WORKPLACE SURVEILLANCE: BIG BROTHER IS WATCHING YOU?

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Abstract

Only recently workplace surveillance has become a real concern of the international community. Very often we hear about employers who monitor and record the actions of their employees, in order to check for any breaches of company policies or procedures, to ensure that appropriate behaviour standards are being met and that company property, confidential information and intellectual property is not being damaged. Surveillance at workplace may include inter alia monitoring of telephone and internet use, opening of personal files stored on a professional computer, video surveillance. But what if this monitoring or recording breaches human rights?

In order to give practical examples for these means, we shall proceed to a chronological analysis of the most relevant cases dealt by the European Court of Human Rights along the time, in which the Strasbourg judges decided that the measures taken by the employers exceed the limits given by Article 8 of the Convention. After providing the most relevant examples from the Court's case-law in this field, we shall analyse the outcome of the recent Grand Chamber Barbulescu v. Romania judgment.

The purpose of this study is to offer to the interested legal professionals and to the domestic authorities of the Member States the information in order to adequately protect the right of each individual to respect for his or her private life and correspondence under the European Convention on Human Rights.

Keywords: *ECHR, employee, human rights, workplace surveillance.*

1. Introductive Remarks

We all have been in the situation, at one point, of using at work the company resources for personal interest. What did you do? Did you stop before doing it and thought you are not allowed to use them? Did you remember that the internal regulations prohibited the use of company resources by the employees? Or does your company have a policy for employee personal use of business equipment or a code of ethics and business conduct? Did you go to the management and asked for permission? Did you use them and thought that nobody else will find out? What if your employer decided to monitor the employees' communications and you did not even know? What if you knew, and you still have decided to use them anyhow? And if we would tell you that certain workplace surveillance techniques could violate your human rights? Most probably you will ask us: what does surveillance in the workplace have to do with human rights?

Through this study, we propose an analysis to increase the understanding between the protection of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "*European Convention on Human Rights*" or the "*Convention*") and one cosmopolite threat: workplace surveillance. The purpose of this study is to strengthen human protection at the national level, having in mind that the European Court for Human Rights (hereinafter the "*ECtHR*" or the "*Court*") represents the most developped regional jurisdiction on human rights[1]. To attain this purpose, the present study seeks to provide the most relevant examples from the Court's case-law in which workplace surveillance has been considered to breach the Convention.

It is indisputable that "*human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings*"[2], therefore all individuals have the right to complain if the domestic authorities[3], natural or legal persons violate their individual rights under the Convention in certain conditions.

Through time, individuals have filed complaints against the Contracting States of the Convention[4],

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[1] For general information on the European system of human rights protection instituted by the Council of Europe, please see Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 184-185, and Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 211 and following.

[2] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, Editura ERA, Bucuresti, 2000, p. 4.

[3] The domestic authorities can breach individual rights trough juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta Claudia Cliza, *Drept administrativ*, Partea a 2-a, Pro Universitaria Publishing House, Bucuresti, 2011, p. 14 and following, and Marta Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

[4] On the other side, it is important to have in mind also the European Union. For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, *Case-law aspects concerning the regulation of states obligation to make good the damage caused to individuals, by infringements of European Union law*, in the Proceedings of CKS eBook, Pro Universitaria Publishing House, Bucharest, 2012, p. 999-1008.

arguing that a breach of the Convention rights has resulted from workplace surveillance which can track an employee's every move. As it is easy to imagine, this is possible because each individual has the right to privacy.

Please note that Article 8 (right to respect for private and family life, home and correspondence) of the Convention provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"[5].

In order to determine whether the interference by the authorities with the applicants' private life or correspondence was necessary in a democratic society and a fair balance was struck between the different interests involved, the European Court of Human Rights examines whether the interference was in accordance with the law, pursued a legitimate aim or aims and was proportionate to the aim(s) pursued.

According to this article, "*the respect for the right to private life, family life, the respect for the domicile of a person and the secrecy of his/her correspondence impose, first of all, negative obligations on the part of the state authorities*[6]". Besides these negative obligations, the public authorities have positive obligations, which are necessary for ensuring effective respect for private and family life.

What should we understand by the notion "private life"? Can it be defined precisely or is it blurred? We totally agree that "*it is a notion whose content varies depending on the age to which it relates, on the society in which the individual lives, and even on the social group to which it belongs*"[7]. As it is stated in the Court's case-law and it is widely recognized in the legal doctrine, the Convention is "a living instrument (…) which must be interpreted in the light of present-day conditions"[8], fact that raises many challenges for its judges.

Even in the Court's opinion, the notion of "private life" is a broad term which is not susceptible to exhaustive definition. Everyone has the right to live privately, away from unwanted attention. In a famous judgment, *Niemietz v.* Germany[9], the Court also considered that "*it would be too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his or her own personal life as he or she chooses, thus excluding entirely the outside world not encompassed within that circle*"[10].

The notion of "private life" may include professional activities[11] or activities taking place in a public context[12].

2. ECHR's Relevant Case-law on Incompatibility Between Workplace Surveillance and Article 8 of the Convention

According to the experts, nowadays employers use many technologies to monitor their staff at work in order to discover their web-browsing patterns, text messages, screenshots, social media posts, private messaging applications. Are all these technologies compatible with the right to respect for private and family life, home and correspondence?

Surveillance at workplace may include *inter alia* monitoring of telephone and internet use, opening of personal files stored on a professional computer, video surveillance. In order to give practical examples for these means, we will proceed to a chronological analysis of the most relevant cases dealt by the Court along the time, in which the Strasbourg judges decided that the measures taken by the employers exceeds the limits given by the Article 8 of the Convention.

One interesting case in monitoring of telephone and internet use is *Halford v. the United Kingdom*[13]. The applicant, Ms Halford, was the highest-ranking female police officer in the United Kingdom (Assistant Chief Constable with the Merseyside police). She decided to bring discrimination proceedings in front of the British courts of law because she had been denied promotion during the years: on eight occasions in seven years, she applied unsuccessfully to be appointed to the rank of Deputy Chief Constable, in response to vacancies arising within Merseyside and other police authorities. One of her allegations before the ECtHR in this respect was that her office and home telephone calls had been intercepted in order to obtain

[5] Please see the European Convention on Human Rights, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf, p. 10.

[6] Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

[7] *Idem*, p. 602.

[8] *Tyrer v. The United Kingdom*, application no. 5856/72, judgment dated 25.04.1978, para. 31, available at http://hudoc.echr.coe.int/eng?i=001-57587.

[9] Application no. 13710/88, Judgment dated 16 December 1992, available at http://hudoc.echr.coe.int/eng?i=001-57887.

[10] *Idem*, para. 29.

[11] Case of *Fernández Martínez v. Spain*, application no. 56030/07, judgment dated 12 June 2014, para. 110, available at http://hudoc.echr.coe.int/eng?i=001-145068, and case of *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment dated 27 May 2013, paras. 165-66, available at http://hudoc.echr.coe.int/eng?i=001-115871.

[12] Case of *Von Hannover v. Germany (no. 2)*, application nos. 40660/08 and 60641/08, judgment dated 7 February 2012, para. 95, available at http://hudoc.echr.coe.int/eng?i=001-109029.

[13] Application no. 20605/92, judgment dated 25 June 1997, available online at http://hudoc.echr.coe.int/eng?i=001-58039.

information against her in the course of the domestic proceedings.

Because of her job, Ms Halford was provided with her own office and two telephones (one for private use) which were part of the Merseyside police internal telephone network (*i.e.* a telecommunications system outside the public network). Since she was frequently "on call", a substantial part of her home telephone costs was paid by the Merseyside police. Unfortunatelly, no restrictions were placed on the use of these telephones and no guidance was given to the applicant.

The Court held that, in this case, there had been a violation of Article 8 of the Convention as regards the interception of telephone calls made on the *applicant's office telephones*. The Court considered that there was a reasonable likelihood that this interception was made by the police with the primary aim of gathering material against the applicant in the defence of the sex-discrimination proceedings she instituted. The Court noted that this interception made by a public authority represented an interference with the exercise of the applicant's right to respect for her private life and correspondence. Additionally, after analyzing the domestic applicable law, the Court noted that there was no legal provision regulating interception of telephone calls made on internal communications systems operated by public authorities, therefore the respective measure could not have been interpreted as being in accordance with the law.

Aditionally, the Court considered that the United Kingdom violated Article 13 (right to an effective remedy) of the Convention, since the applicant had been unable to seek relief at national level in relation to her complaint concerning her office telephones.

On the other hand, surprisingly, the Court held that there had been no violations of Articles 8 and 13 of the Convention as regards the interception of telephone calls made on the *applicant's home telephone*, since it did in particular not find it established that there had been interference regarding those communications. The Court observed that the only item of evidence which tended to suggest that the home calls were being intercepted had been the information concerning the discovery of the Merseyside police checking transcripts of conversations. The applicant provided to the Court with more specific details regarding this discovery (*i.e.* that it was made on a date after she had been suspended from duty), but the Court noted that this information might be unreliable since its source has not been named. Even if it had been assumed to be true, the fact that the police had been discovered checking transcripts of Ms Halford's telephone conversations "*on a date after she had been suspended does not necessarily lead to the conclusion that these were transcripts of conversations made from her home*"[14].

Judge Russo filed a dissenting opinion to this judgment for the non-violation of Article 13 of the Convention in relation to the applicant's complaint that telephone calls made from her home telephone were intercepted. We also consider that Ms Halford had an arguable claim of a violation of Article 8 in respect of her home telephone and she was entitled to an effective remedy in the United Kingdom in respect to this point.

In another interesting case against the United Kingdom, *Copland*[15], the applicant, Ms Copland complained that during her employment in a statutory body administered by the state (the Carmarthenshire College), her telephone, e-mail and internet usage had been monitored. She was appointed personal assistant to the College Principal and from the end of 1995 she was required to work closely with the newly appointed Deputy Principal, with whom at one point it was supposed to have an improper relationship. The Deputy Principal ordered that the applicant's telephone, e-mail and Internet usage to be monitored, during her employment (although at the College there was no policy in force regarding the monitoring of telephone, e-mail or Internet usage by employees).

The Court held that there had been a violation of Article 8 of the Convention since the collection and storage of personal information obtained from the telephone calls, e-mails and internet usage, without he knowledge, had amounted to an interference with her right to respect for her private life and correspondence. The applicant had not been given a warning that her calls, e-mails and personal internet usage would be monitored, fact which created a reasonable expectation as to the privacy of her correspondence.

In *Antović and Mirković v. Montenegro*[16], the Court was asked to decide if an invasion of privacy complaint brought by two university lecturers (University of Montenegro's School of Mathematics) after installing in the university amphiteatres video surveillance, at the dean's decision.

The applicants filed a complained with the Montenegrin Personal Data Protection Agency which upheld their complaint and ordered the removal of the respective cameras, particularly on the grounds that the reasons for the introduction of video surveillance had not been met, since no evidence existed regarding a danger to the safety of people and property and the university's further stated aim of surveillance of teaching was not among the legitimate grounds for video surveillance. The domestic courts overturned this decision in the civil proceedings on the grounds that the university was a public institution, carrying out activities of public interest, including teaching. Therefore, the amphitheatres were a working area, where professors were together with students, and they could not invoke any right to privacy that could be

[14] *Idem*, para. 59.

[15] Case of *Copland v. the United Kingdom*, application no. 62617/00, judgment dated 3 April 2007, available at http://hudoc.echr.coe.int/eng?i=001-79996.

[16] Case of *Antović and Mirković v. Montenegro*, application no. 70838/13, judgment dated 28 November 2017, available at http://hudoc.echr.coe.int/eng?i=001-178904.

violated because of the video surveillance. It is also implied that the professors could not invoke the fact that the respective data collected with such surveillance cameras be considered personal data.

The professors argued that they had no effective control over the information collected through the surveillance system and that the surveillance had been unlawful. Since the cameras had been installed in public areas, the Montenegrin courts of law rejected a compensation claim arguing that the question of private life had not been at issue.

The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention, considering that the camera surveillance had amounted to an interference with the applicants' right to privacy and that the evidence showed that that surveillance had violated the provisions of domestic law.

In the very recent judgment of *López Ribalda and Others v. Spain*[17], dated 9 January 2018, the Court held that there had been a violation of Article 8 of the Convention, finding that the Spanish courts had failed to strike a fair balance between the applicants' right to privacy and the employer's property rights. This case concerned the covert video surveillance of a Spanish supermarket chain's (*i.e.* M.S.A., a Spanish family-owned supermarket chain) employees after suspicions of theft had arisen. After noting some irregularities between the supermarket stock levels (losses in excess of EUR 7,780 in February, EUR 17,971 in March, EUR 13,936 in April, EUR 18,009 in May and EUR 24,614 in June 2009), the employer installed surveillance cameras (visible for customer thefts and hidden for employee thefts – zoomed in on the checkout counters). The employees were informed only about the installation of the visible cameras. After ten days of surveillance, all the employees suspected of theft were called to individual meetings, where the applicants admitted their implication in the thefts. The applicants were dismissed on disciplinary grounds mainly based on the video material, which they alleged had been obtained by breaching their right to privacy.

The Court underlined that under Spanish law the applicants should have been informed that they were under surveillance, but in fact they had not been. The employer's rights could have been safeguarded by other means and it could have provided the applicants at the least with general information about the surveillance.

3. *Barbulescu v Romania*, the Milestone in the ECHR's Recent Case-Law on Workplace Surveillance

This case concerns the surveillance of Internet usage in the workplace and was brought to the attention of the Court on 15 December 2008[18]. The applicant born in 1979, lived in Bucharest and from 01 August to 06 August 2007 was employed in the Bucharest office of a Romanian private commercial company as a sales engineer. For the purpose of responding to the customers' enquiries, at his employer's request, Mr Barbulescu had to create an instant messaging account using Yahoo Messenger, an online chat service offering real-time text transmission over the internet (while he already had another personal Yahoo Messenger account).

The internal regulations prohibited the use of company resources by the employees, but it did not contain any reference to the possibility for the employer to monitor employees' communications.

From the evidence submitted by the Romanian Government to the Court, it appears that the applicant had been informed of the employer's internal regulations and had signed a copy of those internal regulations, after acquainting himself with their contents.

From the evidence it appears that from 05 to 13 July 2007, the employer recorded the applicant's Yahoo Messenger communications in real time, and on 13 July 2007 (at 4.30 p.m.), the applicant was summoned to give an explanation. The relevant notice was worded as follows: "*Please explain why you are using company resources (internet connection, Messenger) for personal purposes during working hours, as shown by the attached charts*". The charts attached indicated that his internet activity was greater than that of his colleagues. It is interesting that at that stage, he was not informed whether his communications monitoring activities had also concerned their content.

On that same day, the applicant informed the employer in writing that he had used Yahoo Messenger for work-related purposes only. In the afternoon (at 5.20 p.m.), the employer again summoned him to give an explanation in a notice worded as follows: "*Please explain why the entire correspondence you exchanged between 5 to 12 July 2007 using the S. Bucharest [internet] site ID had a private purpose, as shown by the attached forty-five pages*". The forty-five pages mentioned in the notice consisted of a transcript of the messages which the applicant had exchanged with his brother and his fiancée during the period when he had been monitored; those messages related to personal matters and some were of an intimate nature. The

[17] Cases of *Isabel López Ribalda against Spain*, *María Ángeles Gancedo Giménez and Others against Spain*, applications nos. 1874/13 and 8567/13, available at http://hudoc.echr.coe.int/eng?i=001-179881.

[18] Case of *Barbulescu v Romania*, application no. 61496/08, Judgment of the Grand Chamber dated 05 September 2017, available at https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Barbulescu%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-177082%22]}.

transcript also included five messages that the applicant had exchanged with his fiancée using his personal Yahoo Messenger account, which did not contain any intimate information.

Later that same day, the applicant informed the employer in writing that in his view it had committed a criminal offence, namely breaching the secrecy of correspondence.

On 01 August 2007 the employer terminated the applicant's contract of employment.

The applicant challenged his dismissal in an application to the Bucharest County Court, asking to:

1. set aside the dismissal,
2. order his employer to pay him the amounts he was owed in respect of wages and any other entitlements and to reinstate him in his post,
3. order the employer to pay him 100,000 Romanian lei (approx. 30,000 euros) in damages for the harm resulting from the manner of his dismissal,
4. reimburse his costs and expenses.

As to the merits, relying on the case Copland v. the United Kingdom[19], he argued that an employee's telephone and email communications from the workplace were covered by the notions of "*private life*" and "*correspondence*", being therefore protected by Article 8 of the Convention. He also underlined that the dismissal decision was unlawful and that his employer had breached the Romanian criminal law, by monitoring his communications and accessing their contents.

The applicant noted the manner of his dismissal and alleged that he had been subjected to harassment by his employer through the monitoring of his communications and the disclosure of their contents "*to colleagues who were involved in one way or another in the dismissal procedure*"[20]. For this reason, we consider that the highly sensitive messages obtained from the transcripts should have been restricted to the disciplinary proceedings, fact which exposes his employer to the accusal that it went far beyond what was necessary with its interference.

In a judgment of 07 December 2007, the Bucharest County Court rejected the applicant's application and confirmed that his dismissal had been lawful.

The relevant parts of the judgment read as follows:

*"*In the present case, since the employee maintained during the disciplinary investigation that he had not used Yahoo Messenger for personal purposes but in order to advise customers on the products being sold by his employer, the court takes the view that an inspection of the content of the [applicant's] conversations was the only way in which the employer could ascertain the validity of his arguments.

The employer's right to monitor employees in the workplace, [particularly] as regards their use of company computers, forms part of the broader right, governed by the provisions of Article 40 (d) of the Labour Code, to supervise how employees perform their professional tasks.

Given that it has been shown that the employees' attention had been drawn to the fact that, shortly before the applicant's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes, and that the employees had been warned that their activities were being monitored (see notice no. 2316 of 3 July 2007, which the applicant had signed [after] acquainting himself with it – see copy on sheet 64), the employer cannot be accused of showing a lack of transparency and of failing to give its employees a clear warning that it was monitoring their computer use.

Internet access in the workplace is above all a tool made available to employees by the employer for professional use, and the employer indisputably has the power, by virtue of its right to supervise its employees' activities, to monitor personal internet use.

Such checks by the employer are made necessary by, for example, the risk that through their internet use, employees might damage the company's IT systems, carry out illegal activities in cyberspace for which the company could incur liability, or disclose the company's trade secrets.

The court considers that the acts committed by the applicant constitute a disciplinary offence within the meaning of Article 263 § 2 of the Labour Code since they amount to a culpable breach of the provisions of Article 50 of S.'s internal regulations ..., which prohibit the use of computers for personal purposes.

The aforementioned acts are deemed by the internal regulations to constitute serious misconduct, the penalty for which, in accordance with Article 73 of the same internal regulations, [is] termination of the contract of employment on disciplinary grounds.

Having regard to the factual and legal arguments set out above, the court considers that the decision complained of is well-founded and lawful, and dismisses the application as unfounded"[21].

As the Bucharest County Court underlined, the employer was obliged to inspect the content of the applicant's conversations since the employee affirmed that he had not used Yahoo Messenger for personal purposes. The Court confirmed that the employer had ther right to monitor employees and the employees had been previously informed about the prohibition of the use of computers for personal purposes.

Unsatisfied by the reasoning of the Bucharest County Court, the applicant then appealed the respective judgment to the Bucharest Court of Appeal, by adding that the court had not struck a fair balance between the interests at stake, unjustly prioritising the employer's interest in enjoying discretion to control its employees' time and resources. He further argued that

[19] Cited above.
[20] Case of *Barbulescu v Romania*, application no. 61496/08, Judgment of the Grand Chamber dated 05 September 2017, para. 26.
[21] *Idem*, para. 28.

neither the internal regulations nor the information notice had contained any indication that the employer could monitor employees' communications.

The Bucharest Court of Appeal dismissed the applicant's appeal in a judgment of 17 June 2008, by underlying that:

"In conclusion, an employer who has made an investment is entitled, in exercising the rights enshrined in Article 40 § 1 of the Labour Code, to monitor internet use in the workplace, and an employee who breaches the employer's rules on personal internet use is committing a disciplinary offence that may give rise to a sanction, including the most serious one.

There is undoubtedly a conflict between the employer's right to engage in monitoring and the employees' right to protection of their privacy. This conflict has been settled at European Union level through the adoption of Directive no. 95/46/EC, which has laid down a number of principles governing the monitoring of internet and email use in the workplace, including the following in particular. (...)

In view of the fact that the employer has the right and the duty to ensure the smooth running of the company and, to that end, [is entitled] to supervise how its employees perform their professional tasks, and the fact [that it] enjoys disciplinary powers which it may legitimately use and which [authorised it in the present case] to monitor and transcribe the communications on Yahoo Messenger which the employee denied having exchanged for personal purposes, after he and his colleagues had been warned that company resources should not be used for such purposes, it cannot be maintained that this legitimate aim could have been achieved by any other means than by breaching the secrecy of his correspondence, or that a fair balance was not struck between the need to protect [the employee's] privacy and the employer's right to supervise the operation of its business.

Accordingly, having regard to the considerations set out above, the court finds that the decision of the first-instance court is lawful and well-founded and that the appeal is unfounded; it must therefore be dismissed, in accordance with the provisions of Article 312 § 1 of the C[ode of] Civ[il] Pr[ocedure]"[22].

Additionally, on 18 September 2007, the applicant had lodged a criminal complaint against the statutory representatives of the Romanian company, alleging a breach of the secrecy of correspondence (a right enshrined in Article 28 of the Romanian Constitution). On 09 May 2012, the Directorate for Investigating Organised Crime and Terrorism (DIICOT) of the prosecutor's office attached to the Supreme Court of Cassation and Justice of Romania ruled that there was no case to answer, on the grounds that the company was the owner of the computer system and the internet connection and could therefore monitor its employees' internet activity and use the information stored on the server, and in view of the prohibition on personal use of the IT systems, as a result of which the monitoring had been foreseeable. The applicant did not avail himself of the opportunity provided for by the applicable procedural rules to challenge the prosecuting authorities' decision in the domestic courts.

After exhausting all the domestic remedies relevant to the alleged violations, Mr Barbulescu filed an application to the ECtHR, relying on Article 8 of the Convention. The applicant complained, in particular, that his employer's decision to terminate his contract (after discovering that he was using their internet for personal purposes during work hours) had been based on a breach of his right to respect for his private life and correspondence as enshrined in Article 8 of the Convention and that the domestic courts had failed to comply with their obligation to protect his right.

The application was allocated to the Fourth Section of the Court, and on 12 January 2016 a Chamber of that Section unanimously declared the complaint concerning Article 8 of the Convention admissible and the remainder of the application inadmissible.

The Court analysed the relevant domestic law (the Romanian Constitution, the Criminal Code, the Civil Code, the Labour Code, and the Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data), as well as the international law and practice (the United Nations standards[23], the Council of Europe standards[24], the European Union law[25], the comparative law[26]).

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[22] *Idem*, para. 30.

[23] The Guidelines for the regulation of computerized personal data files, adopted by the United Nations General Assembly on 14 December 1990 in Resolution 45/95 (A/RES/45/95), the Code of Practice on the Protection of Workers' Personal Data issued by the International Labour Office in 1997, the Resolution no. 68/167 on the right to privacy in the digital age, adopted by the United Nations General Assembly on 18 December 2013 (A/RES/68/167).

[24] The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which entered into force on 1 October 1985, the Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment, which was adopted on 1 April 2015.

[25] The Charter of Fundamental Rights of the European Union (2007/C 303/01), Directive 95/46/EC of the European Parliament and of the Council of the European Union of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC published in OJ 2016 L 119/1, entered into force on 24 May 2016 and will repeal Directive 95/46/EC with effect from 25 May 2018.

[26] The Court analysed the legislation of the Council of Europe member States, in particular a study of thirty-four of them, which indicate that all the States concerned recognise in general terms, at constitutional or statutory level, the right to privacy and to secrecy of correspondence. However, only Austria, Finland, Luxembourg, Portugal, Slovakia and the United Kingdom have explicitly regulated the issue of workplace privacy, whether in labour laws or in special legislation. With regard to monitoring powers, thirty-four Council of Europe member States require employers to give employees prior notice of monitoring (e.g. notification of the personal data-protection authorities or of workers'

In its judgment of 12 January 2016, the Chamber held that Article 8 of the Convention was applicable and found that the case differed from Copland v. the United Kingdom[27] and Halford v. the United Kingdom[28]. The significant difference was that the internal regulations in this case strictly prohibited employees from using company computers and resources for personal purposes. Since a transcript of the applicant's communications had been used as evidence in the Romanian court proceedings, the Chamber concluded that his right to respect for his private life and correspondence was involved.

The Chamber also acknowledged that Romania had positive obligations towards Mr Barbulescu because the dismissal decision had been taken by a private-law entity. From this perspective, the Chamber analised if the domestic authorities had struck a fair balance between, on one part, Mr Barbulescu's right to respect for his private life and correspondence and, on the other part, his employer's interests. The Chamber noted that Mr Barbulescu had been able to bring an action before the competent court of law which found that he committed a disciplinary offence.

The Chamber retained the fact that the employer had accessed the contents of the applicant's communications only after Mr Barbulescu had declared that he had used the respective Yahoo Messenger account for work-related purposes.

It then held, by six votes to one, that there had been no violation of Article 8 of the Convention (except for the Portuguese judge Paulo Pinto de Albuquerque, who's partly dissenting opinion was annexed to the Chamber judgment[29]).

On 12 April 2016, the applicant requested the referral of the case to the Grand Chamber[30] and on 06 June 2016 a panel of the Grand Chamber accepted the request. Considering that the respective case presents interest for all the Member States, President Guido Raimondi allowed the French Government[31] and the European Trade Union Confederation[32] to intervene in the written procedure of this case.

A hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 2016.

By eleven votes to six, the Court held that there had been a violation of Article 8 of the Convention, finding that the domestic authorities had not adequately protected the applicant's right to respect for Mr Barbulescu's correspondence and private life. This violation was due to the failure to strike a fair balance between the interests at stake, *i.e.* determining if the applicant had received a prior notice from his employer regarding the possibility that his communications might be monitored, or if he had been informed of the nature or the extent of the monitoring, or the degree of the intrusion into his private life and correspondence. Additionally, the Romanian courts of law had failed to determine the reasons justifying such monitoring measures, if the employer could have used certain measures less intruding into his private life and correspondence and if the communications might have been accessed without his knowledge.

The Grand Chamber acknowledged the delicate character of the *Barbulescu* case which was heightened by the nature of certain of the applicant's messages (referring to the sexual health problems affecting the applicant and his fiancée and to his uneasiness with the hostile working environment), requiring protection under Article 8. The employer incorrectly proceeded when decided to access not only Mr Barbulescu's professional Yahoo Messenger account created by the applicant at his employer's request, but also Mr Barbulescu's own personal account (entitled "Andra loves you" which is obvious that has no relationship with performing the applicant's professional duties).

representatives). The existing legislation in Austria, Estonia, Finland, Greece, Lithuania, Luxembourg, Norway, Poland, Slovakia and the former Yugoslav Republic of Macedonia requires employers to notify employees directly before initiating the monitoring. In, Austria, Denmark, Finland, France, Germany, Greece, Italy, Portugal and Sweden, employers may monitor emails marked by employees as "private", without being permitted to access their content. In Luxembourg employers may not open emails that are either marked as "private" or are manifestly of a private nature. The Czech Republic, Italy and Slovenia, as well as the Republic of Moldova to a certain extent, also limit the extent to which employers may monitor their employees' communications, according to whether the communications are professional or personal in nature. In Germany and Portugal, once it has been established that a message is private, the employer must stop reading it.

[27] Cited above.

[28] Cited above.

[29] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22], %22itemid%22:[%22001-159906%22]}. The judge shared the majority's starting point (interference with Article 8 of the Convention), but disagreed with their conclusion, since he considered that Article 8 was violated.

[30] In his observations before the Grand Chamber, Mr Barbulescu complained for the first time about the 2012 rejection of the criminal complaint filed in connection with an alleged breach of the secrecy of correspondence. Since this new complaint was not mentioned in the decision of 12 January 2016 as to admissibility, which establishes the boundaries of the examination of the application, it therefore falls outside the scope of the case as referred to the Grand Chamber, which did not have jurisdiction to deal with it.

[31] The French Government gave a comprehensive overview of the applicable provisions of French civil law, labour law and criminal law in this sphere. The authorities referred to the settled French Court of Cassation's case-law to the effect that any data processed, sent and received by means of the employer's electronic equipment were presumed to be professional in nature unless the employee designated them clearly and precisely as personal.

The French Government argued that the employer could monitor employees' professional data and correspondence to a reasonable degree, provided that a legitimate aim was pursued, and could use the results of the monitoring operation in disciplinary proceedings. However, the employees have to be given advance notice of such monitoring. In addition, where data clearly designated as personal by the employee were involved, the employer could ask the courts to order investigative measures and to instruct a bailiff to access the relevant data and record their content.

[32] The European Trade Union Confederation stated that internet access should be regarded as a human right and that the right to respect for correspondence should be strengthened. At least the employee's prior notification is required, before the employer could process employees' personal data.

We also consider that the employer did not have any proprietary rights over this second account, even though the computer used by the employee for this account belonged to the employer.

Hence judge Pinto de Albuquerque was right! He strongly expressed his disagreement with the majority opinion of the Chamber. He warned that unless companies clearly stipulate their Internet usage policy, "*Internet surveillance in the workplace runs the risk of being abused by employers acting as a distrustful Big Brother lurking over the shoulders of their employees, as though the latter had sold not only their labor, but also their personal lives to employers*"[33].

The importance of this rulling is not only for Romania, but for all the forty-seven countries which have ratified the European Convention on Human Rights, because the Court's rulings are binding for all of them. Mr Barbulescu is not a solitary case, therefore many employers have had to change their internal policies in order to conform themselves with this recent rulling. The lesson the Court taught the Contracting States with this Grand Chamber judgment was that Internet surveillance in the workplace is not at the employer's discretionary power.

It is obvius that a comprehenive Internet usage policy in a workplace should be put in place, mentioning specific rules on the use of instant messaging, web surfing, social networks, email and blogging. Employees must be informed of their clear rights and obligations, of the rules on using the internet, of the Internet monitoring policy, of the procedure to secure, use and destroy data, as well as of the persons having access to the respective data.

Every employee should be informed of such policy and should consent to it explicitly. It is obvious that breaches of the internal usage policy expose the employer[34] and the employee[35] to sanctions.

3. Concluding Remarks

It is undisputed that the Convention rights and freedoms have a horizontal effect, being directly binding on domestic public authorities and indirectly on private persons or entities. The Contracting States have the obligation to protect the victims of workplace surveillance, otherwise their legal responsibility may be invoked[36]. Employees do not give up to their rights to data protection and privacy every day when coming to the workplace.

Unfortunatelly, work surveillance is a hot topic, arguments and counterarguments could be brought in discussion. For example, companies that sell packages of employee monitoring tools can offer an interesting part for their clients.

Certain restrictions on an individual's professional life, which influence the way that individual constructs his/her identity, may fall under the scope of Article 8 of the Convention.

It is obvious that "*enforcing the right to respect for private and family life seeks to defend the individual against any arbitrary interference by the public authorities in the exercise of the prerogatives that provide the very content of this right*"[37].

Under the Convention, communications from home or from business premises may be covered by Article 8 of the Conventions, through the notions of "private life" and "correspondence": by mail, by email, by telephone calls, information derived from the monitoring of a person's internet use.

Nowadays, the Internet plays an important role in enhancing the public's access to news and, in general, facilitating the dissemination of information.

In such cases involving Article 8 of the Convention, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State.

After the analysis of the Court's case-law we can conclude that, although the Convention does not mention if there is a formal hierarchy of the human rights enshrined in it, it is recognized the fact that "*a balance has to be achieved between conflicting interests, usually those of the individual balanced against those of the community, but occasionally the rights of one individual must be balanced against those of another*"[38]. As it is stated in the legal doctrine, "*the human being is the central area of interest for the lawmaker*"[39].

Despite the concerted efforts of the national public authorities[40] with the international organizations, in the following years we will still

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[33] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22],%22itemid%22:[%22001-159906%22]}, para. 15.

[34] If the employer's Internet monitoring policy breaches the internal data protection policy or the relevant law, it may entitle the employee to terminate the employment agreement and claim constructive dismissal, in addition to pecuniary and non-pecuniary damages.

[35] Depending on the breaches of the internal policy, the employer should start with a verbal warning, and increase gradually to a written reprimand, a financial penalty, demotion and, for serious repeat offenders, termination of the employment agreement.

[36] For general information on the legal responsability of states, please see Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 29-56.

[37] Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

[38] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, fifth edition, Oxford University Press, 2010, p. 9, *Evans v. United Kingdom*, application no. 6229/05, judgment dated 10.04.2007, available at http://hudoc.echr.coe.int/eng?i=001-80046.

[39] Elena Anghel, *The notions of "given" and "constructed" in the field of the law,* in the Proceedings of CKS eBook, 2016, Pro Universitaria Publishing House, Bucharest, 2016, p. 341.

[40] For more details on public authorities, please see Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 535 and following.

encounter many varieties of innacurate or illegal workplace surveillance, and many States that do not act with responsibility[41] towards their nationals or other categories of individuals found on their territory[42].

The importance of the *Barbulescu* case has been confirmed by the President of the European Court of Human Rights, during the Solemn Hearing of the new judicial year, on 26 January 2018[43]. This was the first case cited by the President during his speech, therefore its value of precedent is undisputed.

We leave you with a conclusion drawn by President Raimondi regarding this case: "[i]t is illustrative of the ubiquitous nature of new technologies, which have pervaded our everyday lives. They regulate our relationships with others. It was thus inevitable that they should permeate our case-law. As was quite rightly observed by Professor Laurence Burgorgue-Larsen: "New technologies have led to an implosion of the age-old customs based on respect for intimacy". What is the point of communicating more easily and more quickly if it means being watched over by a third party or if it entails an intrusion into our private lives? (…) In Barbulescu the Court thus lays down a framework in the form of a list of safeguards that the domestic legal system must provide, such as proportionality, prior notice and procedural guarantees against arbitrariness. This is a kind of "vade mecum" for use by domestic courts"[44].

The public authorities and the companies should understand that, without an accurate and consistent Internet policy in accordance with the principles mentioned in the *Barbulescu* case, "*Internet surveillance in the workplace runs the risk of being abused by employers acting as a distrustful Big Brother lurking over the shoulders of their employees, as though the latter had sold not only their labour, but also their personal lives to employers*"[45].

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[41] For more details regarding the responsibility principle, please see Elena Anghel, *The responsibility principle*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 364 and following. For more details regarding responsibility in general, please see Elena Emilia Stefan, *Raspunderea juridica. Privire speciala asupra raspunderii in Dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 25-39.

[42] Please see Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 3rd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2017, p. 129-130.

[43] Please see President Guido Raimondi's opening speech available at http://www.echr.coe.int/Documents/Speech_ 20180126_Raimondi_ JY_ ENG. pdf.

[44] *Idem*, p. 5.

[45] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22],%22itemid%22:[%22001-159906%22]}, para. 15.