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BACHELOR THESIS

European labour law and the protection of workers' privacy – a loophole?

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ABBREVIATIONS

AMA	American Medical Association
CEO	Chief Executive Officer
CESCR	Committee on Economic Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CoE	Council of Europe
Community Charter	Community Charter of the Fundamental Social Rights of Workers
CSDP	Common Security and Defence Policy
DNA	Deoxyribonucleic acid
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEC	European Economic Community
EES	European Employment Strategy
ESC	European Social Charter
ETUC	European Trade Union Confederation
EU	European Union
FAFA	EC-UN Financial and Administrative Framework Agreement
GDPR	General Data Protection Regulation
GPS	Global Positioning System
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
OMC	Open Method of Coordination
QMV	Qualified Majority Voting
SME	Small and Medium-Sized Enterprise
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICE	Union of Industrial and Employers' Confederations of Europe
UK	United Kingdom

SUMMARY

This year, the judges of the Grand Chamber of the European Court of Human Rights (ECtHR) in Strasbourg will have to decide on the case of *Bărbulescu v. Romania*. The case raises serious questions about the interpretation of the European Convention on Human Rights (ECHR) with regard to the protection of the right to privacy at the workplace. The outcome of the proceedings could become a landmark for labour protection standards in whole Europe. Since the ECHR is one of the sources of EU human rights law, it will also have an impact on EU labour standards.

New technological innovations in the field of computer technology have increased both the number of monitoring devices available to employers as well as the efficiency of these instruments to extract, process and store personal information about employees.¹ The use of monitoring devices by employers has transformed working conditions and the relation between worker and employer.² The intrusiveness of some instruments calls into question current labour protection standards and raises new demands for limiting the extent to which employers can restrict the employees' right to privacy.

Despite growing interest in monitoring technology, international and regional labour standards related to data protection at the workplace are fragmented and a legal consensus is not established. It remains a legal grey area.

Taking this as a starting point, the paper discusses the extent to which the EU regulatory framework protects the employees' right to privacy against surveillance at work.

In order to provide an answer to this question, the paper will proceed as follows. First, both the topic and its relevance for society will be explained. In the next step, the research question and sub-questions will be defined and the interests of the employer and the employees will be briefly discussed. A legal analysis of EU legal competence in the field of labour standards and in particular with regard to the protection of the employees' right to privacy at the workplace will follow. Both international standards as well as European Union secondary legislation, policy documents and relevant case law will be identified. The paper will conclude by arguing that general safeguards for the protection of workers' privacy are in place, however, more specific rules that provide guidance on the implementation of these general principles, are missing.

1. INTRODUCTION

The use of surveillance technology to monitor employees at work has become the subject of legal debate over the past few years. At the level of the ECtHR, the case of *Bărbulescu v. Romania* is not the only one, other cases, e.g. *Halford v. UK* (1997), *Copland v. UK* (2007) and *Niemietz v. Germany* (1992), have received similar attention. Moreover, the number of proceedings at the national level is likely to be higher, as the ECtHR is not able to assess cases against actors not party to the ECHR (Art. 32f. ECHR).

At the same time, the market for monitoring technology is booming.³ Widespread use of internet and e-mail at the workplace have not only led to an increase in the efficiency of working processes, but have also led to the creation of a huge market for both hard ware and soft ware used to control the employees' conduct at work.⁴ ⁵ The services provided by these devices range from software that can block employees' access to

1 S. Kierkegaard, 'Privacy in Electronic Communication: Watch your email: You boss is snooping!', 21 Computer Law and Security Report 2005, 226-236.

2 T. Moreira, 'Every breath you take, every move you make: cybersurveillance in the workplace and the worker's privacy', 7 Masaryk University Journal of Law and Technology 2013, 75-85.

3 Kierkegaard, 'Privacy in Electronic Communication', 226-236.

4 Ibid.

5 S. Cox et al., 'Workplace Surveillance and Employee Privacy: Implementing an Effective Computer Use Policy', 5 Communications of the IIMA 2005, 57-66.

certain websites or that intercept e-mails containing selected words (Ellerup Consult software) to programmes that record and save data related to computer and internet usage (Pro), to keylogger programmes that monitor every keystroke typed by the employee (SpyAgent).⁶ In addition to that, the employer can make use of cameras, microphones, telephone tapping devices and GPS to monitor the behaviour of their employees.^{7 8}

Surveys among American companies, e.g. the 2001 study by AMA⁹ show that a considerable percentage of companies use these monitoring programmes to control the activities of their employees. For example, about 63 percent of the 1,627 companies asked, admit to monitor their workers internet connection and 47 percent store and review their employees' emails.¹⁰ Similarly, a study conducted in the UK among 215 companies revealed that 61 employees had been dismissed in only one year, because of improper e-mail or Internet use at the workplace. The study also found that employers more often punish misuse of email and internet with disciplinary measures than all other offences combined, such as breaches of health care and safety provisions.^{11 12} Similar surveys on the European level are missing so far, however, the third European Company survey (2015) reveals that 62 percent of the 24,251 companies in the study, keep records of work practices of their employees.¹³ Moreover, the adoption of a new amendment on the law on privacy protection, "Lex Nokia", in Finland in 2009¹⁴ shows that the conflict between privacy rights of employees and economic interests of the employer is not finally settled. The amendment has been controversial as it will allow companies to view the emails of their employees if they suspect them of leaking business information or using the business communication services for private purposes without prior authorisation.¹⁵

Legal amendments or business practices such as the ones described above call for a better understanding of the right to privacy at the workplace. Do workers abandon "their right to privacy and data protection every morning at the doors of the workplace"?¹⁶ What rules, either written or non-written, regulate if and to what extent monitoring practices at work are legitimate? And are these rules sufficient to keep pace with new technological advances in the field of monitoring technology?

These developments also have an impact on the social dimension of European integration. The EU employment package launched in 2012 as part of the EU 2020 strategy seeks to transform the European labour market to make it more competitive and inclusive. Moreover, in April 2016, the Council of the European Union adopted a new regulation on data protection. Both documents will have an impact on industrial relations in Europe, but do they also include the protection of privacy rights at the workplace? This paper therefore aims to arrive at an answer to this question by analysing both European as well as international labour standards related to privacy rights at work.

6 Kierkegaard, 'Privacy in Electronic Communication', 226-236.

7 L. Mitrou and M. Karyda, 'Employees privacy vs. Employers security: Can they be balanced?', 23 *Telematics and Informatics* 2006, 164-178.

8 Moreira, 'Cybersurveillance in the workplace', 75-85.

9 American Medical Association, see Kierkegaard, 'Privacy in Electronic Communication', 226-236.

10 Ibid.

11 Ibid.

12 Cox et al., 'Workplace Surveillance and Employee Privacy', 57-66.

13 M. Kankaraš and G. van Houten, 'Third European Company Survey – Overview report: Workplace practices – Patterns, performance and well-being', EurWORK Report No. EF1502, 27 March 2015.

14 A. von Koskull, 'Privacy Protection within Electronic Communication: The disputed Finnish Lex Nokia', 1 *European Law Journal* 2010, 135-140.

15 Ibid.

16 Art. 29 Data Protection Working Party, 'Working document on the surveillance of electronic communication in the workplace', 5401/01/EN/Final WP55, 29 May 2002, available at

<http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2002/wp55_en.pdf>., p. 4

1.1. Research Question

EU labour law and labour protection standards form an important part of European social integration. In recent years, new technological innovations have made it possible for employers to exert almost total control over their employees' conduct at work to an extent "that the worker becomes transparent for the employers".¹⁷ Therefore, this paper seeks to identify the EU's stand on privacy rights at work:

RQ: To what extent does the EU regulatory framework protect the employees' right to privacy against surveillance at work?

The research will thus combine both hermeneutic and evaluative types of legal research.¹⁸ The answer to this question will touch on several aspects including EU competence in labour policy and data protection, international human rights standards and labour standards. In the following, four sub-questions will be defined that cover the different areas relevant for this study.

First of all, it is essential to identify the concept of labour law and the nature of employment relations in order to fully understand the role of fundamental rights including the right to privacy in the employment context.

SQ 1: What is the role of labour law and how does it impact on the relationship between employer and employee?

After obtaining an overview of employment relations and labour law, the competences of the EU in this area and in the area of privacy protection will be discussed. As a supranational organisation, the EU can only adopt legislation if the Member States have conferred on it the competence to do so (Art. 5 TEU; Art. 2 TFEU). The principle of conferral also applies to the field of social and labour policy as well as to the field of data protection. Accordingly, the paper will then settle the question of EU competence:

SQ 2: What are the legal competences of the EU in relation to social and labour policy and in relation to data protection?

Further, the EU commits itself to the principles of international law including international human rights standards and international labour law (Art. 21 TEU). Therefore, any EU regulation on data protection standards at the workplace will have to be in line with international law:

SQ 3: How does the international regulatory framework limit EU action in relation to the right to privacy in the employment context?

After analysing both EU legislation as well as international and regional standards on the protection of the right to privacy at work, it will be necessary to discuss the findings and to evaluate whether EU secondary legislation, policy papers and case law on the protection of workers' privacy are consistent with the broader regulatory framework.

SQ 4: How do European Union secondary legislation, policy papers and case law on the right to privacy at the workplace reflect the rights and obligations of workers and employers as laid down by both European as well as international labour and human rights standards?

¹⁷ Moreira, 'Cybersurveillance in the workplace', p.80.

¹⁸ C. Matera, 'Writing the bachelor thesis in law in the EPA programme at the University of Twente', (2016).

The study will be organised along the four questions. However, the paper will start with a theory section by briefly defining the concept of workplace monitoring and by explaining the underlying theoretical framework and in particular the relation between employer and employee and their interests with regard to workplace monitoring.

1.2. Theory

1.2.1. Workplace monitoring

Workplace monitoring involves “the use of electronic technology to instantaneously and continuously collect, store, and report the behaviour of employees”.¹⁹ While it is not genuinely new to monitor one's personnel, progress in electronic technology allows for new forms of surveillance that have become more extensive, intrusive, anonymous and cheaper than ever before.²⁰ Examples comprise video recording, smart cards, computer log in and activity reports, screen snapshots, GPS and content and traffic data of online communications.^{21 22}

While these new forms of surveillance technology also have positive effects, e.g. detecting criminal activities faster, they violate the employees' right to privacy and data protection as well as the employees' autonomy, dignity and identity to the extent that they may create “the electronic equivalent of DNA” of the employee.²³ That workplace monitoring does not only concern data protection issues is demonstrated by Sarah O'Connor's investigative report “Amazon unpacked” for the *Financial Times* (2013). In her report, O'Connor reveals how Amazon is using personal satellite navigation (short: sat-nav) computers that each employee has to carry to allow the management to monitor the behaviour of the employees. While the sat-nav computers show the employees the most effective walking route to pick the goods ordered by the costumers from the shelves, the computers also collect information about whether an employee is meeting the targets or not.²⁴ If this is not the case, the employee will be informed in real time and will have to face up to dismissal if she cannot meet up with the time schedule.²⁵ Such practices as the one described by O'Connor lay bare how monitoring technology at the workplace can violate the fundamental rights to dignity and autonomy.

Moreover, new surveillance technology has become more intrusive than before which is especially the case as in most sectors, the use of internet and e-mail at the workplace is nowadays essential for both employers and employees alike.^{26 27} Communication has become easier and faster and can be done at any time and any place, as employees may also send business emails from home leading to the blurring of personal and work life.²⁸ Surveys, e.g. the AMA study conducted between 2001-2007²⁹ and the European Company Survey (2009 and 2013) reveal an increase in workplace surveillance.³⁰ Ever more advanced monitoring technology and a general lack of understanding of how these devices work and what they are capable of³¹, do not only

19 J. West and J. Bowman, ‘Electronic Surveillance at Work: An Ethical Analysis’, 48 *Journal of Administration and Society* 2016, 628-651, p. 628.

20 Ibid.

21 Ibid.

22 Kierkegaard, ‘Privacy in Electronic Communication’, 226-236.

23 West and Bowman, ‘Electronic Surveillance at Work’, p. 630.

24 S. O'Connor, ‘Amazon unpacked’, FT investigations, *Financial Times*, 8 February 2013, available at <<https://www.ft.com/content/ed6a985c-70bd-11e2-85d0-00144feab49a>>

25 Ibid.

26 Mitrou and Karyda, ‘Employees privacy vs. Employers security: Can they be balanced?’, 164-178.

27 West and Bowman, ‘Electronic Surveillance at Work’, 628-651.

28 Ibid.

29 Kierkegaard, ‘Privacy in Electronic Communication’, 226-236.

30 West and Bowman, ‘Electronic Surveillance at Work’, 628-651.

31 S. Kokolakis, ‘Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon’, 64 *Computers and Security* 2017, p. 122-134.

risk to undermine data protection standards but also reduce the autonomy of the working force by creating a real-life panopticon workplace.³²

1.2.2. Employer and Employee relationship and interests in relation to workplace monitoring

The relationship between employer and employee is characterised by imbalance.^{33 34} The employee has no power to negotiate on the terms and conditions of the employment contract and has little choice other than to agree to them.³⁵ However, labour rights, such as fair and just working conditions, prohibition of child labour, right of collective bargaining or freedom of assembly and expression ensure that a certain standard is guaranteed and they protect the employee against abuse and exploitation by the employer.³⁶ Labour rights also include the protection of privacy at work.³⁷

Eivazi³⁸ (2011), Hoss³⁹ (2009), von Koskull⁴⁰ (2010) and Yerby⁴¹ (2013) argue that the employees' right to privacy can be restricted as the “employers have a legitimate need to control the personnel's use of the corporation's ICT equipment”.⁴² The legitimate need includes the economic interests of the employer such as performance monitoring, the prevention of financial and legal liabilities and a smooth running of working processes.⁴³ Eivazi argues that the use of monitoring technology provides the employer with a more accurate evaluation of the worker's performance and it controls whether the employee is engaging in criminal behaviour such as leaking confidential information about the company.⁴⁴ Moreover, Yerby (2013) argues that the employee cannot expect that their privacy is protected since she is using the company's equipment. As the legitimate owner the employer has the right to monitor the employees use of the electronic equipment.⁴⁵

On the contrary, the employee has a legitimate interest that his or her right to privacy is protected.^{46 47 48} Although the use of internet and e-mail at the workplace has many advantages for employees, e.g. easy and fast access to information, it also enables the employer to access private data and to control almost every activity of the employee.⁴⁹ Technological innovations in the field of monitoring policy have exacerbated the imbalance between employer and employees as monitoring devices can be obtained at low cost, are easy to install and hard to detect.^{50 51} This new anonymity of workplace monitoring erodes trust between employee and employer as well as among the workforce and it undermines the autonomy of the employees by reducing creativity and integrity at the workplace.⁵² Employees who know that there is the possibility that their behaviour could be monitored will feel constantly watched and will refrain from searching for innovative

32 West and Bowman, ‘Electronic Surveillance at Work’, 628-651.

33 V. Mantouvalou, ‘Are Labour Rights Human Rights?’, 3 European Labour Law Journal, 2012, 151-172.

34 Moreira, ‘Cybersurveillance in the workplace’, 75-85.

35 Mantouvalou, ‘Are Labour Rights Human Rights?’, 151-172.

36 Ibid.

37 Ibid.

38 K. Eivazi, ‘Computer use monitoring and privacy at work’, 27 Computer Law and Security Review 2011, 516-523.

39 D. Hoss, *Internet und E-mail-Überwachung am Arbeitsplatz* (Kassel: Kassel University Press 2009).

40 Von Koskull, ‘The disputed Finnish Lex Nokia’, 135-140.

41 J. Yerby, ‘Legal and Ethical Issues of Employee Monitoring’, 1 Online Journal of Applied Knowledge Management 2013, 44-45.

42 Von Koskull, ‘The disputed Finnish Lex Nokia’, 135-140, p. 135.

43 Eivazi, ‘Computer use monitoring and privacy at work’, 516-523.

44 Ibid.

45 Yerby, ‘Legal and Ethical Issues of Employee Monitoring’, 44-45.

46 Von Koskull, ‘The disputed Finnish Lex Nokia’, 135-140.

47 Mantouvalou, ‘Are Labour Rights Human Rights?’, 151-172.

48 Moreira, ‘Cybersurveillance in the workplace’, 75-85.

49 Ibid.

50 Kierkegaard, ‘Privacy in Electronic Communication’, 226-236.

51 Moreira, ‘Cybersurveillance in the workplace’, 75-85.

52 West and Bowman, ‘Electronic Surveillance at Work’, 628-651.

solutions for fear of disapproval from the employer.⁵³ In this sense, employees will be treated as mere goods that can be replaced at any time and whose value and status as autonomous human beings has been significantly reduced.⁵⁴ In fact, employees will act less in concert with their human self, but instead they will turn into human robotics.⁵⁵ Moreover, the erosion of trust starts even before monitoring devices are installed, because the mere belief that monitoring technology is necessary to ensure that employees are not misusing company equipment is guided by distrust.⁵⁶

In view of these prospects, employees have an interest in limiting the extent to which their employers can monitor their activities. This is especially the case, because the line between private life and professional life has become blurred in recent years and workers' social life is increasingly taking place at the workplace.⁵⁷ Moreover, studies conducted in the UK in 2001 and 2004 show that workers who are under constant surveillance by their employers are more likely to suffer from depression, anxiety and fatigue.⁵⁸

This short theory section revealed that both employers as well as employees have legitimate interests to either use or to be protected from monitoring technology. This section serves as a basic introduction, however, most articles, did not refer explicitly to the situation in Europe. The paper will therefore proceed by focussing on EU labour protection standards and their implementation. In the next part, the methodology used for this purpose will be explained.

1.3. Methodology

In order to answer how and to what extent the EU protects the right to privacy of employees, four sub-questions have been defined.

The paper will start with a short chapter on employment relations and the role of labour law therein (SQ 1). In the next step, the role of labour policy in the EU context will be explained. When adopting labour standards, the EU has to stay within the competences that have been conferred on it by the Member States (Art. 5 TEU) and within the international regulatory framework, in particular international human rights law and international labour law (Art. 21 TEU). While the second question thus identifies the competences that have been conferred on the EU in relation to labour policy as well as in relation to data protection (SQ 2), the third sub-question comprises the limits imposed by international law on EU action in the field of privacy protection at the workplace (SQ 3). The last question asks whether EU secondary legislation, policy papers as well as case law of the ECtHR with regard to privacy rights at work are in concert with the regulatory framework that has been established in the previous questions (SQ 4).

Following this line of thought, in the second chapter, current challenges in the enforcement of labour rights will be pointed out and it will further be discussed how these challenges affect workplace monitoring and the employees' right to privacy. In the third chapter, the scope and the kind of competences of the EU in the area of social and labour policy and in the area of data protection will be identified and explained. The EU's competence with regard to social and labour policy is codified in Art. 4 (2) b and Art. 5 TFEU. More detailed provisions are laid down in Title X of the TFEU. One important aspect of the EU privacy regime is the protection of personal data. The competence conferring article with regard to data protection can be found in Art. 16 TFEU. Furthermore, in order to explain the current outlook of the constitutional provisions, the

53 West and Bowman, 'Electronic Surveillance at Work', 628-651.

54 Ibid.

55 Ibid.

56 Ibid.

57 Mitrou and Karyda, 'Employees privacy vs. Employers security: Can they be balanced?', 164-178.

58 Ibid.

origins of EU social and labour policy will be described (chapter 3.1.1). By the end of chapter 3, the EU's constitutional limits in relation to the protection of workers' privacy will become clear.

The treaties (Art. 21 TFEU) commit the EU to international law. The rules adopted at the international level are not binding on the EU, however, the EU cannot adopt legislation that is contrary to it. The fourth chapter will therefore contain an analysis of the international regulatory framework that restricts EU action in the field of labour policy and in particular with regard to the right to privacy at work. International law includes human rights law and in particular the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). These international protection instruments will be explained and identified in chapter 4.1.

Further, the European Convention on Human Rights (ECHR), the European Social Charter (ESC), the Community Charter of the Basic Social Rights of Workers and the Charter of Fundamental Rights of the European Union (CFREU) depicting the regional dimension of privacy protection, will be examined (chapter 4.3). The CFREU will be discussed within the fourth chapter, because it is a non-binding document and independent from the Lisbon Treaty. Moreover, the Charter does not have the power to confer any competences with regard to social or labour policy on the EU (Art. 6 (1) TEU). It is thus part of the broader framework.

The EU maintains a close partnership with the International Labour Organisation (ILO). It participates in ILO debates on labour protection standards, regularly publishes position papers in response to ILO initiatives and engages in joint programmes, e.g. the EU-ILO agenda for decent work (2006), to support the ratification and implementation of the ILO's (core) labour standards.⁵⁹ The EU also signed several cooperation agreements with the ILO, including FAFA⁶⁰ which establishes annual meetings of EU-ILO high officials and extends cooperation to include further policy areas related to EU external action in the field of trade and development⁶¹. All EU Member States have ratified the eight core labour standards⁶² as identified by the ILO. With regard to the partnership between the EU and the ILO, chapter 4 will also include an analysis of relevant ILO documents that deal with the protection of the employees' right to privacy at work (chapter 4.2). Finally, chapter 4 will conclude by discussing the right to privacy in the international regulatory framework and how it influences EU initiatives in this area (chapter 4.4).

In chapter 5, the findings of the previous analyses will provide the basis for the discussion of the last question which is about the coherent EU regulatory framework on the protection of privacy at work. In this chapter, EU regulations, directives and recommendations relating to privacy protection at work will be analysed, e.g. legislation on data protection (GDPR, 2016; 2002/58/EC) and employment conditions (2002/14/EC) as well as consultations with social partners.

In addition to that specific case law will be introduced (chapter 5.3) to provide information on how existing provisions on the right to privacy at work have been interpreted by courts and whether their judgements reveal a gap between legal standards and how they work in practice.

The study will conclude by comparing the current situation with the findings from all previous chapters. In

59 ILO Office Brussels, 'The ILO and the EU: Partners for decent work and social justice: Impact of ten years of cooperation', November 2012, available at <http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_195135.pdf>.

60 Ibid, 2001 EC-UN Financial and Administrative Framework Agreement, (FAFA)

61 Ibid, The Agreement includes cooperation in areas such as EU enlargement, trade and development and external assistance. It also includes provisions on technical cooperation.

62 Ibid, The eight core ILO conventions on labour standards include: freedom of association and collective bargaining (Convention No. 87+98), minimum age in employment (Convention No. 138), worst forms of child labour (Convention No. 182), forced labour (Convention No. 29+105), equal pay for men and women for work of equal value (Convention No. 100) and non-discrimination in employment (Convention No. 111).

doing this, contested points and legal challenges related to privacy rights of employees can be discovered. Similarly, it will be possible to outline future developments and to explore options for EU action. The data that will be used in this paper will therefore comprise EU treaties, EU legislation as well as policy statements, regional and international human rights treaties, international labour law and court rulings. The approach therefore aims to analyse the right to privacy at work from different legal angles.

2. THE ROLE OF LABOUR LAW AND THE RELATIONSHIP BETWEEN EMPLOYER AND EMPLOYEE

Before analysing in detail European labour law and in particular labour standards related to the protection of workers' privacy at the workplace, it is crucial to understand both the idea and the function of labour law in the first place. This chapter therefore aims at conceptualising labour law and providing an answer to questions relating to the content and scope of labour law, its purposes and the means by which it seeks to achieve them. The influence of globalisation and digitalisation on labour law will also be discussed. By the end of this chapter, the employer – employee relationship and the challenges of enforcing fundamental rights in the employment context will become clear. Moreover, the debate on labour law will significantly inform the interpretation of international and regional standards on the protection of the right to privacy at work. It will further provide an introduction into labour policy in Europe and serves as a basis to evaluate the development of labour and social policy at the level of the EU.

2.1. The conceptualisation of labour law

Modern labour law in Europe is rooted in the liberal and capitalist traditions of industrialised countries.⁶³ ⁶⁴ The industrialisation of the economy had produced an impoverished working class. Against this background, labour standards should protect the workers from the worst forms of physical and moral exploitation.⁶⁵ The concept of labour law as explained by this paper therefore rests on Western and in particular Eurocentric assumptions. Accordingly, the following explanations do not claim general validity, nor do they establish a hierarchy between industrialised and non-industrialised regions as well as between different kinds of employment relations.

2.1.1 The idea and scope of labour law

Although there are divergent opinions on the idea and function of labour law, most scholars agree that labour law is the result of multiple struggles between different social groups and ideologies.⁶⁶ The outlook of current legislation is shaped by market dynamics and path dependence.⁶⁷ As such labour law is closely connected to the domestic context from which it emerged.⁶⁸ Each country has its own provisions and rules on how to protect labour.⁶⁹ Even though globalisation processes and European integration have led to the adoption of minimum standards on the protection of workers, labour law is overwhelmingly shaped at the 'local' level.

63 B. Hepple, 'Factors influencing the Making and Transformation of Labour Law in Europe', in G. Davidov and B. Langille (eds.), *The idea of Labour Law* (New York: Oxford University Press 2011), 30-43.

64 M. Weiss, 'Herausforderungen an das Arbeitsrecht', 58 *Arbeit und Recht* 2010, 284-290.

65 *Ibid.*

66 *Ibid.*

67 Hepple, 'Making and Transformation of Labour Law', 30-43.

68 H. Arthurs, 'Reinventing Labour Law for the Global Economy: The Benjamin Aaron Lecture', 22 *Berkeley Journal of Employment and Labour Law* 2001, 272-293.

69 Weiss, 'Herausforderungen an das Arbeitsrecht', 284-290.

One of the reasons for this is that in contrast to goods and capital, labour itself is not very mobile.⁷⁰ There are only a few people who cross borders for work-related reasons. Those who do either belong to the most privileged group of a society, e.g. CEOs and other high-ranking officials, or represent the most underprivileged group, e.g. migrants or the victims of human-trafficking.⁷¹ Even in the global age, labour law is thus still closely connected to the nation.

The understanding of what labour law is and what function it fulfils are subject to discussion. In the late 1920s, Hugo Sinzheimer argued that labour law should make up for the imbalance in bargaining power between employer and employee.⁷² For Sinzheimer, the main function of labour law is above all to protect the employee and to grant every employee certain rights that ensure that the dignity and autonomy of each worker is respected by the employer.⁷³

On the contrary, Collins (2011) argues that the main function of labour law is to increase the welfare of society as a whole and to make working processes more efficient.⁷⁴ Yet another view is provided by Deakin (2011). According to Deakin, labour law should correct market failures, limit the market in sensitive areas, e.g. healthcare and education, and it has a market constructing function by creating the underlying conditions that channel market dynamics.⁷⁵ Although both Deakin and Collins as well as Sinzheimer name functions of labour law that are related to each other, they all emphasise different aspects. Notably, labour law is not seen as an end in itself, but rather as a means to achieve a higher societal goal, e.g. welfare, social justice, dignity and autonomy of human beings as well as efficiency.⁷⁶

The difference in the conceptualisations of labour law depends to a large extent on what one considers to constitute labour law, e.g. which policies count as labour legislation? The term 'labour law' can be interpreted in a narrow or in a broad sense. Labour law in the narrow sense includes both individual labour law, e.g. legislation on dismissal, working conditions and working contracts, as well as collective labour law including the rights and obligations between the employer and representatives of employees such as unions.⁷⁷⁷⁸ In addition to that, labour law can also extend to social protection policies such as unemployment insurance and retirement pensions that are shaped by labour market dynamics and labour policy.⁷⁹

Traditionally, labour law and social law have been seen as separated from and unrelated to each other. This separation was based on the assumption that social law is part of public law because it is governing the relations between the state and its citizens, while labour law belongs to private law and as such it regulates the relations among the individuals in a state.⁸⁰ At the European level, this traditional view is challenged.⁸¹ The Treaty on the Functioning of the EU acknowledges that social law and labour law are closely related to each other and are mutually influencing. According to Art. 151 TFEU, the EU and its Member States shall, by adhering to the principles laid down in the ESC (1961) and the Community Charter (1989), promote dialogue between management and labour and improve working conditions as well as ensure proper social protection and decent living conditions. This paper therefore speaks of European social *and* labour policy as

70 Arthurs, 'Reinventing Labour Law for the Global Economy', 272-293.

71 Ibid.

72 Weiss, 'Herausforderungen an das Arbeitsrecht', 284-290.

73 Ibid.

74 H. Collins, 'Theories of Rights as Justifications for Labour Law', in G. Davidov and B. Langille (eds.), *The idea of Labour Law* (New York: Oxford University Press 2011), 137-156.

75 S. Deakin, 'The Contribution of Labour Law to Economic and Human Development', in G. Davidov and B. Langille (eds.), *The idea of Labour Law* (New York: Oxford University Press 2011), 156-179.

76 G. Davidov, *A purposive Approach to Labour Law* (New York: Oxford University Press, 2016).

77 Ibid.

78 Ibid.

79 Think for example of pay-as-you-go-schemes, their functioning depends to a large extent on the labour market, see Weiss, 'Herausforderungen an das Arbeitsrecht', 284-290.

80 Ibid.

81 Ibid.

it is impossible to separate the two.

2.1.2. The crisis of labour law

A recurrent theme in the literature on labour law is that of labour law in crisis.⁸² Scholars who hold this view argue that the traditional conception of labour law does not hold true (any more) because labour law is no longer compensating for the imbalance in bargaining power between employee and employer. The reasons for this are both external as well as internal to labour law.

Arthurs⁸³ ⁸⁴(2001, 2011) and Weiss⁸⁵ (2010) state that the reasons for this crisis are grounded in the changing environment. Globalisation, automation and specialisation, e.g. outsourcing, networking, a focus on the service sector and the development of ‘flat hierarchies’⁸⁶ have transformed labour.

Labour in the traditional sense was both understood as a movement as well as a social class.⁸⁷ In the industrial age, labour law in Europe protected the needs of a largely homogeneous working class who claimed their rights by organising in unions and by collective bargaining.⁸⁸ In contrast to other branches of law, labour law depends to a large extent on the willingness of non-state actors such as companies, to ensure that labour standards are guaranteed.⁸⁹ The problem of enforcement is a key feature of labour law. Consequently, the organisation of workers in unions was therefore crucial to enhance the bargaining position of employees and to transform the unequal power relations between the employer and her employees. A single employee was unlikely to challenge her employer because of fear of dismissal.⁹⁰

Globalising processes have led to the specialisation of labour and have created a heterogeneous working force who does no longer constitute a unified social class and who often does not even meet the requirements of qualifying as a worker, e.g. fixed-term workers, a growing group of self-employed workers as well as new forms of employment such as crowd workers. According to Arthurs (2011), labour therefore becomes an individual affair and ceases to be a movement which he argues is also reflected in the low turnout of labour parties in elections and a decreasing number of workers organised in unions.⁹¹ The problem Arthurs (2011), but also Weiss (2010), Davidov (2011) and Hepple (2011) see is that labour law did not adapt to these challenges with the result that a large percentage of workers are not protected by it, because they are either not covered in the first place or they cannot make use of their rights due to a lack of bargaining power resulting from fewer and less powerful unions.⁹²

In this sense, Davidov (2011) argues that despite the changing environment and new forms of employment, the primary function of labour law, namely to account for the imbalance in employment relations, remains. The current crisis of labour law is therefore caused by a mismatch of goals and means.⁹³ Contrary to the neoliberal movement that argues in favour of ordinary market principles over the regulation of employment

82 See for example, Davidov, *A purposive Approach to Labour Law* (2016); Arthurs, ‘Reinventing Labour Law for the Global Economy’, 272-293; Weiss, ‘Herausforderungen an das Arbeitsrecht’, 284-290 and Hepple, ‘Making and Transformation of Labour Law’, 30-43.

83 Arthurs, ‘Reinventing Labour Law for the Global Economy’, 272-293.

84 H. Arthurs, ‘Labour Law after Labour’, in G. Davidov and B. Langille (eds.), *The idea of Labour Law* (New York: Oxford University Press 2011), 13-30.

85 Weiss, ‘Herausforderungen an das Arbeitsrecht’, 284-290.

86 Ibid., p. 285, lessening of top-down instructions while at the same time strengthening self-initiative

87 Arthurs, ‘Labour Law after Labour’, 13-30.

88 Davidov, *A purposive approach to Labour Law* (2016).

89 Arthurs, ‘Labour Law after Labour’, 13-30. note: this may also be one of the reasons why labour law is often located in the field of private law.

90 Davidov, *A purposive approach to Labour Law* (2016).

91 Arthurs, ‘Labour Law after Labour’, 13-30.

92 Davidov, *A purposive approach to Labour Law* (2016).

93 Ibid.

relations and that calls for a 'liberalisation of labour law' through deregulation⁹⁴, Davidov insists on re-regulating labour laws in order to ensure employment protection.⁹⁵

The crisis of labour law fuelled by both internal and external challenges, questions existing employment relations and undermines the purposes of labour law. Although there is no consensus on how to transform existing labour law to solve this crisis, there is agreement on the inadequacy of current labour laws to protect employees.

In the following, the paper will look into one of the proposals that aim to solve the crisis and to transform labour law in Europe. There are various ideas about how to adapt labour law to the global age. One approach aims at categorising different forms of employment, e.g. in precarious, autonomous and secure work and to allocate specific rights and duties to each category.⁹⁶ Labour law would thus become more differentiated and specialised as it is now. Another proposal seeks to transform employment relations by moving away from unilateralism and emphasising collaboration between employer and employee. According to this view, work should be understood as a means to facilitate the accumulation of human capital.⁹⁷

Finally, a third approach that will be discussed in detail in the next section, holds that labour law should be integrated into fundamental rights treaties in order to guarantee that workers are still sufficiently protected.⁹⁸ The central idea of this approach can be summarised with the following question: 'Are labour rights human rights?'

2.2. Discussion: Labour rights as human rights?

Scholars who propose that certain labour standards should be seen as fundamental rights of workers, are concerned that due to new forms of employment, technological progress and the individualisation of the employee, labour rights are undermined as they fail to cover the most vulnerable workers. Therefore, certain labour rights should become fundamental rights in that they are applicable to any employment relationship. But which labour rights are 'fundamental enough' to count as human rights and which are not?

Mantouvalou (2012) distinguishes three approaches that offer different strategies on how to identify labour rights as human rights.

According to the positivist approach, labour rights are human rights inasmuch as they refer to rights included in human rights treaties.⁹⁹ Major human rights documents such as the UDHR, the ICCPR and the ICESCR but also regional instruments such as the ESC and the CFREU, include several rights related to the employment context such as the prohibition of slavery and servitude (Art.4 UDHR), the right to form trade unions and to a fair and just remuneration of one's work (Art. 23 UDHR) and the right to privacy (Art. 12 UDHR).¹⁰⁰ Similarly, the ILO has classified four fundamental rights at work that are codified in its eight core labour conventions: freedom of association and the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the abolition of child labour and the elimination of discrimination in employment and occupation.¹⁰¹

94 Deakin et al, 'How do labour laws affect unemployment and the labour share of national income? The experience of six OECD countries, 1970-2010' 153 *International Labour Review* 2014, 1-27.

95 Davidov, *A purposive approach to Labour Law* (2016).

96 M. Freedland and N. Kountouris, 'The Legal Characterisation of Personal Work Relations and the Idea of Labour Law', in G. Davidov and B. Langille (eds.), *The idea of Labour Law* (New York: Oxford University Press 2011), 190-209.

97 Arthurs, 'Labour Law after Labour', 13-30.

98 Ibid.

99 Mantouvalou, 'Are Labour Rights Human Rights?', 151-172.

100 Ibid.

101 Ibid.

However, the positivist approach does not provide an answer as to which treaties are relevant, all of them, or the UDHR only?¹⁰² In addition to that, not all countries have ratified the treaties mentioned above, whether a labour right is fundamental or not would therefore depend on the provisions ratified by the country in question.¹⁰³ Most provisions are also very vague and do not give clear instructions on how to implement them in practice, also, control mechanisms are rather weak.¹⁰⁴

In contrast, the instrumental approach looks at the consequences of treating labour rights as human rights, e.g. by examining court rulings or civil society action such as strikes to find out whether labour rights are in fact seen as human rights.¹⁰⁵ If the strategy to promote a certain labour right as a human right is successful, the instrumental approach will recognise this labour right as a human right. If this is not the case, the labour right will not be seen as a fundamental right.¹⁰⁶ The problem with this approach is that case law and civil society action may not be consistent in their application of labour rights as human rights. It would further take some time until it could be finally established whether a labour right is a human right or not.¹⁰⁷

The normative approach, on the contrary, tries to identify the characteristics of human rights and it then asks to what extent labour rights do share these characteristics. Accordingly, labour rights can be human rights, if they fulfil the features that characterise human rights. Labour rights that do not meet the requirements are additional standards and are not subject to the same level of protection as fundamental rights.¹⁰⁸ However, any classification on such a basis would be subjective and open to attack. For example, labour rights can be seen as universally applicable as anyone can become a worker, however, not everyone is a worker all the time.

To recognise certain labour rights as fundamental rights would grant every worker, irrespective of their profession or position, a certain level of protection. Fundamental labour rights would thus be independent from market dynamics, the employment context and changes related to external forces such as globalisation and automation. It would also change the conception of human rights as individual rights and would make it possible to claim one's rights collectively as rights not only of the individual but as rights of a large group of people – that of workers.¹⁰⁹ Moreover, this approach would lead to a juridification of employment relations, because labour rights will no longer be articulated and negotiated between employer and employees or representatives of labour unions, but they will become subject of legal analysis before courts.¹¹⁰ This reveals one of the problems central to the rights-based approach. Who will enforce these rights? Which courts should decide? Monitoring mechanisms are weak and it is contested whether companies do have legal personality under international law, for example. To recognise certain labour rights as fundamental rights could also reduce the status of human rights. The line between rights who are recognised a fundamental nature and those who are not is difficult to draw and is always contestable.¹¹¹

This chapter has provided the reader with a short summary on the idea, the function, the means and current problems of labour law in Europe. The focus was on how labour laws can be enforced under changing conditions to ensure the protection of employees. Mantouvalou's discussion on labour rights as human rights offers a way of ensuring the protection of employees' rights in the global age. Her classification will inform the next chapters as both positivist, normative and instrumental approaches will be employed to interpret the provisions of European treaties, regional and universal human rights law and international labour law that are

102 Mantouvalou, 'Are Labour Rights Human Rights?', 151-172.

103 Ibid.

104 Ibid.

105 Ibid.

106 Ibid.

107 Ibid.

108 Ibid.

109 Arthurs, 'Labour Law after Labour', p. 13-30.

110 Hepple, 'Making and Transformation of Labour Law', 30-43.

111 Ibid.

related to the right to privacy in the workplace. Central questions in this regard are for example, how is the right to privacy of workers codified? What is the level of protection? Under what circumstances are restrictions possible?

The paper will proceed by outlining the development of European social and labour policy and by analysing the competences of the EU in this area as laid down by the Treaty of Lisbon. Before answering the question of whether and to what extent the EU regulatory framework is protecting the workers' privacy, it is necessary to establish the competence of the EU in the area of social and labour policy. After the competence has been established, the paper will then interpret the relevant provisions by taking into account the positivist, normative and instrumental approaches that have been identified in this section.

3. THE COMPETENCES OF THE EU IN RELATION TO SOCIAL AND LABOUR POLICY AND IN RELATION TO DATA PROTECTION

The previous chapter has provided a conceptualisation of labour law. It has been argued that labour law is primarily shaped at the national level and that its main function is to protect the employee by guaranteeing certain rights that compensate for the unequal bargaining power between employer and employee. These rights are protected and enforced via collective bargaining. Globalisation processes and the individualisation of labour have weakened the solidarity and collectivity of work relations labour law rests on. In view of these developments, some scholars have argued for the inclusion of fundamental labour rights into human rights treaties in order to ensure that employees are sufficiently protected.

The question of the protection of workers' privacy at the European level calls for an analysis of European labour and social policy. While chapter 2 focused on labour law in general, this section will provide an insight into the development of European labour law and the competences that have been conferred on the Union.

Apart from that, the right to privacy at the workplace does not only concern labour rights but also the right to privacy and data protection. After having elaborated on the features of European labour and social policy, the paper will therefore proceed by identifying the concept of privacy and the competences of the EU in this area. The chapter will conclude by discussing the scope of EU action in relation to the protection of privacy at work.

3.1. European social and labour policy

Academic literature has often argued that a European social and labour policy has long been seen, and continues to be seen, as subordinate to European economic integration.¹¹² Consequently, the scope of EU competence in the field of labour and social policy remains subject to contestation and politicians continue to demand that European integration should be limited to economic matters.¹¹³ Over the years, however, the EU has increased its powers in this field and it has adopted various instruments, in particular soft law measures, that facilitate close cooperation and coordination between the different social and labour policies of its Member States. The Rome Declaration published in March 2017 by the European Commission now includes a clear commitment to a social Europe with a strong role for the European Union in promoting economic and

112 R. Blanpain, *European Labour Law* (Alphen aan den Rijn: Kluwer Law International, Eleventh Revised Edition, 2008).

113 See for example, 'The reluctant European', Special Report, *The Economist*, 17 October 2015, available at <<https://www.economist.com/news/leaders/21674698-there-growing-risk-britain-will-leave-european-union-it-needs-be-counterred>>.

social progress and fighting unemployment, discrimination and poverty.¹¹⁴

In the following, a brief overview of the development of European social and labour policy and important initiatives related to this policy area will be provided. After that, the competences of the EU in relation to labour and social policy will be laid down.

3.1.1. EU social and labour policy: developments

The development of a European social and labour policy from the Treaty of Paris in 1951 to the Rome declaration in 2017 was a complex process marked by various ups and downs.¹¹⁵

The early years of European integration saw only little progress in the field of social and labour policy, albeit the Treaty of Rome (1957) established important institutions such as the the Economic and Social Committee and it led to the adoption of two ground-breaking regulations: the regulation on the free movement of labour (1961) and the regulations No. 3 and 4 on the equal treatment of workers moving within the territory of the Community (1968; 1971).¹¹⁶ The Treaty further prohibited any discrimination in employment on grounds of sex and introduced the principle of equal pay between women and men for equal work (Art. 119 EEC).¹¹⁷

From 1975 to 1980, various harmonisation directives in the field of equality in employment and social protection services between men and women (1976; 1978) and the protection of employees in times of firm insolvency or transfer of enterprise (1977; 1981) were adopted. Moreover, the Community promoted the social dialogue between the European Trade Union Confederation (ETUC) and the Union of Industrial and Employers' Confederations of Europe (UNICE).¹¹⁸ Despite these initiatives, decision-making remained difficult and cumbersome and more ambitious projects failed due to the unanimity requirement in the Council and Britain's reluctance to agree to any common standard in matters related to social policy.¹¹⁹

The focus on marketisation and deregulation in the 1980s put a halt to European social integration and only in 1989 with the adoption of the Community Charter of Basic Social Rights for Workers, did European social integration start to thrive again. The Charter is a non-binding document that sets forth several improvements in living and working conditions, health and safety at the workplace, education and training, equal treatment of all workers and social protection.¹²⁰ Nevertheless, the Charter cannot confer any new competences on the Community.¹²¹

In 1997, the Social Protocol was integrated into the Amsterdam Treaty. The protocol provided the EU with a legal basis in social and labour policy, strengthened the consultative powers of the European parliament and introduced QMV in the Council with regard to policies on working conditions, information and consultation of workers and equal treatment of men and women.¹²² With the European Employment Strategy (EES) that became operational in 1997, the EU also launched its first soft law mechanism in the field of employment and labour policy.¹²³ The integration of the Social Protocol into the Amsterdam Treaty and the creation of the EES represented a major step forward towards a European social policy.

This development continued when, three years later, the EU adopted the Charter of Fundamental Rights of

114 European Commission Statement, 'Rome Declaration of the Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission', Press Release 149/17, 25 March 2017, available at <<http://www.consilium.europa.eu/en/press/press-releases/2017/03/25-rome-declaration/>>.

115 R.R. Geyer, *Exploring European Social Policy* (Malden: Polity Press with Blackwell Publishers Ltd., 2000).

116 Ibid.

117 S. Burri and S. Prechal, 'EU Gender Equality Law', European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2 (Belgium: September 2008).

118 Geyer, *Exploring European Social Policy* (2000).

119 Ibid.

120 Ibid.

121 Ibid.

122 Ibid.

123 European Commission, 'Employment, Social Affairs and Inclusion: European Employment Strategy', (n.d.), available at <<http://ec.europa.eu/social/main.jsp?catId=101&langId=en>>.

the EU (CFREU).¹²⁴ The CFREU maintained the non-binding character of the Community Charter, however, it lays down a comprehensive catalogue of fundamental rights including both civil and political rights as well as social and economic rights. In the same year, at the European Council meeting in Lisbon, the heads of state decided to increase cooperation in social policy matters through a soft law mechanism, the Open Method of Cooperation (OMC).¹²⁵ The mechanism was introduced to achieve harmonisation in Member States' social policies without adopting binding measures. The effect of the OMC is disputed and the lack of control has raised criticisms as to the effectiveness of the method, however, it adds to the repertoire of EU instruments in the field of social policy and offers an alternative to the hard law approach.¹²⁶

With the adoption of the Treaty of Lisbon in 2009, Art. 5 and Art. 151 TFEU now lay down the competences of the EU in the field of labour and social policy. The Treaty did not lead to an extension of EU competence in social and labour policy, nor did it extend QMV to all areas covered by Title X TFEU. The main focus is on soft law measures, e.g. promoting dialogue, increasing knowledge and evaluating initiatives (Art. 153 (2) a TFEU). In the areas where the EU is able to adopt legislation, this is reduced to minimum standards and must not hinder the development of SMEs (Art. 153 (2) b TFEU).

In the next section, the provisions on social and labour policy in the Lisbon Treaty will be analysed in detail. Particular emphasis will be placed on the EU powers in relation to working conditions and on the information and consultation of employees as the use of monitoring technology at the workplace has an impact on both.

3.1.2. European social and labour policy in the Lisbon Treaty

The development of a European social policy shows that the Member States have been very reluctant in the past to give the Commission any real competence in this field. The Lisbon Treaty contains several provisions on social and labour policy, however, they are often not very clear and leave room for various interpretations. They also do not confer any new competences on the EU but rather consolidate existing powers. When analysing the competences of the EU in the field of social and labour policy, it is therefore important to keep in mind this reluctance and the various ups and downs in the process of developing a European social policy.

Art. 2 and Art. 3 of the Treaty on the European Union (TEU) lay down the values and goals of EU action within Europe and in the world. Art. 2 TEU states that the EU is founded on the values of human dignity, freedom, democracy, the rule of law and the respect for human rights. In Art. 3 TEU, the treaty then specifies the objectives the EU should pursue in order to promote these values, e.g. fighting poverty and social exclusion, promoting equality between women and men and developing international law. Art. 3 TEU was framed in a broad way however, the actual scope of EU action in these areas is restricted by Art. 5 TEU which states that EU action is dependent on the conferral of competences from the Member States and needs to follow the principles of subsidiarity and proportionality.

Art. 3 to Art. 6 TFEU are the competence conferring articles. Social policy is both mentioned in Art. 4 (2) a TFEU as well as in Art. 5 (3) TFEU. Art. 4 (2) TFEU contains all policy areas where the EU has shared competence. Once the EU has adopted legislation in this policy area, the Member States are pre-empted from exercising their legislative competence.¹²⁷ The nature of EU competence in Art. 5 TFEU is more complicated

124 Geyer, *Exploring European Social Policy* (2000).

125 B. Hacker, 'Das liberale europäische Sozialmodell: Rentenreformen in der EU und Offene Methode der Koordination', in K. Busch et al (eds.) *Schriften zur europäischen Arbeits- und Sozialpolitik*, Band 6, (Baden Baden: Nomos Verlagsgesellschaft 2010).

126 M. Prpic, 'The Open Method of Coordination', At a glance, European Parliamentary Research Service (EPRS), PE 542.142, October 2014, available at <<http://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf>>.

127 B. van Vooren and R. Wessel, *EU External Relations Law* (Cambridge: Cambridge University Press, 2014).

and has not been settled yet.¹²⁸ According to Craig and de Búrca¹²⁹ (2011), Art. 5 TFEU includes policy areas that are in-between shared and supportive competence laid down in Art 4 and Art. 6 TFEU respectively. In other words, Art. 5 TFEU can be understood as a compromise between the Commission and the Member States. While the Member States wanted to keep this area strictly national, the Commission sought to extend its powers as harmonisation of the Member States' social and labour policies is to some extent necessary in order to fulfil other EU objectives, e.g. the flourishing of the internal market. The fact that social policy is also included in the Article on shared competences, may show that the drafters of the treaty wanted to leave the door open for more extensive legislative powers in the hands of the EU. This is especially important when looking at the detailed provisions in Title X of the TFEU.

Art. 151 and Art. 152 TFEU comprise the goals of EU action in relation to social and labour policy. These include for example, the promotion of employment and dialogue between management and labour, proper social protection and the improvement of living and working conditions.

Moreover, in Art. 152 TFEU the EU commits itself to the promotion of dialogue among the various social partners that are established at the European level. In contrast to what has already been said about the nature of EU competence in relation to social and labour policy, Art. 153 TFEU on the implementation of the objectives mentioned in the previous two Articles, clearly reduces the role of the EU to supporting and complementing tasks. Art. 153 TFEU further enumerates the policy areas where the EU should support and complement Member State action, e.g. social security and social protection of workers, improvement of working and living conditions, the information and consultation of employees, equality between women and men with regard to workplace treatment and the integration of persons excluded from the labour market.

In order to achieve these objectives, Art. 153 (2) a and b lay down the instruments and procedures the EU may use in social policy issues. The measures the EU can employ in this field are diverse and depend on the specific topic in question. Art. 153 (2) a TFEU identifies several soft law measures that aim to increase cooperation between Member States, such as exchanging information, promoting innovative approaches and best practices and evaluating experiences. All these measures must not aim at harmonising Member State legislation. On the contrary, Art. 153 (2) b TFEU gives the EU the competence to adopt, in the areas (1) a to i, directives that require the Member States to implement minimum standards in these areas. Nevertheless, when adopting such a directive, the EU needs to take into account the situation in each Member State and it must not put constraints on the development and the creation of SMEs. The directives shall be adopted in accordance with the ordinary legislative procedure after consultations with the Economic and Social Committee and the Committee of the Regions. In the areas mentioned in (1) c, d, f and g, the special legislative procedure applies which means that the Council decides with unanimity after consulting the European parliament and the Committees. The Council may, however, acting unanimously on a proposal by the Commission, decide to use the ordinary legislative procedure in the areas covered by (1) d, f and g.

According to Art. 153 (4) TFEU, any EU measures that are introduced on the basis of Art. 153 shall leave enough room to the Member States to develop the fundamental principles of their social security systems and they must not result in significant changes of the Member States' budget allocated to this area. Finally, Art. 153 (5) TFEU excludes certain areas that do not fall under EU competence, e.g. wage policy, the right to form unions and the right to strike as well as the right to impose lock-outs.

The following Articles regulate the role of social partners in this process (Art. 154 and Art. 155 TFEU), contain more detailed provisions on specific policy areas such as equal treatment and equal pay for women and men (Art. 157 TFEU), the promotion of enhanced cooperation between the Member States through exchange of best practices and the regularly evaluation of new initiatives in certain areas also including

128 P. Craig and G. De Búrca, *EU Law: Text Cases and Materials* (Oxford: Oxford University Press, Fifth edition, 2011).

129 Ibid.

labour law and working conditions (Art. 156 TFEU, see OMC in part 3.1.1), the creation of a European Social Committee (Art. 160 TFEU) and the publication of annual reports on progress in the implementation of the common objectives mentioned in Art. 151 TFEU and on the social conditions in the Member States (Art. 161 TFEU).

To conclude, the EU's competence in the field of labour and social policy is fragmented. Although the EU can adopt binding legislation in almost any area mentioned in Art. 153 TFEU excluding only the modernisation of the Member States' social security systems and the fight against social exclusion, the focus is on soft law measures as laid down in Art. 153 (2) a and Art. 156 TFEU. This is also underlined by the strict conditions under which the EU may adopt directives, e.g. the treaty prohibits measures that put constraints on SMEs and it requires the EU to consider the national regulatory framework before engaging in legislative action. Notably, only a small fraction of the policy areas in Art. 153 (1) TFEU (a, b, e and h on the improvement of the working environment to protect the workers' health, on working conditions, on information and consultation of employees and on the inclusion of persons excluded from the labour market) falls under the ordinary legislative procedure whereas legislation in all other areas requires unanimity in the Council. Title X of the TFEU should thus be understood as an area where the Member States have to a large extent maintained their sovereignty. The scope of EU action is very limited and the competences conferred on the EU concentrate on the promotion of cooperation between Member States.

This section has provided some insights into the development of European social and labour policy and into the competences that have been conferred on the EU in relation to social matters. The provisions in Title X TFEU reflect the difficulties in finding a compromise between the Member States on the one hand and the Commission and the European parliament on the other. As a result, EU action in this policy area is reduced to soft law measures, however, the EU may adopt binding legislation that aims to guarantee a minimum level of protection, if the Member States have the political will to do so. It is therefore important to note that the EU can adopt binding legislation, for example, with regard to working conditions and the information and consultation of employees both of which are relevant for the protection of workers' privacy. The decision to go for soft law measures instead, is a question of politics and not of law.

In order to go back to the research question, it is not sufficient to look only at EU competence in the field of labour and social policy. As it is the case with many policies, they do not only touch on one policy field, but they also have consequences for many other areas.¹³⁰ With regard to the protection of privacy at work, it is necessary to discuss the competence of the EU in the field of privacy protection. This will be important as the search for the 'right' legal basis traces back to the discussion introduced in chapter 2.2. If the EU recognises the fundamental nature of the right to privacy at the workplace, the legal basis will be the one conferring on the EU the competence to take action in data protection matters. On the contrary, if the EU considers it to be a 'mere' labour right, Art. 153 (2) b TFEU will constitute the correct legal basis.

In order to provide an answer to this question, the following section will first explain the concept of privacy and the EU's conceptualisation of this term, before finally analysing the competence of the EU in relation to privacy protection.

3.2. EU protection of privacy

The protection of privacy at the workplace does not only concern labour rights, but also privacy rights. As a consequence, the Member States need to have conferred on the Union the competence to take action in matters related to privacy. Since privacy protection is a broad term that covers many different aspects, e.g. data protection, protection from physical interference with one's privacy and protection from territorial

¹³⁰ van Vooren and Wessel, *EU External Relations Law* (2014).

surveillance,¹³¹ it is useful to shortly discuss the concept of privacy, before starting to analyse European primary law.

3.2.1. The conceptualisation of privacy

Privacy is a blurry concept that is difficult to grasp as it touches on several issues and can be described and perceived in multiple ways.¹³² For example, privacy can constitute an emotional state, it can be described by looking at the functions it fulfils and it can also be perceived as a legal entitlement that can be either positive or negative or both, e.g. the right to be protected from surveillance and the right to one's self-identity and self-development.¹³³ Moreover, Vasalou et al.¹³⁴ (2015) argue that privacy is a dynamic concept that is subject to change and whose meaning depends on the specific situation and time. Accordingly, the kind of privacy we expect at home is different from the kind of privacy we expect to enjoy at work or in school. This makes it very difficult for policy-makers to adopt legislation in this area. If the meaning of privacy is dependent on time and situation, it will be necessary to adopt different rules for each situation and time.

In this paper, privacy will be defined as a legal entitlement. The right to privacy guarantees freedom from surveillance and interference in one's privacy either by the state or by any other actor and it ensures the protection of one's identity and development.

Privacy as a legal entitlement comprises three different aspects: territorial privacy, privacy of the person and informational privacy.¹³⁵ Territorial privacy refers to the privacy of a person in a specific area, e.g. in school, at the workplace, in shops, in the street, etc.¹³⁶ On the contrary, privacy of the person includes everything that concerns the person directly, e.g. physical searches or pictures of that person. It can be reformulated to the right to one's body or one's identity.¹³⁷ Informational privacy refers to one's personal data and how this data is gathered, stored and processed.¹³⁸ All these aspects can apply in offline as well as in online contexts.

With regard to the protection of privacy at work, all three aspects of privacy as a legal entitlement can be relevant, for example, territorial privacy may become important in cases where the employee may want to know whether her office, the cafeteria or the changing rooms are monitored by the employer. Moreover, the employee may work in a job that requires controls of personal baggage and the person herself. Informational privacy is of special importance as personal data is needed in all stages of employment, e.g. when applying for a job, during working hours when the performance of the employee is monitored and also after the employment relationship has ended, as the new employer or state agencies may ask for data about the former employee.

Therefore, the term privacy includes many different aspects and its meaning may change depending on the time and situation. This paper aims to include all those different aspects, nevertheless, it is necessary to look at how the EU defines privacy and by which measures it seeks to protect it.

131 S. Kokolakis, 'Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon', 122-134.

132 A. Vasalou et al, 'Privacy as a fuzzy concept: A new conceptualisation of privacy for practitioners', 66 *Journal of the association for information science and technology* 2015, 919-929.

133 *Ibid.*

134 *Ibid.*

135 Kokolakis, 'Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon', 122-134.

136 *Ibid.*

137 *Ibid.*

138 *Ibid.*

3.2.2. The right to privacy in the EU

According to Albrecht¹³⁹ (2017), the starting point for EU privacy protection was Art. 8 ECHR. In Art. 8 (1) ECHR it says that “everyone has the right to respect for his private and family life, his home and his correspondence”. The same formulation can now be found in Art. 7 CFREU. Notably, the CFREU does not only include a right to privacy, but also a right to data protection (Art. 8 CFREU). According to Art. 8 (1) CFREU, everyone has the right to the protection of his or her personal data. The data must be processed fairly and on the basis of consent of the persons concerned or as laid down by law (Art. 8 (2) CFREU). Everyone has access to the data that has been collected about him or her and has the right to correct it (Art. 8 (2) CFREU). Furthermore, compliance with these provisions shall be monitored by an independent authority (Art. 8 (3) CFREU). In view of the discussion in section 3.2.1, the question arises whether and how the right to privacy and the right to data protection are related.

In the previous paragraph, it was established that the concept of privacy is very broad and difficult to grasp. Based on the categorisation that was made in the previous part, the right to data protection can be subsumed under informational privacy. As such it constitutes only a small part of the overall concept of privacy. This argumentation was also used by the ECJ in *Schecke v. Hesse*. In the judgement, the court stated that the case concerned the right to privacy with regard to the protection of personal data.¹⁴⁰ In order to clarify this distinction, the paper will follow the explanation provided by De Andrade¹⁴¹ (2012) who explains the relationship between the right to privacy and the right to data protection by referring to the difference between procedural and substantive rights. According to De Andrade, the right to “data protection is a procedural right, setting the rules, methods and conditions through which substantive rights (such as privacy and identity) are effectively enforced and protected”¹⁴². The protection of personal data is, however, not the only method to ensure that the right to privacy is protected, for example, in order to ensure territorial privacy or privacy of the person, legislation on data protection would not be sufficient.

Despite that, the European Union has not been very active in areas other than data protection. When referring to EU initiatives that aim to protect the right to privacy at the workplace, the paper will therefore refer to data protection measures.

3.2.3. The European data protection regime

Over the last decades, the EU has established a comprehensive data protection regime.¹⁴³ Until the entry into force of the GDPR in 2016, the directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, represented the most elaborated piece of EU legislation on data protection.¹⁴⁴ The adoption of the directive was preceded by initiatives from the Council of Europe. The organisation adopted both binding as well as non-binding documents on data protection in general and on the protection of employees' data.¹⁴⁵ The most important document of the Council of Europe with regard to data protection is Convention No. 108 on the protection of individuals with

139 J.P. Albrecht, *Das neue Datenschutzrecht der EU* (Baden Baden: Nomos Verlagsgesellschaft 2017).

140 Albrecht, *Das neue Datenschutzrecht der EU* (2017), p. 27, “the right to respect for private life with regard to the processing of personal data, recognised by Art. 7 and 8 of the Charter”.

141 N. N. G. De Andrade, ‘Regulating electronic identity in the European Union: An analysis of the Lisbon Treaty’s competences and legal basis for eID’, 28 *Computer Law and Security Review* 2012, 153-162.

142 *Ibid*, p. 161.

143 Albrecht, *Das neue Datenschutzrecht der EU* (2017).

144 *Ibid*.

145 See regulation of 17 April 1989 instituting a system of data protection for personal data files at the CoE, Recommendation No. 89 on the protection of personal data used for employment purposes (CoE), in S. Simitis, ‘Reconsidering the Premises of Labour Law: Prolegomena to an EU Regulation on the Protection of Employees’ Personal Data’, 5 *European Law Journal* 1999, 45-62.

regard to automatic processing of personal data.¹⁴⁶ It was opened for signature in 1981.¹⁴⁷ The Convention, the constitutional provisions of the Member States as well as Art. 8 ECHR had a major impact on the development of EU directive 95/46/EC.¹⁴⁸ The directive laid down framework provisions on the protection of personal data. It should protect the fundamental rights of the European citizens and it should reduce barriers to the internal market and ensure the smooth running of cross-border activities.¹⁴⁹ In addition to that, the directive established the Art. 29 Data Protection Working Party, an advisory body that can give the Commission advice in privacy and data protection matters.¹⁵⁰ In 2002, the Art. 29 Working Party adopted a working document on the surveillance and monitoring of electronic communications in the workplace which will be discussed in chapter 5.

The directive 95/46/EC was soon followed by regulation 45/2001 on data protection in the EU institutions and directive 2002/58/EC on the processing of personal data and the protection of privacy in online communications (ePrivacy Directive).¹⁵¹ The regulation 45/2001 also established the office of the European Data Protection Supervisor (EDPS).¹⁵² The EDPS is an independent supervisory authority that monitors the processing of data within the EU institutions, advises the institutions in privacy and data protection matters and ensures cooperation with national supervisory bodies.¹⁵³ In 2008, the Council further adopted a framework decision on the exchange of information between the Member States' police forces and other law-enforcement authorities (2008/977/JHA).¹⁵⁴

With the adoption of the CFREU in 2000 and the entry into force of the Lisbon Treaty in 2009, the EU extended its powers with regard to privacy and data protection. The Charter includes both the right to privacy (Art. 7 CFREU) as well as the right to data protection (Art. 8 CFREU). The EU therefore recognises the fundamental nature of this right. This move has some problems which have already been discussed in the previous section. The problem has been resolved by arguing that the right to privacy is a substantive right, while the right to data protection is a procedural right that lays down the rules by which the substantive right can be enforced.¹⁵⁵ As a consequence, Art 7 and Art.8 CFREU are related as the main purpose of data protection is to guarantee the privacy of European citizens. The inclusion of an additional Article on data protection in the Charter, should thus be interpreted as a way to stress the importance of data protection in the digital age.

With the entry into force of the Lisbon Treaty, Art. 16 (1) TFEU now codifies the right to the protection of one's personal data and provides a legal basis for EU action in this field. According to Art. 16 (2) TFEU, the European parliament and the Council may adopt, in accordance with the ordinary legislative procedure, legislation on the processing of personal data. The rules that have been adopted through this procedure are applicable to the European Union institutions and its subsidiary bodies and to the Member States where the processing of personal data falls within the scope of EU law excluding CFSP and CSDP (Art. 16 (2) TFEU). Independent authorities shall ensure that these rules are complied with (Art. 16 (3) TFEU). The wording and

146 Albrecht, *Das neue Datenschutzrecht der EU* (2017).

147 Council of Europe, 'Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data', ETS No. 108 (Strasbourg: 28 January 1981).

148 Albrecht, *Das neue Datenschutzrecht der EU* (2017).

149 Albrecht, *Das neue Datenschutzrecht der EU* (2017).

150 Ibid.

151 Ibid.

152 See Art. 1 (2) Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ* [2001] L 8/1, 12 January 2001, found at European Data Protection Supervisor, About, available at <https://edps.europa.eu/about-edps_en>.

153 Ibid.

154 Albrecht, *Das neue Datenschutzrecht der EU* (2017).

155 De Andrade, 'Regulating electronic identity in the European Union', 153-162.

the position of Art. 16 TFEU (under general provisions) make it difficult to determine the kind of competence that has been conferred on the EU. Both the position and the wording assume that the EU is able to adopt rules on data protection in any policy area where it has acquired some competence. In this sense, the protection of personal data can be seen as a general principle underlying all EU legislation. Consequently, the powers of the EU in relation to data protection seem to be far-reaching. However, the result may look far less comprehensive as the Member States may seek to block legislation which they believe violates their sovereignty. How the provisions are applied in practice will be further discussed in chapter 5 by analysing in detail the new GDPR that entered into force in April 2016. The GDPR and directive 680/2016 on data protection in law-enforcement matters replace the data protection directive of 1995 to catch up with new technological innovations and a growing concern for the protection of personal data in the digital age.¹⁵⁶

To conclude, the scope of EU competence in relation to data protection has increased over the past decades. The EU has adopted several regulations and directives aiming at the harmonisation of Member State legislation. Art. 16 TFEU in combination with Art. 7 and 8 CFREU provide the legal basis for the adoption of binding legislation on the protection of personal data. The wording and the position of Art. 16 TFEU raise doubts as to the nature of EU competence in this area, as the provisions can be interpreted very broadly. The complexity of European decision-making and the need for consensus may yet prevent the EU from making full use of the powers that have been conferred on it. In spite of the hurdles that may still lay ahead, data protection is a dynamic policy field whose importance may grow in the coming years.

3.3. Conclusion

In this section, the competences of the EU in relation to social and labour policy as well as in relation to the protection of privacy have been discussed. Being a supranational organisation, the EU can only act within the competences that have been conferred on it by the Member States (Art. 5 TEU). The question of competence is thus essential in order to determine the scope of EU action in relation to the protection of workers' privacy. With regard to the right to privacy at the workplace, this Chapter has provided an overview of EU competences in relation to working conditions and in relation to data protection.

The analysis has shown that the competences of the EU in the field of social and labour policy are fragmented. The main focus is on soft law measures that aim to support and complement Member State action. In contrast to this, the EU may still adopt, in accordance with the ordinary legislative procedure, directives on the improvement of the employees' working environment to protect their health and safety, on working conditions, on the information and consultation of the employees and on the integration of persons excluded from the labour market. EU action in all other areas that fall under Art. 153 TFEU require unanimity in the Council. Moreover, the scope of EU legislation is further restricted by additional requirements, e.g. the directives may only lay down minimum requirements, national rules and customs need to be taken into account and the directives must not impose any constraints on the creation and development of SMEs. Nevertheless, the EU may still influence the Member States' social and labour policies through soft law instruments such as the OMC and by making recommendations and sharing best practices. Another way of influencing the labour and social policies of the Member States is to increase cooperation with social partners such as representatives of labour unions and employer organisations. These organisations may then inform their national governments about the ideas that have been discussed at the European level. The Treaty of Lisbon has provided the EU with extensive powers in this respect. Moreover, it is important to note that the treaties do not prevent the development of enhanced cooperation between Member States in matters related to social and labour policy. In fact, the provisions in Art. 4 (2) b TFEU, Art. 5 (3) TFEU, Art. 151

¹⁵⁶ Albrecht, *Das neue Datenschutzrecht der EU* (2017).

TFEU and Art. 153 (2) b TFEU can lead to the adoption of more comprehensive legislation, if there is the political will to do so.

Apart from the EU's competence in relation to social and labour policy, the protection of the right to privacy at the workplace requires the conferral of competence in relation to matters concerning the protection of privacy. Concerns for privacy can be found in many policy areas. For the sake of this study, the right to privacy will be reduced to the right to data protection. The right to data protection does not cover the whole concept of privacy, however, it lays down the methods and procedures for enforcing it.

The competence of the EU in relation to data protection is extensive. In this sense, data protection can be understood as a general principle underlying all EU action. Art. 16 TFEU represents the legal basis for EU action in this field.

So far, the EU has adopted framework provisions on data protection that cover a wide range of different topics and are applicable to both Union institutions and Member States alike. In spite of the comprehensive powers that have been conferred on the EU in relation to data protection, their impact on Member State legislation is not certain. For example, one of the reasons why the directive 95/46/EC was replaced by the GDPR is that their provisions were too general and were thus interpreted very differently by the Member States.¹⁵⁷ The implementation of the GDPR's provisions in the Member States will therefore require close monitoring.

The competences of the EU in relation to labour policy and in relation to data protection are very different from each other. Depending on the choice of the legal basis, this can have an impact on the scope of EU action in relation to the protection of the right to privacy at the workplace. The EU may either choose to include it under the provisions of labour and social policy and in particular under Art. 153 (2) a and b TFEU thereby considering it as a labour right, or it may argue that the right to privacy at the workplace is a fundamental right that falls under the general provisions on data protection laid down by Art. 16 TFEU. The interpretation of these provisions as well as the considerations on the nature of the right to privacy at work are not only of a legal nature but they also involve political decisions.

4. THE INTERNATIONAL REGULATORY FRAMEWORK ON THE RIGHT TO PRIVACY AT WORK AND THE LIMITS IT IMPOSES ON EU ACTION IN THIS FIELD

In the previous chapter, the competences of the EU in relation to the protection of workers' privacy have been explained. However, EU action is not only limited by the principle of conferral, but also by international law. Art. 21 (1) TEU states that the EU, when acting at the international level, shall promote the principles that have led to its own creation including democracy, rule of law, the universality and indivisibility of human rights, equality, solidarity and human dignity. The EU shall further respect the principles of the UN Charter and international law. In addition to that, Art. 6 (1) and (2) TEU bind the EU to the fundamental rights and freedoms laid down in the CFREU and in the ECHR. As a consequence, EU action in relation to the protection of privacy at work needs to be in line with international law and in particular with international standards on human rights protection.

The right to privacy forms part of many international human rights treaties.¹⁵⁸ However, it is not clear how the right to privacy should be protected in the employment context. In this chapter, the relevant provisions on the right to privacy will be identified and it will further be discussed to what extent the right to privacy can be restricted by the employer. The analysis will therefore follow the positivist approach that has been

¹⁵⁷ Albrecht, *Das neue Datenschutzrecht der EU* (2017).

¹⁵⁸ See Art. 7 and 8 CFREU, Art. 8 ECHR, Art. 17 ICCPR and Art. 12 UDHR.

identified in chapter 2.2.

The analysis will start by looking at international standards, e.g. international human rights law and international labour law. It will continue by providing an overview over regional standards. The chapter will conclude by identifying the nature of the right to privacy and the conditions under which the right to privacy may be restricted. Moreover, it will also be discussed how the results of this analysis may influence EU action in relation to the protection of workers' personal data.

4.1. International human rights law and the protection of workers' personal data

When looking at the protection of workers' personal data at the international level, three human rights documents are of special importance: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

4.1.1. UDHR

In 1948, the UN General Assembly adopted the UDHR in Paris. The UDHR is a non-binding declaration recognising the inherent dignity and rights of all human beings.¹⁵⁹ The rights and fundamental freedoms that are included in the declaration were proclaimed as a “common standard of achievement for all peoples and all nations”¹⁶⁰.

According to Art. 12 UDHR, no one shall be subject to “interference with his privacy, family, home or correspondence”.¹⁶¹ Moreover, Art. 12 UDHR states that everyone has the right to be protected by law from interference with one's privacy. Therefore, the right to privacy is both a negative right as states or other actors shall refrain from interfering with the privacy of any human-being, as well as a positive right as everyone has the right to adequate measures that ensure protection from interference with one's privacy.

The Article does not explicitly refer to workers or to the right to privacy in the employment context. However, Art. 2 UDHR states that everyone is entitled to all the rights set forth in the declaration. No distinction must be made as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹⁶² While the Article does not mention one's employment situation, it is worth to look at the category of 'other status'. In its General Comment No. 20 on the interpretation of Art. 2 (2) ICESCR, the Committee on economic, social and cultural rights argues that the list in Art. 2 is not exhaustive and that the category of 'other status' was included to be able to respond to new forms of discrimination that may develop over time.¹⁶³ The Committee further states that disability, age, gender identity, nationality, marital and family status, place of residence and economic and social situation are covered by 'other status'.¹⁶⁴ Economic and social situation also includes discrimination on the grounds of membership of a particular “economic or social group or strata”¹⁶⁵. In contrast to that, in chapter 2 it was argued that labour does no longer constitute a social group. And still, the category was meant to be open as to

159 See Preamble UDHR.

160 Ibid.

161 Art. 12 UDHR.

162 Art. 2 UDHR.

163 UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’, E/C.12/GC/20, 2 July 2009, available at <<http://www.refworld.org/docid/4a60961f2.html>>.

164 Ibid.

165 Ibid, p. 11.

include all forms of discrimination.

The ECHR also includes the prohibition of discrimination on grounds of status (Art. 14). While status was in the past interpreted so that it could be anything as long as it constitutes an individual characteristic, this view has changed. In the ECtHR's case law, a small landowner could now also fall under 'other status'.¹⁶⁶ Moreover, the Committee on economic, social and cultural rights states that the prohibition of discrimination extends to the private sphere and also to the workplace.¹⁶⁷ Within a company for example, being a worker could constitute a status. Moreover, taken from a different point of view, the employer could still justify a limitation of the right to privacy by referring to Art. 29 (2) UDHR on the restrictions of the rights in the declaration. As there is no reason for excluding workers from the rights set forth in the declaration, as the interests of the employers would also be covered by Art. 29 (2) UDHR, Art. 2 UDHR also prohibits the discrimination of workers in enjoying the rights in the declaration.

In addition to Art. 12 UDHR, Art. 23 (1) and Art. 24 UDHR grant everyone the right to just and favourable working conditions as well as the right to rest and leisure and the limitation of working hours. These Articles do not prohibit the use of monitoring software at the workplace, however, as has been shown in chapter 1.2, the use of such devices can reduce the quality of working conditions as workers who are constantly monitored by their employers are more likely to suffer from mental diseases, e.g. depression and fatigue.¹⁶⁸ Workplace surveillance also impacts on the working environment, since the employer's decision to monitor her employees is guided by distrust and puts a strain on the relationship between employee and employer.¹⁶⁹ Similarly, the use of sat-nav computers to monitor employees¹⁷⁰ conflicts with the right to rest and leisure (Art. 24 UDHR) and with the right to dignity (Art. 1 UDHR) as the employer is able to control every step of the employee thereby preventing the worker from taking breaks due to fear of disciplinary measures.

Despite all that, it is important to note that the UDHR is a non-binding document. Many of its provisions are very vague and leave room for interpretation, for example, whether the use of monitoring software affects the right to rest and leisure as well as the right to dignity may depend on the kind of software that is used and on the conditions under which this software is employed. Also, the meaning of rest and leisure from work may change depending on the values and interests of the individual concerned.

As has been mentioned before, Art. 29 (2) of the UDHR can restrict the enjoyment of the rights and freedoms laid down by the declaration, in cases where the rights and freedoms of others are under threat and as determined by law and if the limitation is necessary to secure public order, morality and the general welfare. Although restrictions are thus possible in theory, the conditions are cumulative and therefore very strict. The general welfare may extend to the economic well-being of a country, however, the economic interests of the employer in relation to workplace monitoring, in particular performance monitoring or competitiveness cannot be used to justify a restriction of the right to privacy as this represents a much stronger claim under the UDHR. In addition to that, Art. 30 UDHR states that no one may interpret the provisions of the declaration in a way that aims at the destruction of one of the rights laid down by the declaration. The rights set forth in the declaration, including the right to privacy, can never be declared void, but limitations can be justified in specific situations. This is important as it shifts the burden of proof onto the employer. Unless the employer presents good reasons as to why the right to privacy should be restricted, the employee may enjoy her right to privacy and may be protected against any monitoring measures. Economic

166 See ECtHR, *Chassagnon and Others v. France*, Appl. No. 25088/94, 20 April 1994, in U. Karpenstein and C.

Mayer, *EMRK: Konvention zum Schutz der Menschenrechte und Grundfreiheiten – Kommentar* (München: Verlag C.H. Beck 2012).

167 UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 20', 2009.

168 Mitrou and Karyda, 'Employees privacy vs. Employers security: Can they be balanced?', 164-178.

169 West and Bowman, 'Electronic Surveillance at Work', 628-651.

170 S. O'Connor, 'Amazon unpacked', FT investigations, *Financial Times*, 8 February 2013, available at <<https://www.ft.com/content/ed6a985c-70bd-11e2-85d0-00144feab49a>>.

reasons cannot justify such a limitation especially because it is not proven that workplace monitoring increases competitiveness or evaluates performance more accurately. Moreover, these claims do not increase public order, morality or the general welfare but rather increase the well-being of the employer while reducing the well-being of the employees.¹⁷¹ On the contrary, the prevention of a crime, e.g. software piracy, could justify a restriction as it can affect public order and the general welfare. In view of the provisions in Art. 30 UDHR, such an intervention must be based on concrete evidence and only after less intrusive measures have been tried.

4.1.2. ICCPR and ICESCR

The International Covenant on Civil and Political Rights was adopted in 1966 and entered into force ten years later, in 1976.¹⁷² Together with the ICESCR which was adopted in the same year, the ICCPR and the ICESCR include most of the rights that have been set forth in the UDHR.¹⁷³ In contrast to the UDHR, the ICCPR and the ICESCR contain binding commitments. According to this, they give effect to the principles and freedoms laid down by the UDHR and they provide individuals with the means to communicate violations of the ICCPR and ICESCR to the relevant treaty bodies through the individual petition procedure.¹⁷⁴

With regard to the protection of workers' privacy, the ICCPR takes over the provisions from the UDHR. Art. 17 ICCPR on the protection of the right to privacy, Art. 2 ICCPR on the non-distinction between human-beings and Art. 5 ICCPR on the prohibition to engage in activities aiming at the destruction of the rights in the treaty are based on Art. 12, Art. 2 and Art. 30 UDHR respectively.

In addition to that, the ICCPR adds another Article on non-discrimination stating that everyone is entitled to the same standard of protection of law (Art. 26 ICCPR).

The conditions under which states may derogate from the rights in the ICCPR are stricter as the ones laid down by the UDHR. According to Art. 4 (1) ICCPR, derogation can only be possible if the existence of the nation is threatened and as provided for by law and if the measures are non-discriminatory and do not conflict with international law. The ICCPR therefore, puts special emphasis on the principle of non-discrimination and equal protection. Derogation is only possible under exceptional conditions.

While the ICCPR contains mainly civil and political rights, the ICESCR comprises economic, social and cultural rights. The ICESCR explicitly mentions the rights and obligations of the employer and the employee.

Art. 7 ICESCR gives everyone the right to just and favourable working conditions. These include in particular a fair and equal remuneration of work (Art. 7 a), safe and healthy working conditions (Art. 7 b), equal opportunities for promotion (Art. 7 c) and the right to rest and leisure and a reasonable limitation of working hours and paid holidays (Art. 7 d). Moreover, the formulation "in particular" in Art. 7 ICESCR, reveals that the list is not exhaustive and may include other rights related to the enjoyment of favourable and just working conditions. The extent to which workplace surveillance falls under the provisions in Art. 7 ICESCR is subject to discussion. This may depend on the nature of the equipment that is used and on the consent of the employee. Nevertheless, as demonstrated in chapter 1.2, the use of workplace surveillance measures can impact on the workers' health, their right to rest and it can also affect the relationship between

171 See chapter 1.2.2.

172 S. Joseph and J. Kyriakakis, 'The United Nations and Human Rights', in S. Joseph and A. McBeth (eds), *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar publishing 2010), 1-35.

173 Ibid.

174 Ibid., the Optional Protocol to the ICCPR introducing the individual petition procedure was adopted in 1976, the Optional Protocol to the ICESCR was adopted in 2008, Individual petitions can be addressed to the Human Rights Committee (ICCPR) or to the Committee on Economic, Social and Cultural Rights (ICESCR).

employer and employee. The use of monitoring devices also brings with it a lot of insecurity for the worker. This insecurity is exacerbated in cases where there is no clear privacy policy in the company. This is the case when the worker knows that there is the possibility that she can be monitored, e.g. because of certain clauses in the employment contract, but where there is a lack of more specific explanations as to when the performance is monitored, how it is monitored and by which means. This insecurity can create psychological stress, especially when it is known that the company is using the data as evidence to dismiss employees.¹⁷⁵

4.2. International labour law: The ILO and the right to privacy at work

The ILO is the key institution contributing to the development of international labour standards and social justice.¹⁷⁶ It was founded in 1919 and forms part of the UN agencies system. The ILO's main decision-making institution is the ILO Governing body consisting of 28 member state representatives, 14 representatives of employers organisations and 14 representatives of workers associations.¹⁷⁷ Since its creation in 1919 it has adopted almost 200 binding Conventions and even more Recommendations on the rights of workers.¹⁷⁸ Moreover, the ILO has identified four core labour rights. These are the freedom of association, collective bargaining and industrial relations, the elimination of all forms of forced labour, the abolition of child labour and the protection of children and young persons and equality of opportunity and treatment.¹⁷⁹ The ILO further works to strengthen the dialogue between labour and management and between the Member States, it requires Member States to submit periodic reports on the measures taken to give effect to the provisions and it has established several special procedures that allow Member States or any member of the ILO Governing Body to file a complaint against another Member State for non-compliance with one of the provisions in the Conventions.¹⁸⁰

In 1997, the ILO adopted a non-binding Code of Practice on the protection of workers' personal data in order to provide guidance and to inspire and promote development of Member State legislation in this area.¹⁸¹ The Code of Practice includes both general principles on the protection of workers' personal data as well as more specific provisions on the collection, communication and use of personal data and on individual and collective rights related to data protection at the workplace.

Part 5 of the Code of Practice comprises the general principles of the protection of personal data at work. Several points can be made. First, the data should be collected and processed fairly, confidentially and according to law. Second, the worker shall be informed about the reasons for and the purposes of collecting data and shall be able to take part in discussions on privacy policies in the company. No change in purpose is allowed and the evaluation of workplace surveillance shall not be the only reason for collecting data. Third, decisions that have an impact on the employee shall not be based solely on the data collected, but can only be used in addition to other means. Fourth, the amount of data collected shall be minimised as much as possible and adequate measures protecting the privacy of employees shall be introduced. Fifth, the collection of personal data must not extend to the worker's sex life, political, religious or other beliefs and criminal convictions. Finally, in view of the fundamental nature of the right to privacy, workers cannot be excluded from privacy protection.

175 See for example, ECtHR, *Bărbulescu v. Romania*, Appl. No. 61496/08, 12 January 2016.

176 ILO, 'Protection of workers' personal data', An ILO Code of Practice, International Labour Office (Geneva: 1997).

177 ILO, 'About the Governing Body', available at <<http://ilo.org/gb/about-governing-body/lang—en/index.htm>>.

178 ILO, Normlex: 'Information System on International Labour Standards, Instruments', available at <<http://www.ilo.org/dyn/normlex/en/f?p=1000:12000::NO::>>.

179 ILO, Normlex: 'Information System on International Labour Standards, List of instruments by subject and status', available at <<http://www.ilo.org/dyn/normlex/en/f?p=1000:12030::NO::>>.

180 ILO, 'Applying and promoting international labour standards: ILO supervisory system', available at <<http://ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang—en/index.htm>>.

181 ILO, 'Protection of workers' personal data' (1997).

In the following Articles more detailed provisions are provided, for example, the data should be stored in a secure and confidential manner, communications of the workers' data to third persons shall only take place if the person is authorised to do so, workers' representatives shall be informed about monitoring measures, workers have the right to access their data and can correct or delete incorrect data and workers must give their written and informed consent. Moreover, certain data collection instruments such as truth-verification equipment or genetic screening as well as the collection of medical data are prohibited and can only be justified under exceptional circumstances.

While the Code admits that it is not possible to lay down more detailed principles or to prohibit any collection of personal data due to different employment situations, it argues that the collection of personal data about the employee should be an exception that needs to be justified and that needs to be as transparent as possible.¹⁸² It should be used only after less intrusive measures have been tried. The Code, however, makes many exceptions to this rule and it even allows employers to collect sensitive data provided that the employer has very compelling reasons to do so. The Code is nevertheless very clear on two aspects: The employees must be informed in advance before data is collected and they must be made aware of the reasons, purposes and the means. Moreover, the employer must choose the method of data collection that is the least intrusive for the employee.¹⁸³ Also, monitoring measures must be limited to a specific time period and shall not extend to constant surveillance.¹⁸⁴

The ILO Code of Practice therefore includes several important aspects that have not been addressed by other international bodies. Most importantly, the collection of workers' data should be an exception and any data collection method should be limited in time. The employee must be fully informed and may give her consent. If the consent is refused, the employer must not take disciplinary measures. Ultimately, any worker has the right to enjoy their fundamental right to privacy which means that unless the employer presents good reasons as to why the right to privacy should be restricted, the employee may be protected against any monitoring measures.

4.3. Regional human rights standards: The Council of Europe and the EU

Apart from international instruments, there are several regional organisations that are active in setting human rights standards, ensuring their protection and giving advice on human rights issues including the right to privacy in the employment context.

The Council of Europe (CoE) is the most important organisation in this regard. Since its creation in 1949 it has developed an effective and elaborated system of human rights protection.¹⁸⁵ Over the years the CoE has adopted over 200 human rights Conventions plus additional protocols. In the following, the ECHR and the ESC will be analysed with a view to the protection of workers' privacy.

4.3.1. CoE: ECHR and ESC

The ECHR was set up in 1950 and presents a legally binding document whose fundamental rights and freedoms can be subject to review by the ECtHR. Several protocols have added to the provisions set forth in the original document and improved the complaints procedure that makes it possible for individuals,

182 See Commentary on General principles, ILO, 'Protection of workers' personal data' (1997).

183 ILO, 'Protection of workers' personal data' (1997).

184 Ibid.

185 V. Mantouvalou and P. Voyatzis, 'The Council of Europe and the protection of human rights: a system in need of reform', in Joseph and McBeth (eds.) *Research Handbook on International Human Rights Law*, (Cheltenham: Edward Elgar publishing, Forthcoming, 2009).

organisations or states to submit complaints against a state party to the CoE.¹⁸⁶

Art. 8 (1) ECHR contains the right to respect for private and family life, home and correspondence. The right to privacy is a qualified right meaning that the enjoyment of this right can be restricted in accordance with law and if necessary in order to protect public safety, national security, the economic well-being of the country and if disorder and crime needs to be prevented, the health and morals needs to be protected and the rights of others must be safeguarded (Art. 8 (2) ECHR). Art. 14 ECHR includes the prohibition of discrimination on any grounds including status. Moreover, Art. 18 ECHR prohibits any limitation to the rights established by the Convention other than for the purposes already prescribed in the Art. 8 (2) ECHR.

In chapter 1.2, the interests of the employer in relation to workplace monitoring have been pointed out, e.g. economic interests such as performance monitoring, prevention of crimes committed at the the workplace and control over the company's equipment to prevent misuse of the employer's property.¹⁸⁷ Can these reasons justify a limitation of the right to privacy?

The wording in Art. 8 (2) ECHR reveals that this is a question of degree that requires careful balancing of the rights and interests of the employer as compared to the rights and interests of the employee. The justification of workplace monitoring on economic grounds for example, is not sufficiently backed by Art. 8 (2) ECHR as a single worker is not able to affect the economic well-being of a whole country nor is there any proof that workplace monitoring enhances the economic well-being of a country. Similarly, the provision on the prevention of crime and disorder at the workplace indicates that a certain threshold must be met for a crime to fall under Art. 8 (2) ECHR. Again, it is difficult to determine when this threshold is crossed. In the past, the ECtHR has often held that the ECHR needs to be interpreted as a “living instrument” by taking into account the bigger picture.¹⁸⁸ Therefore, since its judgement in *Niemietz v. Germany*, the ECtHR has increasingly broadened the scope of Art. 8 ECHR to meet new technological developments and the increasing use of monitoring devices at the workplace.¹⁸⁹ By referring to the “necessary requirement” (Art. 8 (2) ii ECHR), the Court has further established the principle of proportionality.¹⁹⁰ The principle holds that the monitoring measures need to follow a legitimate aim, the measures need to be suitable to achieve this aim, there are no less intrusive measures and advantages outnumber disadvantages. Moreover, the Court frequently referred to the right to work in the European Social Charter (Art.1) and how the blurring of private and public life can affect both the right to privacy as well as the right to work as employees should be allowed to establish and to cultivate social relations.¹⁹¹ The provisions of the ESC will be discussed in the following.

In 1961, the Council of Europe opened the European Social Charter for signature. The Charter is adding to the rights set forth in the ECHR by introducing social and economic rights. In 1996 it was revised to allow inter alia for better oversight procedures.¹⁹² With regard to the protection of privacy at work, Art. 2 on the right to just working conditions, Art. 3 in combination with Art. 11 on the right to safe and health working conditions, Art. 21 on the right to information and consultation and Art. 22 on the right to take part in the determination and improvement of working conditions and working environment, are of special importance. According to these Articles, employers are obliged to remove any causes of ill-health at the workplace (Art. 11 (1) ESC) and to inform and consult workers about the working conditions and decisions that may have an impact on the interests of the workers (Art. 2 (6); Art. 21 (1) and (2) ESC). The employer is also responsible

186 Mantouvalou and Voyatzis, ‘The Council of Europe and the protection of human rights’, 2009.

187 See for example, Eivazi, ‘Computer use monitoring and privacy at work’, 516-523.

188 M. Otto, ‘The right to privacy in employment: in search of the European Model of Protection’, 6 European Labour Law Journal 2015, 343-363, p. 349.

189 Ibid.

190 Ibid.

191 Ibid.

192 Mantouvalou and Voyatzis, ‘The Council of Europe and the protection of human rights’, 2009.

for introducing procedures through which the employee can take part in discussions on the improvement of working conditions and the working environment (Art. 22 (1) and (2) ESC).

This means that workers need to be informed about monitoring measures, they need to be consulted on decisions to use monitoring technology and they need to be able to influence these decisions. The ESC therefore calls for the active inclusion of workers in determining their working conditions and in being informed about the purpose and means of workplace monitoring. The ESC also obliges employers to refrain from monitoring measures that could severely impact on the health of the workers, e.g. genetic screening, intrusion of private communications and constant surveillance.

Article G in Part V of the ESC includes the restrictions to the rights laid down by the Charter. They equal the ones set forth in the ECHR, however, the ECtHR cannot rule on the ESC. It has however increasingly sought to interpret the provisions in the ECHR and the ESC as complementing each other rather than treating them as distinct categories of rights.¹⁹³ Nevertheless, oversight of the ESC is weak as Member States need to bound itself only to some Articles of the Charter and the provisions need to be implemented into national law which leaves the Member States with room for interpretation (Part V, Art. I ESC). Therefore, workers who have been subject to workplace surveillance have in the past decided to file a complaint against violation of the ECHR rather than starting reporting procedures under the ESC.¹⁹⁴

Apart from these binding instruments, the CoE has adopted two recommendations that are specifically addressed to the protection of privacy at the workplace: Recommendation (89)2 and Recommendation (2015)5.

Recommendation (2015)5 was adopted in April 2015 and revises the previous recommendation of 1989 to meet the new challenges of digitalisation and technological change. It builds on the Convention No. 108 on the protection of individuals with regard to the automatic processing of personal data (1989) and on the ILO Code of Practice (1997).¹⁹⁵ In fact, the CoE takes over many of the provisions that are in the ILO Code of Practice, while adding more specific guidelines on certain types of workplace monitoring such as video surveillance and monitoring devices revealing the location of the employee. In its recommendation, the CoE clearly states that the right to privacy codified in Art. 8 ECHR includes also the employment context. Moreover, it enumerates general principles that should guide any collection, storage or processing of personal data in the employment context. These are legitimate aim, no change in purpose, the principle of proportionality, transparency including the obligation to inform, consult and to seek the consent of the employee and the right of the employee to access stored data and to correct it. The CoE further stipulates that the employer should always opt for the least intrusive measure and, if possible, measures should be preventive, e.g. collecting data randomly and in a way that does not disclose the identity of the employee. Above that, sensitive data, e.g. data on the employee's health, should only be collected in rare circumstances and under special provisions (Part. I General Principles, No. 9). This data must also not be used to discriminate against employees. Importantly, the Recommendation states that the “the content, sending and receiving of private electronic communications at work should not be monitored under any circumstances”¹⁹⁶.

The CoE has thus established a comprehensive system of provisions related to the right to privacy in the employment context. The provisions are, however, fragmented, open and require a careful examination of the interests and rights of the persons concerned. For example, the use of equipment revealing the employee's

193 See above, M. Otto, ‘The right to privacy in employment: in search of the European Model of Protection’, 6 *European Labour Law Journal* 2015, 343-363, p. 349.

194 See cases ECtHR, *Niemetz v. Germany*, Appl. No. 13710/88, 16 December 1992, ECtHR, *Copland v. UK*, Appl. No. 62617/00, 3 April 2007, ECtHR, *Halford v. UK*, Appl. No. 20605/92, 25 June 1997.

195 D. Gabel, ‘Council of Europe: Recommendation on the Processing of Personal Data in the Context of Employment’, *White & Case*, 31 May 2015, available at <<https://www.whitecase.com/publications/article/council-europe-recommendation-processing-personal-data-context-employment>>.

196 Art. 14.4 Part. II Particular forms of Processing, Council of Europe, ‘Recommendation of the Committee of Ministers to Member States on the processing of personal data in the context of employment’, CM/Rec(2015)5, 1 April 2015.

position is allowed in cases where the principal purpose of monitoring is not to control the behaviour of employees but where it is just a consequence of pursuing other goals, e.g. ensuring effective working processes (Art. 16.1. CM Rec(2015) 5). However, in the absence of a clear policy on how this data is used, workers cannot be sure that the equipment is not used to monitor their performance in the first place.

4.3.2. EU: The Community Charter and the CFREU

The CoE is one of the main sources of EU human rights law, however, the EU has also adopted its own catalogue of fundamental rights and freedoms.

In 1989 the EU adopted the Community Charter of Fundamental Social Rights of Workers and ten years later, in 2000, the Charter of Fundamental Rights of the EU (CFREU) was ratified. The documents will be discussed in this section as they cannot confer any competence on the EU¹⁹⁷. They are thus part of the broader regulatory framework.

Both documents do not significantly deviate from the provisions that exist at the international and regional level. Importantly, the CFREU does not make a distinction between civil and political rights on the one hand and social and economic rights on the other. It therefore includes many provisions that have been laid down by the Community Charter in its Title IV on solidarity rights. With regard to workplace monitoring, the principles laid down by the CFREU are mostly in line with the ones set forth in the ECHR. This is also necessary as EU Member States are required to accede to the ECHR. As the EU itself is not part of the ECHR, both the CFREU and the ECHR must guarantee an equal level of protection, otherwise the Member States would always be in breach of either of the two human rights documents.¹⁹⁸

As has been discussed in chapter 3, Art. 7 includes the right to respect for private and family life, home and communications whereas Art. 8 comprises the right to the protection of personal data. The CFREU further includes the right to fair and just working conditions (Art. 31), the right to information and consultation (Art. 27), the right to property (Art. 17 (1)) and the prohibition of discrimination (Art. 21 (1)).

Art. 30 CFREU protects against unjustified dismissal which is especially important for workplace monitoring as it is not clear whether material gained through monitoring measures can constitute a reason for dismissal. For example, in *Halford v. UK*¹⁹⁹ and *Bărbulescu v. Romania*²⁰⁰, the employee was dismissed because of misuse of the company's electronic equipment which was detected because the employer has monitored the employees' use of such equipment. The use of monitoring software can therefore have very serious consequences for the employee, if the software is detecting something that the employer disapproves or prohibits.

Furthermore, Art. 52 CFREU on the scope of the rights states that the principles of proportionality, necessity, legitimate aim, protection of the rights and freedoms of others and laid down by law need to be fulfilled in order to justify any restriction of the rights in the CFREU.

According to Art. 51 (1) CFREU, the EU is bound by the provisions therein, on the contrary, the Member States are only bound by it when implementing Union acts.

Similar to the CoE, the CFREU therefore enacts the general principles of workplace monitoring, e.g. obligation to inform and to consult employees or to prohibit any discrimination on the basis of the data collected and it also introduces the need to balance the rights and interests of employer and employee. The right to protection from unfair dismissal adds to these principles and ensures that, in combination with the prohibition of discrimination, employees are protected from dismissal motivated by the data obtained via monitoring technology.

Many of the rights set forth in the Community Charter can be found in Title IV CFREU. Interestingly, Art. 18

197 See for example Title II Community Charter and Art. 51 (2) CFREU.

198 See for example the case ECtHR, *Bosphorus Airlines v. Ireland*, Appl No. 45036/98, 25 March 1997, the EU can nevertheless adopt a higher level of protection (Art. 52 (3) CFREU).

199 ECtHR, *Halford v. UK*, Appl. No. 20605/92, 25 June 1997.

200 ECtHR, *Bărbulescu v. Romania*, Appl. No. 61496/08, 12 January 2016.

(1) of the Community Charter states that workers need to be informed, consulted and invited to take part in decisions in particular when “technological changes which, from the point of view of working conditions and work organization, have major implications for the work-force, are introduced into undertakings”.

4.4. Discussion: The right to privacy at work in the broader regulatory framework

The analysis of the broader regulatory framework on the protection of the workers' privacy included universal human rights standards such as the UDHR, the ICCPR and the ICESCR, international labour law as exemplified by the ILO Code of Practice on the protection of workers' personal data, and regional human rights standards, e.g. the ECHR and the CFREU.

Although the documents have a different legal character (soft law and hard law) and are more or less specific with regard to the protection of the right to privacy at work, several important points can be made that bind EU action and limit the scope of EU legislation in relation to privacy and data protection at work.

All documents recognise the fundamental nature of the right to privacy. Workers are not excluded from the enjoyment of this right, but they are equally protected by it. The right to privacy is nevertheless a qualified right. As such, restrictions can be justified, if certain conditions are met. The requirements that need to be fulfilled do not vary considerably, however, while the ILO Code of Practice²⁰¹ and the UDHR²⁰² state that economic interests and in particular performance monitoring, cannot justify a limitation of the workers' right to privacy, the Council of Europe is more ambiguous in this respect.

Central to the protection of workers' privacy is the obligation to seek the informed consent of the employee. The ILO Code of Practice, the ESC and the CFREU state that the employer has a duty to inform her employees of the use of monitoring devices, the purposes, the means and the time period for which these devices are installed. They also prohibit any change in purpose or constant surveillance. The ILO Code of Practice further states that the worker must not face any disadvantages if she refuses to give her consent. The concept of informed consent is problematic, e.g. can you give your consent to let your employer violate your fundamental right to privacy? Eivazi²⁰³ (2011) and Yerby²⁰⁴ (2013) argue that the working contract lays down the rights and obligations of the worker and the employer. They argue that in exchange for work and salary, the worker allows the employer to restrict some of their fundamental rights including the right to privacy to make sure that their business runs smoothly. Nevertheless, workers cannot be denied their fundamental right to privacy, it is therefore the employer who has to justify her decision and who has to find compelling arguments as to why the employees should be monitored. Moreover, certain types of workplace monitoring measures, e.g. genetic screenings, review of sensitive data and in the case of CoE Recommendation (2015)5 private communications, are prohibited, because they constitute a gross violation of the right to privacy. Even in cases where the employee has given her consent, the collection of this kind of data still amounts to a violation of a human right.

Related to the argument of Eivazi (2011) and Yerby (2013), is the idea that it is possible to distinguish between public and private life. Following the argumentation of the ECtHR²⁰⁵ and taking into account the findings of chapter 2 and in particular the increase in non-standard forms of employment, e.g. more flexible working hours or crowd workers, the border between public and private life has become increasingly blurred. Consequently, the argument that workers are denied some of the rights they can enjoy in their private life,

201 Commentary on the ILO Code of Practice, General principles, Art. 5 (4), ILO, ‘Protection of workers' personal data’ (1997).

202 Art. 29 (2) UDHR.

203 Eivazi, ‘Computer use monitoring and privacy at work’, 516-523.

204 Yerby, ‘Legal and Ethical Issues of Employee Monitoring’, 44-45.

205 Otto, ‘The right to privacy in employment: in search of the European Model of Protection’, 343-363.

because of the public character of work relations²⁰⁶, has become difficult to uphold.

To conclude, the international regulatory framework lays down a number of general principles the EU needs to take into consideration when adopting legislation in relation to the protection of privacy at work. The use of monitoring technology needs to be proportionate; final, meaning that there is no other, less intrusive measure; transparent, e.g. informing and consulting the employees; limited in time; and non-discriminatory which means that information obtained via monitoring technology must not be the sole basis for decisions affecting the employee.²⁰⁷ In the end, however, the international regulatory framework remains very vague keeping the door open for exceptions. It will therefore come down to finding a balance between the rights and interests of the employer on the one hand and the rights and interest of the employee on the other.

Finally, to what extent is the EU bound by the international regulatory framework that has been established in this section? In general, human rights form part of the general principles of international law which are ranked below the EU treaties but above EU secondary legislation in the EU legal hierarchy.²⁰⁸ Moreover, the CFREU has the same legal value as the treaties (Art. 6 (1) TEU) and according to Art. 21 (1) TEU, the EU is obliged to promote international law. Apart from that, in *Bosphorus Airlines v. Ireland*, the ECtHR judged that, in view of the failed accession of the EU to the ECHR, the Member States can still be held liable for EU acts that violate the ECHR.²⁰⁹ Accordingly, both the ECJ as well as the ECtHR have an interest in the compatibility of EU acts with the ECHR. As a consequence, the international regulatory framework has a strong impact on the EU and on EU secondary legislation. How this is reflected in EU legislation on the protection of workers' privacy will be analysed in the next chapter.

5. EUROPEAN UNION POLICY DOCUMENTS, SECONDARY LEGISLATION AND CASE LAW ON THE PROTECTION OF WORKERS' PERSONAL DATA

In the previous chapters, the paper has established the framework for EU action with regard to the protection of workers' privacy. The competence conferring articles in relation to social and labour policy (Art. 153 TFEU) and in relation to data protection (Art. 16 TFEU) have been identified. In chapter 4, the international regulatory framework and in particular human rights treaties and international labour law, have been analysed to determine how EU action is bound by international law. This chapter will look at actual EU initiatives aiming at the protection of workers' personal data. It will be examined to what extent EU policy documents and secondary legislation reflect the international regulatory framework established in chapter 4 and the scope of EU competence set forth in the EU treaties. This chapter will therefore provide an insight into the level of protection offered by the EU against surveillance from the employer. The chapter will start with an analysis of relevant EU policy papers discussing the extent to which the EU should take action to protect the privacy of employees. The following section will continue by examining current data protection legislation, including the GDPR and the e-privacy directive (2002/58/EC). Also, secondary legislation related to working conditions and consultation and information of employees will be examined (directive 2002/14/EC). The final section will conclude by introducing the case of *Bărbulescu v. Romania* that is currently under examination by the Grand Chamber of the ECtHR. This chapter will therefore study the impact of European primary law on the protection of workers' privacy in practice.

206 See for example, Arthurs, 'Labour Law after Labour', 13-20.

207 See in particular: ILO, 'Protection of workers' personal data' (1997), General Principles, Art. 5.(5).

208 van Vooren and Wessel, *EU External Relations Law* (2014).

209 ECtHR, *Bosphorus Airlines v. Ireland*, Appl. No. 45036/98, 25 March 1997.

5.1. Policy documents on the right to privacy at work: Communications from the Commission

In chapter 3 it was established that the protection of workers' personal data touches on both labour law as well as on data protection legislation. Depending on what the EU wants to achieve, the Commission may decide whether it wants to use Art. 153 (1) b and e TFEU or Art. 16 (2) TFEU as the basis for legislative action.

In 2001, the Commission initiated a consultation process to find out whether EU legislative action on the right to privacy at the workplace was indeed necessary and desirable. The outcome of the consultation process provides an insight into the European point of view on privacy rights at work and it helps to evaluate the impact of current legislation on data protection at work. In the following, the content of the policy papers will be briefly discussed.

In August 2001, the Commission consulted the social partners on a range of questions about the protection of worker's privacy by directive 95/46/EC and by national laws. It asked the social partners for advice on the protection offered to workers and on the need to take action at Community level.²¹⁰ In order to provide additional input, it commissioned three comparative studies on data protection and employment in the EU (1999, 2001 and 2002). The Art. 29 Data Protection Working Party also contributed to the process by producing an opinion and an additional working document on the protection of privacy at work (Opinion 8/2001 and Working document, 2002).

The 1999 analytical study of law and practice on data protection in the employment context compared European Union legislation and Member State laws on the protection of privacy at work to determine whether the level of protection is adequate.²¹¹ The study found that while the European framework for data protection in the employment context was not extensive enough, national laws only provided a general framework that differed across the Member States.²¹² The study concluded that there is a need for EU action, however, it called for an open-ended approach that combines both general data protection principles as well as specific rules applicable to the workplace. This would be necessary as data protection at work does not only affect privacy rights, but also the right to health safety and welfare at work, non-discrimination and social mobility.²¹³ The study further argued that the EU should differentiate between the phase of relationship between employer and employee, e.g. recruitment or during employment; the type of data, e.g. personal facts or sensitive data; and data activity such as storage or processing of data. The idea was that by taking a differentiated approach to data protection in employment, the rules will be flexible enough to respond to new technological changes while guaranteeing a certain standard of protection.²¹⁴

The second and third study dealt with specific categories of data protection issues in the employment context: sensitive data (2002)²¹⁵ and monitoring and surveillance (2001)²¹⁶. Interestingly, the author of the studies argued that the protection of workers' privacy should fall under labour law. Nevertheless, both studies held that the general data protection principles should also be applicable to the employment context. Both in

210 European Commission, 'Communication from the Commission: First stage consultation of social partners on the protection of workers' personal data' (27 August 2001), available at <<http://ec.europa.eu/social/main.jsp?catId=708>>.

211 M. Freedland, 'Data protection and employment in the EU: An Analytical Study of the Law and Practice of Data Protection and the Employment Relationship in the EU and its Member States' (Oxford: 1999), available at <<http://ec.europa.eu/social/main.jsp?catId=708>>.

212 Ibid.

213 Ibid.

214 Ibid.

215 F. Hendrickx, 'Protection of workers' personal data in the EU: general issues and sensitive data' (completed in July 2002), p. 12, available at <<http://ec.europa.eu/social/main.jsp?catId=708>>.

216 F. Hendrickx, 'Protection of workers' personal data in the EU: surveillance and monitoring at work' (completed in October 2001), p. 97, available at <<http://ec.europa.eu/social/main.jsp?catId=708>>.

relation to workplace surveillance and monitoring as well as in relation to the protection of sensitive data, the studies found that general safeguards are in place, however, they are too abstract to provide guidance for employers.^{217 218} The author therefore concluded that EU action is necessary to clarify how employers can implement the general data protection principles in practice. This could be done by a directive or by adopting alternative, soft instruments such as Community Codes.²¹⁹

The study on surveillance and monitoring at work is of special importance for the paper. The author argued that there is no uniform and consistent approach to privacy issues in the employment context. Workers' privacy is protected by a combination of constitutional provisions, general privacy laws and employment laws. As a consequence, the author came to the conclusion that the EU could improve the situation by providing guidance as to the implementation of the general data protection principles in the employment context.²²⁰ Moreover, the 2001 study also referred to the outcome of the employment privacy seminar in Leuven in 2001. The scholars attending the seminar argued that the right to privacy should have direct horizontal effect which means that employees can invoke this right before courts.²²¹ The experts also addressed the blurring of boundaries between private and work life by stating that employers should only prohibit private use of business email accounts if the worker is able to access her private email account. Monitoring measures should be limited in time and must not extend to private communications. Further, employers should distinguish between traffic and content data.²²²

The Art. 29 Data Protection Working Party also contributed to the consultation process. In Opinion 8/2001, the Working Party affirmed the general data protection principles and their application to the employment context. In contrast to the policy documents that have been discussed this far, the Working Party announced that data protection at the workplace falls within data protection legislation and not within labour law, although it admitted that there is some interaction between the two.²²³ The Working put special emphasis on the need to balance the interests of the employer with the rights and freedoms of the employee and it called for further guidance from the EU.²²⁴ It also stressed that the consent of the employee could not justify any intrusion in the privacy of the employee.²²⁵

The working document on the surveillance of electronic communications which was adopted one year later, gave advice on the meaning of the general data protection principles and offered guidance to employers on the content of their companies' privacy policies. The working document introduced several principles that should guide the employer's decision, for example 'prevention is better than detection'.²²⁶ The employer should thus provide her employees with sufficient information on the use of internet or private communications at work or block some websites employees should not access.

Apart from that, the working document clarified that workers are not excluded from the right to privacy. Consequently, workers do have a legitimate expectation of privacy at the workplace. Their correspondence shall not be read and they have the right to develop relationships with other human beings which includes private communications at the workplace.

217 F. Hendrickx, 'Protection of workers' personal data in the EU: general issues and sensitive data' (2002), p. 81.

218 F. Hendrickx, 'Protection of workers' personal data in the EU: surveillance and monitoring at work' (2001), p. 114.

219 F. Hendrickx, 'Protection of workers' personal data in the EU: general issues and sensitive data' (2002).

220 F. Hendrickx, 'Protection of workers' personal data in the EU: surveillance and monitoring at work' (2001).

221 Ibid.

222 Ibid.

223 Art. 29 Data Protection Working Party, 'Opinion 8/2001 on the processing of personal data in the employment context', 5062/01/EN/Final WP 48, 13 September 2001, available at

<<http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2001/wp48en.pdf>>.

224 Ibid.

225 Ibid.

226 Art. 29 Data Protection Working Party, 'Working document on the surveillance of electronic communications in the workplace', 5401/01/EN/Final WP 55, 29 May 2002, available at

<http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2002/wp55_en.pdf>.

In October 2002, the Commission evaluated the information it has received in the second stage consultations of social partners on the protection of workers' personal data. With a view to the inconsistent level of protection offered to workers and the effect this could have on the enjoyment of fundamental rights and the functioning of the internal market, it decided that it would be necessary to take action.²²⁷

In relation to workplace monitoring and surveillance, the Commission sided with some of the stricter provisions proposed by the Working Party, e.g. private communications must not be opened, monitoring measures must not be used to evaluate a worker's performance and authorisation by a national data protection authority should always be considered when introducing workplace monitoring.²²⁸ To achieve this, the Commission sought to amend directive 95/46/EC by using Art. 138 and Art. 139 EC Treaty as the legal basis.²²⁹ Despite that, the Commission seemed to have forgotten about the more specific rules that should provide guidance to employers. While it agreed that the general data protection principles should also apply to the employment context, the Commission was less clear about how it wanted to ensure that the general principles are also implemented in practice.

In the end, the consultation process did not lead to an amendment of directive 95/46/EC or to the adoption of soft law measures. Instead, in 2009, the Commission started new consultations for a general reform of directive 95/46/EC.²³⁰ The result of which was the GDPR.²³¹ In the next section, the GDPR, the e-privacy directive (2002/58/EC) and EU secondary legislation on working conditions (2002/14/EC) will be examined to find out how much of what has already been discussed in the communications between 1999 and 2002 finally found their way into current legislation on data protection at the workplace.

5.2. EU secondary legislation on the right to privacy at work: GDPR, 2002/58/EC and 2002/14/EC

On 27 April 2016, the European parliament and the Council adopted the General Data Protection Regulation (2016/79) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. The GDPR represents the newest piece of EU legislation in the field of data protection and replaces directive 95/46/EC. The GDPR is based on Art. 16 (2) TFEU and on Art. 8 CFREU. As a regulation, the GDPR is "binding in its entirety and directly applicable in all Member States".²³²

Art. 5 GDPR includes the general principles of the processing of personal data. According to Art. 5 (1) a GDPR, personal data shall be processed according to law and in a fair and transparent manner. The data shall only be collected for legitimate purposes that are specified prior to the processing of that data. Any change in purpose without notification is not allowed (Art. 5 (1) b). Moreover, Art. 5 (1) c states that the amount of data collected needs to be proportionate and must be minimised as much as possible. The data must be up to date and correct and in cases where this is not so, the data must be deleted or rectified (Art. 5 (1) d). In addition to that, the storage of the data concerned must be limited and must not exceed the period for which it is necessary to keep the data in order to fulfil the purpose (Art. 5 (1) e). Finally, the security of the data processing must be ensured ((1) f). Compliance with these principles shall further be monitored by an independent authority (Art. 5 (2) GDPR). Based on Art. 5 (1) GDPR, it is therefore possible to formulate seven general principles that apply to the adequate processing of personal data: legitimacy, transparency,

227 European Commission, 'Second stage consultation of social partners on the protection of workers' personal data', 30 October 2002, available at <<http://ec.europa.eu/social/main.jsp?catId=708>>.

228 European Commission, 'Second stage consultation of social partners on the protection of workers' personal data' (2002).

229 Ibid.

230 Albrecht, *Das neue Datenschutzrecht der EU* (2017).

231 Ibid.

232 Art. 288 TFEU.

finality, proportionality, accuracy and retention of data, right to access and security. The principles match with the ones that are established by the international regulatory framework (chapter 4.4).

Art. 9 (1) GDPR prohibits the processing of special categories of data such as genetic and medical data and data revealing the political opinion, sexual orientation or religious beliefs of the data subject. However, according to Art. 9 (2), the processing of this kind of data may be allowed, if necessary in order to fulfil the obligations and rights of the controller and the data subject and with prior authorisation by Union or Member State law or in the form of a collective agreement. Art. 9 (2) includes the processing of special categories of data in the employment context. This is again very similar to international law on the protection of workers' privacy.²³³

Art. 23 GDPR lays down the circumstances under which restrictions to the rights and obligations set forth in the GDPR may be justified. Any restriction must respect the fundamental rights and freedoms, it must be necessary in a democratic society and the measures must be proportionate to the purpose of the limitation. Art. 23 GDPR also includes a list of legitimate purposes that can lead to a limitation of the provisions in the GDPR: national security, defence, the prevention and investigation of crimes, the general public interest, judicial independence, the enforcement of civil law claims, the protection of the data subject or the protection of the rights and freedoms of others.

Importantly, the GDPR states that the consent of the data subject is not sufficient to justify any intrusion into the right to privacy (Art. 7 and (43)). The GDPR recognises that it is problematic to determine whether the consent was indeed freely given, in particular when there is a clear imbalance between the data subject and the controller (43). Although this is especially true for the relationship between employer and employees, the GDPR does not explicitly mention it. Except for Art. 9, the GDPR makes very little reference to the protection of workers' personal data. Chapter IX on provisions relating to specific processing situations, includes one Article on the processing of personal data in the employment context (Art. 88 GDPR). According to Art. 88 (1), the Member States may, either by law or by collective agreements, lay down more specific rules governing the protection of personal data in the workplace. Art 88 (2) emphasises that any rules adopted on the basis of Art. 88 (1) shall safeguard the human dignity, legitimate interests and the fundamental rights of the workers. Particular emphasis is based on the transparency of data processing in the employment context. Further, the Member States are required to inform the Commission of the legislative acts adopted pursuant to Art. 88 (1) (Art. 88 (3)). The inclusion of Art. 88 in "provisions relating to specific processing situations", leaves doubts as to the application of the general data protection principles to the employment context. Moreover, the GDPR does not specify whether employers can be held liable for violations and whether the Commission is able to impose fines or other sanctions upon employers who are in breach of the provisions.²³⁴ However, taking into account the wording in Art. 88 (1) GDPR "more specific rules" and the initial proposal for a new data protection regulation that was submitted by the Commission in 2012²³⁵ and in particular Art. 124²³⁶ thereof, it becomes clear that the processing of personal data in the employment context shall not be exempted from these principles.

To conclude, it has become clear that while the Commission's proposal did take into account the outcome of

233 See for example, Council of Europe, 'Recommendation of the Committee of Ministers to Member States on the processing of personal data in the context of employment', CM/Rec(2015)5, 1 April 2015, Art.9; ILO, 'Protection of workers' personal data' (1997), general principles, Art. 6.

234 In contrast to the GDPR, the proposal for a regulation did specify that employers may also be punished for non-compliance with the principles laid down by the GDPR, European Commission, 'Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)', COM(2012) 11 final 2012/0011 (COD) (Brussels: 25 January 2012), Art. 79 (5) g.

235 Ibid.

236 Ibid, "The general principles on the protection of individuals with regard to the processing of personal data should also be applicable to the employment context"(124).

the consultation process and sought to provide some clarity about the protection of personal data at the workplace, the final GDPR very much preserves the status quo of directive 95/46/EC. The lack of clarity about the rules and principles that should apply to the processing of personal data in the workplace, remains. This lack of clarity shows that the protection of workers' personal data is still a controversial issue. This may also be the result of vague international law. As identified in chapter 4.4, the international framework on data protection at work is not very precise either and contains many exceptions. Also, the provisions on the protection of workers' privacy are often included in separate documents without a clear connection to the human rights treaties.

Another important initiative in relation to data protection is the e-privacy directive (2002/58/EC) on the processing of personal data in the electronic communications sector. The directive puts special emphasis on the confidentiality of communications. According to Art. 23, the confidentiality of communications also applies to business practices. On the contrary, Art. 5 (2) holds that the recording of communications and traffic data can be carried out if done as part of lawful business practice and if authorised by law.²³⁷ Art. 9 of the directive refers to the use of location data. Such data shall be made anonymous, unless the data subject has given her consent.²³⁸ Finally, in Art. 15 (1), the directive lays down the situations and circumstances that justify a limitation of the rights in the directive.²³⁹ They are identical with the ones set forth in Art. 23 GDPR. With regard to the e-privacy directive it is important to note that any violation of the secrecy of correspondence requires prior authorisation by law.

The GDPR and the e-privacy directive make reference to data protection in the employment context, but their provisions are vague and will not succeed in resolving the inconsistent application of the general data protection principles across the Member States. Nevertheless, by including the protection of workers' personal data in its data protection legislation, the EU recognises the fundamental nature of the right to privacy at work. Data processing at the workplace shall be subject to the same principles and rules as the processing of personal data that takes place outside the workplace.

On the contrary, there is only little legislation on working conditions and data protection at work. This may be the case because EU action in the field of labour and social policy is reduced to soft law measures, whereas in the field of data protection the EU can adopt binding legislation. However, the inclusion of workplace privacy under data protection legislation may also prevent the adoption of more detailed rules. Hence, directive 2002/14/EC establishing a general framework for informing and consulting employees in Europe, is one of the only ones that may be relevant to this study. According to Art. 4 (2) c of the directive, the employees shall be informed and consulted on decisions that have a substantial impact on work organisation and contractual relations. Because of its impact on working conditions, the use of monitoring surveillance at the workplace influences both.²⁴⁰ According to Art. 4 (2) c, the employer is therefore obliged to inform and consult her employees in due time about the introduction and use of monitoring technology. The obligation to inform and consult employees is, however, already covered by the principle of transparency that is central to data protection and that also forms part of the European data protection regime. EU legislative action in relation to data protection at work is therefore limited to data protection legislation.

Consequently, the new GDPR does not fill the gaps in current legislation on workplace privacy. As long as more specific rules are missing, the implementation of the general data protection principles will depend on

237 Directive (EC) No. 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *OJ* [2002] L 201/37, 31 July 2002.

238 *Ibid.*

239 *Ibid.*

240 See chapter 1.2.

far, the judges of the Grand Chamber did not issue a judgement on the case.

In their decision, the judges of the Grand Chamber could either follow the judgement of the Chamber or they could decide against it and in favour of a violation of Art. 8 ECHR. By accepting the argumentation of the Chamber, the judges would significantly increase the scope of action of the employer in relation to workplace monitoring as the employer accessed the private email account of the employee, collected and disclosed sensitive data and used this data to justify the dismissal of the employee, even though the company did not suffer any losses. The principles of transparency, proportionality and security would thus be reduced to a bare minimum, if existent at all. The Grand Chamber could argue that, since there is no common European standard on the protection of privacy at the workplace, the margin of appreciation would be very high. The Grand Chamber would thus have to accept even a low standard of protection. Such a judgement would restrict the workers' right to privacy and it would very likely lead to an increase the number of cases because it would not be possible to find out in advance whether certain monitoring measures would still be acceptable or not.

On the contrary, the Grand Chamber could decide that there has been a violation of Art. 8 ECHR. The Grand Chamber could thus account for the gaps in current data protection legislation and it could set a high standard of protection. In their judgement the judges could clarify some of the data protection principles by laying down specific requirements that need to be fulfilled to ensure compliance with the general data protection principles. For example, the judges could argue that it is not sufficient to warn employees that their activities can be monitored. Instead, employers need to specify when, why, by which means and how long workers will be monitored. The Grand Chamber could further assert that the collection of sensitive data requires prior authorisation by a national supervisory authority and that the disclosure of workers' personal data to third persons can only be allowed, if the respective worker has given her consent. The judges would therefore establish a certain standard of protection that could be applied by other courts and that can ultimately lead to new legislation that sets forth a higher standard of protection.

The case of *Bărbulescu v. Romania* divides judges and policy-makers alike. The case shows that the general principles of data protection can be interpreted in different ways, e.g. the principle of transparency ranges from mere notification of employees to comprehensive surveillance policies and the principle of proportionality is extremely vague to the extent that almost any measure could be justified even the disclosure of sensitive data to the whole workforce of a company. As long as there are no clear rules employers need to follow when monitoring their employees, there is the risk that employees are not protected at all. In this sense it will be interesting to see how the Grand Chamber of the ECtHR will decide in the case of *Bărbulescu v. Romania*.

6. CONCLUSION

The analysis of the right to privacy in the workplace has shown that the topic is controversial. While the use of internet and email at work increases and monitoring software is becoming increasingly popular among employers, the rules regulating their use remain inconsistent across EU Member States.²⁵⁶ The paper has provided an insight into the rules protecting the privacy of employees by examining the topic from different legal angles. In the last chapter of this paper, the findings will be briefly discussed and future developments in workplace privacy will be outlined.

In chapter 1, the paper introduced into the topic by explaining the impact of workplace surveillance on working conditions and on the relation between employer and employee. In chapter 2, the main features of industrial relations have been pointed out and it was argued that globalisation and new technological

²⁵⁶ See chapter 1.1. Introduction.

innovations have transformed labour and have produced the crisis of traditional labour law. The rights-based approach represents a solution to the mismatch between the goals and means of labour law as it calls for the recognition of fundamental labour rights. The analysis of the international regulatory framework on the protection of workers' privacy in chapter 4 has revealed that international organisations such as the ILO, the UN and the CoE are increasingly accepting this rights-based approach and are arguing in favour of the extension of general data protection principles to the workplace. In chapter 3, the competences of the EU in relation to workplace privacy have been identified. It was argued that the protection of workers' personal data concerns both labour and social policy as well as data protection legislation. The EU's competence in the former is limited to soft law measures, while in the area of data protection, the EU can adopt binding legislation. The influence of the EU treaties and of international law is clearly visible in EU initiatives on the right to privacy at the workplace. The GDPR which represents the centre piece of the Union's data protection regime, states that the general data protection principles including transparency, legitimacy, finality, proportionality, accuracy and retention of data, access to data and security, are also applicable to the employment context. However, more specific rules on how these principles should be implemented by employers are missing. Finally, although the GDPR argues that workers must not be exempted from the right to privacy, it does not manage to state this in a clear and unequivocal manner. Since the protection of workers' personal data would be too specific to include it in detail in the general data protection regulation, the EU would have to use the competence conferring Articles in relation to social and labour policy as the legal basis to lay down more precise rules on the protection of privacy in the employment context. So far, the EU did not adopt any guidelines on how the general principles should be implemented.

The case of *Bărbulescu v. Romania* showed how legal uncertainty and the inconsistent application of the general principles of data protection in the employment context can lead to legal disputes between employer and employee. The Grand Chamber's decision in this case could provide some clarity and it could also motivate policy-makers to adopt new rules that lay down clear and high standards of data protection in the workplace. Apart from that, the Commission could also decide to introduce soft law measures such as Codes of Practice and recommendations that include more specific rules on the protection of privacy at work. In this sense, the Art. 29 Data Protection Working Party's working document (2002) represents a step in the right direction because it lays down some guidelines on the minimum content of a company's internet policy.²⁵⁷ These guidelines can help to increase the transparency of data processing at the workplace which is beneficial for both employers as well as employees. This is important as maximum transparency is one of the most important principles in relation to privacy and data protection and in particular when there is an imbalance between the data subject and the controller.²⁵⁸ Therefore, Snowden's statement, "privacy is for the powerless, but transparency is for the powerful"²⁵⁹, is not only relevant for the relationship between the government and its citizens, but also between the employer and her employees.

Moreover, the Commission could also recommend to increase the power of the workers' representatives with regard to monitoring measures.^{260 261} As discussed in chapter 2, empowering the unions could make up for the imbalance between employer and employees. In the absence of hard laws on the protection of privacy at the workplace, providing the unions with an active role in framing and executing the company's internet usage

257 Art. 29 Data Protection Working Party, 'Working document on the surveillance of electronic communications in the workplace' (2002).

258 European Commission, 'Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data' (2012).

259 The quote is available at the website of amnesty international usa, campaign #unfollowme, the following link will lead you there <<https://www.amnesty.org/en/get-involved/unfollowme/>>.

260 European Commission, 'Second stage consultation of social partners on the protection of workers' personal data' (2002), p. 10.

261 Art. 29 Data Protection Working Party, 'Working document on the surveillance of electronic communications in the workplace' (2002), p. 15.

policy, would ensure that workers are sufficiently protected and do not depend on the employer's goodwill.

Finally, further research is needed to find out how these soft law measures should look like to receive sufficient support from workers' unions and employers' organisations. Taking a step back, it would also be necessary to revive the discussions on the future of industrial relations²⁶² and on the protection of the fundamental rights of workers in a changing working environment.

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²⁶² In 2006, the Commission published a green paper on the modernisation of labour law to meet the challenges of the 21st century. A white paper did not follow, see R. Blanpain, *European Labour Law* (2008).

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