the surveillance as physical surveillance and digital or electronic surveillance, depending on the manner of conducting it or level of intrusion. While physical surveillance necessitates physical interaction, active physical intrusions are not necessary in digitalized monitoring. Physical surveillance might include, *inter alia*, searches of possessions, office, or desks of employees, a drug test, urine test, genetic and HIV test, a pregnancy test. As to digital surveillance, it is performed directly by using the technology. This type of surveillance includes, but not limited to, open and close

[21] Laura Pincus Hartman, 'The rights and wrongs of workplace snooping' (1998) 19(3) Journal of Business Strategy 16
[22] Martin and Freeman (n 19) 354
[23] Michael G. Sherrard, 'Workplace searches and surveillance versus the employee's right to privacy' (1998) 48 University of New Brunswick Law Journal 283, 283
[24] Ball (n 8) 93
[25] Manokha (n 16) 25

video surveillance through CCTV cameras, Internet monitoring, e-mail monitoring, microchips, GPS, radio and voice surveillance, smart badges. From the first glance, electronic surveillance may seem less intrusive than physical one because sometimes even employees are not conscious about the monitoring, but such character of electronic surveillance does not reduce its negative effects.

Email and internet use

Computer-mediated workplace communication (CMWC) is an umbrella term used by some authors to cover 'the use of email, social networking sites, instant messages, organizational blogs, and other forms of electronic text-based tools to send and receive messages in organizations'.[26] Internet usage and other online activities of employees at work using the computers provided by the employers are seriously unprotected under privacy laws. Since the emails are sent from corporate computers, they are deemed property of the company, and as long as the company has a business purpose, they have the right to monitor the computers. Usually, employers use a system that copies the sent emails from the company computers to ensure that nothing illegal happens. Such emails often are used in court trials to prove the misdeeds of employees.[27] Also, in the workplaces where the tasks of the employers are repetitive,[28] employers use software to filter the sent emails and to detect the offensive terms in the text of the emails.[29]

Searches

Sometimes corporations conduct bodily searches or control personal possessions of employees. This is permissible if the employee has expressed or implied his/her consent. Otherwise, it is possible only in case of "substantial and real" suspicion of theft. Employers must ensure that such searches are conducted systematically and non-discriminatorily.[30] Technology provided a solution to ease such searches too: now, special tags are used to assure the employers that 'laptops *[also other assets]* aren't walking out the door without authorization'.[31]

Drug testing

This technique of monitoring is more intrusive and self-incriminating because an employee him/herself provides the proof which may lead to discipline.[32] Drug testing plays a significant role to provide the safety of other employees and society at large.

Video surveillance

Video surveillance, open or covert CCTV, is probably the most prevalent technique of snooping. This method allows employers to watch the real-time performance of employees. Video surveillance uncovers unlawful activities or misbehaviours at work easily. Through this method, the employers can check whether the employees are at

[26] Rebecca M. Chory, Lori E. Vela, and Theodore A. Avtgis, 'Organizational surveillance of computer-mediated workplace communication: Employee privacy concerns and responses' (2016) 28 Employ Respons Rights J 23, 25. *See also* Jason L. Snyder, 'Email privacy in the workplace: a boundary regulation perspective' (2010) 47 Journal of Business Communication 266

[27] Privacy In The Workplace: Overview https://employment.findlaw.com/workplace-privacy/privacy-in-the-workplace-overview.html Accessed 11 Mar 2020, 22:38

[28] Kenneth A. Jenero and Lynne D. Mapes-Riordan, 'Electronic monitoring employees and the elusive "Right to Privacy"' (1992) 18 Employee REL. L.J 71, 73

[29] Dana Hawkins, 'Who's watching now? Hassled by lawsuits, firms probe workers' privacy' (1997) 123(10) US News & World Report 56-58

[30] Sherrard (n 23) 286

[31] Kushner (n 18) 58, emphasis added

[32] Sherrard (n 23) 287

place, where they go, how they behave during working hours and do they utilize the items in the right way, etc.[33]

Eavesdropping

Eavesdropping or telephone call accounting is another way of surveillance. This technique is widely used in call centres and customer services. This method makes it possible for employers to monitor the duration, destination, and time of the calls. In workplaces, such as telemarketing, airline reservation agencies, or long-distance operations, where the telephone calls constitute the main element of the employee's work, the employers observe telephone calls to review conversation between employee and customer[34] and quality of the rendered service. To limit the employees' use the telephones for personal purposes is one of the motivations behind eavesdropping.[35]

Wellness programs

Wellness programs provided by the companies to the employees can be regarded as a new form of surveillance. The purpose in the introduction of such programs, mainly, is to achieve the physical and psychological wellness of employees, stimulate them to live a healthy life, and in the end, keep them in a workable condition and productive at work. These programs collect and analyze personal data of the employees on their health and fitness.[36] Many wellness programs provide biometric evaluation or wearable devices to the companies, which record and contain information about sleep quality, health, fatigue levels, location, and fitness.[37] And on the basis of such information, 'just like soccer manager would not call an injured player onto the pitch, a corporate manager would not choose an employee who suffers from fatigue to attend a vital meeting or give an important presentation'.[38]

2.4. Impacts of the surveillance

Workplace surveillance is a sensitive and essential activity, and contrasting results stem from such features of the monitoring. Surveillance of employees may have both positive and negative impacts on the employers and the employees. Achieving the goals set before conducting surveillance can be perceived as positive impact on employers. On the other hand, the monitoring may cause detrimental outcomes for employees who either lose trust in the management of the organization or feel stressed due to the constant controlling, or infringement of privacy. Negative impacts on overall performance and wellbeing of the employees may necessitate limiting the surveillance notwithstanding solid justifications behind it.

It has to be noted that workplace surveillance may have different effects on each employee depending on their assessment of monitoring. The findings of experiments also may distinguish significantly depending on the sector, workplace, even the management

[33] Mateja Gorenc, 'Electronic monitoring in the workplace' (2017) 10(1) Innovative Issues and Approaches in Social Sciences 54, 58

[34] Julie A. Flanagan, 'Restricting electronic monitoring in the private workplace' (1994) 43(6) Duke Law Journal 1256, 1259

[35] Boehmer (n 6) 755

[36] Ifeoma Ajunwa, Kate Crawford, and Jason Schultz, 'Limitless worker surveillance' [2017] California Law Review 735, 763

[37] Ivan Manokha, 'Why the Rise of Wearable Tech to Monitor Employees Is Worrying'(Conversation, 3 January 2017) <https://theconversation.com/why-the-rise-of-wearable-tech-to-monitor-employees-is-worrying-70719> Accessed 25 February 2020

[38] Manokha (n 16) 34

and size of the company. But it is undeniable that it affects the employees in one or another way.

2.4.1. Positive impacts of workplace surveillance

Studies show that employees feel safe when the workplace is monitored. For example, the result of the questionnaire and interviews conducted in Welsh Ambulance Service Trust revealed that 13 out of 15 respondents were agreeable to be monitored while two were bothered. The general feeling was that video surveillance was important for the security of employees and patients.[39]

(c) Cartoonstock

Research finds that the monitored tasks are more critical and important, rather than non-monitored assignments, and therefore, the employees pay more attention to those tasks and control their behaviours which are subject to monitoring.[40] Hence employees develop themselves and increase their productivity when they are aware of being monitored. One of the studies found that employees who were monitored by the physical presence of supervisors demonstrated better results than the employees who worked alone, though the latter showed a steady performance pattern.[41]

Electronically-generated information through monitoring provides the employers with unbiased data about the fulfilment of obligations of the employees. As a result, the performance assessment is carried out 'based on the quantity and quality of an employee's work, rather than on managers' opinions'.[42]

Workplace surveillance has positive impacts on employers as well. The answers to why employees are monitored assist to guess the consequences of surveillance for the employers. Impacts of the surveillance will be assessed positively when the employers achieve the aims pursued. For example, when employers run video surveillance, this will assist them to uncover thefts, dishonest behaviour of employees, or to evaluate adequately the performance of the employees.

As a result of eavesdropping or telephone monitoring, the employer will know how employees serve customers, what they talk, whether an employee gives unauthorized information to the third party, in sum, employers will be able to measure the quality of the service and determine the threats to the business interests of the company.

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[39] Sarpong and Rees (n 12) 219
[40] Ball (n 8) 93
[41] Terri Griffith, 'Monitoring and performance: A comparison of computer and supervisor monitoring' (1993) 23(7) Journal of Applied Social Psychology 549
[42] Jitendra M. Mishra and Suzanne M. Crampton, 'Employee monitoring: Privacy in the workplace?' (1998) 63(3) S.A.M. Advanced Management Journal 4, 9

Through monitoring of CMWC, employers will yield information about wrongdoings of the employees or management. They will be able to unveil the correspondences which imply sexual harassment, racism, or discrimination. Evidence obtained through such monitoring will be used in court proceedings. Additionally, it will be possible to determine whether the employees visits the unauthorized sites, or they download items to the hard drive system of the company computers by breaking the internal policies and values of the company. Such monitoring helps companies also to protect the reputation of co-employees and the company itself from the negative and defaming opinions of disgruntled employees.[43]

2.4.2. Negative impacts of workplace surveillance

Despite the above-mentioned positive outcomes of workplace surveillance for both sides of the employment relations, it is definite that the monitoring leads also to some negative consequences for both employees and employers. Even, the disadvantages of the monitoring may outweigh its advantages. The study of literature let me conclude that the effects of the monitoring on employees in the workplace can be categorized at least under two groups: psychosocial and legal.

Psychosocial effects

Studies show that workplace surveillance negatively affects relations between employees and management. When the management has poor communication with employees or performs surveillance without considering the opinions of the employees, the trust between the management and staff is lost.[44] Injected air of suspicion through monitoring causes ill-effect in general workplace atmosphere and establish a hostile and mistrusted work environment,[45] and in the end, the employees might decide to change their workplace.[46] Research has found that when employees feel more insecurity regarding the privacy of communication means at work due to surveillance, they trust the management less, and the quality of their relation decreases.[47] High level of stress, lack of self-esteem, lack of individual creativity, worker alienation, and lack of communication, repetitive strain injury, and reduced peer review are some of the negative impacts of monitoring on employees.[48] In itself, increased stress level and low morale deteriorate the health of the employees and lead to related problems. In its turn, such problems result in sick leaves, absenteeism, and job dissatisfaction.

[43] Margaret A. Lucero, Robert E. Allen and Brian Elzweig, 'Managing employee social networking: evolving views from the national labor relations board' (2013) 25 Employee Responsibilities and Rights Journal 143, 144

[44] Ball (n 8) 93 See also, Alan Westin, 'Two key factors that belong in a macroergonomic analysis of electronic monitoring: Employee perceptions of fairness and the climate of organizational trust or distrust' (1992) 23(1) Applied Ergonomics 35

[45] Sarpong and Rees (n 12) 218

[46] Roxana Maria Roba, 'Legal aspects regarding the monitoring of employees in the workplace' (2018) 75 Petru Maior University, Faculty of Economics Law and Administrative Sciences and Pro Iure Foundation 107, 108

[47] Snyder (n 26) 283

[48] Kizza J and Ssanyu J, 'Workplace surveillance' in J. Weckert (ed), *Electronic monitoring in the workplace. Controversies and solutions* (Idea Group Publishing 2005) 12-14

(c) cartooncollections.com

Some authors argue that constantly being watched limits personal freedom of employees to carry out personal activities at work, and at the end 'autonomy, development of ideas, and personal dignity and well-being will all be adversely affected'.[49] Also, 'a single-minded emphasis on speed and other purely quantitative measurements' demotivates the employees to focus on the quality of tasks.[50]

Legal effects

The main legal impact of workplace surveillance on employees concerns the right to privacy which is the main point of the thesis and will be elaborated in detail in the subsequent chapters. As the right to privacy is regulated differently in different jurisdictions, its viability within the employment context differs as well. But in general,

> Workers do not abandon their right to privacy and data protection every morning at the doors of the workplace. They do have a legitimate expectation of a certain degree of privacy in the workplace as they develop a significant part of their relationships with other human beings within the workplace.[51]

When it comes to employers, companies may experience unwanted and unexpected adverse effects of the monitoring. It is already known that monitoring at work increases the level of stress, but 'it can actually be more detrimental because it can create adverse working conditions that may, in the long run, defeat the purpose of implementing such systems'.[52] All foregoing negative impacts of surveillance on employees indirectly affect employers socially or legally as well.

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[49] Hazel Olivier, 'Email and internet monitoring in the workplace: Information privacy and Contracting out' (2002) 31(4) Industrial Law Journal 321, 329

[50] John Lund, 'Electronic performance monitoring: A review of the research issues' (1992) 23(1) Applied Ergonomics 54

[51] The European Union, Article 29 Working Party Working document on surveillance and monitoring of electronic communications in the workplace (2002) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2002/wp55_en.pdf> 4

[52] Mishra and Crampton (n 42) 12

Stress-related diseases of employees are costly for the companies because they pay health payments to the employees who are on sick leave.[53] This, in addition to not being financially cost-effective, hinders the course of work and decelerates or delays beating the targets. While surveillance aims to enhance the productivity of employees and safeguard the company assets, its application may destroy the communication and cause a void in relations between management, customers, and employees.[54]

The employees, who allege that monitoring invades their privacy, commence court proceedings against the employers for infringement of their right to privacy. To avoid such allegations, the employers should have reasonable and justified answers to questions such as, whom, what, and where they are monitoring.[55]

[53] Juliet Hassard, Kevin Teoh, Tom Cox, Philip Dewe, Marlen Cosmar, Robert Gründler, Danny Flemming, Brigit Cosemans, and Karla Van den Broek, 'Calculating the Cost of Work-Related Stress and Psychosocial Risks' (Bilbao: European Agency for Safety and Health at Work, 2014) < http://publications.europa.eu/resource/cellar/c8328fa1-519b-4f29-aa7b-fd80cffc18cb.0001.01/DOC_1 > Accessed 25 February 2020

[54] Susan Schumacher, 'What employees should know about electronic performance monitoring' (2010) 8(38) ESSAI 138, 139

[55] Brenda R. Sharton and Karen L. Neuman, 'The legal risks of monitoring employees online' [2017] Harvard Business Review 3-4

III. PRIVACY

Before exploring the privacy as a right in a more detail under the Convention, it is a must to have a look at its way to becoming a human right. Therefore, in this chapter, the understanding of the notion of "privacy" in legal and social senses will be regarded. Furthermore, information about the legal protection of privacy under certain human rights instruments will be provided briefly as "background" information about the protection of the right to privacy. Additionally, in a more concrete context, the privacy in the workplace will be studied, largely from a theoretical perspective. Eventually, the reader will be able to perceive the matter better having knowledge about the fundamentals of the privacy.

3.1. Privacy in a Nutshell

3.1.1. Concept of Privacy in Social and Legal Senses

Where does privacy notion come from? - No one has a clear answer to this question. There is no globally recognized definition of the term "privacy";[56] it lacks clear meaning and contours.[57] As Q. Whitman stated 'honest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define'.[58] Ambiguity is inherent to privacy as a legal and philosophical concept.[59] Westin describes privacy as 'a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings'.[60]

Considering a possible unlimited scope of the concept of "privacy", one should perceive it as "a state or condition", "a desire", "a claim" or "a right".[61] Privacy is understood as a 'personal sphere that surrounds an individual irrespective of location'[62] as well. It is also a 'desire of individuals for solitude, intimacy, anatomy, and reserve'.[63] Generally, there are two underlying ideas of privacy: 'creating distance between oneself and society, about being left alone (privacy as freedom from society)'[64] and 'protecting elemental community norms concerning, for example, intimate relationships or public reputation (privacy as dignity)'.[65] In a broader sense, privacy encompassess four aspects of life, such as personal information (public disclosure, defamation, false lights, etc.), property (intellectual property, real property, etc.), autonomy (marriage, family, sexuality, freedom of choice, etc.), and physical space (trespass, battery, search and seizure, etc.)[66] while some authors argue that it includes'(1) the right to be let alone; (2)

[56] Oliver Diggelmann and Maria Nicole Cleis, 'How the right to privacy became a human right' (2014) 14 Human Rights Law Review 441, 442
[57] Ronald J. Krotoszyski, *Privacy Revisited: A Global Perspective on the Right to Be Left Alone* (OUP 2016) 2
[58] James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 YALE Law Journal 1151, 1153
[59] Alan Westin, *Privacy and Freedom* (Atheneum Press 1967) 7
[60] Robert C. Post, *Three Concepts of Privacy* (89 Georgetown Law Journal, 2001) p.2087
[61] James Michael, *Privacy and Human Rights* (Dartmouth and UNESCO. 1994) 2
[62] Amitai Etzioni, *Privacy in A Cyber Age: Policy and Practice* (Palgrave Macmillan 2015) 4
[63] Westin (n 59) 350
[64] Diggelmann and Cleis (n 56) 442
[65] ibid
[66] Jon. L. Mills, *Privacy the Lost Right* (OUP 2008) 14

limited access to the self; (3) secrecy; (4) control over personal information; (5) personhood; and (6) intimacy'.[67]

Despite unclear origin, it is known that privacy was not one of the constitutional rights in the past; the revolutionary people were not demanding privacy in the 18th century. Protection of privacy developed when the need appeared as a response to human feelings, such as "outrage or embarrassment".[68] In legal academia, it is unanimously accepted that well-known American lawyers Judge Brandeis and Samuel D. Warren popularized the right to privacy in their article titled "The right to privacy" which was published in 1890 in Harvard Law Review.[69] But the right to privacy was born two years before the publication of this article when another American scholar Cooley described it as "right to be let alone".[70] When Brandeis and Warren explained how the right to a life spent an evolutionary way, they concluded that now the right to life includes the right to be let alone as well.[71] They justified this argument by mentioning the intensity and complexity of life and noted that 'solitude and privacy had become more essential to the individual'[72] 'due to modern enterprise invading upon his privacy and by which such intrusion subjected an individual to mental pain and distress, such pain being far greater than could be inflicted by mere bodily injury'.[73]

Generally, in legal scholarship, privacy is used as an umbrella term which might include all spheres of private life. Although more than a century passed since the birth of the right to privacy in the above-mentioned article, neither scholars nor case-law could determine a clear-cut scope of privacy or private life.[74] However, international or regional human rights documents specified the magnitude of protected spheres of private life, and the appropriate authorities developed and enlarged the circle of these notions. Additionally, interpretations and comments by prominent scholars are useful to know the extended meaning of privacy.

3.1.2. Legal Protection of Privacy

First of all, it is important to note that privacy will be used as an umbrella term throughout the thesis which includes, among others, private life as well. For the purpose of this section, which is to examine general legal protection of privacy, I will not distinguish privacy of employees at work from privacy in other contexts, due to the lack of specific languages regarding the protection of privacy at work in the instruments to be reviewed below.

The protection of privacy is regulated differently in different countries, essentially depending on the legal system of those states. While tort law is the primary legal tool to safeguard privacy in common law countries, especially in the US, privacy is under a guarantee of constitutional laws in European countries where mainly civil law pathway is

[67] Daniel J. Solove, 'Conceptualizing Privacy' (2002) 90 California Law Review 1087, 1092
[68] Andrew Clapham, *Human Rights: A Very Short Introduction* (OUP 2007) 109
[69] Bart van der Sloot, 'Privacy as personality right: Why the ECtHR's focus on ulterior interests might prove indispensable in the age of "Big Data"' (2015) 31(80) Utrecht Journal of International and European Law 25
[70] Thomas M. Cooley, *A Treatise on the Law of Torts* (Callaghan 1888) 29
[71] Samuel D. Warren and Louis D. Brandeis**, '**The Right to Privacy' (1890) 4(5) Harvard Law Review 193
[72] ibid 196.
[73] Elena Sychenko, 'International protection of employee's privacy under the European Convention on Human Rights' (2017) 67 Zbornik PFZ 757, 758
[74] ibid

followed.[75] It is not a coincidence that more than 50 years ago professor Prosser defined privacy in light of tort law mentioning that four types of invasion, namely, intrusion upon private affairs; public disclosure of private facts; publicity which results in a false light in the public eye; and appropriation of name or likeness, violate privacy under tort law.[76] Although privacy is protected in a general way within the legal frameworks, there are no specific legislative acts which provide detailed and effective protection of employee privacy in domestic legislation of states. As a rule of thumb, protection of privacy in the workplace is enforced with human rights law, criminal law, employment law, civil law, and other branches of law in different states.[77]

Interestingly, the US Constitution provides for little protection for the right to privacy of employees in the workplace. The Fourth Amendment to the Constitution protects against unlawful searches and seizures only by governmental authorities[78], which means the scope of protection does not extend to intrusions into privacy by private companies.[79] In contrast to this, the European legal framework offers an opportunity for employees to claim infringement of their privacy committed by both governmental and private actors.

Before being formulated firmly as a right in national constitutions, the right to privacy was recognized as an international human right: the national legislations were protecting only some aspects of private life, such as home and correspondence, and the right to privacy had no general guarantee in national constitutions.[80]

3.1.2.1. The First Glimmer – Universal Declaration of Human Rights

The Universal Declaration of Human Rights is the first international document that recognizes and declares the right to privacy. The intent to formulate the right to privacy in one or another form in the text of the UDHR was certain from the outset of the drafting process, and that is why the drafters even did not discuss whether it would be provided or not.[81]

After long discussions on the content of the article on privacy, in the end, the version which was proposed by the Chinese delegation of Commission on Human Rights was approved with slight modification by the General Assembly.[82] Article 12 of the UDHR enshrines this right with a simple formula which reads as follows:

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[75] Paul M. Schwartz and Karl-Nikolaus Peifer, 'Prosser's privacy and the german right of personality: Are four privacy torts better than one unitary concept?' (2010) 98 California Law Review 1925
[76] William L. Prosser. 'Privacy' (1960) 48(3) California Law Review 383, 389
[77] Marta Otto, *The Right to Privacy in Employment: A Comparative Analysis* (Hart Publishing 2016) 172
[78] Lillian Mitrou and Maria Karyda, 'Bridging the gap between employee surveillance and privacy protection' in Gupta M, Sharman R (eds) *Human Elements of Information Security: Emerging Trends and Countermeasures* (IGI Global 2009) 9
[79] Gail Lasprogata, Nancy J. King, and Sukanya Pillay, 'Regulation of electronic employee monitoring: Identifying fundamental principles of employee privacy through a comparative study of data privacy legislation in the European Union, United States and Canada' (2004) 4 Stanford Technology Law Review <https://www.sukanyapillay.com/wp-content/uploads/Regulation-of-Electronic-Employee-Monitoring.pdf. > Accessed 18 February 2020
[80] Diggelmann and Cleis (n 56) 441
[81] ibid 443.
[82] Commission on Human Rights, 3rd Session, Summary Record of the 55th Meeting, 15 June 1948, E/CN.4/SR.55, 2–3

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Although the UDHR is not a binding instrument, the recognition of the right to privacy in this remarkable document led to its specification in binding international or regional instruments later. Despite the elementary language of the article, the UDHR, by enumerating the protected elements of privacy and prohibiting arbitrary interference, established the foundation of the protection of the right to privacy officially on an international level.

3.1.2.2. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) reiterated the text of the UDHR almost with the same wording in 1966. It was the main purpose of the ICCPR to reinforce the UDHR by binding the treaty, anyway.[83] As in other human rights documents, the scope of notion of "privacy" was clarified neither in the text of Article 17 of the ICCPR nor in the General Comment of the Human Rights Committee.[84] However, in General Comment no 16 on Article 17 (Right to Privacy), the Committee interpreted the text of the article and noted that 'this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons'[85] which means that the right to privacy of employees, even in private establishments, is protected in countries ratifying the Covenant. But unfortunately, so far no case on an alleged violation of the right to privacy in the workplace was brought before the Human Rights Committee, which is the monitoring body of the Covenant.

So, Article 17 (1) of the ICCPR reads 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' The second paragraph of the article repeats the text of the UDHR and specifies that 'Everyone has the right to the protection of the law against such interference or attacks.'

Pursuant to Article 4(2) of the ICCPR the right to privacy is a derogable right[86] which means that in times of national emergency the states can derogate from implementation and protection of this right. The ICCPR was criticized for lack of concrete language on restrictions and on purposes in light of which the state interference with privacy might be justified.[87]

The above-mentioned General Comment is a useful tool to clarify whether the intervention in privacy is in line with the requirements of Article 17. In the view of the

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[83] Michael (n 61) 19

[84] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political rights Cases, Materials, and Commentary* (OUP 2000) 349

[85] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para.1

[86] Scott N. Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (Transnational Publishers. American Bar Association 2003) 107

[87] Nowak Manfred, *U.N Covenant on Civil and Political Rights: CCPR Commentary* (N.P.Engel, 1993) 290-291

Committee, '"unlawful" means that no interference can take place except in cases envisaged by the *[national]* law'.[88] The Committee noted that even lawful interference can be arbitrary. To avoid arbitrariness, lawful interference 'should be in accordance with the provisions, aims, and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances'.[89]

One of the protected objectives of Article 17 is a correspondence which also includes correspondences of employees at work. To comply with Article 17, confidentiality and integrity of correspondence should be provided de facto and de jure. Messages sent by the employee have to be free from interception. It should be addressed without being opened or read. The Committee remarked unambiguously that all kinds of 'surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wiretapping and recording of conversations should be prohibited'.[90]

3.1.2.3. The European Convention on Human Rights

Article 8 (right to respect for private and family life) of the European Convention on Human Rights has been inspired by the UDHR to a great extent. Maybe it is because of the fact that the drafting process of the ECHR began right after the adoption of the UDHR. Article 8 of the Convention reads:

> 1. Everyone has the right to respect for his private and family life, his home, and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Despite affinities, the texts of Article 8 of the ECHR and Article 12 of the UDHR have some differences as well. While the attack on 'honour and reputation' is prohibited under the UDHR, the Convention remained silent on this matter. However, the Court considered honour and reputation as elements of private life later in its case-law. Unlike the UDHR, the language about arbitrary intervention in private life lacks in the text of Article 8.

As in other human rights documents, during the *travaux préparatoire* of the Convention lots of proposals were presented by delegations on the wording of the article. Since the text of Article 8 does not provide much for its interpretation, many authors studied material and personal scopes of privacy under Article 8 in academia. While some of them were a proponent of the idea that only natural persons can enjoy the right to privacy[91], others were taking a view that not only natural persons but also legal persons

[88] HRC (n 85) para.3, emphasis added
[89] ibid para.4
[90] ibid para.8
[91] Heinz Guradze, *Die Europäisch Menschenrechtskonvention* (Vahlen Verlag 1968) 118; Kayser, 'Le secret de la vie privée et la jurisprudence civile' in Mélanges R. Savatier (1965) 405 et seq

have the right to privacy.[92] Regarding the conceptual aspect of "private life" in the Convention, there were suggestions, such as "seclusion of himself, his family or his property from the public"[93], "person's family and personal life, his intimate, spiritual life, the life he lives at home with the door shut".[94] Even, the Court seems less enthusiastic to determine the concrete scope of "privacy" in judgments; instead, it deems the elements of Article 8 while interpreting.[95] The Court describes "privacy" using broad statements, such as "right to establish and develop relationships with other human beings and the outside world"[96], "a zone of interaction of a person with others, even in a public context"[97], "physical and psychological integrity of a person"[98], etc.

The Strasbourg Court stated that the Convention is a "living instrument" and its interpretation must be 'in the light of present-day condition'.[99] The Court acknowledged that it is unnecessary and impossible to give an exhaustive definition for private life under Article 8 of the Convention[100], but at the same time, it also asserted that the right to privacy is not unlimited in scope; it does not encapsulate the 'interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between measures State was urged to take and applicant's private life'.[101] Such discretionary approaches have positive consequences for long-term consideration. Hence, the Court stretched the size of private life,[102] and now the considerable extension of the material scope of privacy under the right to respect for private life is observed.[103] No doubt, the expansion of modern information and communications technologies triggered the Court to consider several acts, such as surveillance and information storage, as an intrusion upon privacy[104] and stimulated privacy to depart from traditional public/private dichotomy which disregarded privacy in the workplace for a long time.[105]

Furthermore, Article 8 contains interests that limitations to exercise the right to private life can be set to protect them. Protection of rights and freedoms of others is one of those interests, and this interest involves, among other things, interests of employers as well. This interest leave employees in a "difficult situation" in the workplace while, e.g. conducting intrusive covert video surveillance and monitoring the communication means.

Although the right to respect for private life imposes a negative obligation on the State parties by prohibiting arbitrary interference of authorities with private life, home and correspondence of individuals, it also imposes positive obligations on the states. The requirement to fulfil such obligations arises during horizontal and vertical application of the Convention and has paramount importance in the employment context as well. While the vertical application of the Convention regulates relations between states and

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[92] Jacques Velu, 'The European Convention on Human Rights and the right to respect for private life, the home and communications' in A.H. Robertson (ed) *Privacy and Human Rights* (Manchester University Press 1973) 19
[93] Winfield, *On Tort* (7th edn 1963) 726
[94] '… la vie familiele, personelle de l'homme, sa vie intrieure, spirituelle, celle qu'il mène lorsqu'il vit derrière sa porte fermée'. Lucien M. Martin, *Le secret de la vie privée* (Sirey 1959) 230
[95] Michael (n 61) 27-28
[96] *Peck v. the United Kingdom,* app no 44647/98, §57 ECHR 2003-I
[97] ibid
[98] *Pretty v. the United Kingdom*, app no 2346/02, §61 ECHR 2002 -III
[99] *Tyrer v. the United Kingdom*, app no 5856/72, 25 April 1978, para.31
[100] *Niemietz v. Germany*, app no13710/88, 16 December 1992, para.29
[101] *Botta v. Italy*, app no 21439/93, 26 Eur. H.R. Rep. 241, 257–58 (1998)
[102] Otto (n 77) 74
[103] Sloot (n 69) 28
[104] Aagje Ieven, 'Privacy Rights as human rights: No Limits?' in B Keirsbilck, W Devroe, E Claes (eds) *Facing the Limits of the Law* (Springer 2009) 315
[105] Otto (n 77) 74

individuals, the horizontal effect of the Convention is applied to relations between individuals and private parties. Because of that, both vertical and horizontal effects of the Convention can be experienced in the employment context depending on the status of the employer. When a private company interferes with the right to privacy of employees, the horizontal effect of the Convention will be at stake, and in cases where state authorities are employers and infringe the right to privacy, and then the case will be considered under vertical effect of the Convention.

3.2. Privacy in the Workplace

Article 8(1) of the ECHR reads 'Everyone has the right to respect for his private and family life, his home and his correspondence.' The formulation of the text gives no reason to exclude employees from the scope of "everyone", thus employees also enjoy the right to respect for private life in the workplace. The degree and extent of such enjoyment are subject to several conditions: primarily, they have to be balanced with the interests of employers which will be broadly discussed later in this thesis.

The right to privacy of employees in the workplace has specific features stemming from the inherent character of employment relations - 'A power to command and a duty to obey'.[106] First of all, in a strict sense of the word, the workplace is deemed not a private place, and it can be argued that employee's behaviours during working hours are not private. Additionally, there is a subordination of employee to employer which means that an employer can exercise control over behaviours of employees by the contract.[107] Within the employment relations, usually, two kinds of interests: the right to privacy of employees and, among other things, the property interests of employers can clash. Employers provide workers with the necessary information and resources to ensure a smooth run of their businesses in exchange for personal data, knowledge and skills of employees. So, while employers have personal data of employees, employees have commercially important information about employers.[108] Since labour law allows employers to supervise their employees, the protection of the privacy of employees should adapt to this peculiarity of employment relations.[109] Hence, employee's right to privacy is qualified by relations between employer and employee[110] 'which is based, in particular, on the opposition or reconciliation of rights and interests in the employment context'.[111] But simultaneously, the right to privacy at work is accepted as a fundamental right 'which should not be susceptible to waiver by agreement in the employment contract. It is a value imposed on the employment relationship externally; safeguarding important individual and societal interests that should not be threatened by an employer's superior bargaining power'.[112]

Origins of employee's right to privacy in the case-law of the ECtHR can be observed in *Niemietz v. Germany.*[113] The Court noted that

[106] Julian Sempill, 'Under the lens: Electronic workplace surveillance' (2001) 14 Australian Journal of Labour Law 1, 12
[107] F.Hendrickx and A.V.Bever, 'Article 8 ECHR: judicial patterns of employment privacy protection' in Dorssemont, F.; Lbrcher, K.; Schomann, I. *(eds) The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013) 185
[108] Gorenc (n 33) 54-55
[109] Sychenko (n 73) 758
[110] Frank Hendrickx, *Privacy en Arbeidsrecht* (die Keure 1999) 47 and 51
[111] Hendrickx and Bever (n 107) 185
[112] Olivier (n 49) 330
[113] Sychenko (n 73) 759

> [I]t would be too restrictive to limit the notion [of privacy] to an "inner circle" in which the individual may live his personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.[114]

Coming to the workplace to be considered home, the Court interpreted the concept of "home" in a way that it included an individual's professional and business premises. The Court also observed that it is the same in the domestic legislation of several countries, and, therefore, if the word "home" was interpreted narrowly, it would not be consonant, for example, with the French word "domicile", which is a broader concept than home.[115] Moreover, the Court acknowledged that 'respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings'.[116] It stated that

> There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.[117]

Shortly, in *Niemietz*, the Court concluded that employees enjoy some extent of privacy in the workplace under Article 8. Later case-law of the Court will show that not only calls made from work but also electron mails sent from business premises, 'information derived from the monitoring of personal internet usage'[118], and social media private message communications at work are accepted as elements of private life and protected under Article 8.[119] Moreover, as time pass the Court set out that video surveillance[120], drug testing[121], disclosure of criminal conviction information to a job applicant[122], investigation of intimate lives of soldiers and dismissal of servicemen from the army in the United Kingdom (the UK) on sexual orientation ground[123], storage and release information which collected for security purposes, and avoiding employees to refute it[124], etc., interfered with the private life of employees as well.

The case-law of the Strasbourg Court concerning privacy in the employment context is not limited only to the stage in which both parties of the employment relations execute their contractual obligations but also it extends to the pre-employment stage as well as to cases in which the labour agreement has been terminated between the parties on the basis of the private materials obtained through surveillance.[125] Generally, the right to privacy of employees within the employment relationships involves a vast range of

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[114] *Niemietz v. Germany*, para.29
[115] ibid para.30
[116] ibid para.29
[117] ibid
[118] *Copland v. the United Kingdom*, app no 62617/00 §41 ECHR 2007-I
[119] Otto (n 77) 76
[120] *Köpke v. Germany*, (dec.) app no 420/07, 5 October 2010
[121] *Madsen v. Denmark*, app no 58341/00, 7 November 2002
[122] *MM v. the United Kingdom*, app no 24029/07, §188 13 November 2012
[123] *Lustig-Prean and Beckett v. the United Kingdom*, app nos 31417/96 and 32377/96, §64, 27 September 1999
[124] *Leander v. Sweden*, app no 9248/81, 26 March 1987, para.48
[125] Hendrickx and Bever (n 107) 189

interests which comes out before, during, and after labour relations.[126] While the employee expects the employer to respect his/her privacy throughout an ongoing employment relationship, the job applicant has such expectations before concluding an agreement: in pre-employment selection. In these stages, different aspects of private life might be concerned. For example, if covert video surveillance might be a threat to privacy during an existing employment relationship, processing of materials which were obtained through such surveillance may be subject to dispute on privacy infringement after the termination of employment. Collecting personal data in the course of recruitment process or existing laws which prohibit access to jobs for a group of individuals with a specific background can be a subject of privacy disputes as well. For example, *Sidabras and Dziautas v. Lithuania* is a relevant example for violation of private life cases in the pre-employment stage. In this case, the ECtHR concluded that national law which deprived former KGB officers from filling a post in the public workplace as a civil servant temporarily or from performing a job[127] requiring the carrying of a weapon[128] violates the right to private life under Article 8.[129]

The right to privacy is not an absolute right which means its enjoyment can be limited in certain situations. European Commission of Human Rights noted that 'the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests'.[130] Existence of subordination at work decreases the privacy expectation of employees in the workplace.[131] Moreover, besides managerial privilege, employment relations involve the rights and interests of co-employees and third parties, such as customers,[132] and such interests and rights can reduce the extent of the right to privacy of the employee.[133]

To sum up, as the examined literature and case-law of the Strasbourg Court showed, the scope of privacy in the workplace has no concrete frames just like the notion of privacy. What is provided for in the Convention is that employees have the right to privacy like everybody else. Although employers can control the performance of their employees, this does not mean that employees lose their right to privacy in the workplace, and employees enjoy privacy in all stages of employment.

3.3. The Principle of Reasonable Expectation

While speaking about the protection of privacy at work, probably, one of the first questions comes to mind is whether the employee had a reasonable expectation of privacy. Analysis of case-law of the ECtHR and courts of common law systems show that the existence of reasonable privacy expectation plays an important role in considering the case under Article 8 or e.g. tort law. Reasonable expectation principle originally comes from the US legal system. Although the ECtHR uses that principle too, its role in the European system is different from the American one.[134]

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[126] Otto (n 77) 181
[127] Hendrickx and Bever (n 107) 190
[128] *Sidabras and Dziautas v. Lithuania*, app nos 50421/08 and 56213/08, §37, 23 June 2015
[129] ibid para.50
[130] *Brüggeman and Scheuten v Germany*, app no 6959/75, Commission decision of 12 July 1977, 3 EHRR 244, para.56
[131] Hendrickx and Bever (n 107) 185
[132] *Madsen v. Denmark*, no. 58341/00, 7 November 2002
[133] Hendrickx and Bever (n 107) 185
[134] Hendrickx and Bever (n 107) 186

Within the employment context, reasonable privacy expectation does not present a normative standard that emanates from societal privacy expectations; rather it has been taken as an empirical concept that derives from individual privacy expectations in different circumstances. In the latter case, the employer retains the authority to determine the extent of privacy that can be expected by the employee. The extent of privacy expectation can be 'shaped by contract'[135]; hence an employment agreement can easily contain a clause to limit the privacy expectation of employees, for example, on internet use. So, theoretically, such provisions could exclude privacy expectations. 'Although an employer cannot insist on an employee contracting out from privacy-protective legislation directly, the employer's power to define expectations of privacy in the employment contract has exactly the same effect'.[136] Restrictive privacy policies issued by the employers unilaterally disadvantage privacy expectations of employees, and such deals are unacceptable because this leads to the privacy expectation of employees to depend on the practice, assurance, and policies of employers.[137] Hazel argues that such an approach, besides being unacceptable, is dangerous as well. In addition to the employer-interest-favour character, it will be comprehended as a 'norm' in the workplace which does not base on the normative societal expectation of privacy. Even, 'consent' of employees to privacy-intrusive practices in the outset of employment relations may result in loss of privacy expectation and right to privacy at the end because such acceptance will deny the deeds of employers even being assessed as intrusive. So, it should not be accepted as an appropriate way to deal with a right which has a strong theoretical and legal base and cannot be eliminated with an employment contract between private parties.[138]

The Fourth Amendment to the US Constitution, which protects citizens against unreasonable seizures and searches, brought the reasonable privacy expectation to the US legal system. *Katz v US* is the reference case in which the Supreme Court concluded that protection of the right to privacy is dependent on the reasonable expectation of privacy. The Judge stated that there are two types of privacy expectations: subjective and objective. Subjective privacy expectation exists when '… an individual actually, believes that a situation or location is private — which varies from person to person …'[139] On the other hand, the existence of objective expectation of privacy is subject to society's recognition it as reasonable,[140] thus 'what a person knowingly exposes to the public, even in their home or office, is not subject to a Fourth Amendment protection'.[141] Because the reasonable expectation of privacy is used to clarify the extent of the notion of "privacy", the absence of such expectation might result in the exclusion of many issues outside of privacy. American attitude may lead to the end 'that employees, while under the authority of the employer, cannot automatically claim reasonable privacy expectations'.[142] Considering such possible results it is argued that the approach to reasonable privacy expectation in the US, 'fails to conceive the possibility of "private space", literally or metaphorically, while at work'.[143] Unlike the US system, ECtHR states that individuals

[135] Gillian Morris, 'Fundamental rights: Exclusion by agreement?' (2001) 30 Industrial Law Journal 49, 61
[136] Olivier (n 49) 332
[137] Matthew W. Finkin, 'Employee privacy, American values and the Law' (1996) 72 Chicago-Kent Law Review 221, 226
[138] Olivier (n 49) 332
[139] Finkin (n 137) 226
[140] *Katz v United States,* 389 U.S. 347 (1967) PN2004-68 See also, Sjaak Nouwt and Berend R. de Vries, 'Introduction' in S Nouwt, BR de Vries and C Prins (eds) *Reasonable Expectations of Privacy?* (The Hague, TMC Asser Press, 2005) 3
[141] *Katz v United States,* 351
[142] Hendrickx and Bever (n 107) 187
[143] Matthew W Finkin, *Privacy in Employment Law* (2nd edn BNA Books 2003) xxix

may have a privacy expectation even in the public sphere, namely to be present in the public sphere does not eliminate a claim on reasonable privacy expectations.[144] In *PG and JH v UK* the Court confirmed that there is 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"'.[145] ECtHR introduced the principle of the reasonable expectation of privacy for the first time in *Lüdi v Switzerland*, notwithstanding it did not use the exact phrase of "reasonable expectation" to describe the essence of it. In short, one of the main points of the judgment was that 'a person involved in criminal actions is permitted a lesser expectation of privacy'.[146]

Adjudicated cases of the ECtHR concerning the right to privacy of employees could be divided in two groups: the cases on data protection, where collection, storage and use of data are at stake, and the cases related to surveillance at work, such as video monitoring, interception of communication, searches on personal equipment and offices. Although, the principle of a reasonable privacy expectation was used as an important tool in the second group of cases to determine whether there is an invasion of the private life of an employee,[147] later the Court moderated role of this principle stating that

> There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.[148]

Even though the reasonable expectation of privacy has an important role to determine whether there is an intrusion into the right to privacy of employees, it is not the only factor to come to that conclusion. So, the Court identifies the principle of a reasonable expectation of privacy as a means to reach the scope of protection of privacy afforded under Article 8: less reasonable expectation guarantees decreased level of protection claim.[149]

The ECtHR scrutinizes and takes relevant facts and concrete context into account to find out whether the expectation was reasonable.[150] Reasonableness of privacy expectation in the employment context depends, *inter alia*, 'on the questions of whether the employee was informed about the fact that interference with his right to privacy was possible; the presence of specific indications of the possibility of such interference; or the (permanent) nature and the impact of the interference'.[151] Contrary to the arguments that applicability of reasonable privacy expectation in the workplace is controversial,[152] and an employee gives up his/her privacy expectations by entering into employment relations,[153] the case-law of the Court maintained that reasonable privacy expectation not

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[144] Krotoszyski (n 57) 5
[145] *PG and JH v. the United Kingdom*, app no 44787/98, §56 ECHR 2001-IX
[146] Cicilian Gorman, *Is Society More Reasonable than You? The Reasonable Expectation of Privacy as a Criterion for Privacy Protection* (University of Tilburg Press 2011) 28
[147] Sychenko (n 73) 760 See also, *Halford v. the UK*
[148] *PG and JH v. the United Kingdom*, emphasize added
[149] Hendrickx and Bever (n 107) 187
[150] Fabienne Raepsaet, 'Les attentes raisonnables en matière de vie privée' (2011) 10 Journal des tribunaux du travail 145, 147 and 153
[151] Hendrickx and Bever (n 107) 189
[152] Otto (n 77) 188
[153] Olivier (n 49) 326

only extends to workplaces in a spatial dimension but also it is valid in all stages of employment relations.

Shortly, the Court accepts that, generally, an employee has a reasonable expectation of privacy at work which protects private life from many intrusions under Article 8(1). Therefore, the states have to justify their deeds. Additionally, such expectation is considered while assessing the reasonableness of intrusions under Article 8(2).[154]

[154] Hendrickx and Bever (n 107) 188-189

IV. SUBSTANTIVE ISSUES OF PRIVACY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

As already mentioned in the previous chapter, Article 8 of the ECHR guarantees the right to privacy under the title of the right to respect for private and family life. The Convention enumerates protected aspects of privacy and interests for protection of which the interference with the private life might be justified. This chapter elaborates on the protected aspects of privacy and their relevance to the privacy in the workplace. To know the scope of the protected elements of privacy and legitimate interests will help to see them clearly in the chosen cases to be examined in the next chapter. Furthermore, this chapter explores other important issues emanating from the application of the limitations to the enjoyment of the right to private life. After having looked through these issues, it will be possible to analyze properly the cases in the subsequent chapter.

4.1. Protected aspects of privacy

Private life, family life, home, and correspondence are explicitly protected elements of privacy under the ECHR. Article 8(1) of the Convention reads 'Everyone has the right to respect for his private and family life, his home and his correspondence'. As all of these notions include many different aspects of life, the Court is continuously extending the scope of the protection of private life in its case-law. Considering the Court's conclusion that '"[P]rivate life" is a broad term not susceptible to exhaustive definition',[155] it seems this tendency will continue further due, among other things, to changes in accepted social norms and deployment of new technologies in the workplaces for surveillance purposes.

Private life

The "private life" is 'a notion whose content varies depending on the age to which it relates, on the society in which the individual lives, and even on the social group to which it belongs'.[156] Therefore, the ambit of protection of the right to respect for private life depends on current customs, manners and changes from place to place.[157] Such a relative character of the concept of private life explains why it is difficult to fix it in concrete frames.

The previous chapter already introduced the views of some scholars on the scope of the notion of "private life" under the Convention. Years ago, authors stated that the ECHR meant to protect private life against attack on honour and reputation, physical and mental integrity, identity, moral or intellectual freedom, disclosure of information that are protected under professional secrecy, spying, watching, prying, misuse of private correspondences, etc.[158] Afterwards the development of case-law of the Court confirmed these interpretations: the Court acknowledged that all these elements and actions concern private life under Article 8.

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[155] *Bensaid v. the United Kingdom*, app no 44599/98, §47 ECHR 2001-I

[156] Corneliu Birsan, *Conventia Europeana a Drepturilor Omului. Comentariu pe Articole* (2nd edn C.H. Beck Publishing House 2010) 602

[157] Velu (n 92) 35

[158] ibid 33.

Moreham analyzed the case-law of the Court regarding the right respect for private life and concluded that private life in the case-law of the ECtHR can be categorized under five groups: freedom from interference with physical and psychological integrity; the collection and disclosure of information; protection of one's living environment; identity; and personal autonomy.[159] Each of these categories involves different interventions in a private life interest.[160] For example, searches in workplaces may fall under the category of physical and psychological integrity and may interfere with the right to private life.[161] In general, the Strasbourg Court maintains that professional and business activities constitute part of private life.[162] The Court's view in *Niemietz* that the private life includes professional activities, through which individuals develop social relations with others to an important extent at work, is a reference for this point. Applied restrictions to access to a profession, likewise discharging from the office interfere with private life as well.[163] The Court in *Denisov v. Ukraine* remarked that Article 8 will be engaged in employment-related disputes 'where a person loses a job because of something he or she did in private life (reason-based approach) or when the loss of job impacts on private life (consequence-based approach)'.[164]

Surveillance is another activity that actively interferes with the physical and psychological integrity of the individuals and consequently, with their right to private life.[165] Thus, the states will be liable for installing devices to carry out unwanted listening, among others, in workplaces which is deemed as invasion of private life.[166] Monitoring of internet and telephone use in the workplace regards the informational privacy of individuals and therefore, interferes with the private life of employees.[167]

A criminal conviction of the employee does not constitute a conflict with his/her right to private life. For example, in *Gillberg v Sweden,* the Court stated that '[A]rticle 8 cannot be relied on to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offense'.[168] So, the employee would not be successful in claiming that surveillance interfered with his/her private life if the surveillance was aimed at verifying criminal deeds of the employee and conducted following certain principles which are being examined later in the thesis.

Family life

Right to respect for family life requires identifying what a family is.[169] The Court points out that 'the existence or non-existence of "family life" is essentially a question of fact'.[170] The Court considers several factors to conclude whether the family exists. Living

[159] Nicole A. Moreham, 'The right to respect for private life in the European Convention on Human Rights: Re-examination' [2008] European Human Rights Law Review 44, 49-71
[160] ibid 49-71.
[161] ibid 51.
[162] *Bărbulescu v. Romania,* para.71*; Jankauskas v. Lithuania (no. 2)* app no 50446/09, § 56-57 ECHR 2017; *Fernández Martínez v. Spain*, app no 56030/07 §§ 109-110 ECHR 2014-II
[163] Guide on Article 8 of the ECHR, Right to respect for private and family life, home and correspondence, ECtHR, Council of Europe 31 August 2019 para.131
[164] ibid para.132, See also, *Denisov v Ukraine*, app no 76639/11, §§ 115- 117, ECHR 2018
[165] Moreham (n 159) 53
[166] *Kopp v. Switzerland*, app no 23224/94, 25 March 1998, para.50; *Huvig v. France*, app no 11105/84, 24 April 1990, para.25; *Amann v. Switzerland*, app no 27798/95, **§** 45.1 ECHR 2000-II*; Halford v. the United Kingdom*, paras.43-46
[167] *Copland v. the United Kingdom*, app no 62617/00 **§**42 ECHR 2007-I
[168] *Gillberg v. Sweden*, app no 41723/06, §67, 3 April 2012
[169] Jacobs, White and Ovey, *The European Convention on Human Rights* (Bernadette Rainey, Elizabeth Wicks, and Clare Ovey (eds.) 6th edn OUP 2014) 335
[170] *K and T v. Finland*, app no 25702/94, §150 ECHR 2001-VII

together[171] and length of the relationship, having a child[172] are some of those factors. Cases related to the infringement of the right to respect for family life involves matters, such as couples, including same-sex couples, parenthood, children, custody, adoption, international child abduction, relations with other relatives, etc.[173] Given that the claims by employees in the cases to be studied do not necessarily concern family life, I will not explore this element of privacy more.

Home

Home is another protected element of privacy under Article 8. This right does not imply the right to home, but the State parties are obliged to protect the physical security of individuals' homes and their belongings there.[174] As a concept "home" is autonomous and does not depend on its classification under national laws.[175] The Court checks the factual circumstances, such as the existence of continuous and sufficient links with a place to determine whether a habitation establishes "home".[176] In the previous chapter, it was already stated that the Court in *Niemietz* did not separate the business and professional premises from the scope of the concept of home. A university professor's office,[177] a newspaper's premises,[178] and a notary's practice[179] also fall under the term of home.

Examples of interference with the home include police intrusion into the home, seizures and searches, officials' home visit without permission, destruction of home by the authorities, etc.[180] Private life may overlap with home, that is why in some cases searches constituted a breach of both right to respect for private life and home.[181] Likewise, searches in offices of employees at work should be treated similarly, namely such searches could be argued as an invasion of private life and home of an employee.

Correspondence

The primary purpose of the right to respect for correspondence is to safeguard the confidentiality of the correspondence in various circumstances. The Court specified in *Copland v the United Kingdom* that telephone calls made from business premises, emails sent from work, information derived from the monitoring of personal internet usage are covered by the notions of "private life" and "correspondence".[182] Written materials, including those sent via the post, fall under the correspondence as well.[183] However, the scope of the correspondence is not confined to the mentioned communications; it also covers stored data in computer servers[184] and hard drives[185], packages seized by customs officers,[186] etc.

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[171] *Johnston and others v. Ireland*, app no 9697/82, 18 December 1986, para.56
[172] *X, Y and Z v. the United Kingdom*, app no 21830/93, 22 April 1997, para.36
[173] Guide on Article 8 (n 163) paras.256- 351
[174] Jacobs, White and Ovey (n 169) 364
[175] *Chiragov and others v. Armenia*, app no 13216/05, §206 ECHR 2015-III
[176] *Winterstein and others v. France*, app no 27013/07, § 141, 17 October 2013
[177] *Steeg v. Germany*, (dec.) app nos. 9676/05, 10744/05 and 41349/06, 3 June 2008
[178] *Saint-Paul Luxembourg S.A. v. Luxembourg*, app no 26419/10, §37, 18 April 2013
[179] *Popovi v. Bulgaria*, app no 39651/11, §103 ECHR 2016
[180] Guide on Article 8 (n 163) para.360
[181] Moreham (n 159) 51 See also, *Funke v France*, app no 10828/84, 25 February 1993
[182] *Copland v. the United Kingdom*, app no 62617/00 §41 ECHR 2007-I
[183] Jacobs, White and Ovey (n 169) 364
[184] *Wieser and Bicos Beteiligungen GmbH v. Austria*, app no 74336/01, §45 ECHR 2007-IV
[185] *Petri Sallinen and others v. Finland*, app no 50882/99, § 71, 27 September 2005
[186] *X v. the United Kingdom*, app no 7308/75 Commission decision of 12 October 1978

Intervention in correspondence may include, *inter alia*, making copies and screening of correspondences, interception of communication means, and storage of data obtained through interception with electronic communication means, telephone and internet activity, forwarding correspondence to the third party.[187] Allegations regarding violation of the right to respect for correspondence are always taken together with the violation of the right to respect for private life when the individual is exposed to surveillance through different techniques.[188] The reader will see this in case-analysis in the next chapter; the employees, whose communication means are monitored claim about the violation of right to respect for private life and correspondence.

4.2. Legitimate aims standard: protected interests

Paragraph 2 of Article 8, which signifies that the right to respect for private and family life is not absolute and is subject to restrictions, reads

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Legitimate aims are the grounds specified in the Convention which justify interference with the rights provided therein. The Court stated that a legitimate aim must be a 'pressing social need'.[189] The limitations set on the enjoyment of these rights have to rely on one or more of these grounds, namely, the respondent states must prove that they were pursuing legitimate aim(s) while hindering full enjoyment of the guaranteed rights. As Mégret stated '[A] state cannot overturn human rights simply for idiosyncratic policy preferences that are not themselves for the benefit of rights'.[190] Besides Article 8, Articles 9, 10 and 11 of the Convention contain legitimate aims as well. An explicit specification of interests in the text of the Article 8, which may make interference with the right to respect for family and private life lawful, is the principal distinctive feature that distinguishes ECHR from the other international or regional human rights instruments.

If we apply the above-mentioned interests in the employment context, it will mean that employers may conduct surveillance and interfere with one or several of the protected elements of Article 8(1) if they pursue a legitimate aim, namely, one or more of the interests articulated in Article 8(2). Yet, legitimate aim in itself is not sufficient for justification of the intervention; it has to meet other requirements, such as being in accordance with law or necessary in a democratic society. In the workplace surveillance context, the pursued legitimate aims are, usually, the rights of the employers, such as the right to property. However, it is not an exception that monitoring may be carried out to protect health and morals, or to prevent crime or disorder, and even for protection of national security.

[187] Guide on Article 8 (n 163) para.445
[188] Jacobs, White and Ovey (n 169) 364
[189] *Handyside v. the United Kingdom*, app no 5493/72, 7 December 1976, para.48
[190] Frédéric Mégret, 'Nature of obligations' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd edn, OUP 2018) 101

The interest of national security

This interest is likely relevant for employment context in cases where employers are entities of national importance and conduct surveillance to safeguard national security. Regardless of the status of employer, surveillance measures always involve the privacy of the employees.

National security is a wide notion that may encompass more than one idea. Kempees notes that those measures are for national security that they protect 'the safety of the State against enemies who might seek to subdue its forces in war to subvert its government by illegal means'.[191] However, not only war times but also in peacetime the authorities may limit the exercise of the right to respect for private and family life for the national security interest. In the latter case, the individuals must have legal protection against two risks: the officials may infringe this right even if there is no threat against the national security, and authorities might abuse their authorities for political aims in the interest of national security.[192] Measures against terrorism fall under the scope of national security as well.[193] The Court found secret surveillance as an acceptable way of countering threats of espionage and terrorism against national security.[194]

The interest of public safety

There are not many cases raising questions solely based on public safety interests. Public safety is frequently relied on together with national security and the prevention of disorder [195] but states can impose restrictions on the exercise of the right to respect for private life during natural disasters, such as flood, fire, or other calamities, to aid the victims or secure the safety of people or properties too.[196] Considering this, it is possible to note that this ground of limitation imposed on private life will mostly concern privacy matters out of the employment context. Although so far the Strasbourg Court has not considered a case concerning public safety in the context of workplace surveillance, it is not an exception that the employers may carry out surveillance to uncover illicit activities of employees that may endanger public safety.

Easily, one can observe in the case-law of the Court that it often uses public safety as a synonym of public order. The example can be found in the *Metropolitan Church of Bessarabia* case, where the Court described the pursued legitimate aim as 'protection of public order and public safety'.[197]

The economic well-being of the country

Interestingly, the protection of the economic well-being of the country was set forth only in Article 8 as a ground of limitation in comparison with other articles containing legitimate aims. This interest was invoked by the respondent State and accepted by the Court in the *Gillow* case in 1986. The case was concerning the requirement of getting permission from the government to buy a house in Guernsey Island. The ECtHR upheld the justification of the State that it was allowable to 'maintain the population within limits that permit the balanced economic development of the

[191] Peter Kempees, '"Legitimate aims" in the case-law of the European Court of Human Rights' in P. Mahoney and others (eds) *Protecting Human Rights: The European Perspective*. Studies I Memory of Rolv Ryssdal (Carl Heymans, 2000) 662
[192] Velu (n 92) 72
[193] See *Zana v. Turkey*, no.18954/91, 25 November 1997, para.49
[194] See *Klass v. Germany*, no. 5029/71, 6 September 1978
[195] Jacobs, White and Ovey (n 169) 317
[196] Velu (n 92) 73
[197] *The Metropolitan Church of Bessarabia and Others v. Moldova*, app no 45701/99 §113 ECHR 2001-XI

island'.[198] Another case is *Funke v France*, in which the Court had to deal with the complaint concerning searches of the individuals dwelling regarding 'financial dealings with foreign countries contrary to French law'.[199] In this case, the Strasbourg Court confirmed that the intrusion had a legitimate aim to protect the economic well-being of the country. It is theoretically possible that similar matters arise within the employment context as well, especially in public workplaces. Employers in such workplaces may carry out monitoring, for example, may secretly monitor the computers or internet activities, or may open the files stored on the computer of the employees to unveil such wrongdoings which may affect the economic well-being of the country.

The prevention of disorder or crime

As mentioned earlier in the thesis, the prevention of disorder and crime is one of the motivations triggering for workplace surveillance. Employers use different techniques to uncover or prevent employees' illegal activities and to collect evidence to use against the employees in possible court proceedings. As many applications before the Court address penal measures aiming at preventing the crime and disorder, it is not surprising that this ground is invoked often by the states and the Court accepts it frequently.[200] The Court notes that the prevention of crime is a concept that includes, among others, 'the securing of evidence for the purpose of detecting and prosecuting crime'.[201]

The protection of health and morals

According to the European Commission of Human Rights, the protection of health and morals does not refer only to public health or morals, it encompasses also the protection of health and morale of individuals, and it includes both the psychological and physical well-being of the persons.[202]

The Dudgeon case may be a relevant example for a case where this justification was relied on regarding allegations of the violation of the right to private life. Shortly, the case was concerning the criminalization of consensual sexual activities between men in Northern Ireland. The State invoked the protection of moral standards, but the Court did not accept the justification and concluded that the application of penal sanctions constitutes the violation of Article 8.[203]

So far, no case concerning the protection of health and morals in the employment context has been brought before the Court. Only in one case, *Libert v. France*, which will be presented in detail in the next chapter, the element of morality was involved, though it was not considered as a legitimate aim by the Court there. Therefore, no more detailed and referenced information can be provided here. Despite the lack of precedent in this context, there is nothing that leaves out the possibility of protection of health and the moral ground being dealt with in the employment context in future cases.

The protection of the rights or freedoms of others

The study of the case-law of the Strasbourg Court allows mentioning that this ground is the most frequently invoked one in cases related to surveillance in the workplaces where the interference with the element(s) of private life is justified for the protection of the rights and freedoms of others. If monitoring happens in the private workplace, then the rights and interests of employers are at stake opposite to the right to

[198] *Gillow v. the United Kingdom*, app no 9063/80, 24 November 1986, para.54
[199] Jacobs, White and Ovey (n 169) 318
[200] ibid 319.
[201] *Van Der Heijden v. the Netherlands*, app no 42857/05, §54, 3 April 2012
[202] European Commission of Human Rights, 10 April 1961, application 911/60, Yearbook IV, 118
[203] See *Dudgeon v the United Kingdom*, app no 7525/76, 22 October 1981

private life or correspondence of employees. What involves the rights of an employer may change from case to case, but usually, it involves the interest of an employer in the smooth running of the business, property rights, and other related business interests. When the employer is a state organization or public-funded entity, the competing interests will be employees' right to privacy and the rights and freedoms of others, community as a whole. This ground covers a vast range of issues and, kind of, shows how the authorities may justify the restrictions endlessly due to the open-ended scope of rights of others.[204]

4.3. State's obligations: negative or positive?

The classic *laissez-faire* attitude to the obligations of states in international law will not work in human rights law because the obligations involved are wide and comprehensive, also human beings are supposed to benefit from the implementation of those rights. Therefore, a new terminology emerged to come up with the obligations of states.[205] Typically, states should respect, secure,[206] and 'ensure right to all individuals'.[207] Since such articulations are broad in meaning, tripartite typology of the obligations of states was defined in the United Nations (the UN) system, namely states have obligations to 'respect, protect, fulfil' human rights.[208]

Obligation to respect human rights imposes a negative obligation on states requiring them to refrain from taking any measure that impedes enjoyment of the rights. States have to abstain from the violation of human rights 'either through their organs or agents'.[209] Such organs of the states include, but not limited to, the courts, executive, and administrative bodies. Obligation to protect, in a simple sense, stands for the protection of human rights by states. This obligation requires states to actively ensure that the human rights of the individuals in their jurisdiction are not violated by the third parties. Obligation to fulfil entails taking the measures to secure human rights.[210] Such measures involve not only the adoption of legislative acts but also taking 'judicial, administrative, educative, and other appropriate measures'.[211]

The wording of Article 8(2) of the Convention explicitly deters governmental authorities from interfering with the right to respect for private and family life of the individuals. Therefore, this obligation is a traditional negative obligation. When the Court deals with negative obligations, typically it tries to find answers to two questions: 1) is there interference with one of the rights articulated in the first paragraph of Article 8? 2) Has the intervention been justified according to the second paragraph of the same article?[212] So, when the interference complained of with private life has been committed by the state authority, the Court examines the case in light of the negative obligations of the state. However, the Court frequently stated that Article 8 refers also to the positive obligations of the states. For example, in the *Dickson* case, the Strasbourg Court indicated its current approach with the following statements:

[204] Jacobs, White and Ovey (n 169) 323
[205] Mégret (n 190) 97
[206] ECHR, Article 1
[207] ICCPR, Article 2
[208] Mégret (n 190) 97
[209] ibid
[210] ibid 98.
[211] Human Rights Committee, General Comment 31, HRI/GEN/1/rev.9 (Vol 1), 243, para.7
[212] Moreham (n 159) 47

> The Court observes that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be ***positive obligations*** inherent in effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, both instances regard must be had to fair balance to be struck between the competing interests…[213]

As seen from this long paragraph, the Court stands for the emergence of the States' positive obligations even during horizontal application of the Convention, namely, the states have to protect the human rights of individuals from the violations happening in the context of relations between individuals and private parties. This point is very relevant to the employment context because employers in the private sector often interfere with the right to privacy of the employees by performing surveillance. The above-mentioned excerpt from the judgment identifies clearly that the State parties are not free from the liability in the case where the infringement of privacy happened within the private relations. However, it does not mean that the states are always liable for each infringement of rights of the individuals by the private entities, in itself. The state will be responsible for those violations that 'can be traced to its shortcomings in protecting individuals from others, for example, because it adopted a law that made the violation possible'.[214]

Moreover, once the positive obligations of states are engaged in the case the Court counts whether the alleged violation of the interest in the issue is so significant that it demands imposition of the positive obligations on the respondent state. To assess this, the Court has taken several factors into account. One of them is about the significance of the interests at stake and concerns

> [W]hether "fundamental values" or "essential aspects" of private life are in issue or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administration and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8.[215]

In more concrete cases, the ECtHR "has distinguished two types of substantive positive obligations: the obligation of taking protective operational measures, and the obligation of adopting an effective regulatory framework to provide general protection to the society at large."[216] These obligations could be transferred to context of the privacy at work by naming 'duty to regulate' and 'duty to act'[217]respectively. Then, the duty to regulate will requires states to enforce regulative norms to protect the right to respect for

[213] *Dickson v. the United Kingdom,* app no 44362/04, §70 ECHR 2007-V, emphasize added
[214] Mégret (n 190) 97
[215] Guide on Article 8 (n 163) paras.6-8
[216] Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' [2020] Leiden Journal of International Law 1, 5 See also, *Fernandes de Oliveira v. Portugal*, app no78103/14, §103 ECHR 2019; *Mikhno v. Ukraine,* app no 32514/12, §126 ECHR 2016
[217] Sychenko (n 73) 775

the private life of employees either through case-law or legislation.[218] Although the states are free to choose the measures they take, the Court asserts that there should be a law in place for the cases of more intrusive interference.[219]

In *M.M. v. the United Kingdom,* the Court declared its considerations regarding the quality of those regulations by stating that

> [I]t *[is]* essential, in the context of the recording and communication of criminal record data as i*n telephone tapping, secret surveillance and covert intelligence-gathering,* to have clear, detailed rules governing the scope and application of measures; as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.[220]

On the other hand, the duty to act will require the states to use effective and necessary tools to protect or secure the privacy of employees, especially in the field of data protection. For example, in the case of *I v. Finland,* the applicant was working as a nurse in the hospital, after a while she became a patient of the same hospital (she was HIV positive). As the patient register, which was containing information about diseases of the patient, was accessible by the staff, her colleagues knew about her diagnosis, and the applicant claimed that the respondent government failed to secure her data, namely, the State breached its positive obligation failing to provide a system of data protection safeguards and rules. The Court found the State's failure of its positive obligation under the Article and noted that

> [T]he mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorized access occurring in the first place.[221]

4.4. The role of a margin of appreciation

Implementation of human rights law requires consideration of the historical, cultural, or political background of nations to a necessary extent, and there is no expectation of uniform application thereof. In lie, certain minimum standards are set. These minimum standards should be applicable by respecting the above-mentioned realities of the societies at the same time. The principle of the margin of appreciation should serve to achieve this goal when the states implement their obligations.[222] The Strasbourg Court states that

> [T]he main purpose of the Convention is ‘to lay down certain international standards to be observed by the Contracting States in their relations with

[218] ibid
[219] ibid See also *Köpke v. Germany*, (dec.) no. 420/07, 5 October 2010
[220] *M.M. v. the United Kingdom* (24029/07) 13/11/2012 at para.195, emphasize added
[221] *I v. Finland*, app no 20511/03 §47, 17 July 2008
[222] Mégret (n 190) 102

> persons under their jurisdiction'. This does not mean that absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws.[223]

For Yourow, the margin of appreciation

> [C]an be defined in the European Human Rights Convention context as the freedom to act; maneuvering, breathing or "elbow" room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws.[224]

Although many scholars referred to the definition provided by Yourow, some authors do not agree with him, especially with the conclusion that states' domestic discretion is confined with the review of the Court.[225]

To believe that national courts and other domestic authorities are in a better position to evaluate the local norms and to consider particularities of nations rather than international or regional human rights mechanisms is one of the reasons for introducing the margin of discretion doctrine.[226] The margin of appreciation doctrine encompasses 'an assessment of the degree of consensus', about certain practices in the state parties. If there is a lack of such commonalities, or there are substantial differences between practices, then the Court does not insist to impose certain understanding of rights on minority states.[227]

Depending on the nature of the rights at stake, the significance of the breached right of the applicant, the nature of the interference, and the legitimate aim pursued by the interference, the breadth of the states' margin of appreciation is distinguished as wide, narrow,[228] and certain[229] by the Court.[230] The margin of appreciation is relevant both for the positive and negative obligations of the states. When the positive obligation of states is at stake, the margin of appreciation is considered in the steps taken by the state to safeguard the rights provided in the Convention. On the other hand, when the negative obligations of the state are involved, the Court assesses the relevance of the margin of appreciation in choices by the states when they interfere with the right under Article 8.

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[223] *The Sunday Times v. the United Kingdom*, app no 6538/74, 26 April 1979, para.61

[224] Charles Yourow Howard, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff, Dordrecht 1996) 3

[225] See e.g., Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (International Studies in Human Rights, Vol.99, Martinus Nijhoff Publishers, 2009) 311

[226] Mégret (n 190) 102

[227] ibid

[228] Jacobs, White and Ovey (n 169) 325

[229] Janneke Gerards, *General Principles of the European Convention on Human Rights*, (Cambridge University Press 2019) 165

[230] *S. and Marper v. the United Kingdom*, app nos 30562/04 and 30566/04, §102 ECHR 2008-V

The Court examines superficially the choices of the states if they have a wide margin in a matter, and in this case, the burden of proof generally lies on the applicant. When the Court leaves the state a narrow margin of discretion, the burden to justify the limitations stays on the states, and the Court checks the facts carefully to identify whether the balance was attained. Finally, in many cases, the Court lets a respondent state enjoy a certain margin of appreciation which means that the Court scrutinizes the facts intermediately. In such cases, the Court applies a neutral attitude 'allowing the State some leeway for making its own decisions, yet not limiting itself to a pure review of arbitrariness or manifest unreasonableness'.[231]

Although the scholars remarked many different factors determining the scope of the margin,[232] here three of them will be noted: the 'common ground' factor, the 'better placed' argument, and 'the nature and importance of the Convention right at stake'.

'The common ground' factor

The common ground factor is related to a consensus of the states. Existence of unanimity on a specific matter between the European countries leaves a narrow margin to the states; on the contrary, if there is no common ground, the states will enjoy wide discretion. The common ground factor is considered in situations where the Court has to define the general interest that may be relied on to substantiate the limitation of the rights under the Convention and to assess the suitability, proportionality, reasonableness, and necessity of the limitations.

'The better placed' argument

The better-placed argument is, as mentioned above, relied on when the Court considers that the domestic authorities are in a better place to assess the reasonableness, necessity, and suitability of restrictions imposed on the rights, and therefore, they have to have wide discretion. The better placed argument is summoned in the cases where the moral or ethical, socio-economic, political policies, interpretation of national laws and establishing facts, competing convention rights, and procedural equality and fairness are at stake.

'The nature and importance of the Convention right at stake' ground

Lastly, this factor is deemed in determining the scope of discretion of states depending on core and peripheral rights in issue. So, the discretion of states will be narrow if the affected right is one of the core rights. Despite the lack of such categorization of the rights in the Convention, the Court refers to the values underlying the Convention, such as pluralism, autonomy, democracy, and human dignity, to assess whether the aspects of rights are related to these concepts, consequently whether they are core rights. The states enjoy wider discretion if the issue is related to a less important aspect of the right.[233] Typically, the states do not hold wide discretion when the significant aspect of an individual's identity or existence is at stake under Article 8.

Regarding the workplace surveillance practices, which interfere with the privacy of employees, usually, the Strasbourg Court leaves the states a wide margin of appreciation considering the lack of European consensus on the matter. The ECtHR stated that the states have to have a wide margin of appreciation 'in assessing the need to establish a legal framework governing the conditions in which an employer may regulate electronic

[231] Gerards (n 229) 166-167

[232] See e.g., Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002)

[233] Gerards (n 229) 172-192

or other communications of a non-professional nature by its employees in the workplace'.[234] Notwithstanding such conclusion, the Court also emphasized that such discretion is not unlimited;

> The domestic authorities should ensure that the introduction by an employer of measure to monitor correspondence and other communications, irrespective of the extent and duration of such measures, is accompanied by adequate and sufficient safeguards against abuse.[235]

4.5. Justifications for the limitations

Paragraph 2 of Article 8 of the Convention enumerates justifications for interferences which pursue legitimate aims. The paragraph reads as follows:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Legitimate aims were reviewed in the subchapter 4.2 already. This subchapter examines the justifications of restrictions.

In accordance with law

Basically, the principle of lawfulness requires the interferences to have a legal basis in the national laws. This requirement will be breached if the domestic legislation lacks a provision which would make the interventions in the rights under the Convention lawful.[236] The Court finds a violation of this requirement when there is a discrepancy between the objective of the provision and the purpose it was used for.[237] But in many cases, the Court is less enthusiastic to scrutinize the presence of a basis in the national legislation; rather it tends to consider the views of domestic courts on validity and interpretation of domestic law.[238] The restrictions in the national laws have to be accessible, namely, 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case'.[239] Another requirement for domestic laws is foreseeability, namely, it has to be foreseeable. The Strasbourg Court in *Sunday Times* concluded that laws must enable 'the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[240] These two requirements have been referred to as "quality of law" requirements.[241] Moreover, the presence of a legal basis in the national laws is not enough to consider the interference lawful; a specified legal basis must have safeguards against arbitrariness[242] and abuse of power by authorities.

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[234] *Bărbulescu v Romania*, paras.118-119
[235] ibid para.120
[236] See e.g. *Olsson v. Sweden*, app no 13441/87, (No.2) 27 November 1992, para.81
[237] See e.g. *Huseynli and others v. Azerbaijan*, app nos. 67360/11, 67964/11 and 69379/11,§98 ECHR 2016
[238] Gerards (n 229) 202
[239] *Sunday Times v. the United Kingdom*, para.49
[240] ibid
[241] *Al-Nashif v Bulgaria*, no. 50963/99, §121, 20 June 2002
[242] *R.Sz. v. Hungary*, app no 41838/11, §36, 2 July 2013

The Court used the non-arbitrariness requirement as a procedural safeguard as well. Procedural safeguards to protect individuals and other private parties from the arbitrary application of national legislations must be available. Such procedural guarantees are more relevant and necessary for interferences committed in secret, such as intercepting communication or correspondence. Mostly, these cases concern conducting secret surveillance by the states for national security purposes.[243] In *Zakharov* case, the Court gathered together its case-law and determined clear requirements for several aspects of secret surveillance, such as

> [T]he accessibility of the domestic law, the scope, and duration of the secret surveillance measures, the procedures to be followed for storing, accessing, examining, using, communicating and destroying the intercepted data, the authorization procedures, the arrangements for supervising the implementation of secret surveillance measures, any notification mechanisms, and the remedies provided for by national law.[244]

The Strasbourg Court established such procedural safeguards to assess the overall lawfulness of the interference in the context of workplace surveillance, too. Morris notes:

> Translating these criteria into the employment context would require that any restriction on the exercise of [a privacy right] should be clearly specified, either in workers' contracts or a supplementary document, and that this document should be made available to all those to whom the restrictions are applicable.[245]

Generally, different ways are available to ensure respect for private life, and choosing a specific means of protection of this right stays within the margin of appreciation of the states. The Court has found that in certain cases the state will adequately comply with its obligations under Article 8 if it 'safeguards respect for private life in the relations of individuals between themselves by legislative provisions providing a framework for reconciling the various interests which compete for protection in the relevant context'.[246] However, the Court does not seem like endorsing this view in the workplace surveillance context as it took a view that the states have to have a wide margin of appreciation 'in assessing the need to establish a legal framework governing the conditions in which an employer may regulate electronic or other communications of a non-professional nature by its employees in the workplace'.[247] Additionally, the Court takes into account the important role of labour law and contracts regarding the regulation of relations between the parties in the employment context.[248] In light of these considerations, the lawfulness requirement related to interference with the private life of an employee in the employment context will mean that any interference necessitates having a legal basis either in the domestic law or case-law, or in the contract between the employer and employee.

Necessary in a democratic society

In itself, it is not sufficient the interference to be deemed as justified when it has a ground in the national law and pursues a legitimate aim. It also has to be necessary in a

[243] Gerards (n 229) 214-215
[244] *Roman Zakharov v. Russia*, app no 47143/06, §238 ECHR 2015-VIII
[245] Morris (n 135) 66
[246] *Köpke v. Germany*, (dec.) no. 420/07, 5 October 2010
[247] *Bărbulescu v Romania,* para.119
[248] ibid paras.117-118

democratic society. This is another test used by the Court to find whether the interference was in compliance with Article 8(2) of the Convention or not.

Necessary in a democratic society has never been used as an independent standard of review in the case-law of the Court; it has been evaluated together with other tests, such as proportionality and fair balance.[249] Typically, as the states are in a better place to evaluate the necessity of the restriction, the initial assessment of necessity will be up to the domestic authorities.[250] The necessity can be clarified in different ways: one of them is to find whether a specific aim could have been obtained less easily if there were no restrictions. This explains the Court's statement that '"necessary" could mean anything between "indispensable" and "merely useful"'.[251]

In *Sunday Times*, the Court held that national authorities have to show that there is a pressing social need to justify restriction which makes it necessary in a democratic society.[252] The "pressing social need" test weighs and compares the importance of the pursued aims and the necessity and effectiveness of the taken measures to achieve those aims. Therefore, this test has a strict case-specific character:[253] pressing social need to restrict the exercise of the right provided in the Convention is determined only in light of specific facts and circumstances of the case. The Court also introduced the effectiveness and appropriateness of the taken measures to achieve the pursued goals.[254] So, it does not suffice to have an admirable policy then take steps that do not align with the purposes of the policy.[255]

Sometimes the Court defines necessity with a "less restrictive means" test. This test basically suggests that the states have to use less intrusive and harmful means to contribute to the pursued aims. The Court employs these tests in rather rare cases and only in cases where the states are left a narrow margin of discretion. Additionally, this test is occasionally decisive; it is just considered as one factor to assess the overall effectiveness of the taken measure. The reluctance of the Court to apply this test is due to the difficulties of assessing other possible alternatives' being as effective as the chosen one.[256]

Since the necessary in a democratic society test requires a strict case-based approach, in the workplace surveillance context it is required to answer the question whether it was necessary to interfere with private life or correspondence of employees to achieve the pursued aim. Also, domestic courts must ensure that sufficient and adequate guarantees against abuse accompany the introduction of monitoring measures by an employer. The proportionality of the measures and safeguards against arbitrariness is significant in this context.[257] Moreover, the employer has to ensure that there was no less intrusive measure to achieve the pursued goal, for example, to verify the criminal act of an employee.

[249] Gerards (n 229) 229-230
[250] Otto (n 77) 82
[251] Gerards (n 229) 233
[252] *Sunday Times v the United Kingdom*, para.59
[253] Gerards (n 229) 235
[254] See e.g. *Michaud v. France*, app no 12323/11, §125 ECHR 2012-VI
[255] Mégret (n 190) 101
[256] Gerards (n 229) 236-238
[257] *Libert v. France*, app no 588/13, §47 ECHR 2018

Proportionality

The Court often applies a proportionality test in its judgments concerning Article 8. No clear definition of proportionality was provided by the Court, but in a broad sense proportionality means that 'there must be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective'.[258] According to a definition provided by Barak, proportionality '*stricto sensu* is a consequential test and requires an appropriate relationship between the benefit gained by the law limiting a human right and the harm caused to the right by its limitation'.[259] The proportionality test evaluates the overall reasonableness of the domestic measures, national objectives, and decisions by weighing the individual interest in the issue, the seriousness of the infringement, the significance of pursued aims, and the need to attain those aims.[260] The margin of appreciation is closely related to the proportionality test. Typically, the assessment of proportionality is left to the states in the cases concerning the issues where the states enjoy a wide margin of appreciation. In such cases, the Court superficially examines the decisions of national authorities just to make sure that they did not deliver obviously disproportionate or unreasonable decisions. By contrast, when the states have narrow discretion, the Court takes a stricter position, and the state's arguments have to convince the Court that the pursued aim is strong to such extent that it outweighs the individual interest. However, the Court does not accept it easily.[261]

In the workplace monitoring context, the Court reviews different factors to determine whether the proportionality requirement has been met. For example, in the *Madsen* and *Wretlund* cases, both concerned taking urine samples from the applicants as a control measure, the Court considered the following factors to assess the proportionality of the interference with the private life of employees:

- Employees were informed about the possibility of tests;
- Employees were informed about the frequency of these tests;
- Prior notice was given to employees about the test;
- The test covered all employees;
- The manner of testing and usage of collected data.[262]

4.6. A Fair Balance Principle

According to the Court, 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[263] Some of the commentators of the Convention noted that the notion of "fair balance" 'is obscure and amenable to a varying margin of appreciation'.[264] The Court for the first time in *Belgian Linguistics* case found an implied "just balance" principle in the Convention by stating:

> The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention

[258] Moreham (n 159) 47, footnote
[259] Aharon Barak, 'Proportionality and principled balancing' (2010) 4(1) Law & Ethics of Human Rights 1, 7
[260] Gerards (n 229) 242-243 *See* e.g. *Odièvre v. France*, app no. 42326/98, 9 October 2002
[261] ibid 244.
[262] Sychenko (n 73) 772
[263] *Soering v. the United Kingdom*, app no 14038/88, 07 July 1989, para.89
[264] Van Dijk, Van Hoof, Rijn and Zwaak (eds) *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 349

> on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.[265]

Paraphrasing Gerards, it is not enough to have a solid legal basis and pursue a legitimate interest to justify the limitation put on the enjoyment of a Convention right; the restrictions must be proportionate or necessary and lawful. Additionally, the fair balance must exist between the pursued aim and the restricted right.[266] The Court resorts to all tests mentioned in the sub-sections above to establish whether a fair balance between the competing interests at stake has been struck by the respondent states or its authorities.

Mowbray remarks that the principle of fair balance performs at least two functions. One of them is that this formula makes possible for the Court to evaluate the proportionality of the conduct of the respondent state. Another mission of the fair balance is 'to provide a mechanism enabling the Court to determine if the respondent state is subject to an implied positive obligation arising under the Convention'.[267] Unlike the negative obligations, the focus of the Court in cases concerning the positive obligations of states is not to conclude whether the state has met the requirements of Article 8(1) and Article 8(2); rather it is to find whether the first paragraph of the Article 8 is applicable, and whether the state has attained the fair balance between the competing interests in the case.[268]

A fair balance principle has been widely used by the Court also in the cases which invoke Article 8 in many different situations.[269] When assessing whether a fair balance was struck, the Court strictly examines positive obligations of the states to see whether the states have taken necessary measures to balance the conflicting rights in the issue and hence fair balance principle requires case-based approach: all particular facts and circumstances are examined by the Court to find whether the just balance between 'the right of individual applicants and the general interests of the public'[270] has been achieved.

This principle is used also in cases concerning workplace surveillance and the positive obligations of the states. In such cases, the applicants complain of the monitoring measures taken by employers allege that surveillance interferes with their right to respect for private life or correspondence. Here the Court must ascertain whether a just balance between the interests at stake, namely the right to privacy of employees and the interests of employers, had been struck by the national courts, which is a positive obligation of the states deriving from Article 8.[271]

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[265] Case '*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium* (Merits) A 6 (1968) 1EHRR 252. para.5
[266] Gerards (n 229) 229
[267] Alastair Mowbray, 'A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights' (2010) 10(2) Human Rights Law Review 289, 308-310
[268] Moreham (n 159) 48
[269] Mowbray (n 267) 303
[270] Arai-Takahashi (n 232) 193
[271] Joe Atkinson, 'Workplace monitoring and the right to private life at work' (2018) 81(4) The Modern Law Review 688, 691

V. THE EXTENT OF EMPLOYEES' PRIVACY PROTECTION IN SELECTED CASES OF THE STRASBOURG COURT

Generally, as mentioned in Chapter III, Section 3.3 of this thesis, cases adjudicated by the Court related to the right to privacy of employees could be categorized under two main groups. One of them concerns data protection. In these cases, the Court mainly examines the legality of the collection, storage, use, and disclosure of personal data of employees. The second group of cases deals with the interferences with the right to private life, correspondence or other protected objectives of Article 8 committed through the practice of video monitoring at the workplace, interception of telephone calls made from offices, the monitoring of computers or other equipment provided by employers, or the searches in the office of the employees.[272] The cases to be studied in this chapter belong to the second group of cases, where interference with private life is the subject of claims.

In this chapter, I examine four cases heard by the Court. All four cases are related to workplace surveillance practices performed by employers using different techniques. In these cases, the applicants allege that the surveillance measures interfere with their private life and violate their right to respect for private life or correspondence under Article 8 of the Convention.

I have to note that the Court as of April 2020 heard seven cases about an alleged violation of Article 8 in the workplace surveillance context. I considered different factors while choosing the cases for this thesis. As stated in the Introduction chapter of the work, the employers in those cases represent both the private and public sectors, namely in two of the cases impugned surveillance has been conducted by private sector companies, and in the other two of the cases, monitoring has been executed by public entities.

Furthermore, while the Court found a violation of Article 8 in two of the chosen cases, in the other two, the Court concluded that there was no violation of the right to respect for the private life of the employees. These two different conclusions by the Court will let the reader see in detail how the Court investigated the practice of surveillance in the workplace in light of both negative and positive obligations of the states deriving from Article 8, the justifications behind limitations, and applied principles, etc. Additionally, the judgments, where the Court found a violation of Article 8, included the cases where both private and public entities performed surveillance. This is the same for the judgments where the Court did not find a violation of Article 8.

At the end of each case, a critical analysis of the judgment of the Court and conclusions will be provided. Consequently, the reader will be able to understand whether and how the case-law of the Court developed through the years and how the future seems.

[272] Sychenko (n 73) 760

5.1. Halford v the United Kingdom

5.1.1. Facts of the case

The applicant Ms Halford was working as Assistant Chief Constable in Merseyside police and was the highest-ranking police officer in the United Kingdom. She unsuccessfully applied for a Deputy Chief Constable position over 7 years. After the last refusal of a promotion, she commenced proceedings before the Industrial Tribunal against the authorities whose approval was necessary for promotion. She claimed that she has been discriminated against on the base of sex by the police authorities. She further alleged that in response to her complaint, some members of the Merseyside police began a campaign against her in the form, among others, of interception of her telephone calls, leaks to the media, and launching a disciplinary proceeding against her. The case before the Tribunal was adjourned. The parties negotiated between themselves; Ms Halford was given some amount of money, and it was agreed that she would retire from police on a medical basis, in its turn, the police authority agreed to update its selection and promotion procedures.

Ms Halford had been provided with two telephones and an office at the police station. One of the telephones was designated for her private use, and this telephone was part of the communication network belonging to the police authority which was not related to the public network. The police placed no restriction 'on the use of these telephones and no guidance was given to her, save for an assurance which she sought and received from the Chief Constable shortly after she instituted the proceedings in the Industrial Tribunal that she had the authorisation to attend to the case while on duty, including by telephone'.[273] Ms Halford alleged that her telephone communication from her home and her office was intercepted by the police to obtain information to use against her in the discrimination case before the Tribunal. To prove this allegation she adduced several pieces of evidence, and the State accepted that she presented sufficient evidence that establishes a reasonable possibility of interception of calls made from her office, but not from her home.

Proceeding before the Commission

Ms Halford in her application of 22 April 1992 to the Commission claimed, *inter alia*, that the unjustified interception of her calls by the police made from home and office amounted to a violation of her right to respect for private life under Article 8 of the Convention. The Commission expressed its opinion that there was a violation of Article 8 in relation to calls made from office, but not concerning the calls made from home telephones.

5.1.2. Reasoning and decision of the Court

Applicability of Article 8

As to the applicability of Article 8, while the applicant arguing that her telephone calls from work fell within the notion of private life according to the case-law of the Court, the Government submitted that calls made by the applicant from her workplace were out of that concept because she had no reasonable expectation of privacy in respect of those calls.[274]

[273] *Halford v the United Kingdom*, para.16
[274] ibid paras.42-43

The Court reconfirmed its findings in previous judgments that the telephone calls and other communications made from workplace and home were covered by the concepts of "private life" and "correspondence" for the purpose of Article 8(1). The Strasbourg Court pointed to the fact that not any warning has been given to Ms Halford that her calls from office might be subject to interception. Therefore, she would 'have had a reasonable expectation of privacy for such calls, which expectation was moreover reinforced by a number of factors'.[275] These factors include the facts that she was ensured about the allocation of one of two telephones in her office for her private use, and she could use these telephones for the ends of her sex discrimination proceedings.

The Court agreed and accepted the relevant evidence that the police intercepted the calls of the applicant. Consequently, it considered that the interception by the police 'constituted an "interference by a public authority" within the meaning of Article 8 para.2 with the exercise of Ms Halford's right to respect for her private life and correspondence'.[276]

As the Court found interference with private life and correspondence of the applicant, in the second step it ascertained whether the interception was justified under Article 8(2).

The Court stated that "in accordance with law" requirement of the restriction under Article 8(2) entails not only the compliance of limitation of the right with domestic law, but it also refers to the quality of law. Further, the Court noted that the contexts of secret surveillance measures and interception of correspondence by governmental authorities, due to the absence of public scrutiny and the risk of abuse of power necessitate ensuring the safeguard of persons against arbitrariness in the national laws. Considering this, the national law 'must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures'.[277]

The Court applied foregoing conclusion to the current case and found that as the domestic law lacked the provisions regulating interceptions of telephone calls made outside of the public network, the interception of calls of the applicant was not in accordance with law for the purposes of Article 8(2), and the national law failed to guarantee the sufficient protection to the applicant against interference by public authorities with her protected rights to respect for private life and correspondence under Article 8(1). The Court ruled that there has been a violation of the right to respect for private life and correspondence of the applicant in relation to her calls made from her office.

Regarding the applicant's calls made from home, the Court did not find a violation of the rights under Article 8 because it was not convinced that there was a reasonable likelihood that the calls made from her home were intercepted by the police.[278]

[275] ibid para.45
[276] ibid para.48
[277] ibid para.49
[278] ibid paras.57-60

5.1.3. Analysis and conclusion

This case was the first big case where the surveillance of an employee and privacy claims stemming from the surveillance were at stake. An explicit address of the "reasonable expectation of privacy" formula for the first time is the most remarkable point of this very case. However, it is not clear from the judgment whether it is always sufficient for an employee to have a subjective expectation of privacy to determine the reasonableness of the expectation of privacy, and whether the Court will use this formula as a benchmark in further cases.[279] Also, the Court was silent about the importance of the factors, such as the absence of prior notice regarding surveillance, the designation of the telephone for private use, etc., namely it is not understood whether these factors were necessary or merely relevant to determine the reasonableness of the expectation. The problem with determining the reasonableness of expectation on the bases of a subjective expectation of employee is that the latter might be controlled or manipulated easily by the employer, as in the example where, an employer 'informs employees at the workshop door that they have no right to privacy, and maybe watched or listened to at any time'.[280]

How would the conclusion in case of Ms Halford change if the employer would inform her that the telephone line in her office would be subject to the interception or would not give other assurances which made the applicant expect privacy as to the use of telephone? What is understood from the current judgment is that she would lose reasonableness of her expectation of privacy, and in that case, the Court would decide that Article 8 is not applicable. Probably this is the reason why the Court considered this formula as 'not necessarily decisive'[281] one in its subsequent judgments.

Furthermore, it is noteworthy that the Court, after examining the national law of the respondent State, specified that any interference with the right to respect for private life or correspondence of employees must be regulated clearly in the domestic law; otherwise "in accordance with law" requirement would not have been met. The Court later held that lawfulness requirements regarding surveillance and monitoring of employees would be met by the presence of case-law or collective bargaining as well. However, we will see later in this thesis that the states are left a leeway by the Court in relation to the regulation of workplace surveillance, which I think is, kind of, disadvantageous in terms of the protection of privacy of employees.

So, taking into account the above-mentioned uncertainties rising from the judgment, any answer to the question whether the existence of reasonable expectation always 'saves' an employee would lead to further discussion, but as long as the reasonable expectation of privacy of employee depends on the policy of the employer, the answer will not be affirmative. Regarding the fair balance principle, as the Court found that the interference with private life and correspondence of Ms Halford was not in accordance with the law, no need left to assess whether the fair balance between the competing interests of the applicant and the employer was struck by the national courts. Even if it would be the case, namely, if the Court would hold that the interference is lawful, it had to determine the legitimate aim pursued by the employer which would make the interference justified. Considering the facts of the case, the police authorities would, most probably, fail to show a reasonable legitimate aim that they intended to

[279] Tomas Gomez-Arostegui, 'Defining private life under the European Convention on Human Rights by referring to reasonable expectations' (2005) 35(2) California Western International Law Journal 153, 167
[280] Michael Ford, 'Article 8 and the right to privacy at the workplace' in Keith D. Ewing (ed), *Human Rights at Work* (1st edn, Institute of Employment Rights 2000) 27
[281] *Köpke v. Germany*, (dec.) no. 420/07, 5 October 2010

achieve when they were intercepting the communication of the applicant. Because, none of the specified legitimate aims in Article 8, namely neither national security, nor public safety, nor economic well-being of the state, nor prevention of disorder or crime, nor protection of health or morals, nor protection of the rights and freedoms of others seems acceptable to refer to in this case. The Government might rely on the last interest, but considering the facts of the case, it is possible to note that no apt evidence would be presented about Ms Halford's unlawful deeds which damaged the protected interest of her employer.

5.2. Bărbulescu v Romania

5.2.1. Facts of the case

The applicant, Mr Bărbulescu, was working as a sales manager in a private company in Bucharest, Romania. He, at the request of his employer, created a Yahoo Messenger account to respond to the inquiries of the customers. The messenger is an online chat platform that provides real-time text transmission over the internet.[282]

The employer's internal regulations prohibited the use of computers for personal purposes, but the regulations did not contain any provision about the possibility of surveillance of the employees' communications. The Government has submitted that the applicant was informed about the content of the regulations and he has signed a copy thereof on 20 December 2006.[283]

A notice issued by the head office of the company was circulated between the employees on 3 July 2007. Shortly, the notice warned the employees about the prohibition of dealing with personal problems at work. The notice also dictated that employees must not spend their time by using the internet for matters unrelated to work, and the employer had a duty to monitor and supervise the work of employees and punish them at fault. The misconduct of employees will be monitored and punished. The text also gave information about the employee who was dismissed on disciplinary grounds due to private use of the internet and other facilities of the company.[284]

The Government in its submission noted that the applicant was acquainted with the content of the notice and signed it in a day between 3-13 July 2007. Additionally, the Yahoo messenger account of the applicant was monitored between 5-13 July. The applicant was summoned by his employer and was informed that his communication through Yahoo messenger has been monitored, and he was required to explain why he used the internet for personal purposes by breaching internal regulations of the company. However, Mr Bărbulescu was not informed that the monitoring covered the content of the correspondence, too. On the same day, the applicant refuted the allegations and stated that he used the internet only for work-related purposes. Then the employer re-summoned the applicant and required him to give an explanation why the messages the applicant exchanged between 5-12 July had a private purpose and presented a 45-page transcript of correspondence which the applicant exchanged with his brother and fiancée. The transcript contained personal messages, and some of them had intimate nature. [285] Upon this event, the applicant told the employer that by breaching the confidentiality of his

[282] *Bărbulescu v. Romania,* para.11
[283] ibid paras.12-14
[284] ibid para.15
[285] ibid paras.16-21

correspondence the employer has committed a criminal offence. On 1 August 2007, his employment contract was terminated by the employer.

Proceedings before the national courts

The applicant unsuccessfully lodged a complaint in sequence before the Bucharest County Court, the Bucharest Court of Appeal, and the Supreme Court of Cassation and Justice. Before the County Court, the applicant asked the Court to overrule his dismissal decision, reinstate him to his position, and order the employer to pay him a sum of roughly 30000 euros for the harm resulting from the manner of his dismissal. Mr Bărbulescu alleged that his dismissal was unlawful and monitoring of his communication and accessing its content was a crime. As to the harm, he alleged that by reading the personal correspondence and disclosing its content to the co-employees who involved directly or indirectly in the dismissal procedure, the employer exposed the applicant to harassment.[286]

The County Court ruled that his dismissal was lawful stating that disciplinary investigation led to the termination of contract according to the Labour Code. The Court also noted that monitoring of communication cannot undermine the validity of the disciplinary investigation in this case (the Court disregarded whether the monitoring of communication by the employer was legal or illegal). The Court took a view that the investigation of the content of the correspondence was the only way to verify the validity of the arguments of the applicant as to the use of the internet for professional purposes. It also held that monitoring is part of the power of the employer to supervise the workplace. Furthermore, the Court noted that '[I]nternet access in the workplace is above all a tool made available to employees by the employer for professional use, and the employer indisputably has the power, by virtue of its right to supervise its employees' activities, to monitor personal internet use'.[287]

The applicant, in addition to the arguments that presented before the County Court, claimed in the Court of Appeal that the first instance failed to strike a fair balance between the interests at stake by unduly prioritizing power of the employer. But, the Court of Appeal endorsed the decision of the County Court and emphasized the facts that the employer has an interest in providing smooth running of the business and to this end to supervise the performance of employees. Therefore, this legitimate aim authorizes the employer to monitor the communication of employees. Consequently, the Court noted that legitimate aim could not be achieved through other means except breaching the secrecy of communication, and it could not be maintained that a fair balance has not been struck. [288] The ruling of the Cassation Court was not different from the judgments of lower instances.

5.2.2. Reasoning and decision of the Court

Proceeding before the Chamber

Firstly, the claim was considered before the Chamber. The Chamber found that Article 8 was applicable in the case. It referred to the principle of a reasonable expectation of privacy as well but distinguished it from the one used in the *Halford* case. The Chamber stated that in the present case, the employer warned the employees about

[286] ibid paras.24-26
[287] ibid para.28
[288] ibid para.30

strict prohibition regarding use company computers for personal purposes. It had regard to the content of the correspondence of the applicant and decided that the right to respect for private life and correspondence of the applicant was at stake.[289]

As the interference with the private life of the applicant and his dismissal were carried out by the employer of a private entity, the Chamber assessed the case from the standpoint of the positive obligations of the state, and it had to ascertain whether the national authorities had struck a fair balance between the rights of the employee and interests of the employer. The Chamber examined the manner of conducting a disciplinary proceeding and noted that despite notice from the employer, the applicant has breached internal rules, and the employer checked the content of correspondence after the employee avoided the allegations about the use of computers for private purposes. Additionally, it noted that the domestic courts did not decide on the basis of the content of correspondence, and monitoring was limited to the Yahoo Messenger account. Consequently, the Chamber with the judgment of 12 January 2016 ruled that the national courts have struck a fair balance and there is no violation of Article 8 of the Convention.[290] The applicant referred the case to the Grand Chamber.

Proceeding before the Grand Chamber

Applicability of Article 8

As to the applicability of Article 8 in the case, the Court reiterated the findings from its previous cases. The ECtHR emphasized that '"private life" is a broad term not susceptible to exhaustive definition'.[291] The Court noted that the right to lead a private social life is guaranteed under Article 8, too. Furthermore, regarding 'correspondence' the Court reminded that calls made and received from and in the workplace and the emails sent from workplace computers fall under the term "correspondence". The Court stated that while determining whether Article 8 applies to the case it examines the existence of the reasonable expectation of privacy but also noted that 'a reasonable expectation of privacy is a significant though not necessarily conclusive factor'.[292]

Applying the above-mentioned principles to the present case, the Court observed that instant messaging is also a form of communication which enables people to live a social life and added that sending and receiving communication falls under the notion of "correspondence" even if they have been sent from computers of the employer. The Court followed that, although the applicant broke the internal rules of the employer and used the computer for personal matters, there is no evidence that the applicant was informed about the extent and nature of the monitoring in advance, also possibility of the employer to check the content of correspondence, and the national courts omitted to ascertain whether the applicant was informed about the monitoring before it began.[293] The Court left the question open whether and to what extent the restrictive instructions of employer leave reasonable privacy expectations for employees but stated that 'An employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary'.[294] Consequently, the Court held that communication of the applicant falls within the notions of "private life" and "correspondence" under Article 8, therefore the article is applicable in the case.

[289] ibid para.56
[290] ibid paras.57-60
[291] ibid para.70
[292] ibid paras.72-73
[293] ibid paras.77-78
[294] ibid para.80

After finding that Article 8 is applicable, the Court considered three matters: a) whether the case concerned positive or negative obligations of the State; b) the general applicable principles to assess the state's positive obligations to secure the right to respect for private life and correspondence; c) application of those principles to the case.

The positive or negative obligations of state?

As to the type of the obligation of the State, the Court stated that the measure complained of by the applicant, namely monitoring of the applicants' communication, was taken by not a state authority but a private entity. In this point, the Court noted that although the interference with private life and correspondence of the applicant has not been committed by the national authorities, 'their responsibility would be engaged if the facts complained of stemmed from a failure on their part to secure to the applicant the enjoyment of a right enshrined in Article 8 of the Convention'.[295] In light of all the facts and circumstances of the case, the Court held that the case should be considered from the standpoint of the positive obligations of the State.[296]

Applicable general principles

Regarding applicable general principles to the assessment of the positive obligations of the respondent State to secure the right to respect for private life and correspondence, the Court reiterated that it is within the margin of appreciation of the states to choose the means to ensure compliance with Article 8 in relations between individuals themselves. Here the nature of the state's obligation will depend on the particular aspect of private life at stake.[297] The Court had to determine the nature and scope of State's positive obligations 'that the respondent State was required to comply with, in protecting the applicant's right to respect for his private life and correspondence in the context of his employment'.[298]

The Court noted that in some cases, it is a must for states to provide a legislative framework, which takes into account the specific contexts, to regulate relations between individuals to comply with the obligations arising from Article 8. Considering the contractual and subordinate character of labour law and the lack of common practice between the Council of Europe countries about the regulation of the right to privacy of employees in the workplace,[299] the Court held that the states have to be given a wide margin of appreciation 'in assessing the need to establish a legal framework governing the conditions in which an employer may regulate electronic or other communications of a non-professional nature by its employees in the workplace'.[300] However, the ECtHR remarked that the extent of discretion in this sphere is not unlimited: the national authorities 'should ensure that the introduction by an employer of measures to monitor correspondence and other communications, irrespective of the extent and duration of such measures, is accompanied by adequate and sufficient safeguards against abuse'.[301] Therefore, the domestic courts have to take the following factors into consideration while assessing proportionality against arbitrariness:

- [W]hether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures;

[295] ibid para.110
[296] ibid para.111
[297] ibid para.113
[298] ibid para.114
[299] ibid paras.115-118
[300] ibid para.119
[301] ibid para.120

- the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy;
- whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content since monitoring of the content of communications is by nature a distinctly more invasive method, it requires weightier justification;
- whether it would have been possible to establish a monitoring system employing less intrusive methods and measures than directly accessing the content of the employee's communications;
- the consequences of the monitoring for the employee subjected to it and use made by the employer of the results of the monitoring operation, in particular, whether the results were used to achieve the declared aim of the measure;
- whether the employee had been provided with adequate safeguards, especially when the employer's monitoring operations were intrusive;
- the domestic authorities should ensure that an employee whose communications have been monitored has access to a remedy before a judicial body with jurisdiction to determine, at least in substance, how the criteria outlined above were observed and whether the impugned measures were lawful.[302]

In light of the above-mentioned principles, the Court assessed how the domestic courts dealt with the complaint of the applicant about infringement of his right to privacy by his employer in the workplace surveillance context.

Application of the foregoing principles to the case

As the competing interests at stake were, on the one hand, the right to respect for private life and correspondence of the employee and, on the other hand, the employer's right to conduct monitoring to ensure the smooth running of the business, the Court has to ascertain whether the national courts carried out a balancing exercise between these two competing interests. The Court acknowledged that the employer had a legitimate aim in securing the smooth running of the company, and to ensure this, the employer can set mechanisms to monitor whether the employees perform their duties properly.

Moreover, the Court observed that the domestic courts omitted to determine whether the employee had been informed with a notice in advance about the possibility of monitoring measures and its nature and extent. Additionally, the national courts did not examine the degree of intrusion in the privacy of the applicant; neither had they assessed sufficiently whether there were legitimate aims to monitor the communication of the employee. Furthermore, the domestic courts failed to examine whether the pursued aims by the employer could have been achieved with less intrusive measures without accessing the content of the correspondences. Neither had the courts considered the outcomes of the monitoring for the applicant. Also, the domestic courts did not inspect whether the employer already had access to the content of the communication when the applicant was summoned for an explanation. According to the Court, it is contrary to the principle of transparency to accept that the content of the communication can be accessed at any stage of disciplinary action.[303]

Having regard to the foregoing considerations, the Court concluded that the national courts have failed to afford adequate protection of the rights of the applicant and

[302] ibid paras.121-122
[303] ibid paras.133-138

to strike a fair balance between the interests at stake. Consequently, the ECtHR found a violation of Article 8 of the Convention.[304]

5.2.3. Analysis and conclusion

This case is a landmark case of the Court in the workplace surveillance context. It developed the Court's case-law on privacy issues at work and the states' obligations arising from this matter. The fact that interference complained of with the right to respect for private life and correspondence of the applicant has been executed by not a public authority, but a private company, distinguishes it from the previous cases in this field. As the case concerned a relation between an individual and a private party, the case was assessed from the angle of the positive obligations of the State, and the Court clarified the obligations of the states regarding disproportionate workplace monitoring measures taken by the private parties. Additionally, the ECtHR enumerated the factors that the national courts were required to take into account when assessing the proportionality of adduced monitoring measures by employers in relation to the pursued aims and balancing the competing interests in workplace surveillance cases.

The importance of this judgment was not only for Romania but also for all other states that have ratified the Convention. The employers in those countries should adapt their internal regulations addressing employee monitoring to the judgment of the Court. Although the Court accepted that the employers may employ monitoring systems to ensure that the staff executes their contractual duties adequately, the Court also taught that 'Internet surveillance in the workplace is not at the employer's discretionary power'.[305] The findings of the Court maintain that the policies of the employers should be explained to employees thoroughly and clearly, and employees should consent explicitly to the way of monitoring and its scope in advance. However, the judgment does not show clearly whether it will be sufficient for the employers to avoid liability for monitoring the communication of employees when they pursue a motivated justification for such an intrusive measure.[306]

Even though the reasonable expectation of privacy was the main tool in determining the applicability of Article 8 in workplace surveillance cases, the Court in the present judgment, unlike previous *Halford* and *Copland* judgments, moderated its attitude regarding the reasonable expectation of privacy in this context and ruled that even though the reasonable expectation of privacy of the employee is significant but not necessarily conclusive factor in determining the applicability of Article 8. It means that Article 8 might be applicable even in the lack of reasonable expectation of privacy. However, the Court did not specify other factors that should be considered in future cases to determine the protection ambit of Article 8. In *Bărbulescu* it is difficult to see whether a reasonable expectation of privacy even existed because the applicant had been informed by the employer that using company computers for personal purposes is prohibited and that they might be monitored. Such uncertainty caused the Court to leave the question open whether the applicant had a reasonable expectation of privacy, as a result, this formula collapsed as being a threshold for determining the applicability of Article 8.

[304] ibid para.141
[305] Corneliu Birsan and Laura-Cristiana Spătaru-Negură, 'Workplace surveillance: big brother is watching you?' (2018) 25 Lex ET Scientia Int'l J 50, 61
[306] Andreea Suciu, 'Commentary on Bărbulescu v Romania' (2017) 4 European Employment Law Cases 242, 244

Regarding the pursued legitimate aim, the Court stated that national courts failed to determine whether there were legitimate reasons to justify the monitoring of the applicant's communication. I assume that to ensure the smooth running of the business by the employer could be considered as a plain justification for monitoring because as also dissenting judges mentioned 'It is not unreasonable for an employer to wish to check that its employees are carrying out their professional duties when making use in the workplace and during working hours of the equipment which it has made available to them'.[307]

The opinions of the majority and minority of judges were different about the scope of obligations of the respondent State. The dissenting judges mentioned that although the majority of judges acknowledged that the state had a wide margin of appreciation in choice of means to fulfil its obligations, they assessed whether the fair balance was struck, in a narrow context without evaluating the legal system as a whole, and without assessing the effectiveness of all possible legal frameworks.[308] Interestingly, one can argue that, on the one hand, the State chose to strike a fair balance between the competing interests in the background of employment law which makes sense, as it is within the discretion of the state to choose a means to fulfil its obligations. On the other hand, how adequate is it to determine the scope of the obligations of the states and conclude that the domestic courts failed to protect the right to respect for private life of an employee, even without examining the other existing relevant legal frameworks?

Despite all progressive findings of the Court in *Bărbulescu,* its silence on factors that should be considered in determining the applicability of Article 8 in future cases where a reasonable expectation of privacy is absent leaves the ambit of the protection of this right uncertain in workplace surveillance cases. Since the monitoring implicates key dimensions of the private life of an employee, Article 8 should be engaged without depending on whether an employee is aware of its occurrence or not.[309]

5.3. Libert v France

5.3.1. Facts of the case

The applicant, Mr Eric Libert, was a Deputy Head of the Amiens Regional Surveillance Unit at French National Train Company (Société Nationale des Chemins de Fer – "the SNCF"). He was suspended from his post by the SNCF following a charge of his false accusation against a co-employee.

When he was reinstated to the position, the applicant found that his computer at the office had been taken. After several days, his superiors informed him that 'the hard disk on the computer had been analyzed', and that 'address change certificates drawn up for third persons and bearing the Lille General Security Service logo' had been found as well as a large number of files containing pornographic images and films'.[310] His computer was seized upon an alert of an employee who replaced Mr Libert during his suspension after the employee had found 'documents which had caught his attention'.[311]

[307] *Bărbulescu v. Romania*, Joint dissenting opinion of judges Raimondi, Dedov, Kjølbro, Mits, Mourou-Vikström and Eicke, para.22
[308] Atkinson (n 271) 693
[309] Claire E.M. Jervis, 'Bărbulescu v Romania: why there is no room for complacency when it comes to privacy rights in the workplace' (2018) 47(3) Industrial Law Journal 440, 453
[310] *Libert v France*, para.9
[311] ibid

The applicant in response to the request of explanation of his employer stated that he has transferred the files in his USB to the work computer due to problems in his personal computer. Also, he said that pornographic files were sent to him through the SNCF intranet by the person that he does not know. On 17 July 2008, the applicant was dismissed from his post on disciplinary grounds. The decision on dismissal contained that the applicant had breached the 'special obligation of exemplary conduct inherent in the duties formerly performed by him'.[312]

Proceedings before the national courts

The applicant unsuccessfully lodged complaints before the national courts claiming that his dismissal was not based on the genuine or serious case. The applicant claimed that by opening his personal files in his absence, his employer has infringed his private life. The Amiens Court of Appeal asserted that

> "As a matter of policy, documents kept by employees in the company's office, save those identified by them as personal, are presumed to be for professional use, meaning that the employer can have access to them in the employee's absence.
>
> It can be seen from the report drawn up by the SEF that the pornographic photos and videos were found in a file called "fun" stored on a hard disk labeled "D:/personal data".
>
> The SNCF explained, without being challenged, that the "D" drive was called "D:/data" by default and was traditionally used by staff to store their work documents. An employee cannot use an entire hard disk, which is supposed to record professional data, for his or her private use. The SNCF was therefore entitled to consider that the description "personal data" appearing on the hard disk could not validly prohibit their access to it. In any event, the generic term "personal data" could have referred to work files being personally processed by the employee and did not therefore explicitly designate elements relating to his private life."[313]

Furthermore, the Court of Appeal did not find the dismissal disproportionate. It observed that both internal regulations and the Code of Conduct of the company required employers to use the computers of the company for exclusively professional purposes. The Court found that Mr Libert 'committed a "massive breach of those rules, going as far as using his work tools to produce a forged document"'.[314] The ruling of the Court of Cassation did not overrule the decision of the Court of Appeal as well, and the applicant brought the case before the Strasbourg Court.

5.3.2. Reasoning and decision of the Court

Applicability of Article 8

In response to the submission of the Government regarding the inapplicability of Article 8 to the current case, The Court reminded its ruling from the *Halford* and *Copland* cases, where the Court found that telephone calls made from the workplace for non-professional purposes, sent and received emails, and information derived from the

[312] ibid para.12
[313] ibid para.14
[314] ibid para.15

internet usage of employees concerned the right to respect for private life and correspondence of employee. Therefore the Court accepted that items of non-professional nature stored on the computer of an employee provided by an employer can be considered dealing with private life as well. Consequently, Article 8 was applicable in the case. [315]

The negative or positive obligation of state?

The Court was not convinced by the argument of the Government that the SCNF is not a public authority. Being under the state supervision, holding a monopoly, having directors appointed by the Government, and providing a public service make the company a public authority for the purposes of Article 8.[316] As the interference with the right to respect for the private life of the applicant has been committed by the public authority, the case was assessed from the standpoint of the negative obligations of the State. According to Article 8(2), the interference by the public authority violates the right to respect for private life unless it is in accordance with law, is necessary in a democratic society and pursues a legitimate aim.

Was the interference in accordance with law?

The Court observed that the Government has relied on the provisions of Labour Code which specified that

> [W]ithin a company no one may restrict the rights of persons or individual and collective liberties in a manner that is neither justified by the nature of the task to be performed nor proportionate to the aim pursued and that the internal rules laid down by the employer cannot contain provisions restricting the rights of persons or individual and collective liberties in a manner that is neither justified by the nature of the task to be performed nor proportionate to the aim pursued.[317]

But the Court noticed the practice of the Court of Cassation which ruled that items stored and folders created on computers of employees provided by the employer are deemed professional unless they are explicitly titled as private, and the employer has the right to open those items and folders in absence of the employee. Additionally, the Court of Cassation held that employers can access items and documents stored in the hard disk of the computer of an employee which are identified as personal only in the presence of employees or after duly calling them, with exceptions of cases of serious risk or exceptional circumstances. Considering these conclusions of the domestic court, the Strasbourg Court asserted that positive law of France provided the employer to access the files kept in the hard disk of the employee's computer, therefore, the interference had a legal basis and was in accordance with law.

Was a legitimate aim pursued?

The Court did not agree with the assertion of the State about the purpose of the pursued legitimate aim which was to prevent the crime. The Court noted that consulting the files on the computer of the applicant was carried out when the applicant was on suspension from his post, and the opening of the files did not happen in the context of criminal proceeding against the applicant nor no evidence was presented that the content of the files might amount to a criminal offence. That is why this aim was not a case here. However, the Court admitted that interference purposed to protect the 'rights of others',

[315] ibid paras.23-25
[316] ibid para.38
[317] ibid para.44

namely, the rights of the employer. The employer has an interest in ensuring that his/her employees use the facilities at their disposal to perform their contractual obligations properly.[318] So, the interference pursued a legitimate aim as well.

Was the interference necessary in a democratic society?

The Court noted that the interference should correspond to pressing social needs, and it has to be proportionate to the pursued legitimate ends. The Court has to have regard to the margin of appreciation of the states while assessing the necessity of interference. Additionally, it has to 'consider the impugned decisions in the light of the case as a whole and determine whether the reasons adduced to justify the interference at issue are relevant and sufficient'.[319] The Court also noted that the domestic courts have to make sure that adequate and sufficient guarantees against the abuse of power accompany the monitoring measures taken by the employers.

When considering this in the light of the present case, the Court observed that French positive law contained such guarantee against abuse providing that an employer cannot open files identified as personal by an employee without his/her presence or without duly calling him/her, save in case of serious risk or exceptional circumstances. Furthermore, the Court observed the interpretation of the Court of Cassation which reads:

> Files created by the employee with the assistance of the computer facilities supplied to him by his employer for work purposes [were] presumed to be professional in nature, meaning that the employer [was] entitled to open them without the employee being present unless they [were] identified as personal.[320]

Since the applicant did not identify the folders as "private" properly, the above-mentioned principle had not precluded the employer to open the files of the applicant. Also, the Court noted that

> [A]n employee could not "use a whole hard disk, which was supposed to record professional data, for private use and that "in any event, the generic term "personal data" could have referred to work files being processed personally by the employee and did not therefore explicitly designate elements related to private life."[321]

Considering the foregoing observations the Court accepted that the dismissal was proportionate; the applicant had breached the internal rules and Code of Conduct of the company. As an official who is responsible for general surveillance the applicant was expected to be of exemplary conduct. Additionally, as the applicant used a large amount of storage space to store those items on his work computer, his employer and the domestic courts counted it necessary to examine the case thoroughly.

The Strasbourg Court scrutinized the observations and decisions of the domestic authorities in light of all circumstances of the case and concluded that the national courts did not overstep their margin of discretion and found no violation of Article 8 of the Convention.

[318] ibid para.46
[319] ibid para.47
[320] ibid para.49
[321] ibid para.51

5.3.3. Analysis and conclusion

Despite the State's arguments about the SCNF's not being a public authority, the Court's assessment and further finding it a state company was one of the interesting outcomes of the judgment. If it would be deemed as a private-sector entity by the Court, then the case would be assessed in light of the positive obligations of the State, like in *Bărbulescu*.

The most significant contribution of this ruling to the development of case-law of the Court concerning employee privacy at work was that under some circumstances Article 8 might be invoked in relation to the items or folders in non-professional nature stored or created by employees on the computers supplied by the employers to perform work duties. Such files were recognized as part of private life for the purpose of Article 8. In light of the French law, it means that a violation of Article 8 could be found in principle if the files of the employee had been accessed by the employer without knowledge or presence of the file subject.[322] It is clear, at least from this judgment, that the employees have to identify such personal files as private if they want these items to be covered by the protection scope of Article 8. On the other hand, the Court once again maintained that the employers have a legitimate interest in ensuring that the employees carry out their contractual obligations, namely the possibility of monitoring of employee's computer and files on it being subject to certain conditions, had been endorsed. The Court's omitting the use of the principle of reasonable privacy expectation of the employee while assessing whether Article 8 is applicable in the case and whether the applicant had such expectation of privacy in relation to the files identified as "personal" and "fun" on the computer attracts attention as well.

In conclusion, the importance of having clear and detailed national laws in place which stipulate the circumstances and conditions under which the employers may surveil their employees was proved once more. This is quite important for private employers as well. In addition to specifying concrete legitimate aims, the employers should state explicitly in their appropriate policies or regulations that to what extent the use of company facilities is permissible, or how the employees should name their private files stored on the work computer to be considered as "untouchable".

5.4. López Ribalda and others v. Spain

5.4.1. Facts of the case

Isabel López Ribalda, María Ángeles Gancedo Giménez, Maria Del Carmen Ramos Busquets, Pilar Saborido Apresa, and Carmen Isabel Pozo Barroso, all five applicants were working in a supermarket in Barcelona. Three of them were cashiers, and the other two were sales assistants. After noticing that there is a gap between the stock of products and sales figures, the manager installed CCTV cameras in the market on 15 June 2009. Some of the cameras were visible, others were hidden. Hidden cameras directed towards counters. Each camera monitored three tills and space behind, and front of counters. The staff was informed about the installation of visible cameras upon the theft suspicion, but not about the hidden cameras.

[322] Sebastian Klein, 'Libert v. France: ECtHR on the Protection of an Employee's Privacy Concerning Files on a Work Computer' (2018) 4 European Data Protection Law Review 250, 251

After 10 days of camera installation, the manager informed the union representative that the camera recordings uncovered that some of the employers had committed theft of goods at the tills. The representative watched the records of the cameras.

In the meetings, which the manager, lawyer and union representative attended, 14 employees were dismissed, including the five applicants, on disciplinary grounds with immediate effect. The third, fourth, and fifth applicants by concluding an agreement with the employer waived any claims against the employer under the employment agreement. The employer, in its turn, undertook not to begin a criminal proceeding against these applicants.

The proceedings before the national courts

All five applicants brought the case before the Employment Tribunal, claiming that their dismissal was unfair and requested the Tribunal not to accept the video recordings as evidence because they have been obtained by breaching the right to privacy of the applicants. The applicants, who signed an agreement with the employer, asked the Tribunal to revoke the agreements relying on that they have signed those agreements under the threat of criminal proceedings. The employer presented video surveillance materials as evidence, and on 20 January 2010, the Tribunal dismissed the claims of the applicants and considered their dismissal fair.[323]

The Tribunal referred to one of the judgments of the Constitutional Court concerning covert video surveillance at work, where the Court found that

> [C]covert video-surveillance measure had been proportionate and had not breached the employee's fundamental right to privacy guaranteed by Article 18 of the Constitution given that, first, it was justified by reasonable suspicions of serious misconduct; that, secondly, it was appropriate to the aim pursued, namely to verify whether the employee was committing misconduct and to adopt sanctions if necessary; that, thirdly, it was necessary, because the recordings would provide evidence of the misconduct in question; and that, fourthly, it was proportionate, because the monitoring was limited in space and in time to what was sufficient to fulfill its aim.[324]

The Employment Tribunal applied these principles to the current case and concluded that hidden video surveillance did not breach the right to privacy of employees. As to the employees who had signed an agreement, the Tribunal observed that there is no evidence proving the agreement being concluded under coercion and dismissed their actions on the ground of the lack of *locus standi.*[325]

The applicants appealed from the decision of the Employment Tribunal to the High Court of Justice of Catalonia. The Court of Appeal upheld the ruling of the previous instance almost with the same reasoning based on the principles established by the Constitutional Court. Furthermore, the Court stated that failure to give prior notice by the employer could be explained by the fact that prior notice of monitoring would defeat its purpose.[326]

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[323] *López Ribalda and Others v. Spain*, paras.19-23
[324] ibid para.25
[325] ibid paras.29-30
[326] ibid para.33

In respect to the third, fourth and fifth applicants, the Court of Appeal did not overrule the decision of the first instance court, however, also did not agree with the dismissal of the case on the lack of *locus standi* ground; the Court of Appeal stated that signing an agreement which deprives the employees of appearing before the courts against the employer was not procedurally correct. The Court observed that the agreements show that 'they had expressly acknowledged the facts of which they were accused, that they had accepted the employer's decision to discontinue their employment and that they had thus given their consent to the termination of their contracts'.[327]

The applicants lodged an appeal before the highest instances, but their applications were declared inadmissible owing to the 'non-existence of a violation of a fundamental right'.[328]

5.4.2. Reasoning and decision of the Court

The case before the Chamber

On 9 January 2018, the Chamber ruled that Article 8 was applicable in the case, and as the video surveillance was carried out by a private-sector employer, the case would have to be examined in light of the positive obligations of the State. The Chamber sought to determine whether the fair balance between the right to respect for the private life of the employees and the interest of the employer had been struck by the domestic courts.[329] While finding a violation of Article 8, the Chamber relied on the facts that, although video surveillance was commenced on the ground of theft suspicion, it was broad in scope; not limited in time and area, and the employer failed to give a prior warning to the employees. The Chamber was in view that video surveillance was not proportionate. The case was referred to the Grand Chamber by the State.

Applicability of Article 8

The Court began its assessment by examining whether Article 8 was applicable in the case with reiterating the principles that had been established in its case-law. The Court once more stated that "private life" is a broad term, not susceptible to exhaustive definition. It covers multiple aspects of the social and physical identity of persons. The Court reminded that professional activities are not excluded from the scope of private life. Even, there is 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"'.[330]

The Court noted that privacy considerations arise when a systematic or permanent recording of pictures of persons happens because a person's image is one of the main attributes of an individual's identity distinguishing him/her from peers. As to video surveillance in the workplace, the Court found that for 50 hours of recording during more than two weeks period, and use of the materials obtained through such surveillance before the employment court to justify dismissal, interferes with the private life.[331]

By applying the mentioned principles to the case, the Court observed that the period of surveillance was limited to ten days and it covered the checkout area and its

[327] ibid para.36
[328] ibid para.39
[329] ibid para.78
[330] ibid para.88
[331] ibid para.91 (referring to *Köpke v. Germany*)

surroundings in the supermarket. Also, the cameras did not target the employees directly but as three of the applicants were working behind the cash desk, they were being monitored through the working day. Regarding the applicants' reasonable privacy expectations, the Court noted that a supermarket is a public place, and taking the payments from the customers is not a private or intimate act. However, systematic video recording and processing of the materials might raise questions regarding private life even in public spaces. Moreover, the Court noted that the applicants had an expectation of privacy in relation to the places where the employer did not inform them about the existence of video cameras. Furthermore, the Court observed that the film by the cameras was watched by several persons who were working for the employer. In light of all these facts, the Court concluded that Article 8 was applicable in the case.[332]

Compliance with Article 8

As the interference with private life has been executed by the private employer, the Court decided to examine the case from the angle of the positive obligations of the State and noted that the Court would ascertain whether a fair balance between the competing public and private interests had been struck by the national courts. The Court reasserted that the choice of means directed to guarantee the compliance with Article 8 in relations between individuals falls under the margin of discretion of states. The Court has already held that it is up to the states to decide whether to enact or not a law regulating video surveillance or monitoring of employees in the workplace.[333]

The Court took a view that the requirements on monitoring of employees established in *Bărbulescu* may be transposed to the present case. Namely, to make sure that taken video-surveillance measures were proportionate to the pursued legitimate aims, the domestic courts should consider the factors, such as, whether the employees were informed about the video-surveillance by the employer; the extent of the monitoring; whether legitimate aims were pursued by the employer which would justify the monitoring; whether it would be possible to choose less intrusive monitoring tool; whether the consequences of the monitoring for employees were considered; and whether the employees were provided with appropriate safeguards.[334] By applying and considering the established principles and factors the Court found the followings:

- Spanish law, especially the Personal Data Protection Act and Instruction no. 1/2006 and Article 20 § 3 of Employment Regulations, contained several safeguards to protect the private life of individuals in the context of video surveillance. Procedural rules prohibited consideration of evidence obtained in breach of fundamental rights. Case-law of the Constitutional Court required that any monitoring measure by employers which interfere with the privacy of employees had to meet the tests of appropriateness, necessity, and proportionality. Consequently, the necessary regulatory framework was in place and was not at issue in this case;
- The domestic courts had observed that the installation of CCTV cameras was justified with legitimate reason: there was a serious suspicion of theft which was followed by a significant financial loss.
- Surveillance measure was limited in time and area, contrary to the allegations by the applicants, which lasted 10 days and covered the checkout areas where the losses happened. Therefore, this measure did not exceed what was necessary to verify the theft suspicion;

[332] ibid paras.93-95
[333] ibid para.114
[334] ibid para.116

- The applicants performed their duty in a place that was open to the public; therefore their privacy expectation was manifestly lower;
- As to the extent of the intrusion of surveillance into private life, the Court observed that it was limited in time and only three persons, the manager, legal representative, and union representative watched the recordings, therefore intrusion was not in a high degree;
- The Court noted that although the consequences of surveillance were significant for the applicants, as they have been dismissed on the basis of the materials obtained through the surveillance, the employer did not use the recordings for any other purpose other than it was intended to;
- The national courts observed that there was no other less intrusive measure available to achieve the pursued aims in the circumstances of the case;
- As to the lack of prior notice, the Court noted that only predominant private or public interest could justify the failure by the employer to give information about surveillance in advance. The Court cannot accept that a slight suspicion of misconduct may justify the installation of CCTV cameras, but in the present case, the suspicion about serious wrongdoing was grave;
- Additionally, there were other remedies available, particularly, Data Protection Agency and ordinary courts, for the applicants to claim redress for alleged infringement of privacy which the applicants chose not to use. Hence, there is no reason to argue ineffective remedy.[335]

By taking into account all the above-mentioned observations, findings, and facts the Strasbourg Court ruled that the domestic authorities did not overstep their margin of appreciation and did not fail to fulfil their positive obligations under Article 8 of the Convention. Therefore, no violation of the right to respect for the private life of the applicants was found.

5.4.3. Analysis and conclusion

The case of *López Ribalda and Others v. Spain* is the latest judgment that the European Court of Human Rights delivered concerning employee privacy in the context of workplace surveillance (as of April 2020). This case is another example which displays how expanding technology affects our daily life. Therefore, the Court, considering the living character of the Convention, has to recognize and develop adequate guarantees to protect private life.[336] Given the following reasons, I think this judgment will have a significant impact on further considerations of the Court in the relevant field.

Firstly, so to say, the Court reasserted its position regarding the factors that have to be taken into account while evaluating the proportionality of the monitoring measures. The factors specified in *Bărbulescu*, which was the first case that concerned interference by the private-sector employer, were re-addressed in the current case, and it seems the Court will employ them again in relevant future cases.

Secondly, the Court's statement that an overriding requirement related to the safeguard of important interest of employers could justify their failure about giving prior notice about the covert video surveillance, is interesting and rather sensitive as well as an

[335] ibid paras.119-135
[336] *López Ribalda and Others v. Spain*, Joint dissenting opinion of judges De Gaetano, Yudkivska and Grozev, para.2

important point. This means that, even if the national laws require a warning to be given beforehand to the data subject about monitoring, the domestic courts might disregard the fact of employers' failure to fulfil this requirement upon the existence of overriding interests. To assess the significance of this interest will demand a thorough examination of all the facts of the cases. Acceptance of a weightier interest justifying covert video surveillance by the Court may lead the employers to use this means arbitrarily in other cases as well. Covert video surveillance is quite an intrusive method and its wide prevalence might weaken the already poor protection of employee privacy at work.

Thirdly, the Court's approach to the reasonable expectation of privacy of the employees is another worthy point. It seems like the Court did not give weight to the reasonable expectation of privacy of employees as an essential factor in the case. However, it noted that the extent of privacy expectation of employees will decrease evidently in places that are accessible and visible to co-employees or public.

This case has several similarities with the landmark case *Bărbulescu* in respect to general facts and principles that the Court used. In both cases, the alleged interference with the private life of the applicants performed by a private-sector employer. Therefore, the cases were examined from the perspective of the positive obligations of states, and the main question before the Strasbourg Court was to determine whether the domestic courts practised an appropriate balancing exercise and struck a fair balance between the competing interests at issue. While competing interests in *Bărbulescu* were, the right to respect for private life and correspondence of the applicant, on the one hand, and the employer's interest in conducting monitoring to ensure that employees fulfil their contractual obligations properly on the other hand, in *López Ribalda and Others v. Spain*, the competing interests were the applicants right to respect for their private life, and the employer's protection of his property, especially by practising disciplinary authority. Despite the difference between the competing interests at stake, the Court found allowable to use similar considerations in assessing the proportionality of the surveillance measures.

In conclusion, I find the judgment fair and think that the Court has struck a fair balance between the competing interests. I take the view that the sanction against the employees as a result of secret surveillance was legitimate and proportionate. Having both a detailed legal framework for the protection of elements of private life at work and clear monitoring policies of the companies in place are vital not only in relation to the applicants but also other individuals. Maybe, the lack of prior notice was proportionate regarding those employees, whose wrongdoings were proved through the surveillance, but the covert video cameras filmed other employees at the supermarket as well, and protection of private life of those employees is left under question. It would be appropriate to take into account such facts as a whole in assessing the proportionality of the measures.

VI. CONCLUDING REMARKS

This thesis examined the privacy concerns of employees arising from workplace surveillance. The workplace surveillance phenomenon, the underlying motivations behind the monitoring of employees, techniques of surveillance, and impacts of such surveillance on both sides of the employment relations were elaborated on. Additionally, privacy as a legal and social term was scrutinized. Protection of the right to privacy under certain international human rights documents and legal systems was touched briefly. Further, I delved into privacy in a workplace context, and the reasonable expectation of privacy of employees was examined. Moreover, substantive matters of the right to respect for private life under Article 8 of the ECHR were studied. Finally, by studying and analyzing four cases that the Strasbourg Court has considered on this matter, the extent of the protection of the right to respect for private life of employees under the Convention in the workplace surveillance context was determined and still pressing problems were highlighted.

Workplace surveillance is not a new concept; it is an element of work-life for centuries. What has changed is its breadth and techniques. The gaze of the employers was replaced by the lances of the cameras. Yet, surely, surveillance cameras are just one form of monitoring in the workplace. The employers operate numerous means and techniques to watch their employees at work, even out of office and after working hours. Non-stop advancement of information communication technologies creates wide possibilities for employers to keep an eye on employees.

Studies showed that the main reason behind the monitoring of the workplace by employers is to protect their property. However, besides this end, to increase the productivity of employees, security reasons, and protection of the rights of other employees are among the motivations that prompt employers to perform surveillance of employees at work. Moreover, the study of the case-law of the Court showed that to ensure that employees properly discharge their obligations under labour contracts, and smooth operation of the company, are the primary aims in executing surveillance of employees or facilities at their disposal, such as computers or telephones.

Findings of research suggest that surveillance in the workplace has contradictory effects on the employees. While a group of employees might feel safe when an employer carries out continuous monitoring of the workplace, others lose their trust in management or experience a high level of stress which affects their physical or psychological well-being. It is also known that in some cases, being aware of monitoring stimulates employees to increase their productivity. On the other hand, privacy concerns, which were handled as the central point of the current work, disturb employees, especially, in respect to their work computers and files stored thereon, or communication means. In addition to the impacts of snooping in the workplace on employees, its positive and unwanted effects were encountered by employers as well. Workplace surveillance makes it possible for employers to bring wrongdoings or misconduct of employees to light and obtain the necessary evidence to use in possible court proceedings. Also, it becomes easier for management to evaluate the performance of employees. Yet, employers could be taken to courts by employees whose right to privacy was allegedly infringed through intrusive monitoring practices of employers. Such undesirable “headache” is one of the negative results of workplace surveillance for companies.

As to the ambiguous term “privacy”, neither scholars nor courts could establish its limits precisely. It can be understood either in legal or social means. Depending on this, it

encapsulates numerous aspects of life. Although its legal definition was perceived as the "right to be let alone" in the beginning, afterwards the circle of the term was expanded enormously in scholarship and through the case-law of the courts and included, among other things, personal information, physical space, and autonomy. "Privacy" is used as an umbrella term in legal academia, and prominent human rights documents, sort of categorizes protected aspects of privacy under the terms of private life, family life, home, and correspondence, in general. But these notions are wide enough in them and involve too many spheres of life. Considerations of the Court allow mentioning that blurry contours of the private life will be stretched even more due to, among other things, continuously changing social standards and norms and reliance on advanced technologies which trigger new challenges to privacy.

In the context of privacy in the workplace, some features of privacy emerge. The existence of subordination between an employer and an employee comes with the formula of 'A power to command and a duty to obey'.[337] Two types of interests, namely, 'an organization's ability to achieve stated goals and the individual employee's desire to be free from observation'[338] collide during monitoring in the workplace. Employment contracts make it possible for employers to assess how employees execute their contractual duties and to set a mechanism to carry out such an assessment. Initial traces of protection of private life in the workplace are observed in the case of *Niemietz* of the ECtHR, where the Court laid down that business premises fall under the notion of "home" for the purpose of Article 8 and that people develop relations with the outside world in workplaces. Therefore, it was admitted that employees enjoy a certain level of privacy in the workplace. Privacy in the workplace may concern many different aspects of private life, including calls or other correspondences made/received from/in the workplace, and collection, storage, use, or dissemination of personal data of employees. Privacy concerns may arise not only during an ongoing employment relationship but also before the commencement of labour relations, and after termination thereof. The undeniable fact is that employees enjoy the right to respect for private life in the workplace too, and the reality of employers' power to conduct surveillance does not deprive the employees of having privacy in a professional environment.

The American origin formula of a reasonable expectation of privacy is an important factor to evaluate the extent of privacy at work. However, it can be shaped by contract; namely, either labour agreements or internal policies of the employer may limit the extent of the privacy expectation of employees. Early case-law of the Strasbourg Court concerning workplace surveillance set that this principle had a strong place in determining the applicability of Article 8, but by the time, the Court's moderation the role of the privacy expectation principle was observed. The Court also specified several factors to gauge the reasonableness of the expectation in cases related to employee monitoring. These factors include, among other things, the existence of prior notice about the possibility of surveillance and nature and extent of monitoring. It is a reality that it would be dangerous to determine the extent of privacy protection of employees at work solely relying on the existence of privacy expectation due to its easily manageable character by the third parties, and also to admit that rules issued by employers completely remove applicability of Article 8 in workplace communications. Therefore, I found it commendable that the Court did not consider the reasonable expectation of privacy as a decisive factor in subsequent cases. But it is a drawback that the Court kept silence about other factors that would be used to determine whether protection of the Convention is applicable or not in a concrete case where privacy expectation is absent.

[337] Sempill (n 106) 12
[338] D'Urso (n 10) 285

It has already been stated that the ECHR safeguards the right to respect for private and family life, home and correspondence from interferences of governmental authorities, though it is permissible to interfere with the protected elements of privacy if it is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. All of these interests may be relevant in employment context depending on the situation, but the examined cases of the Court showed that, so far, only the last interest, namely, protection of the rights of employers, was invoked.

Article 8 imposes negative and positive obligations on states. Examination of the case-law of the Court exposed that in the workplace surveillance context, where the interference with the private life of employee was made by private employers, the case was assessed from the standpoint of the positive obligations of states, while it was evaluated in light of the negative obligations when the complained infringement was committed by state authorities. The Court's establishment of the positive obligations for states in its case-law in the field of the right to respect for privacy plays a necessary role in the development of the domestic laws and policies in this sphere.[339] The positive obligation of states requires, *inter alia*, providing a legal framework to secure private life and using effective and necessary tools to protect the privacy of employees. At this point, the margin of discretion of states shows up. What is seen from the rulings of the Court is that a wide margin was left to the states 'in assessing the need to establish a legal framework governing the conditions in which an employer may regulate electronic or other communications of a non-professional nature by its employees in the workplace'.[340] However, I think this conclusion of the Court leaves employees in a disadvantageous position because it is a fact that everywhere, in each country, employers enjoy a power stemming from the nature of employment relations which authorizes them to monitor the workplace, and employees are always in a weaker position, considering that their privacy expectation depends on the policies of employers on a large scale. Therefore, such a weak position of employees has to be taken into account by the Court, and I think the Court has to take a stricter position here by firmly demanding a relevant and detailed legal framework in place in the national laws on this matter which would prohibit abuse of power by employers. Though the Court in the judgment of *Halford* noted that national law 'must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures'[341], I think these requirements have to encompass not only secret monitoring measures taken by public authorities or public employers but also employers in the private sector. As the new technologies are used in the workplace, new legal regulations are needed which would specify the rights and duties of both employers and employees. The laws have to precisely determine in which cases and under which conditions employers in private businesses may conduct secret surveillance. Given that the attitudes to certain questions alter in societies by time, it is not an exception that the margin of discretion of states would change adequately as well.

To sum up the findings and the answers to the research questions of the current work, I can note that the protection of the right to privacy extends to the workplaces, and employees enjoy the right to respect for private life under Article 8 of the European Convention on Human Rights in regard, but not limited to, to their calls made and

[339] Sychenko (n 73) 775
[340] *Bărbulescu v Romania,* para.119
[341] *Halford v the United Kingdom*, para.49

received from/in the workplace, personal files stored on the computer provided by employers, correspondence, including, e-mails, and instant messages transferred from work computers, social media accounts, and materials obtained through video recordings. Workers simply do not waive their right to privacy at work, notwithstanding the restrictive internal policies of employers.

Regarding the fair balance principle, it has already been noted that the Court uses this formula to determine whether the domestic courts did exercise a balancing practice between the competing interests, which were the right to respect for private life of employees and the rights of employers in the examined cases. The Court strictly investigates the positive obligations of the states to ascertain whether a fair balance has been struck, namely, whether the states have taken necessary measures to balance the conflicting rights. Therefore, the fair balance principle requires a case-based approach. As to the question how to strike a fair balance, I think, when the Court assesses whether the domestic courts exercised a fair balance, in addition to the assessment of the proportionality of taken measures to pursued legitimate aim, its necessity, etc., it also has to take available all relevant legal frameworks and their effectiveness into account, not only some of them, such as employment law or any specific laws. As one of the questions to be answered while evaluating the exercise of fair balance is to ascertain whether the national law provides an effective safeguard for the protection of privacy, it would be incomplete not to consider the whole available legal framework but only a few of them. Furthermore, where relevant, in cases of the lack of detailed legal guarantees in the national system, the Court should not hesitate to refer to other appropriate regional or international documents to determine whether a fair balance had been struck by the domestic courts. One of those documents is EU directive 95/46/EC, which was repealed by General Data Protection Regulation that specified clear principles, such as, lawfulness, fairness and transparency; purpose limitation; data minimization or necessity; accuracy; storage limitation; and integrity and confidentiality, regarding the processing of personal data of individuals. Another relevant document would be the Code of Practice on Protection of workers' personal data by the ILO. Though the document is not a binding document but may be useful while examining whether the national laws and policies provide an effective safeguard.

I believe that the judgments of the Court will have a serious effect on the protection of privacy of employees at work. Although the number of the specific cases concerning workplace surveillance heard by the Court is not many, and the states are held responsible at the end, surely the outcomes of those cases will have impact significantly not only the development of national laws but also the policies issued by the private employers indirectly. As long as the living character of the Convention will influence the consideration of the Court, the workplace surveillance practices will be adapted to the modern approaches. As a result, it might be possible to establish a common ground between the European states on regulation of workplace surveillance, which would be very helpful for the Court to examine whether the just balance practice has been exercised by the domestic courts.

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