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Between Casuistry and Vagueness – A Comparative Legal Analysis of Employer Surveillance of Employee Tasks under Polish and Czech Legislation

ABSTRACT: *The new phase of economic development has brought many benefits to the countries of Central and Eastern Europe, yet rapid technological advancements also present inherent risks. While modern technologies have made it significantly easier for employers to fulfil their control entitlements and more efficiently protect their property, they concurrently pose threats towards employee privacy and dignity. The employee cannot be objectified and treated as a tool of the employer, and nor can his or her work be treated as a mere market commodity. The employer must respect the employee's dignity and right to privacy, and should not infringe it by excessive surveillance. The relationship – which can also be classified as a conflict between the interests of the employer and the privacy of the employee – underscores the necessity of striking a certain balance between the two. Legal measures regulating workplace surveillance serve this purpose, albeit with variations across different countries. This article aims to analyse models of employee tasks surveillance in two countries in the Central and Eastern European region: the Czech Republic and Poland. Despite the similar paths followed by the labour law systems of both countries, the regulations concerning employee tasks surveillance exhibit significant divergence. The Polish model of workplace surveillance can be described as detailed yet narrow, while the Czech one can be referred to as open guidance, and sometimes even as a puzzle. Therefore, the focal point of the research is to compare the differences between these models. To achieve this, an exhaustive analysis was conducted of the doctrine, jurisprudence and provisions of legal acts regulating the issue of employee surveillance in both countries.*

KEYWORDS: *privacy in the workplace, surveillance of employee tasks, monitoring of employees, labour law, GDPR, right to privacy*

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1.
Introduction

Recent years have brought increased economic development to the countries of Central and Eastern Europe. Convergence between CEE and Western European countries has improved, and their national labour markets have strengthened[1]

This new phase of economic development is associated with rapid technological progress,[2] driven in part by foreign investment. Multinational companies, while investing in the CEE region, are also introducing new technological solutions, most often affecting the areas of management and employee surveillance.[3] These activities also provide inspiration for domestic employers, thus creating new trends in the terms and conditions of employment.

New technologies and their widespread availability enable employers to supervise employees with much greater ease than before. Such forms of employee surveillance as visual monitoring, covert monitoring, monitoring of employees' business email, checking of the visited websites and computer activity during working hours, GPS monitoring, interception of employees' telephone calls and recording of keystrokes allow the employer at relatively low cost to assert its interests. These interests include protecting the employer's property from personal use (or misuse); controlling the correct performance of the tasks entrusted to the employee; preventing crime; ensuring good quality of services and products; preventing the disclosure of company secrets; and securing the employer's reputation.[4] To a certain extent, these motives for employee surveillance are understandable and justified. However, as a result of the pursuit of profit, among many employers there is a visible tendency to objectify employees by exposing them to excessive surveillance measures.[5] This, in turn, may cause the infringement of employees' privacy and can lead to increased stress and distrust towards the employer, the consequence of which can be a reluctance to cooperate[6] and an increased desire to resist.[7] On the other hand, more detailed surveillance of employees is happening not without reason. The increasing digitalisation

1 Polster, 2021, pp. 74-79.
2 Instytut Analiz Rynku Pracy (Institute for Labour Market Analysis), 2020, p. 3 .
3 An example of such an action can be the automated system of worker performance reviews introduced in Amazon's distribution centre in Poznań (POZ1). The system combines the elements of employee evaluation and surveillance, collects vast amounts of personal data throughout the working day and uses algorithms to measure two indicators during process of work: productivity and quality of work. – See more in: Rozmysłowicz and Krzyżaniak, 2023.
4 Dąbrowska, 2019, p. 12.
5 Góral, 2016, p. 56.
6 Chang, Liu, Lin, 2015, p. 96.
7 Ball, 2021, p. 37.

of workplaces has resulted in the fact that the fulfilment of employees' tasks often demands access to computers and the internet. This, in turn, carries the risk that employees will use these technologies in ways that are not work-related, e.g. for online shopping, entertainment, social networking, etc. This phenomenon is known as 'cyberloafing',[8] and is becoming more prevalent in Central and Eastern Europe, as can be seen in the example of a group of employees described by Štefko as the 'Facebook fired'.[9] [10]

In light of the above, there are increasing calls for the need to establish a balance between the interests of the employer and the rights of the employee in the context of workplace surveillance. The balance can be achieved by appropriate legal measures. However, it is extremely difficult to do so because the law cannot keep up with the swift development of technology. This article intends to contribute to the ongoing discussion between labour law scholars and parties to labour relationships in Central and Eastern Europe. Its aim is to analyse and compare Polish and Czech legislation on surveillance in the workplace, with a special focus on the surveillance of employees' tasks.

The system of labour law in both countries has followed a similar path, consisting of three main periods. The first was the period of law characteristic of the communist bloc and the so-called 'socialist labour relations'.[11] The second period was that of systemic transformation and the beginnings of the primacy of neo-liberalism in the economic sphere, which left its mark on the labour law systems of the region at the time.[12] The last period, which continues to this day, commenced in 2004 when Poland and the Czech Republic joined the European Union and began the process of adapting labour law to the standards of the community. However, the harmonisation of the labour law system, the increase in employee protection standards, and the obligation to implement the principles set by GDPR[13] – in the context of employees' data collection and processing and workplace surveillance – have not eliminated all the problems and inconsistencies that are associated with this topic.

8 Ball, 2021, p. 29.
9 Štefko, 2016, p. 11 – Štefko describes the "Facebook fired" group as a group of employees who lost their jobs because of posts or comments on social media.
10 Štefko, 2017, p. 131.
11 Florek, 2015, p. 31.
12 Orenstein, 2013, pp. 378-379.
13 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 (General Data Protection Regulation) (hereinafter: GDPR).

2.
Models of Employee Surveillance in Czech and Polish Legislation

On the subject of broadly understood personal data protection, 25 May 2018 is an important date for all EU member states – including Poland and the Czech Republic. On that day, the fundamental legal act regulating data protection within the European Union became 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" (hereafter: General Data Protection Regulation, or GDPR). The regulation is of a general nature, binding in its entirety and should be directly applicable, although it leaves the member states a certain degree of regulatory discretion in certain areas.[14] An example of such an area is the regulation of personal data protection in employment. Indeed, according to Art. 88 (1) of the GDPR, member states may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context.[15] Moreover, in line with Art. 88 (2) of the GDPR, those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in joint economic activity and monitoring systems at the workplace.[16] The legislative discretion in the context of personal data protection in employment is illustrated by the workplace surveillance models regulated in the Polish and Czech labour codes. These models have some similarities, but are notably different. The Polish model for regulating workplace monitoring can be briefly described as detailed yet narrow.[17] Czech legislators have taken the opposite approach, regulating the model more in the form of open guidance, which is described by some as a puzzle.[18]

14 Barański, 2022, p. 56.
15 Art. 88 (1) of the GDPR.
16 Art. 88 (2) of the GDPR.
17 Otto, 2023, p. 412.
18 Šmejkal, 2019, pp. 58.

2.1. Employee Surveillance under the Czech Legal Framework

The issue of surveillance in the workplace in the Czech Labour Code is addressed in Chapter VIII, Protection of an Employer's Property Interests and Protection of an Employee's Personal Rights. This chapter consists only of Section 316, which is divided into four paragraphs. However, it is the first three paragraphs that are of relevance to this article, as they touch upon the issue of surveillance measures over the tasks performed by the employees. Paragraph 4 expresses the prohibition against employers collecting employee information that does not directly relate to the performance of work and the basic labour relationship.[19]

There is a certain duality between Paragraphs 1-3 of Section 316, as they can be divided into two groups.[20] Paragraph 1 introduces a general right of the employer to check compliance with the prohibition against employees using the employer's means of production and other means necessary for the performance of work for personal use.[21] In this provision, the legislature has not specified the concrete means by which such compliance can be checked. It has only indicated that it should be conducted in an appropriate way. In turn, Paragraphs 2 and 3 regulate the issue of the impermissibility of an employer's encroachment upon an employee's privacy at a workplace without serious cause and establish an information obligation.[22] However, in contrast to the first paragraph, Paragraph 2 points out the means of possible workplace surveillance, which under certain conditions[23] will constitute an admissible infringement of the employee's privacy.[24] These are open or concealed surveillance (monitoring) of employees, interception (including recording) of their telephone calls, and checking email or postal consignments addressed to a certain employee.

19 Section 316 (4) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce".

20 Šmejkal, 2019, p. 58.

21 Section 316 (1) [LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce"] - Without their employer's consent, employees may not use the employer's means of production and other means necessary for performance of work, including computers and telecommunication technology for their personal needs. The employer is authorized to check compliance with the prohibition laid down in the first sentence in an appropriate way.

22 Section 316 (3) [LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce"] - Where there is a serious cause on the employer's side consisting in the nature of his activity which justifies the introduction of surveillance (monitoring) under subsection (2), the employer shall directly inform the employees of the scope and methods of its implementation.

23 According to Section 316 (2) of the Czech Labour Code, this condition is a serious cause consisting of the employer's nature of the activity.

24 Section 316 (2) [LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce"] - Without a serious cause consisting in the employer's nature of activity, the employer may not encroach upon employees' privacy at workplaces and in the employer's common premises by open or concealed surveillance (monitoring) of employees, interception (including recording) of their telephone calls, checking their electronic mail or postal consignments addressed to a certain employee.

Although these paragraphs may, at first glance, appear similar and relate to the same issues, they should not be interpreted as synonymous. This has in fact been confirmed by the Czech Supreme Court. In its judgement of 16 August 2012, as well as in the judgement of 7 August 2014, the Supreme Court indicated that the first paragraph of section 316 of the Czech Labour Code concerns mainly the issue of employer's property, while the second and third paragraphs touch on the protection of employees' privacy.[25] An employer's monitoring – according to Paragraph 1 – does not constitute an infringement of the privacy indicated in Paragraph 2. However, it must be conducted in an adequate manner so as to remain within the limits set by the employee's subordination to the employer, according to which the employer is entitled to check that its employees use the entrusted means of production or services exclusively for the performance of the assigned tasks, manage them correctly, ensure their protection against harm or misuse, and refrain from actions against the employer's rightful interest.[26] Therefore it can be said that, in practice, Paragraph 1 serves primarily as a basis for the employer's surveillance of employee tasks. After all, a correctly performed task should not involve misuse of the employer's property, which has been entrusted to carry out a specific work. However, an important question arises. How should surveillance under Paragraph 1 be carried out in order to comply with the statutory requirement of adequacy? The answer can be found in the judgement of the Supreme Court of 16 August 2012,[27] in a case concerning the possibility of an employer checking the use of a company computer – specifically the extent of internet use by an employee during working time – and the legality of the dismissal resulting from this control. In the case, during his monitoring, the employer detected that - despite the prohibition on employees using company equipment for private purposes - one of the employees spent 102.97 out of 168 working hours (in a single month) visiting non-work-related websites through the company computer. Citing gross negligence within work duties, the employer took the decision to terminate the employment contract immediately. Nevertheless, the legal qualification of the surveillance and the legality of the dismissal became a matter of dispute. According to the employee, the employer's monitoring – which provided him with information on employee misuse of company equipment and improper performance of assigned tasks – was carried out covertly without the employee's knowledge and consent, which constituted a breach of Paragraphs 2 and 3 of Section 316 of the Labour Code (LC). However, the Supreme Court settled the issue by ruling that, in this case, the employer acted in accordance with its right to check granted by Paragraph 1, and there was no impermissible encroachment on the employee's privacy. However,

25 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011; Judgement of the Czech Supreme Court of 07.08.2014 on the case 21 Cdo 747/2013.

26 Šmejkal, 2019, p. 60.

27 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011.

using the example of this case we can see that within the Czech model of workplace surveillance, there is a general problem with the subsumption of the employer's act of control over the employees' tasks – namely, when should it fall under Paragraph 1, and when Paragraphs 2 and 3? Indeed, this problem was partly pointed out by the Supreme Court itself. Justifying its judgement, the court drew attention to two key factors indicating the need to qualify the employer's action as an exercise of the right set out in Paragraph 1, rather than surveillance under Paragraphs 2-3. First of all, the court stated that the employer's monitoring cannot be exercised by the employer in a completely arbitrary manner, since the employer is entitled to exercise such control only in a 'reasonable manner' and it must be examined whether the inspection was continuous or subsequent, what was the scope and duration, whether it interfered with the employee's right to privacy, and to what extent. The court also ruled that the object of the inspection can only be the determination of whether the employee has breached the absolute prohibition laid down by law. The second key point highlighted by the court was that the employer did not intercept the employee's phone calls or check his emails and text messages (the measures mainly indicated in Paragraphs 2-3) during his inspection, but limited itself to checking whether the employee browsed websites not related to his work (the employer also focused only on their type and not on their detailed content). The view expressed by the court in its 2012 judgement was later confirmed in another judgement in 2014, in a case concerning unauthorised private calls via a company phone.[28]

Following the jurisprudence, the doctrine has defined two conditions, which are a kind of guidepost on how the employer should use the right indicated in Section 316 Paragraph 1, in order not to exceed the statutory framework of adequacy.[29] These conditions are: 1) the restriction of the scope and extent of control, including the exclusion of the possibility to check the exact content of non-work 'activities' undertaken by employees during work[30] (e.g., the precise content of browsed websites – there is no doubt that data which can be collected from them might allow an employer to obtain knowledge about the employee's private life, health, sexual preferences, etc.); 2) refrain from using the employee surveillance measures listed in Section 316 Paragraph 2.[31]

However, there is also a critical approach in the doctrine to this type of interpretation of workplace surveillance in the context of Paragraph 1. Vobořil argues that it is rather difficult to agree that tracking the URLs of websites visited is not an intrusion into privacy, because access to websites is connected with the storing of specific data, which can be used to identify the personal information of users, their preferences,

28 Judgement of the Czech Supreme Court of 07.08.2014 on the case 21 Cdo 747/2013.
29 Šmejkal, 2019, p. 61.
30 See also: Štefko, 2016, p. 15.
31 Šmejkal, 2019, p. 61.

etc. Moreover, it is questionable whether supervising internet activity is a proportional method of checking under Paragraph 1. There are different and more adequate ways to prevent the misuse of the employer's resources, e.g. by blocking websites that are unrelated to work and those that disrupt the performance of assigned tasks. The author also draws attention to another important point with which it is difficult to disagree, namely that – with such broadly defined surveillance criteria under Paragraph 1 – an employer may try to hide, behind the right to protect its property, a real intent to supervise and collect employee data of a private nature.[32]

On the other hand, there is an ongoing discussion on the relation of Paragraphs 1 and 2, especially in the context of the second of the mentioned conditions: non-use of surveillance means listed in Paragraph 2 within the monitoring conducted under Paragraph 1. According to Morávek, Paragraph 1 is exclusively applicable if there is a high probability (or *de facto* certainty) that the employee's privacy cannot be encroached upon, regardless of the method of surveillance. Furthermore, even in a situation in which an employee's privacy has been violated, this provision should apply only if a different method of surveillance is chosen than those enumerated in Paragraph 2.[33]

Considering the above interpretation, it is possible to come to the false but nonetheless dangerous conclusion that, since the list of surveillance measures listed in Paragraph 2 is exhaustive, an employer using other methods can freely intervene in an employee's privacy. This conclusion is erroneous because its adoption would violate the entire logical construction of Section 316 Labour Code, a key element of which is the assumption that – when acting within the framework set out by Paragraph 1 – there can be no infringement of the employee's privacy.[34]

However, despite efforts by both the judiciary and the doctrine to clarify the relationship between Paragraphs 1 and 2, it remains unclear. Paragraph 1 only deceptively resembles safe harbour for a Czech employer.[35] In reality, it rather looks like an open sea full of hidden dangers. This is illustrated particularly by the Supreme Court, which in its judgement of August 2012 indicated that Paragraph 1 constitutes a norm with an abstract hypothesis, thus leaving it to judicial discretion to determine the very hypothesis of the legal norm in each individual case.[36] This, in turn, opens up the possibility of excessive judicial activism, which – with regard to the regulation of employment relations and privacy within the workplace – is particularly undesirable,

32 Vobořil, 2012.
33 Morávek, 2017, p. 6.
34 Šmejkal, 2019, p. 62.
35 Šmejkal, 2019, p. 60.
36 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011.

as it results in provisions becoming hard to understand for the ordinary addressee and undermines legal certainty for both employer and employee.[37]

Paragraph 2 also raises interpretation problems. Under this provision, a serious cause – depending on the nature of the employer's activity – may justify proportional encroachment upon employees' privacy at workplaces and in the employer's common premises. Again, as in Paragraph 1, addressees of this norm are confronted with an abstract hypothesis. What is the serious cause, and who is authorised to use the surveillance measures indicated in this provision? Every employer, or only those engaged in a particularly hazardous activity? On this matter, the doctrine takes different views.

Šimečková indicates that Paragraph 2 cannot be interpreted in a way that only employers involved in specific dangerous activities may exercise the power granted to them by the law. She claims that the grounds for implementing surveillance facilities are compliance with occupational health and safety, protection of the life and health of employees, protection of the property that belongs to the employer or employee, and productivity monitoring. These grounds apply to every employer, and that is why every employer may find justification to use the measures listed in Paragraph 2.[38] The opposite approach is taken by the State Labour Inspectorate (SUIP). In one of its publications on the protection of employees' personal rights and the protection of the employer's property interests, the inspectorate pointed out that 'a serious cause' is generally not applicable in the production of ordinary products or the supply of ordinary services.[39] Thus, Paragraph 2 does not apply to all employers, regardless of their field of activity. On the other hand, Šmejkal is critical of the SUIP view – stating that such a straightforward answer does not provide good guidance for the doctrine – and of Šimečkova -denying that Paragraph 2 can apply to every employer. Following the literature on the subject[40] and the position of the Office for Personal Data Protection (UOOU), Šmejkal advocates a 'situational analysis', which in his view allows for a more accurate assessment of an increased or extraordinary need for workplace surveillance.[41] Within this approach, he distinguishes the following situations which may justify a proportionate encroachment upon an employee's privacy: a) significant amounts of cash are processed; b) the workplace operates under specific regulations (e.g. when highly sensitive or classified information is handled[42]); c) there is a heightened risk of accidents, explosions, etc. (e.g. in a nuclear power

37 Morávek, 2017, p. 12.
38 Šimečková, 2017, p. 95.
39 Státní Úřad Inspekce Práce (hereinafter: SUIP), 2019, p. 3.
40 See: Zemanová Šimonová, 2016; Vych, 2015; Jouza, 2022.
41 Šmejkal, 2019, p. 74.
42 Zemanová Šimonová, 2016.

plant)[43]; d) there exists a significant need to safeguard intellectual and industrial property rights, valuable knowledge, personal data of third parties,[44] and ensuring equal treatment and non-discrimination.

There is another, different approach, which addresses Paragraphs 1 and 2 holistically. This approach is recommended by Štefko and can be called the 'practical approach'. Štefko identifies three steps that an employer should take before commencing surveillance in the workplace. The first step is a discussion about the scope, duration and manner of the surveillance mechanism with employee representatives – or employees if there are no representatives – before its introduction. The second step is the information obligation towards employees. The last is expressed in obtaining employees' consent.[45] Štefko also indicates that the requirement for consent is not set by the law, but such a practice may alleviate the legal consequences associated with breaches of employee privacy, as it reduces a reasonable expectation of privacy.[46] However, when analysing this aspect it should be borne in mind that an inherent feature of the employment relationship is the inequality of the parties – which in the context of the employee's consent as a factor limiting reasonable expectation of privacy in the workplace – is of significant importance, as consent cannot be given under coercion. It is the very nature of the employment relationship that makes it difficult to obtain the employee's entirely voluntary consent to relinquish part of his or her privacy, since the employee, as the party economically dependent on the employer, may always feel a kind of pressure from the side of employer.[47] This pressure does not necessarily have to be direct but can often involve a limitation of future employment prospects (such as promotion, etc.).[48] Taking this into account, it is fair to say that the 'practical approach' also does not solve all the problems that arise on the grounds of the Czech model of workplace surveillance.

2.2. Employee Tasks Surveillance under the Polish Legal Framework

The Polish model of workplace surveillance has been shaped in a different manner to the Czech one. In fact, it constitutes a more closed and specified system, defined by three areas of surveillance: video, email, and other forms of monitoring,[49] with the purposes indicated explicitly that each surveillance measure is intended to serve.

43 Vych, 2015.
44 Jouza, 2022.
45 Štefko, 2016, p. 15; Štefko, 2017, p. 129; Štefko, 2023, p. 153.
46 Štefko, 2023, p. 153, footnote 44.
47 Otto, 2016, p. 86.
48 Morris, 2001, pp. 53-54.
49 Otto, 2023, p. 394.

This model appears to be more in line with current standards related to privacy in the workplace, and is more understandable to the parties of the employment relationship, as it clearly addresses some issues that in the Czech model are not directly regulated by the provisions of the Labour Code. This is primarily because the Polish regulation is more recent than the Czech one, as it was only implemented in connection with the delegation and the requirements established by GDPR. Previously, the issue of workplace surveillance and the protection of personal data processed in relation to employment was regulated in a fragmentary and implicit way.[50] Some of the principles were derived from the Constitution,[51] some were interpreted from the Labour Code,[52] and some had their source in the Act of 29 August 1997 on the protection of personal data.[53] It was only on 10 May 2018 with the new personal data protection act that the Labour Code was amended and Articles 22^2 and 22^3 were added,[54] regulating the conditions and scope of admissible workplace surveillance. The need for change and the regulation of a proper model of workplace surveillance within the framework of the Labour Code has been advocated by the doctrine for a long time.[55]

Article 22^2 of the Polish Labour Code states that an employer may introduce special supervision over the premises of the establishment, or the area around the establishment, in the form of technical measures that enable video recording (monitoring). However, this form of surveillance can be introduced only if it is necessary to ensure at least one of the prerequisites listed in the form of *numerus clausus*.[56] These prerequisites are the necessity to ensure the safety of employees or protection of property, or production control or confidentiality of information, the disclosure of which might damage the employer's interests. Given the subject matter of the article, the premise of production control is of particular importance, as it is closely linked to the surveillance of the tasks assigned to the employee. On the basis of this premise, the problem arises whether video monitoring can only be used as a surveillance of the work process – which serves the purpose of its continuity and correctness – or also to measure the productivity and efficiency of work.[57] In accordance with the position taken above and the opinion of the President of the Personal Data Protection Office,

50 Otto, 2023, p. 393.
51 In this context Art. 47 (Principle of protection of private life), Art. 49 (Principle of freedom of communication), Art. 50 (Principle of "domestic mir") and Art. 51 (Prohibition on the obligation to disclose information) of the Constitution of the Republic of Poland of 2nd April 1997 no. 78 item 483, are relevant.
52 Art. 11^1 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code (hereinafter: LC).
53 For an overview of the employer's obligations to protect the employee's personal data under the Act of 29th August 1997 no. 133 item 883 on the protection of personal data, see – Drzewiecka, 2013.
54 Art. 111 of the Act of 10th May 2018 item 1781 on personal data protection.
55 See: Kuba, 2014, pp. 561 and 569.
56 Art. 22^2 §1 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
57 Dąbrowska, 2019, p. 16.

as expressed in the guidelines on the use of video monitoring,[58] a narrower scope of monitoring and the inadmissibility of using video monitoring to measure work efficiency or productivity should be advocated.

Moreover, the Polish legislature – in §1[1] and §2 of Article 22[2] of the Polish Labour Code – specifies the sites that should be excluded from the video monitoring. Monitoring shall not cover rooms made available to a company trade union organisation, sanitary rooms, locker rooms, canteens, or smoking rooms.[59] The law provides an exception to this general restriction: listed areas might be monitored if it is necessary to ensure the safety of employees, protection of property, control of production or confidentiality of information, the disclosure of which might damage the employer's interests. There is also a condition that it should not infringe upon the dignity and other personal rights of the employee, especially by techniques making it impossible to recognise individuals present in those areas. Additionally, the monitoring of sanitary rooms shall require the prior consent of a company trade union organisation, and when the employer does not have a company trade union organisation within its structure, the prior consent of the employees' representatives selected in accordance with the procedure adopted by the employer.[60]

Further, according to the principle of the data storage limitation expressed in the GDPR,[61] Article 22[2] §3-5 regulates precisely the retention period of the video-recorded data. As a general rule, this period cannot exceed 3 months from the date of the recording.[62] This means that the employer may set a shorter period. An exception to this rule is when the video recordings constitute evidence in proceedings conducted under law, or the employer has become aware that they may constitute evidence in proceedings. In such a case, the storage period is extended until the proceedings have been terminated.[63] After the end of these retention periods, the recordings containing personal data must be destroyed, unless separate regulations provide otherwise.[64]

An integral part of the procedure for implementing video surveillance is defining its objectives, scope and manner of its use. Article 22[2] §6 states that it shall be established in a collective labour agreement or in the work regulations, and if the employer is not covered by a collective labour agreement or is not obliged to adopt work regulations, in an announcement.[65] This regulation corresponds to the principle of transparency of data processing and is in line with the opinion 2/2017 of the now

58 Personal Data Protection Office, 2018, p. 20.
59 Art. 22[2] §1[1] and §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
60 Art. 22[2] §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
61 Art. 5 (1)(e) of the GDPR.
62 Art. 22[2] §3 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
63 Art. 22[2] §4 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
64 Art. 22[2] §5 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
65 Art. 22[2] §6 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

defunct Article 29 Data Protection Working Party. The Working Party recommended involving a representative group of employees in the creation and evaluation of rules and policies regarding monitoring.[66] The introduction and amendment of both the collective labour agreement and the work regulations require agreement with the trade union organisation active in the establishment.[67] Miłosz and Świątek-Rudoman write that in cases where the areas of application of video monitoring vary according to the criterion of the purpose of its use, the said documents should specify which areas are covered by which objectives – and this is particularly important with regard to monitoring used to ensure production control.[68] In addition, there is an obligation on the employer to inform the employees of the introduction of the monitoring no later than 2 weeks prior to its commencement. The method of the notification should be the one adopted by the employer concerned.[69] In relation to new employees, contrary to employees already in an employment relationship, the information obligation is of an individual character.[70] According to the Labour Code, before permitting a new employer to perform his/her work duties, an employer must provide the employee with the information on objectives, scope and manner of the use of monitoring in writing.[71] The information obligation also includes the need to designate monitored areas in a visible and legible manner. This should be done by appropriate signs or sound announcements, but no later than one day before starting the monitoring.[72] The President of the Personal Data Protection Office, in his guidance on the use of video surveillance at work, indicated that, firstly, persons present in the monitored area must be aware that monitoring activities are taking place in their location. Thus, the signs notifying workers of the installed monitoring should be visible, synthetic, and permanently placed not too far from the monitored areas, and the size of the signs must be proportional to the place where they are located. Additionally, pictograms informing of the coverage of cameras may be used. However, pictograms are not a sufficient means of marking, as the information obligation in Article 13 of the GDPR must be taken into account. Full monitoring information, including all the requirements of Article 13, should be available at the monitored site. However, this does not mean that all this information should be included on one board. In order to comply with this obligation, layered information notes can be used, e.g. in the form of documents available at reception or at the administrator's representative.[73]

66 Article 29 Data Protection Working Party, 2017, p. 23.
67 Art. 241^2, 241^9, and 104^2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
68 Miłosz and Świątek-Rudoman, 2019, p. 36.
69 Art. 22^2 §7 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
70 Dąbrowska, 2019, p. 17.
71 Art. 22^2 §8 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
72 Art. 22^2 §9 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
73 Personal Data Protection Office, 2018, pp. 14, 20.

Following the model of regulation adopted in the case of video surveillance, the Polish legislature decided to explicitly regulate the second form of monitoring in the workplace, namely monitoring of employees' business email (Art. 22^3 of the Labour Code).[74] The employer may conduct control of employees' business mail if it is necessary to ensure an organisation of work that enables the full use of the working time and the proper use of the tools made available to the employee. Both of these prerequisites must be met cumulatively.

There is no doubt that employees' business email control translates directly into the supervision of tasks performed by an employee, especially those that involve the use of email or even generally of electronic equipment with access to business email. This is also confirmed by the Personal Data Protection Office, indicating that the employer on this ground can control the activity of his employees while they are at his disposal at the workplace.[75] However, it is important to consider the adequacy of this surveillance measure in relation to the premises for its admissibility. Kuba points out that the monitoring of business email – introduced to ensure an organisation of work that enables the full use of the working time and the proper use of the work tools made available to the employee – might not comply with the rule of adequacy or data minimisation set by regulation 2016/679 in Article 5 (1)(c).[76] In Kuba's view, it would be more appropriate to use other forms of monitoring, such as control of the use of company computers or websites visited by an employee during work, without the need to monitor the contents of an employee's business electronic mailbox.[77] It is difficult to disagree with this position since, in reality, business email is rarely the only tool for providing work. Thus, its control may be insufficient and, in some cases, even too severe to fulfil the premises of this form of surveillance.

Email monitoring constitutes a specific limitation of the freedom and privacy of communication, which is protected at a constitutional level.[78] This is also expressed by the legislature, indicating that it shall not violate the confidentiality of correspondence and other personal rights of employees.[79] Therefore, there is a serious need to define the exact boundaries of an employer's email control. It should be stated with certainty that the literal wording of the act makes it clear that only business email boxes, and under no circumstances private ones, may be subject to monitoring.[80]

74 Art. 22^3 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
75 Personal Data Protection Office, 2018b, p. 34.
76 Kuba, 2019, p. 31.
77 *Ibid,*
78 Art. 49 of the Constitution of the Republic of Poland of 2nd April 1997, Dz. U. No. 78 Item 483.
79 Art. 22^3 §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
80 Kuba, 2019, p. 34.

Moreover, the control of private correspondence is completely prohibited.[81] Hence, if a private message is found in a business email box, it cannot be checked.

When it comes to the establishment of the objectives, the scope, the manner of use and the information obligation regarding email monitoring, the legislature has stated that the provisions of Article 22^2 §6-10 shall apply accordingly.[82] Therefore, the considerations and conclusions made above on the grounds of video monitoring will also apply to the control of the employees' business mail.

The last of the provisions that constitute the Polish model of employee surveillance is Article 22^3 §4. This regulation extends the catalogue of admissible forms of surveillance within the workplace because it enables, under certain conditions, the use of other forms of monitoring than those specified in the previous articles. However, for other forms of monitoring, the provisions regarding the monitoring of an employee's business email should apply *mutatis mutandis*.[83] Therefore, the other forms of monitoring can be introduced only when it is necessary to ensure an organisation of work that enables the full use of the working time and the proper use of the work tools made available to the employee. Such forms of control may include geolocalisation, monitoring of IT systems, monitoring of the use of the internet by employees, the use of systems based on algorithms to record and check the working time,[84] and many others depending on the target of surveillance and the nature of the activity of the employer.

3.
Similar Paths, Different Outcomes – A Comparison of Both National Models of Employee Tasks Surveillance

A comparison of the two models of employee task surveillance is a challenging task. As can be deduced from the considerations above, Polish and Czech legislatures have taken two different paths when regulating this issue. This is already apparent from the structure of the regulation, which illustrates the approach of the legislatures to the key issues, namely the interest of the employer (i.e. the protection of property) and the interest of the employee (the protection of privacy).

Czech legislation separates issues of the protection of employer's property and the protection of employees' privacy. The protection of the employer's property is addressed in Paragraph 1 of Section 316 of the Czech Labour Code, which introduces a general right of the employer to check compliance with the prohibition on

81 Personal Data Protection Office, 2018, p. 35.
82 Art. 22^3 §3 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
83 Art. 22^3 §4 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
84 Otto, 2023, pp. 409-410; Dąbrowska, 2019, p. 19.

employees using the employer's means of production for personal use. According to the jurisprudential line of the Czech Supreme Court, this provision does not touch upon the question of the employees' privacy and cannot be considered as an infringement of the privacy indicated in Section 316 Paragraph 2.[85] In turn, the notion of the employees' privacy is established in Paragraph 2 by indicating that without a serious cause consisting in the employer's nature of activity, the employer may not encroach upon employees' privacy at workplaces by specific means of surveillance enumerated in this provision. Unlike the Czech one, the Polish legislature did not treat the issues of protection of the employer's property and employees' privacy as separate. While individually regulating video monitoring, business email monitoring and the possibility of using other forms of monitoring, the Polish legislature has restricted them with specific conditions under which such forms of surveillance may be used. The conditions concern in their essence, among other things, the protection of the employer's property. Moreover, the Polish legislature has regulated the issue of the usage of each type of monitoring in detail so as not to allow excessive infringement of employees' privacy. In comparison, the Czech Labour Code does not stipulate any further details on how or when the potential surveillance should be conducted. It only uses vague terms such as that the employer's monitoring should be done in an appropriate way (Paragraph 1 of Section 316), or that the employer may encroach upon the employee's privacy by monitoring or other mentioned forms of surveillance when there is a serious cause consisting in the employer's nature of the activity (Paragraph 2 of Section 316).

Moreover, further differences will emerge when we look at the specific elements of the models applied by legislatures, such as the territorial scope of monitoring, retention period, information obligation, covert surveillance and the question of private usage of employer's equipment.

While commencing with the territorial scope of monitoring, it should be pointed out that not every location within the workplace can be monitored. Premises where the surveillance could lead to the collection of sensitive data, or data not related to the purpose of the monitoring as set out in laws, should not be subjected to monitoring. Such monitoring could constitute a violation of the employee's dignity and the principles set out by the GDPR.[86] The Polish Labour Code seems to adhere to this principle. It defines the sites that should be excluded from the video monitoring and regulates the possibility of derogating from the general prohibition.[87] On the other hand, the Czech legislature did not indicate *explicite* in Section 316 of the Labour Code which areas of a workplace should be excluded from monitoring, or where it should be

85 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011; Judgement of the Czech Supreme Court of 07.08.2014 on the case 21 Cdo 747/2013.

86 See the principle of data minimisation - Art. 5 (1)(c) of the GDPR.

87 Art. 22^2 §1^1 and §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

limited, which creates rather a problematic situation. However, the task of clarifying the 'territorial scope' of video monitoring has been undertaken by doctrine[88] and jurisprudence. The Czech Supreme Administrative Court, in the judgement of 23 August 2013, noted that the monitoring should be directed at the employer's property, not at the employee's person, and should be carried out in the workplace, not in areas designated for hygiene or resting.[89]

Another difference between Poland and the Czech Republic that arises on the grounds of video monitoring is the issue of the principle of data storage limitation.[90] To comply with this principle, the Polish legislature has comprehensively regulated the data retention period, indicating how long it may last, in which situation it may be extended, and what should happen to the data after the expiry of the period.[91] The Czech Labour Code does not introduce any similar regulation on the data retention period. In this case, once again, the answer should be sought within the doctrine. Skubal writes that the generally accepted period for the storage of records resulting from video monitoring (CCTV surveillance) shall not exceed 7 days. However, the period can be longer if it is properly justified by the employer. Moreover, he notes that when a data controller has solid arguments for a longer period of retention, the Office for Personal Data Protection (UOOU) often accepts it.[92] On the surface, it may seem that a time limit of 7 days more appropriately corresponds to the principle of data storage limitation. However, it should be considered that this time limit is not directly set in law and is dependent on the approval of the public authority responsible for personal data protection. This creates a situation of uncertainty for the parties to the employment relationship. Furthermore, the Czech legislation does not specify what should happen to the data after the retention period, whether it should be destroyed or archived.

The situation partially changes with regard to the information obligation. Although the Polish legislature continues to proceed along the path of the extended and detailed regulation[93] discussed earlier, the change is evident on the Czech side. The Czech model of workplace surveillance, just like the Polish one, directly addresses an information obligation. However, it is formulated in a much briefer manner than under the Polish Labour Code. Namely, its regulation is limited to a single provision. Section 316 Paragraph 3 of the Czech Labour Code stipulates that in the case of the

88 Šmejkal, 2019, p. 72.
89 Judgement of the Czech Supreme Administrative Court of 23.08.2013 on the case 5 As 158/2012-49 – "Monitoring musí být směřován na majetek zaměstnavatele, nikoliv na osobu zaměstnance (nasměrování kamer) a musí být prováděn na pracovišti, nikoliv na místech určených k hygieně nebo k odpočinku zaměstnance".
90 Art. 5 (1)(e) of the GDPR.
91 Art. 22^2 §3-5 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
92 Skubal, 2023, p. 17.
93 Art. 22^2 §6-10 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

introduction of the surveillance measures referred to in Paragraph 2, the employer is obliged to directly inform the employees of the scope and methods of their implementation.[94] Therefore, this obligation can be fulfilled in any appropriate form that enables the individual and direct transfer of information to each employee.[95] Thus, this may be done through an adopted and duly promulgated internal regulation or through a channel with which the employer customarily communicates with the employee – written communication, oral communication, email, etc.[96] The specific discretion of the form of information on monitoring is also expressed in the Polish Labour Code with the expression that "an employer shall notify employees of the introduction of monitoring, in the manner adopted by the given employer."[97] The information should, in particular, allow the employee to familiarise him/herself with the scope of the surveillance, i.e. it should specify the duties entrusted to the employee that are to be monitored; the period during which the surveillance will take place; the premises under monitoring; and the means by which the surveillance is to be carried out.[98]

On the grounds of the information obligation, one more point of divergence arises between the Polish and Czech models of employee surveillance. Namely, it concerns the possibility of covert surveillance. Under Polish law, both doctrine[99] and jurisprudence[100] unequivocally state that such surveillance cannot be conducted, irrespective of the type (video monitoring, email monitoring and other forms of employee surveillance). The situation is the opposite with regard to the Czech model, as the Czech Labour Code explicitly expresses the possibility of concealed monitoring by an employer.[101] This poses the question of how to comply with the requirements imposed by the regulation on information obligation. As a rule, in such a situation the information obligation is limited in a certain way, which does not change the fact that the employer should fulfil it to the maximum extent, but in the *ex-post* manner only after the surveillance was conducted.[102] Moreover, the employer should give advance notice of the possibility of control.[103] However, this solution seems rather fictitious because as Šmejkal rightly points out, in any future conflict between an employer and

94 Section 316 (3) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce".
95 Sehnálek, 2023, p. 259.
96 Morávek, 2017, p. 10.
97 Art. 22^2 §7 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.
98 Morávek, 2020, pp. 26-27.
99 Barański, 2018, p. 48; Personal Data Protection Office, 2018, pp. 25-26.
100 Judgement of the Supreme Administrative Court of 13.02.2014 on the case I OSK 2436/12.
101 Section 316 (2) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce".
102 Sehnálek, 2023, p. 260.
103 Morávek, 2020, pp. 26.

an employee, the employee will find out that the employer collected evidence of his/her misconduct as a result of workplace surveillance.[104]

Another interesting question that arises is connected to the surveillance of business email inboxes, and touches on issues of the possibility of private usage of employer's equipment by employees and privacy of correspondence. In both countries, such a form of surveillance is permitted and, as indicated earlier, in both countries it is prohibited to check private messages even within a company's email inbox, as it would constitute an infringement of the privacy of correspondence, which is safeguarded by both Polish and Czech constitutional orders.[105] The mere fact that a message is sent or received via a business email does not determine that such a message does not contain private content, nor does the proper designation of the subject and the parties suggest the business character of the conversation.[106] Therefore, employers need to be particularly careful when conducting this form of monitoring, which may prove to be more of a challenge in Poland than in the Czech Republic. This is mainly because of the issue of the use of the company's equipment for private purposes, which obviously has an impact on the process of possible surveillance and its correctness. This issue under Polish labour law is less clear-cut than under Czech law. Czech regulation indicates unequivocally that without the employer's consent, employees may not use the company's equipment for private purposes.[107] However, the situation is reversed in the case of the Polish model of regulation. It follows that in principle, unless such use is prohibited, it is permitted. This state of affairs can cause many problems, infringements and uncertainty on both sides of the employment relationship. Hence, it is reasonably advocated in the doctrine that employers should prohibit the use of business email for private purposes.[108] Such a solution should make it possible to significantly facilitate the control criteria.

Despite the above differences, which are in the overwhelming majority, there is one provision that brings a rather closed and specified Polish model of workplace surveillance closer to the more open and vague Czech one. Namely, Article 22^3 §4 of the Polish Labour Code, which under certain conditions widens the closed catalogue of forms of monitoring to other forms. It resembles to a certain extent Section 316 Paragraph 1 of the Czech Labour Code, which by its vague wording that the employer's monitoring should be carried out in an appropriate way, also opens up a catalogue of forms of surveillance. The discussed provision of the Polish Labour Code is rather

104 See more in: Šmejkal, 2019, p. 76.

105 Art. 49 of the Constitution of the Republic of Poland of 2nd April 1997 no. 78 item 483, Art. 13 of the Charter of Fundamental Rights and Freedoms of the Czech Republic of 16 December 1992 (Const. act No. 2/1993 Coll. as amended by constitutional act No. 162/1998 Coll.).

106 Kuba, 2019, p. 34.

107 Section 316 (1) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce".

108 Dąbrowska, 2019, p. 18; Kuba, 2019, p. 34.

controversial. On the one hand, it might bring a certain level of risk, especially towards the privacy of employees; but on the other hand, it is a practically useful mechanism to keep up in terms of employee surveillance to rapidly changing and evolving concepts of the workplace.

4.
Conclusion

The issue of surveillance of tasks assigned to the employees is linked to two important aspects. The first is the work itself performed by the employees. Under the Polish and Czech Labour Codes, this work is framed by specific obligations/duties setting out how the work should be performed. Czech employees should work properly in accordance with their strength, knowledge and capabilities, fulfil instructions given by their superiors in compliance with the statutory provisions, and cooperate with other employees.[109] Very similarly, Polish employees shall perform work conscientiously and with due diligence, and shall comply with the work-related instructions of their superiors, unless they are contrary to the provisions of law or the contract of employment.[110] However, for the work to be performed in this manner, it firstly needs to be concretised (in the form of specific tasks); secondly, it needs an adequate system to check its process and outcomes. The realisation of these needs is made possible by the second-mentioned aspect – the organisational function of labour law. This function enables the employer to assign specific tasks to a specific employee, and is a source of the employer's control entitlements.[111]

It is only by bringing these two aspects together that a fair model for the surveillance of employees' tasks can be shaped, which recognises both the employee's right to privacy, dignity and respect for their work, and the need of the employer to organise work and the related need for surveillance. Tannenbaum expressed this relationship in the following words: "organisation implies control."[112] In our case, the organisation is the workplace.

The Polish and Czech legislatures have both considered these aspects when shaping their national models of employee tasks surveillance. However, they have taken different measures to implement them. The discrepancy between the two models is mostly due to the fact that the Polish regulation is more recent than the Czech one, as it was only implemented in connection with the delegation and the

109 Section 301 (a), LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce".
110 Art. 101 § 1 of Act of 26 June 1974. Labour Code (Dz. U. z 2023 r. poz. 1465).
111 Kuba, 2022, section 2.2.
112 Tannenbaum, 1962, p. 237.

requirements established by GDPR. The Czech model already existed in its current shape beforehand.

This has also resulted in the fact that the Polish model appears to be more in line with current standards related to privacy in the workplace, and is more understandable to the parties of the employment relationship. It clearly addresses issues that, in the Czech model, are not directly regulated by the provisions of the Labour Code. However, its detailed and partly casuistic nature may lead to its obsolescence in a situation of rapid technological development. In this context, the openness of the Czech model can be perceived as a positive feature; on the other hand, its over-vagueness results in many interpretation problems, lack of certainty, and may lead to excessive activism of judges, which is rather an undesirable situation, especially in a case of labour law regulations.

Based on conducted research, two general conclusions can be drawn. The first is that, despite a similar path followed by the labour law systems in the countries of Central and Eastern Europe, their individual parts may differ significantly - as can be seen in the Czech Republic and Poland with regard to their models of employee surveillance. The second conclusion is that there is an urgent need to find a balance between the two approaches to workplace surveillance, and to propose a more comprehensive and equitable model which will have to face so far unknown challenges caused by new surveillance techniques.

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The Gender Pay Gap, and Multiple Forms of Discrimination Against Female Migrant Workers: Anti-Discrimination Legislation in Slovakia, and the Current EU Approach

ABSTRACT: *The migration of workers is inextricably linked with today's increasingly globalised environment. Ensuring their equal and non-discriminatory status should be a prerequisite for their participation in the labour market. This particularly concerns their pay equality. The principle of equal pay for men and women has been part of the EU legal framework since the beginning of the integration processes. However, despite decades of efforts, gender pay equality has still not been achieved. A particular challenge in the field of effective implementation and real enforcement of equal pay is the position of female migrant workers. They face multiple forms of discrimination, both as women and as migrants. Legislation at the European and national level should therefore take into account all the discriminatory factors they face. However, the sustainable achievement of pay equality requires joint, mutually coordinated, and targeted solutions.*
KEYWORDS: *gender pay gap, gender discrimination, migrant workers, from Slovakian anti-discrimination legislation to Slovak anti-discrimination legislation.*

1. Introduction

The EU is based on a set of values and principles: the principle of equal pay for equal work is just one of them. It is an important part of a fairly set and efficiently functioning internal market. The internal market is a key element of the EU, and the primary purpose of economic integration.[1] The free movement of workers is one of the cornerstones of the internal market, enshrined in Article 45 of the Treaty on the Functioning of the European Union (hereafter 'TFEU'). The free movement of

1 Craig and De Burca, 2015, p. 607

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workers includes the abolition of any discrimination against workers in the member states, with respect to employment, remuneration and other working conditions.[2] The right to equal treatment of workers is formulated quite broadly, and covers not only the right to employment but also other areas closely linked to the residence of workers and their families in another EU member state.[3] Equal treatment and related anti-discrimination legislation is the subject of intense interest in the EU. Achieving equality without discrimination of any kind has been one of the EU's objectives for decades. Despite the existing legal framework, the actual implementation and enforcement of equal treatment remains an ongoing challenge.

Violations of the principle of equal treatment can occur for a number of reasons. These often include sex, racial or ethnic origin, language, religion or belief. Female migrant workers have a special position in this context, facing multiple forms of discrimination as both women and migrants at once. Thus, there may be a combination of grounds on which the principle of equal treatment is violated and different axes of discrimination intersect. Most often in a combination of gender and other reasons such as language, race or ethnicity. The principle of equal treatment is of particular importance in terms of equal pay: female migrants are in a particularly vulnerable position in this respect, given the intersectional discrimination.

The principle of equal pay for equal work has been an integral part of primary law since the beginning of integration processes. Equal pay regardless of sex was already provided for in the Treaty Establishing the European Economic Community (hereafter the 'EEC Treaty', or 'EEC'). The main idea behind the EEC Treaty was to achieve economic objectives through the creation of a common market consisting of the free movement of goods, services and factors of production in the form of labour and capital.[4] Above all, it was about integration and economic growth through the removal of trade and other barriers. Article 119 of the EEC was part of a broader definition of social provisions in which member states set themselves the objective of promoting the improvement of working conditions and the raising of workers' living standards in such a way that these conditions could be reconciled while maintaining the level achieved. The legal basis in the current legal framework in the field of EU primary law is, in particular, Article 157 of the TFEU. It is the duty of each member state to ensure that the principle of equal pay for men and women for equal work or work of equal value is applied. Equality between men and women is thus one of the EU's objectives,[5]

2 Article 45(2) of the Treaty on the Functioning of the European Union.
3 Equinet, 2021, p. 5.
4 Barnard, 2012, p. 4.
5 European Parliament, 2021, p. 1. See also: European Commission, 2020, p. 4.

and the principle of equal pay for equal work has the status of its fundamental value.[6] The continuous development of this principle has extended its application to work of equal value. In the field of secondary EU law, anti-discrimination legislation is concentrated in a number of directives. With regard to the principle of equal pay, these are in particular Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The principle of equal pay has evolved over time: the initially economic dimension of this principle was systematically extended to include anti-discrimination and human rights aspects. The main objective in relation to pay has been for each member state to ensure that the principle of equal pay for equal work is applied and further respected.

2.
Discriminatory Factors in the Pay of Female Migrant Workers

Female migrant workers belong to a special group facing multiple forms of discrimination, with several related factors. This inequality is based on two basic premises:

6 Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 2021, p. 4.

that they are women, and that they are migrants.[7] They are discriminated against on the grounds of sex, racial or ethnic origin, religion or belief, but this inequality is particularly pronounced in the area of pay. The EU has been working for decades to strengthen and equalise the position of women in employment relations, with an emphasis on their pay. Nevertheless, despite these efforts, gender pay gaps persist across the EU. Unequal treatment, including pay inequalities, occurs despite the existence of a legal framework aimed at promoting equality – as well as ongoing initiatives to eliminate inequalities between men and women. The principle of equal pay for equal work or work of equal value (hereafter: 'the principle of equal pay') is also enshrined in the preamble of the Constitution of the International Labour Organisation (hereafter 'ILO'). It requires ratifying states to ensure that migrant workers are equal in remuneration with nationals. Nevertheless, the ILO has repeatedly noted the violation of this commitment by a number of states and, consequently, the persistence of inequalities in the remuneration of migrant workers. It should be stressed that the purpose of the principle of equal pay is not only to protect migrant workers, but also to protect the labour market.[8]

The pay gap of migrant workers may also be based on objective factors, including education, experience or language skills. Without knowledge of the local language, the position of migrant workers is significantly hindered.[9] On the other hand, their status is also affected by the mismatch between their skills and the labour market requirements of the host country. The transfer of work skills and experience, and their adaptation to host country conditions, is also problematic. This is mainly due

7 This paper uses the term 'migrant worker' in line with the definition of 'third-country worker' in several existing EU laws to refer to a third-country national who has been admitted to, is legally resident in and may work in the territory of an EU Member State under a valid legal relationship under national law. In this context, see, for example, Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. As Fox-Ruhs and Ruhs point out in this context, in accordance with EU terminology, the term 'migrant workers' refers to workers who are not nationals of countries of the European Economic Area, as the principle of free movement of workers applies. They further state that, in line with the EU's preferred terminology, EU citizens who reside and work in another EU Member State are referred to as mobile workers rather than migrant workers. For more details see: Fox-Ruhs and Ruhs, 2022, p. 11. In this context, see also: European Commission, 2016 or also Fasani and Mazza, 2020. In a broader context (not only within the scope of the definition of EU law), the term 'migrant' in this paper refers to a third-country national who, for whatever reasons, has changed his or her country of permanent or habitual residence and has moved from his or her home country to another country. However, for the purposes of ILO references and outputs, the term 'migrant workers' also includes workers from other EU Member States. Thus, references to ILO outputs include both migrant workers as well as mobile workers.

8 International Labour Organisation, 2020, p. 3.

9 Reid et al., 2022, p. 3.

to the lack of adequate systems for the recognition of qualifications and differences in the skills and competences required in different countries. A significant part of the pay gap remains unexplained, even after accounting for objective factors and the characteristics of migrant workers, their education and practical experience. As much as 10% of the overall 12.6% pay gap between migrant workers and nationals remains unexplained by labour market characteristics. This may point to discrimination against migrant workers in terms of their remuneration. As the ILO report notes, if the unexplained part of the pay gap were eliminated, the pay gap between migrant workers and nationals would almost disappear. Moreover, if remuneration were determined on the basis of objective factors such as education and experience, the pay gap between migrant workers would remain very low in many countries – and in some countries there might even be a shift in the ratio in favour of migrant workers. This would particularly affect the status of female migrants.[10]

The income status of female migrant workers differs depending on whether they are in high-income countries or middle- and low-income countries. While migrant workers earn on average 12.6% less in a high-income country compared to nationals, in middle- and low-income countries migrant workers earn on average 17.3% more than nationals. The reason for this difference is the high proportion of highly skilled migrant workers in the total number of migrant workers in middle- and low-income countries, which also increases their average remuneration. Assumptions about the rationale for discrimination against female migrant workers are confirmed by data comparing their pay to men who are nationals of the given country. The pay gap between female migrant workers and male nationals is 20.9% in high-income countries. However, the average pay gap between male and female nationals is 16.2%.[11] Migrant care workers in high-income countries are a special group: the vast majority are women, and the pay gap for this group is 19.6%. When compared with the average pay gap between migrant workers and nationals at 12.6%, it is again possible to observe a multiple disadvantage for female migrant workers.[12] The above data clearly justifies the urgent interest in eliminating pay inequalities between men and women - and in particular female migrant workers – as these, in addition to discrimination, distort the overall labour market.

10 International Labour Organisation, 2020, pp. 1-2. On the unexplained part of the pay gap between men and women migrant workers, see also: Reid et al., 2022, p. 4.
11 Based on the average hourly wage.
12 International Labour Organisation, 2020. p. 1.

3.
Equal Treatment in Slovak Law

3.3. Introduction to Anti-Discrimination Law in Labour Relations in Slovakia

In line with the overall development within the EU, anti-discrimination law in Slovakia is also evolving.[13] Equal pay without discrimination is an integral part of this area of legislation. The fundamental pillar is the Constitution of the Slovak Republic, guaranteeing equality for all in dignity and rights. In accordance with Article 12(1) of the Constitution of the Slovak Republic, fundamental rights and freedoms are inviolable, inalienable, imprescriptible, and indefeasible. In the field of labour law, the legal regulation is mainly concentrated in Act No. 311/2001 Coll., the Labour Code, as amended (hereafter the 'Labour Code'). In accordance with Section 13 of the Labour Code, employers are obliged to apply the principle of equal treatment in labour relations – which applies to both employees and job applicants.[14] Any discrimination against employees is prohibited, including discrimination on the basis of sex, race, language, origin or ethnic group. The Labour Code provides for a number of rights on the part of the employee in this area, in turn matched by the employer's obligations. An employee has the right to lodge a complaint with respect to a breach of the employer's obligation to comply with the principle of equal treatment. Upon receipt of an employee's complaint, the employer shall respond to it in writing without undue delay. It shall also be obliged to remedy the situation, to refrain from the conduct violating the principle of equal treatment, and to eliminate the consequences of such conduct. However, in addition to the right to lodge a complaint with the employer, the employee has the right to apply to the competent court for legal protection. The Labour Code thus provides the employee with more legal tools to protect him or her against violations of the principle of equal treatment by the employer.

In addition to the Labour Code, other legislation contains legal provisions aimed at protecting against discrimination in labour relations. Slovak anti-discrimination legislation is primarily concentrated in Act No. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination and on amendment and supplementation of certain acts (the Anti-Discrimination Act), as amended (hereafter the 'Anti-Discrimination Act'). The Anti-Discrimination Act is the general legal basis for anti-discrimination law in Slovakia. The prohibition of discrimination provided for in the Labour Code is in the position of *lex specialis* in relation to the

13 Barancová, 2019, p. 118.
14 National Labour Inspectorate, 2023, p. 2.

anti-discrimination law.[15] The principle of equal treatment in employment relations is contained in Section 6 of the Anti-Discrimination Act. According to this provision, discrimination against persons on the grounds referred to in Section 2(1) – which includes discrimination on the grounds of sex, race, language, or ethnic origin – is prohibited. The principle of equal treatment under Section 6(1) also applies in the field of remuneration in employment.

3.4. Prohibition Against Discrimination in Labour Relations Under Slovak Law

The general prohibition against discrimination in Slovak labour law stems from Article 1 of the Fundamental Principles of the Labour Code, and the provisions of Section 13 of the Labour Code.[16] Under Article 1 of the Fundamental Principles, natural persons have the right to work; to free choice of employment; to working conditions that are fair, satisfactory, transparent and predictable; and to protection against arbitrary dismissal. These rights are to be in accordance with the principle of equal treatment in labour relations laid down in the Anti-Discrimination Act. Equality in access to employment, pay and promotion, training and working conditions – in accordance with the principle of equal treatment without discrimination on grounds of sex – is laid down in Article 6 of the Fundamental Principles.

Anti-discrimination legislation has been subject to gradual development. The prohibition against discrimination was already part of the original wording of the Labour Code. The wording of Section 13 was based on Article 1 of the Fundamental Principles and Article 12 of the Constitution of the Slovak Republic.[17] The legislation adopted was in line with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.[18] Under Section 13, employees are entitled to rights arising from employment relationships without direct or indirect discrimination. The prohibition of discrimination under the original wording of section 13 included discrimination on grounds of sex, race, language, or ethnic origin. However, an exception was made where the law so provided – or where there was a substantive reason

15 Barancová, 2019, p. 117.
16 *Ibid*, p. 118.
17 According to Article 12 of the Constitution of the Slovak Republic, fundamental rights and freedoms in the territory of the Slovak Republic are guaranteed to "everyone, regardless of sex, race, colour, language, belief and religion, political or other opinion, national or social origin, membership of a nationality or ethnic group, property, birth or other status".
18 Explanatory Memorandum - Special Part to the Draft Labour Code, 2001, p. 112.

for the performance of the work, consisting in the prerequisites or requirements, as well as in the nature of the work to be performed by the employee. For the purposes of the principle of equal treatment, indirect discrimination was an outwardly neutral instruction, decision or practice which disadvantaged a substantially larger group of individuals, where such instruction, decision or practice was not appropriate and necessary and could not be justified by objective facts. According to the original wording of the Labour Code, an employee also had the right to file a complaint with the employer in connection with a violation of rights and obligations in the area of prohibition of discrimination, and the employer was obliged to respond to such a complaint without undue delay, to remedy the situation, to refrain from such conduct and to eliminate the consequences of such conduct. At the same time, if the employee felt aggrieved as a result of the failure to comply with the conditions relating to the prohibition of discrimination, they could pursue their rights before the competent court. It was for the employer to prove that there had been no breach of the principle of equal treatment. The exercise of a right arising out of the employment relationship could not be grounds for the employer to penalise or disadvantage the employee.[19]

The provision of Section 13 of the Labour Code has been amended several times. A more extensive modification of its wording occurred with the adoption of the Anti-Discrimination Act in 2004. The exception contained in Section 13(1) of the original version of the Labour Code – which consisted in narrowing the scope of restrictions and direct or indirect discrimination in cases where the law so provided, or where there was a substantive reason for the performance of the work, consisting in pre-requisites or requirements, as well as in the nature of the work to be performed by the employee - was removed. However, the exception in question remained in Article 1 of the Fundamental Principles of the Labour Code. This amendment to the Labour Code removed the title of Section 13 (Prohibition of discrimination) and introduced a reference to the principle of equal treatment in employment relations in accordance with the Anti-Discrimination Act. The wording of Article 1 of the Fundamental Principles was amended by Act No. 48/2011 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and supplementing certain acts. According to the amended wording of the exemption, differential treatment is justified by the nature of the activities performed in the employment or the circumstances in which these activities are performed. This reason is intended to constitute a genuine and decisive requirement for employment, and the legitimacy of the aim and the reasonableness of the requirement are a condition.

Act No. 376/2018 Coll., amending Act No. 5/2004 Coll. on Employment Services and on Amendments and Supplements to Certain Acts, as amended, and amending and supplementing certain acts, brought a significant change. Under Section 13

19 For more details see the promulgated version of the Labour Code of 2 July 2001.

of the Labour Code, a new paragraph 5 introduced a prohibition against obligating an employee to maintain confidentiality about the employee's working conditions, including wage terms and conditions of employment. At the same time, the provisions of an employment contract or other agreement between the employer and the employee which would impose an obligation on the employee to maintain confidentiality about his or her working conditions, including wage terms and conditions of employment, are null and void. The above provisions, albeit in a slightly modified form, are part of the currently valid and effective version of the Labour Code. The introduction of these provisions in the Labour Code was highlighted by the UN Committee on the Elimination of Discrimination against Women in its Concluding Observations on the Seventh Periodic Report of Slovakia published in 2023.[20]

The principle of equal treatment in labour relations is also regulated in Act No. 5/2004 Coll. on Employment Services and on Amendments and Supplements to Certain Acts, as amended, (hereafter the 'Act on Employment Services'). In accordance with the principle of equal treatment laid down in the Anti-Discrimination Act, pursuant to Section 14(2) of the Act on Employment Services, a citizen has the right to access to employment without any restrictions. Any discrimination on grounds of language or origin is also prohibited. In case of violation of rights and obligations in connection with violation of the principle of equal treatment, a citizen has the right to lodge a complaint with the Office of Labour, Social Matters and Family, which is obliged to respond to such a complaint without undue delay, to remedy the situation, to refrain from the conduct in question, and to eliminate the consequences of such conduct. At the same time, in such cases, the citizen has the right to seek legal protection before the competent court. The Act on Employment Services links the principle of equal treatment to the right of access to employment of a citizen of the Slovak Republic. Pursuant to Section 2(2) of the Act on Employment Services, a citizen of an EU member state, a family member of a citizen of an EU member state, and a family member of a citizen of the Slovak Republic who are nationals of a third country and who have legal residence in the territory of the Slovak Republic – as well as nationals of the United Kingdom of Great Britain and Northern Ireland and members of their family who are nationals of a third country, nationals of a third country who have been granted asylum or subsidiary protection and nationals of a third country who have been granted residence in the Slovak Republic as third-country nationals who have been granted EU long-term resident status – have the same status as a citizen of the Slovak Republic in legal relations arising under this act. With regard to the above categories of persons, migrant workers – insofar as they are third-country nationals – may not fall under the above provisions of the Act on Employment Services in any case. On the other hand, mobile workers from other EU member states have the same

20 Committee on the Elimination of Discrimination Against Women, 2023, p. 2.

status as citizens of the Slovak Republic for the purposes of access to employment, and thus without any restrictions in accordance with the principle of equal treatment in labour relations.

The impetus for the adoption of the Anti-Discrimination Act into the Slovak legal system was primarily the obligation to transpose EU directives. The explanatory memorandum to the Anti-Discrimination Act shows that the aim of its adoption was to complete the transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereafter 'Directive 2000/43/EC') and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereafter 'Directive 2000/78/EC').[21] These directives do not provide for the concept of multiple discrimination, however they do not exclude situations in which multiple forms of discrimination would occur. In practice, there are often combinations of multiple grounds of discrimination. In the field of labour law, the consequences of multiple discrimination on an employee should be expressed in a different form of moral or pecuniary compensation, since it causes more serious consequences for the injured party.[22] In August 2023, preliminary information was published according to which the text of the Anti-Discrimination Act should be amended in the coming period. One of the main objectives of this amendment is to define the concept of multiple discrimination.[23] The proposed text of this amendment is not currently available. However, the very intention of introducing this concept into Slovak law can be evaluated positively, especially in the case of female migrant workers, since in practice multiple discrimination often occurs especially in relation to women.[24]

4.
Equal Pay Principle Under the Labour Code

The right to remuneration of employees for work performed is enshrined in Article 36 of the Constitution of the Slovak Republic. The principle of equal treatment in the field of remuneration is based on Article 6 of the Fundamental Principles of the Labour Code. According to this, both women and men have the right to equal treatment in relation to employment, remuneration and promotion, training and working

21 Explanatory memorandum to the draft act on equal treatment in certain areas and protection against discrimination and on amendment and supplementation of certain acts (the Anti-discrimination Act), 2004.
22 Barancová, 2019, p. 121.
23 For more details see: Preliminary information PI/2023/255.
24 Barancová, 2019, p. 121.

conditions. The principle that women and men have the right to equal pay is covered by the provisions of Section 119a of the Labour Code. Remuneration conditions must be agreed without any discrimination based on sex. Remuneration includes any remuneration for work as well as other remuneration paid in connection with employment. Equal work or work of equal value is defined under Section 119a (2) as work of equal or comparable complexity, responsibility and exertion. It is performed under the same or comparable working conditions and with the same or comparable performance and results of work. At the same time, such work is performed in the course of employment with the same employer. The provision of Section 119a was added to the Labour Code by Act No. 348/2007 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and supplementing certain acts. This was a rather extensive amendment to the Labour Code, which primarily harmonised Slovak labour law with EU law.[25] The principle of equal pay has been added to the employer's basic obligations by this amendment to the Labour Code. According to the added provision of Section 82(c), managers are obliged to ensure that employees are remunerated in accordance with the relevant legislation, collective agreements and employment contracts, and at the same time to comply with the principle of equal pay under Section 119a. As stated in the explanatory memorandum to Act No. 348/2007 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and amending certain acts in its specific part, the principle of equal pay is one of the basic requirements of the EU. It is part of EU primary law and is also the subject of several directives in the field of EU secondary law.[26] This principle is also enshrined in the International Labour Organisation's Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, No. 100 of 1951. As further stated in the explanatory memorandum in this context, according to the relevant EU directives the principle of equal pay implies the elimination of any discrimination on grounds of sex, in relation to all aspects and conditions of pay. As the 2004 assessment of the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organisation shows, the principle of equal pay has not been sufficiently and unambiguously expressed in the previous wording of the Labour Code. These conclusions were drawn despite the adoption of the Anti-Discrimination Act and the application of the complexity and hardship criteria to ensure equality in

25 Explanatory memorandum - General part to Act No. 348/2007 Coll., amending and supplementing Act No. 311/2001 Coll., the Labour Code, as amended, and amending and supplementing certain acts, 2007, p. 1.

26 In this context, see Article 141 of the Treaty establishing the European Economic Community, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

relation to women's and men's entitlement to remuneration. One of the objectives of this amendment to the Labour Code was to incorporate the requirement to add the obligation to ensure equal pay conditions for women and men also in the case of comparable work, i.e. work of equal value. The amendment also responded to the conclusions of the CJEU concerning the conceptual definition of remuneration. The principle of equal pay is to apply not only to all types of remuneration for work, but also to all remuneration provided to employees in connection with their employment, even if it is not regarded as wage under the relevant provisions of the Labour Code. The amendment has also introduced a modification reflecting the conclusions of the CJEU, where the scope of the principle of equal treatment also applies to employees of the same sex if they perform the same work or work of equal value. The amendment also modified the system of occupational classification used to determine the level of pay. This system must be based on the same criteria, irrespective of sex and excluding any discrimination.[27]

5.
Current EU initiatives on equal pay

Despite the existing EU legal framework, there is still a gender pay gap.[28] Effective implementation and enforcement of the principle of equal pay in practice remains a challenge. The relevance of the topic is underpinned by the still relatively high and persistent gender pay gap in the EU. It currently stands at around 13%.[29] The primary factors are, in particular, the lack of pay transparency and the related lack of evidence of pay differentials, the inconsistency of applicable national case law, the lack of specific criteria in relation to application of the principle of equal pay, as well as sophisticated and hidden forms of discrimination.[30] In March 2020, the Commission adopted the Gender Equality Strategy 2020-2025, setting out the basic framework for efforts to advance gender equality in Europe and beyond. As one of the first outputs of the Gender Equality Strategy 2020-2025, the Commission proposed binding measures on pay transparency in 2021. It submitted a proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms (hereafter the 'Draft Directive'). It aims to address the persistent lack of

27 Explanatory memorandum - Special Part to Act No. 348/2007 Coll., amending and supplementing Act No. 311/2001 Coll., the Labour Code, as amended, and amending and supplementing certain acts, point 86, 2007, p. 14.
28 See for example: Polachek, 2019, p. 1 or Foubert, 2017, p. 88.
29 Eurostat, 2022, p. 2.
30 Burri, 2019, pp. 38-40.

enforcement of the fundamental right to equal pay and to ensure its respect across the EU by setting standards in pay transparency and strengthening their effective application.[31]

A particular challenge in the implementation and effective enforcement of equal pay is the position of migrants in the labour markets of individual member states. The migration of workers is inextricably linked to today's increasingly globalised environment. Migration can contribute to stabilising the labour market. However, it is essential to ensure that the rights to which migrants are entitled in the context of legal migration are effectively defined and enforced, both at EU and national level. In line with the European Parliament resolution of 20 May 2021 on new avenues for legal labour migration, Article 79 TFEU provides for the management of legal migration at EU level and commits member states to the development of a common immigration policy, including common rules on the entry and residence of third-country nationals and the definition of the rights to which they are entitled.[32] In relation to remuneration, this includes the principle of equal pay.

The Draft Directive has recently been approved by the EU institutions. The process of adopting the final text took two years. The Commission presented the Draft Directive to the Council on 4 March 2021. The European Economic and Social Committee subsequently delivered its opinion on 9 June 2021. On 30 March 2023 the European Parliament adopted its first reading position. Finally, on 24 April 2023 the Council adopted the final text of the Draft Directive. As stated by the General Secretariat of the Council, the outcome of the European Parliament's vote reflects a compromise agreement reached between the relevant EU institutions.[33] However, not all member states voted in favour of the adoption of the Draft Directive. Some member states attached statements justifying their decision to vote against the Draft Directive or to abstain from voting. Bulgaria, Hungary and Sweden were against the Draft Directive. Germany and Latvia abstained. Member states have highlighted some problematic parts from their point of view. It is clear from the statements of some member states that the interpretation of the term 'gender' has been particularly problematic.[34] The statements of Germany and Austria show the problematic nature of the use of the term 'racial origin'. In this context, they assumed that the clarification of the use of the term 'racial origin' in the recitals of Directive 2000/43/EC also applies to the

31 European Parliament, 2021, p. 3. See also: Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 2021, p. 2.

32 European Parliament. 2021b, p. 4.

33 For more details see: General Secretariat of the Council, 2023, pp. 1-2.

34 In this context, see the statements by Bulgaria and Hungary: General Secretariat of the Council, 2023b, pp. 2-3.

Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms (hereafter the 'Pay Transparency Directive'). In addition, member states have warned in statements of the burden that the new obligations will impose on employers. The original text of the Draft Directive has therefore been modified. Employers will be obliged to provide information on the gender pay gap, depending on the number of employees, from differently defined periods. In Bulgaria's view, the inclusion of intersectional discrimination in the operative part would create legal uncertainty in view of the legal basis for the adoption of the Pay Transparency Directive, which is Article 157(3) TFEU. This article, as the statement goes on to say, only applies to the protection of equality between men and women on grounds of sex, but not to protection on other grounds or a combination of such grounds.[35] In the context of the statement in question, it seems useful to highlight the objective of the Draft Directive, which is to address the persistent lack of enforcement of the fundamental right to equal pay. It can be assumed, however, that the failure to include intersectional discrimination in the operative text of the Pay Transparency Directive may result in the non-coverage of multiple forms of discrimination against female migrant workers, which will contribute to the persistence of the pay gap.

6. Conclusion

The principle of equal pay is part of both the European and national legal framework. Nevertheless, gender pay inequalities persist. Female migrant workers are at a particular disadvantage in this respect, facing discrimination as both women and migrants at the same time. Legal instruments to ensure equal treatment are contained in a number of acts in Slovak law. From this perspective, the legal environment is based on defined rules in relation to the rights of employees and the obligations of employers. However, multiple discrimination is not clearly defined. The position of female migrant workers is thus insufficiently enshrined in law. At the same time, the factors causing their unequal status are largely linked to their multiple forms of discrimination. A new Slovak legislation that clearly defines multiple discrimination and clearly defines the determining factors for its elimination could bring about change. At EU level, the driving force could be the newly adopted Pay Transparency Directive,

35 On this point see: General Secretariat of the Council, 2023b, pp. 1-3. According to the recitals of Directive 2000/43/EC "The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.".

which aims to ensure equal pay for men and women through pay transparency and enforcement mechanisms.

Equal pay has received attention for decades. However, attention to pay equality for migrant workers, particularly women, has lagged far behind the attention paid to the gender pay gap at large. The adopted text of the Pay Transparency Directive confirms these considerations. The obligations on employers in relation to intersectional discrimination were deliberately excluded from the scope of the Pay Transparency Directive in the process of adopting the final text. Discrimination under Article 3(2) formally includes intersectional discrimination in combination with any other ground or grounds of discrimination, but under Article 3(3), there are no additional obligations on employers to collect the data set out in the Pay Transparency Directive relating to protected grounds other than sex discrimination. Those grounds are precisely those on the basis of which female migrant workers face multiple forms of pay discrimination. Member states have an obligation to transpose the Pay Transparency Directive within a three-year period. In this respect, the Commission has stated that this is a compromise that has been reached and that the deviation from the standard two-year period should not act as a precedent for the future.[36]

In accordance with Article 1 of the Pay Transparency Directive, the Directive sets minimum requirements to reinforce the application of the principle of equal pay. However, this is without prejudice to the adoption of more comprehensive legislation that is sufficiently targeted and specifically addresses also the aspect of multiple forms of pay discrimination of female migrant workers. In this context, a broader conceptual coverage of the area of equal pay and the grounds on which migrant workers – particularly women - face discrimination would be very beneficial. The transposition of the Pay Transparency Directive appears to be a specific instrument for achieving the EU's long-term objective of equal pay without discrimination. Otherwise, there may be insufficient coverage of the factors that cause the unequal position of female migrant workers, and thus a missed opportunity to adopt effective legal instruments aimed at ensuring equal treatment in all areas in the current period.

36 On the Commission's statement see: General Secretariat of the Council, 2023b, p. 5.

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Current Challenges of the Czech Space Sector

ABSTRACT: *On Wednesday May 3, 2023, Czechia signed the Artemis Accords. With this signature, this Central European country joins an ever-growing list of ambitious and prominent state actors in the NewSpace era. This milestone for the Czech space industry is a clear display of intent to actively participate in the new era of space exploration. Czechia has admirable STEM capacities which continue to grow, and is involved in many international space projects. Despite the general practice of legislation following technical progress, based on documents available to the public the state's focus does not seem to extend beyond the scientific and business aspects of space. The National Space Strategy – published in 2019 with plans for the 2020-2025 period – makes no mention of national space legislation. This paper maps out the current state of the Czech Space Sector, and focuses on its associated challenges. It covers Czechia's participation in the international space industry, and its membership and activities in space-relevant international organisations. It also aims to summarise Czech history with space law, and elaborate on possible future challenges and developments in national space law and policy.*
KEYWORDS: *national space law, Czech space law, Czech space sector, Intercosmos, national space governance*

1. Introduction

In 2023 the Czech Republic – mainly referred to as Czechia in this article[1] celebrated 30 years since its establishment. Even as former Czechoslovakia, the country had a very strong track record in space, whether through science or industry. Now a proud member of the European Union and the European Space Agency, the state commits itself to the European approach to space and international cooperation. The ambitious phrase 'The space can become our sea' has appeared in the media recently,

1 Ministry of Foreign Affairs of the Czech Republic, 2016.

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hinting at how the countries that took part in the sea trade benefited immensely from it[2]. Viewing space as a business opportunity points to a shift in the Czech perception of outer space. Now, in addition to space being observed through science, Czechia recognises its business opportunities and strives to be an active participant in the NewSpace era.

In this paper, the author aims to summarise Czech engagement in space and elaborate on possible challenges. Firstly, the rich history of the Czech space industry is emphasised. Secondly, the national institutional structure for space activities is introduced and its impacts are weighted. And lastly, the core focus of this article is on Czech involvement in space law and policy, accompanied by an outlook into the future. A significant portion of Chapter 4 is based on interviews with employees of the Ministry of Transport, Department of Space Activities and New Technologies, whom the author thanks for their cooperation and the time they took for answering questions.

2.
A History with Outer Space

Providing a historical context is important for better understanding the development of Czechia's space industry. Czechs first distinguished themselves as a nation after the First World War, which resulted in the dissolution of the Austro-Hungarian Empire. Czechoslovakia was established in 1918 and had the tenth-strongest economy in the world by the 1920s. This promised a bright future, and amongst the strongest industries were weaponry and shoemaking[3]. However, this "brightness"lasted only until 1938. After the Second World War, Czechoslovakia fell within the sphere of influence of the Soviet Union. This development is significant, since involuntary membership of the 'Eastern Bloc' – which lasted for over half a century – set the path for Czechoslovakia and its industry. Thus, until 1989 Czech engagement in the space industry was closely tied to the USSR.

1.1. Intercosmos

The 1960s were for many reasons a memorable decade for space exploration. In the light of Cold War hostility, the two ultimate world powers – the USA and the USSR – engaged in the so-called 'space race'. The Intercosmos programme was a part of the

2 Kozelka, 2022.
3 Šrámek, 2015.

USSR's efforts to foster cooperation within the Soviet bloc in the exploration of outer space. It was inaugurated in 1967, and outlined by the Agreement of Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes of July 13, 1976[4].

The programme was designed to give nations which were on good and friendly terms with the USSR access to crewed and uncrewed space missions. In addition to Czechoslovakia, other participating countries were Bulgaria, Cuba, Hungary, Mongolia, Eastern Germany, Poland, Romania, and Vietnam. Cooperating countries also included India, Syria, France and Great Britain.

After the dissolution of the USSR, Western nations participated in the programme too, and Intercosmos joined the International Solar Terrestrial Programme with NASA and the European Space Agency[5].

1.2. MAGION satellites

The MAGION satellites were a prominent milestone in Czech space history. The five small satellites were manufactured in Czechia between the 1970s and 1990s, and were a part of the Czechoslovak space programme focused on research in the physics field. The name stands for both Magnetosphere and Ionosphere[6], and the satellites' scientific purpose was to study the parameters of, and collect data on, magnetic, ionospheric and plasma presence in Earth's orbit.

MAGION satellites 1, 2 and 3 were launched within the frame of the Intercosmos programme; MAGION-4 and MAGION-5 were designed as part of the INTERBALL project. The five MAGION satellites were also the first entries within the Czech Space Objects Registry (more on this in Chapter 4.3.1). They are no longer operational, with MAGION-1 having burned up in the atmosphere.

1.3. Cosmonauts and astronauts

Different terms can be used when referring to those individuals who fulfil the role of what the Outer Space Treaty (OST) calls "the envoys of mankind"'.[7] The most well-known term is 'astronaut', however terms such as 'cosmonaut'[8] or 'taikonaut' are in use as well. The difference is in the origin of the agency under which such a mission

4 Grant and Barker, 2009.
5 Dasch and O'Meara, 2018.
6 Magion History.
7 Article V of the Outer Space Treaty: "States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space (...)".
8 Greek words cosmos (space) and nautes (sailor) put together.

is conducted. Cosmonauts are trained and certified by the Russian Space Agency (formerly the USSR Space Agency). Astronauts are trained and certified by NASA, the ESA, CSA, or JAXA[9], and taikonaut is a term used in the West for people undertaking Chinese space missions[10].

In the history of Czech space exploration, the term cosmonaut is more prevalent and important. On 2 March 1978, Czechoslovakia gained its first cosmonaut with Vladimír Remek, who - accompanied by Aleksei Gubarev of the USSR - flew on board Soyuz 28. Their mission was to spend several days on the Salyut 6 orbital space station. It was the first Intercosmos mission with another national on board, making the significance of the mission not purely scientific but also political[11]. They returned safely to Earth on 10 March, having spent almost 8 days in space. This made Czechoslovakia the third country in the world – after the US and the USSR – to reach outer space.

Debate exists on why the honour was even given to Czechoslovakia out of all participating Intercosmos countries. Some authors may credit this to participation in the Intercosmos programme, as up until 1978 45% of the experiments conducted on the satellites were of Czechoslovak origin[12].

Other sources, for example the recent multi-part documentary Czechoslovakian Space (Cz: *Československý vesmír*) by Czech Television, dive more into the political reasons. The USA considered plans for a rocket plane which could undertake numerous flights and transport into space not only American citizens but also nationals from European countries. This prompted the USSR to conduct a similar initiative, to also help other nations into space.

In 1976 the three westernmost countries of the Eastern Bloc were offered to present their candidates for spaceflight. Those were East Germany, Poland and Czechoslovakia. East Germany was likely aware that the milestone of a third nationality in space could not be granted to them so soon after the Second World War, so the final choice was between the latter two[13].

The final choice was between the pairs of Vladimír Remek-Aleksei Gubarev and Oldřich Pelčák[14]-Nikolai Rukavishnikov. The sources differ in who had the final pick between the cosmonaut pairs. The Soviet side alleges it was done by a commission voting in Prague, however we can confidently assume it was rather a Soviet decision. Gubarev was a member of the military, and this gave him more leverage to be chosen for the spaceflight. The Czechoslovak half of the two crews did nothing to tip

9 Frost, 2017.
10 Smith, 2005.
11 Human Spaceflights, 2021.
12 Grün, 1978.
13 Československý vesmír, 2023.
14 Mr. Pelčák was a fighter pilot, graduated from the Gagarin Air Force Academy and a cosmonaut candidate. He passed away on October 7th 2023.

the scales, even though it was suggested that Remek's parents' origin contributed: his father was a Slovak and his mother a Czech, with his background representing both nations.

Now, after 45 years Czechia has currently two more opportunities to send its second citizen to outer space. One chance is via the public sector, while the other is from the private sector. During the ESA astronaut call finalised in November 2022 – which produced five career astronauts – fighter pilot Aleš Svoboda was selected as one of the members of the ESA astronaut reserve[15].The twelve members of the reserve will not be permanent ESA staff, but could have the opportunity to be selected for specific projects and join the ranks of career astronauts in the future[16].

In June 2023, Czechia received an offer from US-based private company Axiom Space to fly Svoboda to conduct his research in space aboard the International Space Station[17]. Axiom provides this opportunity to individuals through the Crew Dragon spacecraft built by SpaceX. Amongst nations who will venture out to space with Axiom are Saudi Arabia[18] or Svoboda's colleagues from the ESA astronaut reserve[19], Sławosz Uznański from Poland[20] or Marcus Wandt from Sweden[21].

Taking up the offer to send a second Czech to space would cost the national budget roughly 41 million euros[22]. Despite these costs, such investment will be worth it and prove itself returnable in both scientific contribution and prestige, as pointed out by Svoboda himself[23]. In addition, he emphasises the positive exposure of local universities and researchers[24]. The question remains whether Czechia will decide to invest in this opportunity, or if the money will be acquired through private fundraising - if at all.[25]

The second person to possibly become the second Czech in outer space is an artist and Czech Goodwill Ambassador Yemi Akinyemi Dele, known as Yemi A.D. (Yemi A.D. n.d.) – via a private company project dearMoon – which selected him in December 2022 (ČTK 2022). The project was initiated by Japanese billionaire Yusaku Maezawa, and plans to send a group of 8 international artists towards the Moon and back, with half of the crew descending to the Moon's surface and the rest staying in

15 ESA presents new generation of astronauts, 2022.
16 Astronaut selection 2021-22 FAQs,
17 CT24zive, 2023.
18 Reuters, 2022.
19 Wandt.
20 A Pole among the ESA astronaut reserve, 2022.
21 Lea, 2023.
22 Denko, 2023.
23 Kužel, 2023.
24 Dolejší,, 2023.
25 In June 2024, Czechia has announced that the government will fund Mr. Svoboda's flight with Axiom, despite refusing the previous offer back in December 2023.

orbit. Yemi will be a member of the former group. The launch date, as of November 2023, is still undecided[26] as it is dependent on the Starship by SpaceX development and test schedule[27][28]

Sending humans to space is an important part of space exploration. Even historically, such a mission holds prestige and opens many opportunities for the state. For example, the recent European Space Policy Institute brief analyses the undoubtable economic benefits of such an endeavour[29]. Czechia now faces the challenge of how to gain a second national astronaut – whether to wait for the ESA mission, the dearMoon crew launch, or to actively seek funding for the flight with Axiom Space.

3.
Institutional Engagement

The beginnings of Czech space exploration were rooted in the Eastern Bloc. Since its newfound sovereignty in 1993, Czechia has become more involved in Western-led projects and sought memberships to many international organisations dealing with space activities. Building up its own space industry required the state to create and arrange a governing structure for management and supervision.

3.1. Governing Structure

At first, national space activities were led mainly by the Ministry of Education, Youth and Sport (MEYS). MEYS also deals with general research and development[30], suggesting that in the beginning space was seen more as a scientific research platform than a business opportunity.

The first National Space Plan (NSP) from 2010 provides the first comprehensive description of the governing structure, and discloses cooperation with a private non-governmental entity called the Czech Space Office (on which more in Chapter 3.2.1.) during the Czech ascension to the European Space Agency (ESA). Apart from MEYS, other ministries involved were and, in many ways still are, the Ministry of Transport (MT), the Ministry of Industry and Trade (MIT), the Ministry of Environment (ME) and the Ministry of Foreign Affairs (MFA). This fragmented structure is defended in

26 Announcement by dearMoon project, 2023.
27 Schedule.
28 The dearMoon project was cancelled in June 2024 due to delays in the SpaceX Starship development.
29 European Space Policy Institute, 2023.
30 From the History of the Ministry of Education

the NSP 2010 as necessary, due all the different aspects space utilisation provides, arguing that creating a singular authority would be too complicated. On the other hand, the NSP 2010 admits that this fragmentation may be an obstacle to the healthy and efficient development of the space sector[31].

The follow up National Space Plan for 2014-2019 puts forth in its review of NSP 2010 precisely this problem. It further establishes that, in April 2011, the Czech Government gave the authority over national space activities to the MT. This ministry handles the national coordination of space activities to this day.

The MT is responsible for national regulations and space activities support (preparation and implementation of the NSP; overall membership of the ESA; EU space policy and the EU space programme).

The MFA joins the MT in the UN Committee on the Peaceful Uses of Outer Space (COPUOS). MEYS still is involved in Czech space activities but on the level of research and development, and it also cooperates with the MT on ESA affairs. The MIT takes responsibility for state industrial and trade policy, and for support of business and Czech companies' visibility through CzechInvest or Czech Trade initiatives.

3.1.1. Coordination Council for Space Activities

In April 2011 the MT also established the Czech Coordination Council for Space Activities (hereafter: 'the council'). It is still active, with seven governmental members – namely the MT, MEYS, the ME, the MFA, the Ministry of Defence (MD), and the Office of Government of the Czech Republic (OGCZ)[32].

Other entities which are advised to participate when appropriate are the Ministry of Finance, the Ministry of Regional Development, the Ministry of the Interior, the Ministry of Agriculture, the Czech Telecommunication Office, the Czech Office for Surveying, Mapping and Cadastre, the National Cyber and Information Security Agency, the National Security Authority, the State Office for Nuclear Safety, the Czech Science Foundation, the Technology Agency of the Czech Republic and CzechInvest[33].

The council has three cross-sectional committees to share views with industry and academia, namely Industry and Applications, Science Activities, and Security and International Relations. Creating such a platform was necessary for tackling the fragmented structure, as it gives a platform for the representatives to meet and coordinate efforts. The council also contributes to the fulfilment of the National Space Plan.

31 Ministry of Education, Youth and Sports of the Czech Republic, 2011.
32 Koordinační rada pro kosmické aktivity.
33 Coordination of Czech Space Activities.

3.2. National Space Plan

Czechia has put forth three national space plans so far, each of which were in place for several years. The first National Space Plan (NSP) was published in 2010. The content was based on the National Space Strategy from December 2009. As mentioned previously, the authority over Czech space activities shifted to the MT only in 2011, and thus this first space plan was still facilitated under MEYS.

There were two main impulses for creating the NSP 2010. The first one was Czechia putting forth the candidacy of Prague as the seat of the European GNSS Agency (GSA), which resulted in being tasked by the EU to set up its national space programme. The second reason was the need to define the Czech space strategy for the CZECH/ESA Task Force working group (more on Czech ESA membership in Chapter 3.5.).

NSP 2010 set out medium-term objectives for the following six years, and reflected the needs of the Czech space sector at that time, stating explicitly in its preamble that its contents were addressed mainly to the relevant governmental bodies. Other possible recipients of the NSP contents were academia, industry, and the general public, to serve as a source of information more than any concrete recommendations or plans. However, even the first NSP emphasises the importance of space research and innovation for the competitiveness of Czech industries.

The second Czech NSP was for 2014-2019, this time put together by the MT. The reason for a new space plan so soon after the previous one is that Czechia had fulfilled the goals of NSP 2010 surprisingly quickly. The original deadline was 2016, however most of the medium-term objectives had been fulfilled by 2013. Now, the main goal of NSP 2014 was to increase competitiveness of the Czech space industry and advance its technological progress and innovations. It is also noticeably longer than the previous NSP, and dedicates more pages to relevant financing from the European Funds and its Czech Operational Programmes.

The third Czech NSP is the current one, as it plans for the period 2020-2025. The main objectives are building up Czech space capacities to increase excellence and competitiveness, as well as holding an active position in international relations. This should help increase the visibility of the country[34]. NSP 2020 includes an evaluation of NSP 2014 and introduces 46 measures for the five-year period. A substantive part of the NSP 2020 focuses on education and awareness spreading at all educational levels. Another portion is dedicated to financing and participating in ESA projects and missions.

34 National Space Plan 2020 – 2025.

3.2.1. National Space Agency

The idea of having a national space agency is not a novelty in Czechia. In 2011 the National Economic Advisory Board to the Government (NERV) put forth an analysis regarding Czech technological advancements[35]. It strongly recommended setting up a national space agency. According to the report, the lack of such an agency complicates cooperation on a higher international level with other national agencies such as NASA, JAXA in Japan, or the DLR in neighbouring Germany.

Apart from business opportunities for Czech companies, such an authority would be represented internationally, which could result in new jobs, better return on investments into space technologies, and overall improve the image of the Czech space industry. Bavaria is mentioned as an example of good practice when furthering the space field, as it mirrors Czechia in its size, population and schooling system[36]).

However, there are currently no explicit plans to establish a national space agency. While an intent to do so was mentioned in every single National Space Plan so far – and in NSP 2020 is listed as measure number 1[37] – the plan has not yet come to fruition. This is caused by several factors.

As the outline of the Czech national institutional structure suggests, space-related areas are quite fragmented. Uniting those under a sovereign separate agency would require consensus amongst all involved governmental bodies, who would possibly have to hand over their authority.[38] Such transfer of competencies will require a thorough, separate plan with a clear outline - while the NSP treats it as a suggestion only and does not elaborate. Another complication is the funding, because in addition to institutional willingness there must be political will to supply the money. It is up for debate whether Czechia, in its current economic and political climate, is ready to take a step in the direction of its own national space agency. The obvious benefit would be to appear unanimous on the international scene.

The Czech Space Office (Cz: *Česká kosmická kancelář*, or CSO) was already introduced in Chapter 3.1. It is a private, non-governmental, non-profit entity established in 2003 to provide the largest and most effective involvement of Czech research, development and industrial institutions in international space projects[39]. For years it has cooperated with MEYS and provided consulting of space activities. This was a unique arrangement, which has even been pointed out in NSP 2014, as it is unusual for a government to delegate a voice for its national space industry to a private entity.

35 NERV: V ČR by měla vzniknout Národní kosmická agentura, 2011.
36 NERV, 2011.
37 NSP, 2020, p. 54.
38 NSP, 2020, p. 117.
39 Kolář, 2012.

Nowadays it creates confusion on the international scene as to whether Czechia has an official space agency. As of November 2023, the CSO was even listed on a Wikipedia page of national space agencies[40]. Even though the CSO website holds a disclaimer at the bottom of its page that its operation is "Co-financed by the Ministry of Education, Youth and Sports within INTER-EXCELLENCE programme", it is unclear from the website information whether that is still the case, as the website is rarely updated. Most recent articles were published in 2015 or 2016. This suggests that the funding has been halted and the CSO does not actively engage in representation of the Czech space sector anymore. Nevertheless, the confusion still stands.

This may pose another challenge to Czechia's self-representation. Either the CSO should be clearer on the website that they are not an official governmental entity, or Czechia should include an explanation of this situation on the official Czech Space Portal run by the MT. The current situation is very confusing, not only for other state representatives but for foreign researchers, businesses and investors as well.

3.3. International involvement

3.3.1. UN COPUOS

The United Nations Committee on the Peaceful Uses of Outer Space (UN COPUOS) was established after the launch of the first artificial satellite in 1958, due to growing concerns during the Cold War over what unregulated outer space may become[41]. Czechoslovakia was one of the 18 founding members, and has continued its membership as the Czech Republic since 1993. It regularly participates in both The Scientific and Technical Subcommittee (STSC) and The Legal Subcommittee.

3.3.2. European Union

In 2004 Czechia joined the European Union in its largest expansion to date – counting 10 countries, along with Slovakia, Poland and Hungary. The European GNSS Agency (GSA) was established in 2012 in Prague, and was followed by the European Union Agency for the Space Programme (EUSPA) in 2021. The GSA has been transformed to better cater to European needs in the growing space utilisation[42].

40 Wikipedia Contributors, 2023.
41 COPUOS History.
42 From GSA to EUSPA: space transforming business and the economy, 2019.

The current plans are to relocate EUSPA into a larger building by 2025, and increase the number of its employees[43]. The EU has also recently introduced plans to publish an EU Space Law. This will be elaborated on in Chapter 4.3.2.

3.4. Other relevant engagement

Apart from the ESA, the EU and the EUSPA, Czechia is involved in many more international organisations dealing with space. Since 2010 it has been a member of the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT) – a European operational satellite agency for monitoring weather, climate and the environment from space[44]. Czechia takes part in the mandatory programmes but not the optional ones. Other memberships are of the European Southern Observatory (ESO, since 2006) NATO (since 1999), EUROCONTROL (since 1996), ICAO (since 1944, as Czechoslovakia), ITU (since 1920, as Czechoslovakia) and others.

These organisations are an important gateway for Czech engagement in the space industry. Based on how many Czechia takes part in, the intent of international cooperation and advertisement of local capacities is clear and well-handled.

Considering future plans, an interest has been expressed in becoming a member of Eurisy.[45] Looking at the nature of institutions that are current Eurisy members (space agencies, educational institutions, ministries), this will probably be done through the Ministry of Transport.

Apart from official memberships, Czechia is indirectly involved in other space-relevant organisations through private bodies. The International Astronomical Union (IAU), the International Aeronautical Federation (IAF; there are currently three Czech members in addition to the EUSPA – the Czech Space Alliance, the Czech Space Office, and most recently the Institute of Experimental and Applied Physics, of the Czech Technical University in Prague), and the Committee on Space Research (COSPAR).

In addition to engagement in international institutions, Czechia has also signed a three bilateral agreements or memoranda of understanding about space-related activities. Namely with Brazil in 2011, France (the UN Committee on the Peaceful Uses of Outer Space 2016) in 2014, and Luxembourg in 2018 (Luxembourg Ministry of the Economy and the Ministry of Transport of the Czech Republic 2018).

43 Hrabětová, 2022.
44 Who we are .
45 NSP 2020, measure 2.

3.5. European Space Agency

The predecessors of the European Space Agency were the European Launcher Development Organisation (ELDO) and the European Space Research Organisation (ESRO). ELDO, with six members (Belgium, France, Germany, Italy, the Netherlands, and the United Kingdom), was established to develop a heavy launcher. Another project, ESRO, followed soon after, with Denmark, Spain, Sweden and Switzerland joining the cause of undertaking scientific satellite programmes.

Both organisations were established by respective conventions, signed in 1962, that entered into force in 1964. Eventually ELDO and ESRO were merged to create the European Space Agency (ESA), which would respond more effectively to the different needs of the ever-evolving space sector[46]. On 30 May 1975 the ESA Convention was opened for signature.

According to Article II of the Convention, the purpose of the ESA is to "elaborate and implement a long-term European space policy, by recommending space objectives to the Member States, by concerting the policies of Member States, and with respect to other national and international organisations and institutions'"[47]. Furthermore, Article XIV can be used to meet different needs of international cooperation. The article has three paragraphs, with the first dealing with the general principle of cooperation and the latter two with specific examples of cooperation – participation in ESA programmes or associate member status (European Centre for Space Law 1998). Czech involvement in the ESA shows clear dedication to this mission.

3.5.1. Membership Procedure

For non-member states, the ESA offers cooperation through the Plan for European Cooperating States (PECS) scheme, which provides the possibility to cooperate on some ESA projects. It is a route to becoming an associate member and later possibly a full member [48]. This scheme has been used mostly by Central and Eastern European countries.

Since the ESA plays an important part in the European space industry, Czechia has strived for membership ever since the 1990s[49]. The Agreement between the

46 Tinjod, 2015.
47 Sagath et al. ,2018.
48 General overview.
49 Evropská kosmická agentura (ESA) .

Government of the Czech Republic and the European Space Agency was signed on 7 November 1996, and entered into force on 5 November 1998[50].

In June 2000 Czechia started participating in PRODEX (Programme de Développement d'Expériences scientifiques, or PRODEX 2001), which is an optional scientific programme established to fund initiatives proposed by institutes or universities[51].

The European Cooperating State Agreement between the European Space Agency and the Government of the Czech Republic was signed on 24 November 2003 and entered into force on 19 November 2004[52].

The Programme of the European Cooperating State was also signed on 24 November 2003, and entered into force on 24 November 2004[53].

The PECS for Czechia was valid for the next 5 years, during which the space sector soared. In 2008 Czechia gained full membership with the milestone of being the first Central and Eastern European country to do so [54].

3.5.2. Projects and Funding

According to the ESA 2022 Annual Report, Czechia contributed 46.2 million EUR to its activities and programmes, which equals 0.9% of the ESA budget[55]. Czech companies have been engaged in several significant projects, like the Ariane 6 launch system[56], the HERA mission and the PLATO mission. The participation of Czech companies seems to be increasing over the years, as well as Czechia's monetary contribution to the ESA. In 2022 it was announced that the budget would be raised to 62 million EUR[57].

In the same ESA 2022 report, it is stated that the agency currently employs nine Czech citizens (all A-grade positions[58]). Programmes by the ESA such as the Young Trainee Programme have been attended by Czech nationals; however, as opposed

50 Sdělení Ministerstva zahraničních věcí o sjednání Dohody mezi vládou České republiky a Evropskou kosmickou agenturou o spolupráci ve výzkumu a využívání kosmického prostoru pro mírové účely, 1998.
51 Program vývoje vědeckých experimentů (PRODEX).
52 Sdělení Ministerstva zahraničních věcí o sjednání Dohody evropského spolupracujícího státu mezi Českou republikou a Evropskou kosmickou agenturou, 2004.
53 Sdělení Ministerstva zahraničních věcí o sjednání Listiny Programu evropského spolupracujícího státu, 2004.
54 Czech Republic accedes to the ESA Convention, 2008.
55 ESA, 2023.
56 Majer, 2020.
57 ČTK, 2022.
58 Includes scientific or engineering activities within the position, or professional administration relating to law, finance, contracts or administration.

to some other member states Czechia does not have its own separate national programme for students and graduates.

The NSP 2020 does mention within its measures (numbers 13-15) an intent to establish a Czech Trainee Programme or support its citizens through the International Space University with student loans or scholarships. Unfortunately, no known steps have been taken, nor can any specific scheme can be found.

4.
Czechia and Space Law

Czechia has the privilege of being the birthplace of several important names, which have made a significant impact in international space law. Professor Vladimír Mandl is often credited as the author of the world's first comprehensive survey of space law[59] in the book Space Law: A Problem of Space Travel (De: *Das Weltraum-Recht: Ein Problem der Raumfahrt*).

Another space law expert, professor Vladimír Kopal, published one of his last works about this revolutionary legal persona[60]. Professor Kopal himself was a well-respected international law expert and served as a chairman of the Legal Subcommittee of COPUOS from 1999 to 2004 and from 2008 to 2010.

4.1. International Law

Czechia is a signatory of four out of five main space law treaties: the Outer Space Treaty,[61] the Rescue Agreement,[62] the Liability Convention[63] and the Registration Convention.[64] However, it has never signed nor considered signing the fifth known space treaty: the Moon Agreement.

59 Plavec, 2011.
60 Hofmannová, 2014.
61 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.
62 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.
63 Convention on International Liability for Damage Caused by Space Objects.
64 Convention on Registration of Objects Launched into Outer Space.

4.2. Artemis Accords

The Artemis program is a NASA mission to return humans to the Moon[65]. The initiative is accompanied by a bilateral document – the Artemis Accords – which with its 13 sections has managed to spark international discussion.

This is due to its approach to safety zones on the Moon and the ownership of space resources possibly extracted from it[66]. The document was drafted in 2020, and so far thirty-two countries and one territory have signed.[67]

Czechia joined as the 24th country when Minister of Foreign Affairs Jan Lipavský signed the document during his visit to Washington DC on 3 May 2023[68]. This was an important milestone for the Czech space sector, as it opened new cooperation opportunities.

4.3. National Space Legislation

We can observe a rising trend of states drafting their own national space legislation. According to UNOOSA, 43 states have a legislation that is somewhat related to outer space and outer space technologies[69]. This number can vary throughout other sources, as it is subjected to individual assessment of what is deemed to be 'space' law.

For example, the German laws related to space deal only with remote sensing (Gesetz zum Schutz vor Gefährdung der Sicherheit der Bundesrepublik Deutschland durch das Verbreiten von hochwertigen Erdfernerkundungsdaten, from 2007) or transfer of responsibilities for space activities (Gesetz zur Übertragung von Verwaltungsaufgaben auf dem Gebiet der Raumfahrt, from 1990). Amongst the most active countries in space laws are the USA and Luxembourg.

It is desirable for countries to pay more attention to their national space activities via legislation. However, attention should not be applied only to the existence of the legislation itself, but also to its contents. In the legal field, a unified language and clear meanings are essential. Different definitions or varying interpretations of international space treaties can cause problems, especially in an effort to conduct outer space activities safely[70].

The UN General Assembly (UNGA) resolution from 2013 (Resolution 68/74) put forth recommendations for states when regulating their national space activities.

65 Artemis Accords
66 Riordan, Machoň & Csajková, 2023.
67 As of November 9th, 2023.
68 Czechia joins the Artemis Accords, 2023.
69 National Space Law .
70 Frans von der Dunk, 2006.

As a desirable content of such legislation ("should include"), the UNGA puts forth the topics of the launching of objects into – and their return from – outer space; operation of a launch or re-entry sites; and operation and control of space objects in orbit.

Furthermore, topics of design and manufacturing of spacecraft, the application of space science and technology, and exploration activities and research, are advised to be at least considered for inclusion in such laws[71].

4.3.1. Czech Space Objects Registry

To fulfil obligations stemming from Article VIII of the Outer Space Treaty and Article II of the Registration Convention, each state is obliged to establish and maintain its national space object registry. The current Czech National Registry of Space Objects has been administered by the Ministry of Transport since 2014. It currently holds information about eight space objects, one of which (MAGION-1) has already decayed. The registry lists the launching state, registration number, date and territory or location of launch, basic orbit parameters and the general function of the space object.

MAGION-2 was originally registered by the USSR, but after 1990 the registration was transferred to Czechoslovakia. The United Nations registry which is kept by UNOOSA lists seven space objects registered under Czechia and four yet unregistered – VZLUSAT-2 (which can already be found in the Czech registry), BDSAT, PLANETUM1 and BDSAT-2 (the latter three are not noted within the Czech registry to this date).[72]

The curious fact about the Czech registry is that the ownership and authority over it was moved four times. From 1979 it was administrated by the Czechoslovak Academy of Sciences (as the Czechoslovak National Registry of Objects), the Institute of Atmospheric Physics of the Czech Republic took over in 1996 until the CSO managed the registry from 2009 until 2014. As mentioned in Chapter 3.2.1., it is unusual to entrust a private entity with access to and administration of the national space objects registry.

This was fixed in 2014 when the authority was handed over to the Ministry of Transport via a Government resolution from 5 May 2014, number 326, on the designation of responsibility for the management of the National Register of Space Objects. This resolution is possibly the only document eligible to be considered a Czech space 'law', as Czech government resolutions are considered *secundum et intra legem*.[73]

71 General Assembly resolution 68/74 Recommendations on national legislation relevant to the peaceful exploration and use of outer space, 2013.

72 October, 2023.

73 *Authorities may only act within the law.*

4.3.2. The Future (of) Czech Space Law

Outer space is subject to international law, and as such the state bears responsibility for all its activities. The most valid reasons for establishing a national space law are Article VI and Article VII of the OST, which deal with liability for space activities. Here it is up to the state to set further conditions for their companies to engage in space through legislation.

Czechia began working on its space law in 2018. Realising its great importance for furthering the space industry, discussions have been held about what the contents of national space law should be, so that they would cater to both state and private sector interests. These discussions, however, are never made public, and plans for national space legislation are not mentioned in the NSP 2020. No information about Czechia's intentions can be found online from official sources. By comparison, Poland is actively working on furthering a draft that has been mentioned in academic publications[74], and Slovakia and Hungary have informed COPUOS about their active works on national space legislation.

The only way to get a scope of the possible contents of the potential Czech Space Law is by contacting its Ministry of Transport directly. Thereby it seems the first challenge of Czech national space law is finding out whether plans for it exist or not. Some dated insight can be found in a thesis written by Klára Štenclová from April 2021, titled Article VI of the Outer Space Treaty and its implementation in Czech Republic[75]. Chapter 7 of the work is dedicated to the future of Czech national space legislation, and is based on an interview with Michal Reinöhl, a Czech delegate to the ESA at the Administrative and Finance Committee and International Relations Committee, and an employee from the Ministry of Transport Space Activities and New Technologies Department.

In 2021 Czech national space law was supposed to include authorisation and supervision of space activities of private companies, as well as obligation to inform the relevant state body (which should also be set up by the law), and the requirement of insurance when conducting space activities. Damages exceeding the arranged insurance amount might be covered by the state.

The company was to have its individual activity authorised – as opposed to just gaining a licence to operate – and was to commit to not creating unnecessary space debris. Furthermore, the law was also to regulate the national space registry – meaning how the individual objects should be registered and under what requirements. At the time of the referenced interview, the planned year for implementing the law was 2022. This clearly did not come to fruition, as we are now near the end of

74 Konert & von der Dunk, 2023.
75 Štenclová, 2021.

2024 and no space legislation has been published. The reason for this could have been Czechia's presidency of the Council of the EU, as well as different matters requiring the department's and the lawmakers' attention.

To get a better scope of Czech plans and priorities for its national space law at present, this author has also reached out to Michal Reinöhl with a request for information on the current state of the legislation. The interview took place online on 30 October 2023. Another interview was conducted on 8 November 2023 with Václav Kobera, the Director of Space Activities and New Technologies Department of the Ministry of Transport, Czech delegate to the ESA (ESA Council, AFC Committee) and Czech delegate to the EC space bodies.

It is important to emphasise that the interviews covered merely the scope and overall intent of the department, and are not binding reflections of what may be published by the Czech government in the future. Everything can be subject to change, as the document is put forth for comments from other ministries, interested bodies or parliament. Both interviewees have provided a valuable insight which greatly contributed to this article. The following information about the progress of Czech national space legislation is based on those interviews, and the author is sharing this with the interviewees' permission.

The reason why drafting a national space legislation is not mentioned in any of the NSPs is apparently that it is not seen by the ministry as the proper platform to do so. Though it covers visions and objectives, NSPs are focused on the space economy, industry, and innovation. In the author's judgement, however, this should not exclude establishing a legal framework. Better governance of space activities can further these objectives too, by – for example – embedding space resources' best practices into them[76].

However, this poses a question as to whether Czech space legislation should aim that far, as only a few countries out of the many with space laws (see Chapter 4.4.2.) have included space resources. According to the ministry, there are no plans for Czechia to cover the issue of property and ownership rights to space resources in its national law, and a change in this approach is highly unlikely. Czechia is however a party to the Artemis Accords (see Chapter 4.3.), which provides an indirect clue as to how government views this issue.

In the works on the national space legislation, the ministry has consulted several sources – the UN General Assembly Resolution 68/74, the Sofia Guidelines for a Model Law on National Space Legislation of the International Law Association, and ESA-organised consultations. In addition to that, some of the fellow ESA member states, which have already passed national space laws, have been informally consulted. Choice of these consultants was made with the size of Czechia and its space industry

76 Gatto and Goessler, 2023.

in mind, as it has different needs for its legislation compared to, for example, France, with a launcher. Due to the similarity in size and historical development of law, cooperation with Austria is the most likely. The Austrian space legislation consists of the Austrian Outer Space Act from 2011, which was later joined by the Outer Space Regulation in 2015.

The intended contents of the space law have not changed much since those covered in the thesis from 2021. What may have changed, however, is the timeframe and the feeling of urgency to adopt a national space law. The author believes the reason behind this seeming reluctance – apart from the limited personnel capacities of the ministry and willingness of politicians – is the matter of mandatory insurance for space companies. Or rather, as it is planned, individual projects and missions. The ministry would prefer to authorise individual projects rather than give generic authorisation to a company. The insurance may be too expensive for many Czech companies, which would hinder progress and work against the desired results.

Based on the interviews, Czechia does realise the international trend of writing a national space law. Not only with the hope to achieve legal certainty by regulating space activities and fulfilling obligations as per international law, but also to protect the interests of the state in the NewSpace age, especially regarding liability. At the same time however, Czechia does not wish to overly restrict the activities of companies in its laws, which could slow industry progress. That seems to the author to be the prominent factor in why the ministry is reluctant to focus on legislation in the current moment.

Another factor that may be delaying the development of the law is a recent initiative from the European Union to create an 'EU Space Law' (EUSL). The form of this, whether it will be a directive or a regulation, is currently unknown. The ministry is likely to contribute to the public consultation. Another official Czech entity, the Civil Aviation Authority, has encouraged the air traffic management community to participate due to the impact of launches and re-entry of space objects on their work[77]. The ministry believes the final EU law may cover some scope of the planned national space legislation, which could deem a national creation redundant.

The EUSL puts forth three pillars – safety, resilience, and sustainability[78]. The safety pillar should cover satellite traffic and space debris; the resilience pillar the protection of satellites against threats such as cyber-attacks; and the sustainability pillar long-term sustainability of space operations for economic growth. Security was not touched upon as a topic possibly included in the Czech space law; prevention of orbital debris is merely 'considered'. The main motivations for drafting it seem to be the registration of space objects, authorisation of Czech space missions, and insurance. These are not very likely to be included in the EUSL.

77 Konzultační průzkum – EU Space Law, 2023.
78 Targeted consultation EU Space Law, 2023.

5.
Conclusion

The Czech space sector is currently facing numerous challenges, and its success in tackling them varies. Firstly, we can assess that Czechia is successfully following up on its 20th century space industry through joining the ESA and the EU, which opened new possibilities for local companies and academia, hosting EUSPA headquarters, staying an active participant in COPUOS, and following industry trends through the strategic signing of the Artemis Accords.

Regarding national and international popularisation of the space industry, space gets more exposure on the news due to the efforts of the Ministry of Transport and local space companies. The most excessive exposure for the Czech space industry would be gaining another Czech astronaut.

Even though the governmental coordination of space activities has improved, the fragmented nature of the Czech space sector persists. Crucial steps towards this development were the establishment of the Coordination Council and moving the main responsibilities under the authority of the Ministry of Transport, such as maintaining the space objects registry. The establishment of a national space agency, which could help to alleviate the fragmented nature even more, unfortunately seems unlikely at present.

Legal aspects of space exploration do get some recognition in Czechia, and it remains committed to the four international space treaties it is a party to. Efforts to adopt a national space law are underway but are not treated as a priority. This is supported by the fact that plans for preparation have not been made public, nor have the contents been discussed with academia or stakeholders as of yet. The reluctance seems to stem from the limited capacities of the ministry, the worry of burdening the local private sector, and the announced development of space law by the European Union. Adopting a national space law seems like a challenge that will not be tackled anytime soon.

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Gellért NAGY*

The Protection of National Sovereignty and Constitutional Identity in the Case Law of the Constitutional Court of Romania

ABSTRACT: *One of the most crucial issues in the European Union arises in the relationship between its law and national constitutions. This issue has emerged as one of the breaking points of European integration, which could shape the future development of the EU and the integration process in the years to come.* Although *the Romanian Constitution recognises the primacy of EU law over national law (in Article 148 paragraph (2)), the case law of the Constitutional Court of Romania reflects that this primacy is far from absolute, since the Constitutional Court interpreted that EU law has no primacy over provisions that form the Romanian constitutional identity. Moreover, during the past few years the Court of Justice of the European Union opened a new area of interpretation of EU law, namely its primacy over the decisions of the national constitutional courts. This issue was first raised in relation to Romania and provoked fierce protest from the Constitutional Court. In the following contribution, I intend to analyse these cases and reflect on the judicial dialogue between the Constitutional Court of Romania and the Court of Justice of the European Union.*
KEYWORDS: *Constitutional Court of Romania, Court of Justice of the European Union, constitutional identity, national sovereignty, primacy of EU law.*

1.
Introduction

The aim of this contribution is to provide a synthesis of the Romanian approach to the primacy of EU law – which may be useful not only for lawyers but also for the political community. In the words of the Portuguese jurist and politician Poiares Maduro,

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European integration challenges not just national constitutions, but constitutional law itself.[1]

All these challenges can only be understood if we properly analyse the position of each member state and its relationship with EU law. This article undertakes such an in-depth analysis, presenting not only the constitutional regulatory framework, but also the relevant recent cases.

The dialogue between EU institutions and the Romanian public law authorities – in particular the Constitutional Court of Romania – has recently brought to the surface a number of diverging views. Their examination and analysis could play a significant role in shaping the future of the European Union.

Prior to this examination, however, it is necessary to refer to the principles of primacy and direct applicability of EU law. The principle of primacy has been laid down by the Court of Justice of the European Union (CJEU) in its case law, starting with the famous Costa Enel case.[2] Based on this principle, if there is a conflict between an EU law provision and a national standard, the EU law prevails. Nonetheless, this primacy does not lead to the invalidity of the national provision.[3] At the same time it is pivotal to separate primacy from supremacy, because "while supremacy is simply a doctrine of hierarchy of powers, of subordination, the principle of primacy expresses the rules of division of competences between the Union and the Member States."[4] In contrast, the principle of direct applicability – which also appeared in the case law of the CJEU - presupposes that EU law is applied uniformly and entirely by the member states in a direct manner.[5]

2.
The Primacy of EU Law and the Concept of Sovereignty i n the Romanian Constitution

In the years following the revolution of 1989, Romania made European and the North Atlantic integration a declared political priority. The state's objective was therefore to join both the EU and NATO as soon as possible. At the same time, in the steps taken to achieve these objectives, it soon became clear – in the early 2000s – that the Constitution of Romania was not adequate to resolve the issues arising from

1 Vincze and Chronowski, 2018, p. 17.
2 Judgment of the Court in case C-6/64. ECLI:EU:C:1964:66. Available at: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A61964CJ0006 (Accessed: 26 July 2023).
3 Lupu, 2022, p. 112.
4 Gombos, 2019, p. 33.
5 Lupu, 2022, p. 94.

the relationship between domestic law and EU law.[6] The Romanian legislator soon remedied the shortcomings and enshrined the primacy of EU law in the Romanian Constitution by Law No 429/2003 on the revision of the Constitution of Romania.[7]

The constitutional basis for the primacy of EU law in Romania therefore is provided by Article 148 (2) and (4) of the Constitution.[8] According to these two paragraphs:

> "*(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. [...]*
> *(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.*"[9]

The provisions of Article 148 (2) and (4) of the Constitution are often referred to – both in the legal literature and the case law of the Constitutional Court of Romania – as the compliance clause (Ro. *clauză de conformitate*)[10] thus justifying its purpose – namely, to ensure the conformity of domestic law with EU law. As can be seen, the provisions on the primacy of EU law "[enjoy] a separate, carefully tailored, locus standi and a peculiar status quo in the Romanian constitutional architecture."[11]

Article 148 is fundamentally concerned with the essential elements deriving from the status of a member state, and as such recognises the primacy of EU law as one of these essential elements. Moreover, by virtue of paragraph (4), all three branches of power are responsible for guaranteeing this primacy.[12]

It is important to underline – in the context of the provisions of the Constitution on the primacy of EU law – that in the Romanian constitutional system, primacy is only given to the constituent treaties of the EU and to the other mandatory community regulations. Furthermore, the primacy of EU law does not apply in cases in which national rules are inconsistent with it, but only in relation to those which contain

6 Popescu, 2017.
7 I consider that it is a true reflection of the Romanian people's commitment to European values that the only constitutional amendment since 1991 was adopted in order to join the European Union and the North Atlantic Treaty Organisation (although there have been subsequent attempts to amend the Constitution of Romania, none of them have gone beyond the stage of the referendum).
8 Enache, 2014, p. 142.
9 The Constitution of Romania. Available at: https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 02 June 2023).
10 Varga, 2019a, p. 24.
11 Viță, 2016, p. 1631.
12 Fuerea, 2019.

contrary provisions.[13] On this basis, some scholars held that "Article 148 (2) of the Constitution partially restricts and also partially extends the scope of the primacy of Community law."[14]

Moreover, this article creates the constitutional framework for the transfer of certain national competences to the European Union. However, as it has been expressed in the legal literature:

> "[t]he transfer is neither a full transfer of sovereignty, nor can it be, as it would lead to the dissolution of the statehood of those who compose the Union, and the latter would turn into a federal state, which is not the reality, nor an explicit wish of the (majority) of the states."[15]

It is pivotal to underline that all these observations are also in line with the case law of the Constitutional Court, which has already pronounced on Article 148 when examining the constitutionality of the proposed amendments in 2003. In the given decision, the Constitutional Court pointed out that the EU had not acquired its own sovereignty by the transferring of certain competences, and on the other hand stressed that EU provisions are in an intermediate position between the Constitution and other laws.[16] All these findings were upheld by the Constitutional Court in its subsequent case law.[17]

The new approach to national sovereignty, resulting from the accession to the EU, is well reflected by the fact that the provisions of Article 148 (1) do not merely refer to the transfer of certain competences, but also to the exercise of some powers in common with the other member states.[18]

Therefore, it can be concluded that the provisions of the Constitution of Romania concerning the primacy of EU law must be interpreted in accordance with the constitutional framework on national sovereignty, since with its accession Romania did not completely abdicate its sovereignty, but merely transferred certain state competences and powers to the EU.

The provisions on sovereignty can be found in Article 2 of the Constitution of Romania, which states in (1) that "[t]he national sovereignty shall reside within the

13 Tănăsescu, 2008, p. 1440.
14 Ibid, p. 1441.
15 Varga, 2019b, p. 453.
16 Decision No 148 of 2003 of the Constitutional Court of Romania. Published in Official Gazette No 317/2003.
17 See for example: Decision No 683 of 2012 of the Constitutional Court of Romania. Published in Official Gazette No 479/2012; Decision No 64 of 2015 of the Constitutional Court of Romania. Published in Official Gazette No 286/2015.
18 Vrabie and Balan, 2004, p. 46.

Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum."[19]

It can be observed that – when it comes to defining sovereignty – the Romanian Constitution applies the so-called 'mystification strategy'[20] developed by French constitutional doctrine.[21] Article 2 (1) of the Constitution traces its foundation of sovereignty back to Rousseau's concept of popular sovereignty,[22] where the sovereignty is the expression of the general will (Fr. *volonté générale*).[23] Similar to the French Constitution, the Romanian Constitution's model of sovereignty, vested in the people, combines in itself "the national sovereignty based on the principle of representation and the republican popular sovereignty based on the principle of direct democracy."[24] The text of the Constitution explicitly refers to both of the main elements of this mixed model: the possibilities offered by direct democracy (referendums) and by representative, indirect democracy (free, periodical and fair elections). As it was noted in the legal literature, by this model Romania tried "to reconcile fire and water and to combine the two theories in a compromise formula."[25] However, according to some scholars, national sovereignty in the given context should not be seen in its traditional sense, but as equivalent to the sovereignty of the state.[26] On the basis of this interpretation, the Romanian Constitution's definition of sovereignty can no longer be considered deficient, but merely open to criticism from a terminological point of view.[27]

Undisputedly, this concept of sovereignty is – due to the accession to the EU – subject to a number of challenges. In its current form, the EU is able to harmonise integration with the sovereignty of the nation-states only if both the member states and the union respect the provisions of the founding treaties regarding competences. Although it is possible to go further, to the point of abdicating national sovereignty, at present this is not the case, nor is it in the interest of Romania.[28]

19 The Constitution of Romania. Available at: https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 02 June 2023).
20 For further information on the mystification strategy, see: Jakab, 2016, pp. 98–106.
21 The first sentence of Article 3 of the Constitution of France is almost verbatim the same as the Romanian Constitution's concept of sovereignty: "*[n]ational sovereignty shall vest in the people, who shall exercise it through their reprsentatives and by means of referendum*." Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf (Accessed: 03 June 2023).
22 For more on Rousseau's concept, see: Balogh, 1899, pp. 42, 156.
23 Jakab, 2016, p. 99.
24 Ibid, p. 101.
25 Drăganu, 1993, p. 165.
26 Ibid, p. 166.
27 Ibid, p. 166.
28 Severin, 2020.

Furthermore, national constitutional courts have recently developed several control mechanisms to defend their sovereignty in the light of EU integration. One such mechanism – used by the Constitutional Court of Romania as well – is the identity control, under which member states act in defence of their constitutional identity. According to some scholars, constitutional identity "is a narrative, a story that is developed along constitutional principles, values, history and experience."[29]

Originally the concept of constitutional identity emerged as a defence against constitutional amendments – and eventually led to the development of the so-called 'eternity clause'.[30] The Constitutional Court of Romania (similar to the case law of the German or French constitutional courts) considers as elements of the Romanian constitutional identity those provisions of the Constitution that are protected by eternity clause and thus cannot be subject to constitutional amendments.[31] Under Article 152 of the Constitution of Romania, it is protected by eternity clause and, as such, is an element of the Romanian constitutional identity: "the national, independent, unitary and indivisible character of the Romanian state, the republican form of government, territorial integrity, independence of justice, political pluralism and official language" (Article 152 (1) of the Constitution or Romania). In addition, paragraph (2) points out that "no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof."

Nevertheless, as has been noted by some scholars, historically the Romanian constitutional identity has been characterised by an interesting dichotomy. This Janus-facedness can be still observed today: it is simultaneously Eurocentric and ethnocentric.[32] It "reflects the strong desire of the Romanians to acquire constitutional modernisation in terms of constitutional Europeanisation and, at the same time, to keep their national ethnic identity."[33] Ethnocentrism can be justified by historical reasons, such as the union of the Romanian-inhabited territories or the negative effects[34] of the system established during more than a century of domination by the Phanariot rule.[35] This dichotomy also permeates the spirit of the post-communist Constitution of 1991, since "the Constitution of 1923 was largely considered by the fathers of the post-communist constitution, who, however managed to recover not only some of its liberal elements but also its illiberal ethnocentric ethos."[36]

29 Boros, 2023, p. 24.
30 Orbán, 2020, p. 52.
31 Decision No 390 of 2021 of the Constitutional Court of Romania. Published in Official Gazette No 612/2021. Reasoning 81.
32 Guțan, 2022a, pp. 32–39.
33 Guțan, 2022b, p. 124.
34 This period is basically characterised as "*rapid turnover of princes and a high degree of corruption.*" See: Veress, 2022, p. 174.
35 Guțan, 2022b, pp. 109–110.
36 Ibid, p. 122.

In order to achieve the necessary balance between the protection of sovereignty and further integration, the EU institutions and the public law authorities of the member states have a key role to play, as a dialogue between them is essential to overcome the challenges. Therefore, it is worth examining how the Romanian public law authorities – in particular the Constitutional Court of Romania – relates to EU law and its primacy. In the following, I intend to review the relevant, recent case law of the Constitutional Court of Romania, reflecting also on the dialogue between the Constitutional Court and the CJEU.

3.
A Synthesis of the Relevant Case Law of the Constitutional Court of Romania

By the accession to the European Union, the provisions of EU law became "a reference instrument for the review of constitutionality, in the application and with the distinctions laid down in Article 148 of the Constitution."[37]

Recently, there have been a number of major cases in which the Constitutional Court of Romania interpreted the primacy of EU law. Moreover, the CJEU also ruled in some cases related to Romania, thus providing an opportunity to present the constitutional dialogue between the two institutions.

3.1. Decisions on the Establishment and Operation of the Section for the Investigation of Offences in the Judiciary

Romania, since its accession to the EU, has committed itself to the EU's additional expectations through judicial reforms and the fight against corruption. A Cooperation and Verification Mechanism (hereafter: CVM) was established at the time of the accession, by Decision 2006/928/EC, in order to review and monitor these reforms. Later, Romania established an authority to investigate criminal offences committed by judges and prosecutors. This special authority was the so-called Section for the Investigation of Offences in the Judiciary (Ro. *Secția pentru investigarea infracțiunilor din justiție,* hereafter: SIOJ). Nonetheless, in 2018 - some days before the SIOJ came into force - the rules governing its operations were amended by a Government Emergency Ordinance (Government Emergency Ordinance No 90 of 2018 on certain measures for operationalisation of the SIOJ).

37 Stanciu and Safta, 2021.

These amendments have been shown to be relevant in several cases pending before national courts (e.g., proceedings for the annulment by an administrative litigation court of the Ordinance on the organisation and functioning of the SIOJ). In one of these cases an exception of unconstitutionality (*ex post* review) was raised against the provisions of the Government Emergency Ordinance and against Law No 304 of 2004 on the organisation of the judicial power. In several other cases references for preliminary ruling have been made to the CJEU, asking for an assessment of the compatibility of the amendments with EU law provisions.

In its Judgment of 18 May 2021,[38] the CJEU – acting jointly on the references for preliminary ruling – held *inter alia* that

> *"the principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status [...] according to which a lower court is not permitted to disapply of its own motion a national provision [...] which it considers, in the light of a judgment of the Court, to be contrary to that decision."*[39]

In essence, the CJEU underlined that – according to the principle of the primacy of EU law - national courts must disregard even constitutional rules if they are contrary to EU law provisions.

To support this conclusion, the CJEU pointed out that

> *"[b]y virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that."*[40]

Already in the light of this judgment, the Constitutional Court of Romania examined the exception of unconstitutionality brought before it and, as will be seen below, reached a very different conclusion from that of the CJEU.

38 Judgment of the Court of Justice of the European Union in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19. ECLI:EU:C:2021:393. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=378468 (Accessed: 07 June 2023).

39 Ibid, Reasoning 252.

40 Ibid, Reasoning 245.

In its Decision No 390 of 2021[41] the Constitutional Court of Romania examined the exception of unconstitutionality raised by the associations "*Forumul Judecătorilor din România*" ('Forum of Judges of Romania') and "*Mișcarea pentru apărarea statutului procurorilor*" ('Movement to Defend the Status of Prosecutors') and by a natural person.

In the given decision, the Constitutional Court of Romania stated that the Constitution "is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of a discrepancy between its provisions and those of the European Union."[42] The supremacy of the Constitution over the legal order should not be affected by the fact that a state, in our case Romania, is a member of the European Union. In addition, the Constitutional Court, referring to its case law, pointed out that although the member states delegate certain powers to the union in order to achieve community objectives, this transfer of competences must not, however, infringe the national constitutional identity of these member states.[43] According to this opinion, the member states do not transfer the powers and competences that are necessary to preserve their national constitutional identity. In this sense, national constitutional identity has a double purpose: it empowers the Constitutional Court to ensure the supremacy of the Constitution, and acts as a barrier to the prohibition of the adoption of rules contrary to EU law.

Moreover, the Constitutional Court also underlined in its decision that, although Article 148 of the Constitution provides that national courts must apply the EU law in the event of a conflict with national law, the terms 'national law' and 'domestic law' only refer to 'infra-constitutional legislation.'[44] In the light of this, as interpreted by the Constitutional Court, Article 148 does not give primacy to EU law over the provisions of the Constitution of Romania.[45]

41 Published in the Official Gazette No 612/2021.

42 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 79. This opinion was already stated by the Constitutional Court of Romania in its Decision No 80 of 2014 of the Constitutional Court of Romania. Published in the Official Gazette No 246/2014.

43 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 79. With regard to the term "*national constitutional identity*" it is worth pointing out that national constitutional courts use the phrase "*constitutional identity*", while the Court of Justice of the European Union operates with the phrase "*national identity*", which is also expressed in this way in Article 4 (2) of the Treaty on European Union. Nevertheless, in the case law of the Constitutional Court of Romania, the two terms are combined, somewhat strangely, in the term "*national constitutional identity*". Since it is not the explicit purpose of my study to examine the substantive content of the two terms in depth (which I would not be able to do, due to the space limitations), I consider it important to simply point out that when the Constitutional Court of Romania refers to "*national constitutional identity*", it is essentially referring to "*constitutional identity*", as it is known in the legal literature.

44 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 83.

45 Ibid. This opinion was already stated by the Constitutional Court of Romania in its Decision No 148 of 2003 of the Constitutional Court of Romania. Published in Official Gazette No 317/2003.

In the meantime, the Craiova Court of Appeal also issued a reference for a preliminary ruling on the operation of the SIOJ and its compliance with EU law. This reference was ruled by the CJEU by Judgment of 22 February 2022.[46] In that Judgment, the CJEU – already aware of the relevant case law of the Constitutional Court of Romania – emphasised that:

> *"[i]f a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for preliminary ruling under Article 267 TFEU, in order to assess the validity of that provisions in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid."*[47]

This 'exchange of judgments' between the Constitutional Court of Romania and the CJEU, as described above, accurately reflects the fact that the issues raised go well beyond the changes in the functioning of the SIOJ and their compatibility with EU law. In essence, the two institutions cannot find common ground on the question of the extent of a member state's constitutional identity, nor on who has the power to declare that an EU norm infringes on that identity.

It is salient to note that, as the case law presented above also reflects, the Constitutional Court interpreted that an EU law provision that is contrary to the Constitution has primacy over domestic law only after the amendment of the Constitution, in accordance with Article 11(3) of the Constitution. Nevertheless, in Romania constitutional amendments must also comply with certain material limits, which are contained in the eternity clause, in Article 152 of the Constitution.[48] On this basis, the Constitutional Court linked the eternity clause to the core of the Constitution, against which EU law does not prevail.

In accordance with the opinion expressed by some scholars, we can state that "[t]he eternity clause provides a strong constitutional basis for invoking the national constitutional identity in relation to the principle of (possibly) absolute primacy of the European law."[49]

46 Judgment of the Court of Justice of the European Union in Case C-430/21. ECLI:EU:C:2022:99. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=254384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21075214 (Accessed: 12 June 2023).
47 Ibid, Reasoning 71.
48 Guțan, 2022a, 31.
49 Varga, 2019a, p. 23.

The possibility that an EU law norm may infringe the constitutional identity of a member state should be examined by the CJEU in close cooperation with the constitutional court of the member state concerned. This solution would also be in line with the principle of sincere cooperation between the European Union and its member states.

Moreover, in this cooperation the CJEU should also take into account the fact that "[c]onstitutional courts are best placed to be familiar with national evolutions when analysing complex issues arising in the relationship between national and EU law."[50] On this basis, the role of the national constitutional courts is indisputable in determining whether an EU law provision violates the constitutional identity of the state in question.

3.2. A New Issue: the Question of the Primacy of EU Law Over the Decisions of the National Constitutional Courts. The Euro Box Promotion Judgment.

Over the past few years, the CJEU opened up a new area of interpretation of EU law, namely its primacy over the decisions of the national constitutional courts. This issue was first raised in relation to Romania and initiated a considerable political and legal debate in the country.

Of particular relevance to this issue is the Judgment of the CJEU of 21 December 2021[51] (hereafter the *Euro Box Promotion* judgment). This judgment was delivered in connection with five references for preliminary ruling.

All five references for preliminary ruling were based on the same factual situation: the Constitutional Court of Romania (in the context of *ex post* reviews or solving legal disputes of a constitutional nature between public authorities) had pronounced decisions finding either that criminal procedural rules were unconstitutional or that the rules on the composition of the court chamber were contrary to the Constitution. These decisions of the Constitutional Court had an effect on all the ongoing criminal proceedings, concerning corruption and maladministration, in the framework of which the references for preliminary ruling had been formulated.

The national courts addressed the CJEU, among others: "[m]ust the primacy of EU law be interpreted as permitting a national court to disapply a decision of the

50 Teodoroiu, Enache and Safta, 2019, pp. 45–46.

51 Judgment of the Court of Justice of the European Union in joined cases C-357/19, C-379/19, C-547/19, C-811/19, C-840/19. ECLI:EU:C:2021:1034. Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=3754DC8DE20A524AC21797BCAAE42FFC?text=&docid=251504&pageIndex=0&doclang=HU&mode=lst&dir=&occ=first&part=1&cid=2486417 (Accessed: 09 June 2023).

constitutional court delivered in a case relating to a constitutional dispute, which is binding under national law?"[52]

With regard to this question, the CJEU, on the one hand, held that it has the exclusive jurisdiction to give interpretation of EU law and to clarify "the scope of the principle of the primacy of EU law."[53] On the other hand, it underlined that:

> *"in accordance with the principle of primacy, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, [...] to give full effect to the requirements of EU law in the dispute brought before it by disapplying, as required, on its own authority, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect."*[54]

In the light of this, the CJEU ruled – also in the light of its case law – that the primacy of EU law precludes any national rule or practice under which the decisions of constitutional courts are binding on national courts, and judges are obliged to apply them even against EU law in their jurisdiction, under the penalty of disciplinary sanctions.[55]

This judgment has been the subject of much criticism in the legal literature. On the one hand, it could easily lead to the conclusion that the decisions of the Constitutional Court are not to apply at all and that the CJEU, acting as a court of appeal, can overrule these decisions.[56] It can be presumed that the CJEU did not intend to promote this interpretation, but the possibility of interpreting the judgment in such a manner should have been explicitly excluded by a more precise and transparent reasoning.[57]

On the other hand, the CJEU did not adequately distinguish between the primacy of EU law over national constitutions and over the decisions of the constitutional courts, so it would have been useful to clarify this aspect in the judgment as well.[58]

As a response to this judgment, the Constitutional Court of Romania issued a press release on 23 December 2021. In this press release it sought to nuance the wording of the judgment. First of all, the Constitutional Court underlined that its decisions are binding under the provisions of the Constitution [Article 147 (4)]. On this basis, the *Euro Box Promotion* judgment

52 Ibid, Reasoning 111.
53 Ibid, Reasoning 254.
54 Ibid, Reasoning 252.
55 Ibid, Reasoning 264.
56 Carp, 2022, p. 399.
57 Ibid.
58 Ibid.

> *"can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself."*[59]

Regarding this reaction, a legitimate question may arise: what is the legal binding force of a press release, and to what extent can it be invoked? In line with the opinion expressed in the legal literature, I consider that this press release is not binding in itself.[60] At the same time, the arguments advanced in it may be invoked before the Constitutional Court in a future constitutional review. Moreover, in time the arguments set out in the press release may also appear as a matter of principle in the practice of the Constitutional Court. Therefore, this press release can also be interpreted as a general guideline.[61]

The need for cooperation between the EU institutions and national authorities – and more specifically between the CJEU and the constitutional courts of the member states – is also emphasised in the present judgment. It is beyond dispute that with this judgment the CJEU sought to limit the binding force of the decisions of national constitutional courts in cases where they contravene the principle of the primacy of EU law. However, in making this conclusion it did not take into account either the specific features of the public law systems of the member states, nor the constitutional role of the national constitutional courts.

3.3. The Question of the Primacy of EU Law Over the Decisions of National Constitutional Courts in Matters Relating to the Limitation Period

In the summer of 2023, the Constitutional Court of Romania and the CJEU had another 'exchange of judgments', which once again focused on the primacy of EU law over the decisions of the national constitutional courts.

In 2022 the Constitutional Court of Romania ruled[62] on several exceptions of unconstitutionality. These exceptions challenged the constitutionality of the provisions of Section 155 (1) of the Criminal Code, according to which "[t]he running of the limitation period of criminal liability shall be interrupted by the performance of any procedural act in the case." The petitioners stated that, by a decision pronounced in

59 Press release of the Constitutional Court of Romania, 23 December 2021. Available at: https://www.ccr.ro/en/press-release-23-december-2021/ (Accessed: 12 June 2023).
60 Carp, 2022, p. 399.
61 Ibid.
62 Decision No 358 of 2022 of the Constitutional Court of Romania. Published in the Official Gazette No 565/2022.

2018,[63] the Constitutional Court already admitted an exception of unconstitutionality and found that the legislative approach providing for the interruption of the course of the limitation period of criminal liability by performing "any procedural act in the case", in the provisions of Section 155 (1) of the Criminal Code, is unconstitutional.[64] Nevertheless, these provisions were still enshrined in the Criminal Code and the legislator failed to amend them.

The Constitution Court of Romania held (already in its decision pronounced in 2018) that the provisions of Section 155 (1) of the Criminal Code lack predictability and, at the same time, are contrary to the principle of the legality, since the phrase "any procedural act" also refers to acts which are not communicated to the suspect, thus preventing them from knowing whether the running of the limitation period has been interrupted.[65]

The Constitutional Court found that the situation created by the passivity of the legislator represents a violation of the provisions of Article 1 (3) and (5) of the Constitution, which enshrines the character of the Romanian State as a state governed by the rule of law, as well as the supremacy of the Constitution.[66] In order to restore constitutionality, it is necessary for the legislature to clarify and detail the provisions relating to the interruption of the running of the limitation period for criminal liability.[67]

On the basis of the decisions of the Constitutional Court (and of the Decision No 67 of 2022 of the High Court of Cassation and Justice) a number of criminal proceedings have been declared time-barred, by the statute of limitations, and thus terminated. In some of these cases, the Brașov Court of Appeal rendered references for preliminary ruling to the CJEU, asking the court to examine how the situation arising from the decisions of the Constitutional Court relates to EU law.

One of these references for preliminary ruling was decided by the CJEU on 23 July 2023.[68] In this judgment, it essentially reiterated the principles set out in the *Euro Box Promotion* case but – partly because of the nature of the questions under examination – clarified them.

First of all, in the given judgment the CJEU held that the legal situation resulting from the application of the decisions of the Constitutional Court of Romania and of

63 Decision No 297 of 2018 of the Constitutional Court of Romania. Published in the Official Gazette No 518/2018.
64 Decision No 358 of 2022 of the Constitutional Court of Romania. Reasoning 13.
65 Ibid, Reasoning 42.
66 Ibid, Reasoning 75.
67 Ibid, Reasoning 76.
68 Judgment of the Court of Justice of the European Union in case C-107/23. ECLI:EU:C:2023:606. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62023CJ0107 (Accessed: 26 July 2023).

the High Court of Cassation and Justice risks that serious frauds against the financial interests of the EU will remain unpunished.[69]

Moreover, on the basis of the principles set out in the *Euro Box Promotion* judgment, the court emphasised that national courts have the obligation to disapply national provisions that prevent the application of sanctions against offences in connection with fraud proceedings affecting the financial interests of the EU.[70]

On this basis, taking into account the relevant provisions of the founding treaties, the CJEU found that national courts are required to disapply the Decisions of the Constitutional Court of Romania (Decisions No 297 of 2018 and No 358 of 2022) as well as the Decision of the High Court of Cassation and Justice "in so far as those judgments have the effect that criminal liability is time-barred in a large number of cases of serious fraud affecting the financial interests of the European Union."[71]

However – as it was pointed out in the legal literature after the publication of the judgment – these arguments of the CJEU must be interpreted in the light of the judgment as a whole and as such are nothing more than an expression of the primacy of EU law.[72] Yet, in addition to these arguments, the CJEU also listed a number of other arguments, such as the fact, that "the Romanian Constitutional Court applied a national standard of protection of fundamental rights which supplements the protection against arbitrariness in criminal matters offered by EU law."[73]

Moreover, the Decision of the High Court of Cassation and Justice and the relevant decisions of the Constitutional Court of Romania were based on two separate principles. Whilst the later was based on "the principle that offences and penalties must be defined by law, as to its requirements relating to the foreseeability and precision of criminal law", the Decision of the High Court of Cassation and Justice was connected to the "principle of retroactive application of the more lenient criminal law *(lex mitior)*."[74] It is therefore important to distinguish between the Decision of the High Court of Cassation and Justice and the decisions of the Constitutional Court, and the CJEU took this aspect into consideration.

Considering all the arguments put forward, the CJEU gave a much more nuanced answer to the questions raised by Brașov Court of Appeal. The court considered that the referred EU law provisions (Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests) must be interpreted in a way that the national courts

69 Ibid, Reasoning 91.
70 Ibid, Reasoning 97.
71 Ibid, Reasoning 98.
72 Blendea and Toader, 2023.
73 Judgment of the Court of Justice of the European Union in case C-107/23. Reasoning 115.
74 Ibid, Reasoning 102.

> *"are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if [...] a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period."*[75]

However, on the other hand, national courts "are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law *(lex mitior)* which makes it possible [...] to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity."[76]

The answer to the third question raised by the Brașov Court of Appeal further nuances the situation, as the CJEU stated that the principle of primacy EU law precludes any domestic law under which the national courts of a member state are bound by decisions of the Constitutional Court and the High Court of Cassation and Justice, if that case law is contrary to the provisions of EU law.[77] This third response is essentially a repetition of the principles stated in the *Euro Box Promotion* judgment.

4.
Closing Remarks and Some Conclusions

It is a fact that, by acceding to the EU, Romania has transferred certain powers and competences and has given primacy to EU law over contrary provisions of national law (as it is reflected in Article 148 of the Romanian Constitution). However, as it can be observed from the cases presented above, there are significant divergences between the EU and national public authorities on the question of how far exactly the primacy of EU law can extend. Through its recent case law, the Constitutional Court of Romania joined the ranks of national constitutional courts that consider that the primacy of EU law should not infringe the constitutional identity of a member state. On the other hand, the CJEU, on the basis of the principles set out in its case

75 Ibid, Reasoning 138.
76 Ibid, Reasoning 138.
77 Ibid, Reasoning 138.

law, intends to uphold the primacy of EU law even over the decisions of the national constitutional courts.

In order to solve these conflicts, several solutions have been proposed in the legal literature, such as: clarification and specification of EU and member state competences; the more pronounced role and application of the principle of subsidiarity and "strengthening the democratic function of the European Parliament."[78] At the same time, the most essential first step would be to promote sincere cooperation between EU and national institutions, to achieve a mutually respectful dialogue, in which both sides take into account the arguments and reservations of the other. As it has been stated in the legal literature:

> *"each individual state, in particular through its constitutional case law, as well as through the case law of the Court of Justice of the European Union, can contribute separately and together through a sustained constitutional dialogue not only to the solution of specific disputes, but also to the development of the idea of national constitutional identity in relation to European constitutional identity."*[79]

78 Mathieu, 2021, pp. 142–144.
79 Varga, 2019b, p. 466.

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Ana PANEVA*

The Advantages, Risks, and Rules of Installing Video Surveillance in Workplaces

ABSTRACT: *The monitoring of employees is an issue closely related to the right to privacy, protection of personal data, and dignity. The development of modern technology has brought many benefits, but also risks – to which special attention should be paid, especially with the installation of video surveillance systems. The data collected during video surveillance is usually images relating to an identified person, or a person who can be identified – directly or indirectly – to monitor behaviour. As video monitoring spreads, people's freedom of movement and behaviour, and their privacy, are therefore reduced. Video surveillance is used for various purposes, but mostly for security - where guarantees must be taken to avoid any misuse for completely different and individual purposes (e.g. for marketing; to monitor the work of employees, etc.). This paper provides an analysis of the rules and regulations in Macedonian legislation. Special attention is paid to the procedure and circumstances under which it is possible to install permanent video surveillance to control work activity.*
KEYWORDS: *video surveillance, workplace, data protection, procedure.*

1.
Introduction

In our increasingly digitised and interconnected world, the intersection of modern technology and the right to privacy has become a matter of concern. The rapid development of advanced technologies has ushered in a new era of convenience, efficiency, and security – but it has also raised crucial questions regarding the protection of personal data and individual dignity. One significant concern in this scenario is the intricate matter of employee monitoring. This issue revolves around a delicate balance between the necessity of maintaining workplace security and the fundamental rights of individuals regarding privacy, personal data protection, and human dignity.

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One aspect of this challenge involves the use of video surveillance systems. These systems have become pervasive in various environments, offering valuable tools for security and asset protection. However, with this increasing prevalence comes the potential for encroachment upon the individual rights of those being observed. The data captured through video surveillance invariably comprises images of identified individuals – or those who can be indirectly or directly identified – providing a comprehensive record of their actions and behaviour. As these surveillance systems expand their reach, there is a corresponding reduction in the privacy and freedom of movement of those under their surveillance.

Video surveillance is used for a variety of purposes, but mostly for security, where guarantees must be taken to avoid any misuse for completely different and for individual purposes (e.g., for marketing; to monitor the efficiency of employees' performance, etc.). As such, it is imperative to establish clear legal guidelines and regulations to safeguard the rights and freedoms of individuals, while upholding the legitimate objectives of surveillance.

This paper embarks on an in-depth examination of the rules and regulations within North Macedonian legislation. It delves into the specificities of the procedure, and the circumstances under which the installation of permanent video surveillance systems is permissible. This paper aims to clarify the complex legal system that governs the intersection of technology and individual rights, with a specific emphasis on the legal framework in Macedonia.

In the following, the paper will delve into the complexities of video surveillance, examining the challenges of balancing security with personal privacy; it will assess the existing legal safeguards and their effectiveness in achieving a fair equilibrium. Ultimately, this paper aims to contribute to the ongoing discourse on surveillance, privacy, and the protection of personal data – offering insights into how North Macedonian legislation addresses the challenges and complexities posed by video surveillance.

2.
The Legal Framework of the Right to Privacy

One of the most important aspects of moral integrity is a person's privacy, and it is therefore necessary to enjoy legal protection. Hence, the right to privacy is one of the most basic human rights, among a wider group of civil-political rights.

However, modern understandings of privacy were only formed after World War II.[1] In 1947 the United Nations (UN) created the Human Rights Commission

1 Neuwirth, 2007, p. 1.

and prepared the Universal Declaration of Human Rights (UDHR),[2] which has a fundamental significance in building legal frameworks in the field of human rights and freedoms. This declaration, accepted on December 10, 1948, by the UN General Assembly, became the first universal legal document of worldwide significance that deals exclusively with human rights and freedoms. The right to privacy is enshrined as one of the 30 articles of the declaration, with Article 12 emphasising: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The right to privacy in the International Covenant on Civil and Political Rights[3] of 1966 is based on the principle of the UDHR and refers to the right of every person to be protected from arbitrary and unlawful interference with his private life, family, home, or correspondence.[4] In addition, if the person believes that his right to privacy has been violated, he has the right to legal protection and can turn to the competent judicial authorities for the determination of damages and the protection of his rights.

The European Convention for the Protection of Human Rights[5] is also an important international document in which the right to privacy can find its foundations. The European Convention – one of the most important international agreements for the protection of human rights in Europe – has been accepted by the Council of Europe and aims to protect and ensure the fundamental rights and freedoms of the signatory states.[6] The protection of privacy is declared in Article 8 of this convention and reads:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary for 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."*

2 The Universal Declaration of Human Rights was adopted and published in Resolution 217 A(III), of December 10, 1948, by the United Nations General Assembly.

3 International Covenant on Civil and Political Rights was adopted and open for signature and ratification or accession by resolution of UN General Assembly 2200 A(XXI) of December 16, 1966. Entered into force on the 23rd. March 1976.

4 Article 17 International Covenant on Civil and Political Rights.

5 Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950.

6 Under the strong influence of the Universal Declaration of Human Rights Council of Europe in 1950 (on November 4 in Rome) adopted a Convention for the Protection of Human and Fundamental Rights Freedoms. The convention is the first and basic document of The Council of Europe for the Protection of Human Rights and Freedoms.

The primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, home, and correspondence.[7] However, member states also have positive obligations to ensure that Article 8 rights are respected even between private parties. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals themselves. The right to privacy can only be limited on the basis of a legitimate purpose. Article 8 paragraph 2 of the convention lists such legitimate goals: national security, public security, economic well-being, protection of health and morals, and protection of the rights and freedoms of other citizens.

Later, the Convention for the Protection of Persons with Regard to Automatic Processing of Personal Data[8] was adopted, in order to extend the protection of the basic rights and freedoms of individuals, and especially the right to privacy. This convention provides specific instructions for the legal processing of personal data (the processing is required to be legal, proportionate, and justified by a legitimate purpose), which allows under certain circumstances and limitations the protection of the right to privacy, in order to respect the rights and freedoms of other persons.

The right to privacy, as defined in international documents, is a universally recognised right that not only binds the international community but also national legislation, creating fertile ground for the formulation and integration of the first mechanisms and norms for the protection of citizens' privacy. Thus the right to privacy, defined as one of the basic human rights in international sources, is not limited only to the international scene. In the constitutions of many countries, including the Constitution of the Republic of North Macedonia,[9] a guarantee is provided for the right to privacy, which confirms it as an important and universal right at the national level. In the constitution as the highest legal act, in the section dedicated to human rights and freedoms, protection of the right to privacy is ensured. Thus, in Article 25, every citizen is guaranteed respect and protection of the privacy of his personal and family life, dignity, and reputation.

Going deeper into the very content and concept of the right to privacy, it is clearly a complex right with no universally accepted definition. However, in the broadest sense, it represents the right of every individual to live, develop, and realise himself as a person without illegal interference from the state and other natural and legal persons. This right, in specific cases, also requires an active role by the state in creating conditions for its realisation, and providing protection in case of its violation.

7 Guide on article 8 of the European Convention on Human Rights, Rights to respect for private and family life, home and correspondence, 31 August 2022.

8 The law on the ratification of the Convention for the protection of individuals with Regard to Automatic Processing of Personal Data (Official Journal – International Agreements 7/2005).

9 Constitution of the Republic of North Macedonia (The decision to promulgate the constitution, 17.11.1991).

3.
The Right to Privacy in Working Relationships

The right to privacy is a broad concept that includes the protection of individual freedom and the relationship between the individual and society.[10] Hence, in each legal system and country the content of this right may be defined in different ways, but its essence remains unchanged. The right to privacy – like other civil-political rights – aims to protect the private sphere of individuals in relation to the state, but with the development of working life and the fact that people spend considerable time at the workplace, a serious question arises about protection of employees privacy. Today, labour relations are intertwined with the right to privacy where workers are exposed to various aspects of surveillance, monitoring, and data collection in the workplace. In this context, balancing workers' right to privacy with employers' need to ensure efficient work and job security becomes a challenge.

To ensure that workers' privacy is protected, many states have enacted laws governing the collection and use of workers' personal information, as well as workplace surveillance and monitoring procedures. In the Macedonian legal system, the Law on Personal Data Protection[11] takes a central place. This law aims to protect the right to privacy and other human rights of all citizens. This law, adapted from European legislation, was adopted in February 2020, and enables the state to monitor progress in the area of personal data protection. It also introduces the standards and principles of the European Union, specifically the General Data Protection Regulation (GDPR).[12] In addition, in 2022 the methodology for harmonising departmental legislation with the Law on Personal Data Protection was adopted. This methodology ensures consistency and compliance with the law in the various sectors and departments of the state. Although this law does not specifically regulate the right to privacy of employees as such, these provisions are appropriately applied to workers when it comes to protecting the right to privacy and personal data. It is evident that employers automatically or semi-automatically collect various information about their employees in the

10 Jernej, 2005, p. 44.

11 The Law on Personal Data Protection (Official Gazette of the Republic of North Macedonia No. 42/20, 294/21), in the following text LPDP.

12 As technology advanced and the internet was developed, the European Union (EU) recognised the necessity for contemporary data protection measures. Subsequently, Europe's data protection authority announced the need for a comprehensive approach to personal data protection within the EU. This initiative led to the revision of the 1995 directive. The General Data Protection Regulation (GDPR) was implemented in 2016 after receiving approval from the European Parliament, and starting from May 25, 2018, all organisations were mandated to ensure compliance with its provisions.

course of employment, effectively processing personal data.[13] Consequently, employers are obligated to adhere to legal requirements for data processing according to the LPDP: processing must be lawful (based on written consent or another legitimate and authorised basis); the processing method should be legal; and data should be proportionate and up to date.

The Law on Labour Relations[14] sets the foundations of labour relations, however the legislator did not recognise the need for a more detailed regulation of the issue related to the right to privacy of workers. The need for a more detailed regulation of this issue is often untouched, and the law only briefly mentions it in a few provisions. The first, Article 43, sets an obligation for the employer to protect and respect the personality and dignity of the employee, as goods from the sphere of private life. The second provision, Article 44, establishes the rules for the collection, processing, use, and delivery of workers' personal data. This limits the collection and use of the employee's personal data only if it is determined by law, or if it is necessary for the exercise of rights and obligations from the employment relationship or in connection with the employment relationship. However, these provisions represent principles rather than clear practical guidelines, therefore the issue of protection of the right to privacy of workers remains outside the scope of the Law on Labour Relations. Therefore, the key regulation for analysis when it comes to this issue in the Macedonian legal system is the Law on Personal Data Protection.

Employee privacy rights are rules that limit the extent to which an employer can search an employee's property or person, monitor their activities or conversations, or obtain information about their personal life, especially in the workplace.[15] The nature and extent of protection of these rights have become increasingly important in recent years, especially with the development of the internet and social media.

In this area, three aspects of the employees' right to privacy can be distinguished, from where their protection can be threatened. The first refers to the protection of personal data, which is the most frequently discussed aspect in the legal field, as well as in the theory of labour law.[16] In addition, the privacy of employees can be defined by factors related to their private life, especially in the context of establishing and terminating the employment relationship. Finally, the danger to the privacy of the employees increases in the sphere of the surveillance carried out by the employer during the work process.[17] The greatest danger to the privacy of employees arises

13 Danilović, 2017, p. 170.
14 Law on Labor Relations of the Republic of Macedonia (Official Gazette No. 62/2005; 106/2008; 161/2008; 114/2009; 130/2009; 149/2009; 50/2010; 52/2010; 124/2010; 47/ 2011; 11/2012; 39/2012; 13/2013; 25/2013; 170/2013; 187/2013; 113/2014; 20/2015; 33/2015; 72/2015; 129/2015 and 27/2016).
15 Employee Privacy Rights: Everything You Need to Know.
16 Jašarević, 2016, pp. 263-282.
17 Jovanović and Božičić, 2018, p. 861.

from the unequal relationship between the employee and the employer. One of the basic elements of the working relationship is subordination, that is, the existence of an imbalance of positions in the context of working relationships. Specifically, that would mean the performance of work tasks by the employee under the authority of the employer. More precisely, during the exercise of managerial powers, the most possible danger is the violation of the employee's privacy. With the development of technology, the violation of the right to privacy becomes an essential concern in the workplace, because it provides the employer with various options for managing and monitoring the work process. However, one form of surveillance attracts particular attention, and that is video surveillance.[18] By using video surveillance, employers control the work process and workers in real-time. This can be considered an effective method of monitoring, but it can also be a potential violation of employee privacy, especially if not applied with appropriate restrictions and legal frameworks.

4.
Video Surveillance

In today's fast-paced corporate world – where the need for safety, productivity, and workplace compliance is paramount – video surveillance has emerged as a powerful tool for employers. The implementation of video surveillance systems in the workplace is becoming more and more common, promising increased security, optimisation of operational processes, and protection of valuable assets. However, this also raises significant questions about privacy, ethics, and the delicate balance between protecting organisational interests and respecting the rights and dignity of employees.

The establishment of video surveillance in the workplace is mainly justified from the aspect of security – to detect and prevent potential security risks, and to sanction persons who threaten both the public and private aspects of security. This system was initially introduced in the public sector in the 1960s,[19] and was extended to the private sphere in the form of business premises, where it reached its full momentum during the 1990s.[20] Bringing this type of surveillance into the workplace raises questions about its expediency and impact on workers.

The introduction of video surveillance creates a complex situation where legitimate employer interests – such as ensuring a safe working environment and protecting property – conflict with the employee's right to privacy. In situations where these

18 Ibid.
19 Žarkoviћ, 2015, p. 170.
20 Potokar and Androić, 2016, p. 150.

two valid interests collide, and it becomes evident that workplace video surveillance can infringe upon an employee's private life,[21] restrictions on the employer's supervisory authority become necessary to safeguard employees' privacy rights.

It is crucial to address several significant principles according to European legislation. Firstly, to establish spatial and temporal constraints in the operation of video surveillance. Concerning the workplace, the use of video surveillance has no place within the employer's premises where the work process is not directly conducted. When it comes to time limits, video surveillance should be reserved exclusively for the duration of the employee's working hours. This further implies that continuous video surveillance within the work process is inappropriate. Such limitations are not only in line with safeguarding employees' right to privacy, but also relate to the adverse effects of constant exposure to surveillance on employees' mental well-being.[22]

Transparency also represents a fundamental component of permissible video surveillance. This means that employees must receive written notifications prior to its establishment.[23]

The issue of secret video surveillance in the work process is particularly sensitive. Its presence inherently suspends the principle of transparency. It is generally prohibited, but exceptions exist in specific, exceptional cases, primarily related to situations where there is reasonable suspicion of criminal activity.[24] Before covert recording is carried out, a privacy impact assessment should be carried out to ensure that it is necessary and proportionate to the discovery of criminal activities in the workplace. Where covert video surveillance is installed to monitor criminal activity, then it cannot be used for other purposes (for example, to monitor the work of employees). It is clear that a decision on reasonable suspicion of criminal activity cannot be left to the employer alone. Employees have a right to privacy, which can be limited if justified and proportionate to the intended goal. The jurisprudence of the European Court of Human Rights introduces the concept of 'reasonably expected privacy' to assess the admissibility of employer interference with employees' private lives, considering the interests of both parties.[25]

When it comes to secret video surveillance in the workplace, it is clear that the decision on its permissibility will depend on the circumstances of each specific case. This is also the conclusion reached by the European Court, which grappled with

21 This position will be taken by the European Court in the case *Köpke v. Germany (dec.)* - 420/07.
22 Jovanović and Božičić, 2018, p. 864.
23 More about the specific conditions for the introduction of video surveillance in the member states of the European Union in: Hendrickx, 2001, pp. 110-111.
24 Jovanović and Božičić, 2018, p. 865.
25 Danilović, 2017, p. 176.

this issue in the case of Köpke v Germany.[26] In this case, the court highlighted that in a scenario where the legitimate interests of the employer and the rights of the employee are in conflict, the competing interests concerned might well be given a different weight in the future, having regard to the extent to which intrusions into private life are made possible by new, more and more sophisticated technologies.

In practice, the introduction of video surveillance requires a thorough legal analysis to achieve a balance between employer interests and employee rights. Once this analysis demonstrates the appropriate equilibrium, internal policies, procedures, and notifications should be established to inform employees of all aspects related to the processing of personal data through surveillance applications.

Only after completing these steps and ensuring a proper balance between employer interests and employee rights should the employer consider implementing video surveillance.

5.
Video Surveillance Installation Under the Macedonian Legal Framework

As previously mentioned, in the Macedonian legal system the issue of video surveillance in the workplace is not specifically regulated by the Law on Labour Relations. Also, there is no separate legal act dedicated exclusively to this topic. However, personal data protection and workplace video surveillance are regulated by the Personal Data Protection Law. This law ensures the rights of persons to whom personal data refers, and sets provisions for the collection, processing, and protection of this data. In the employment relationship, the employer processes the personal data of the employees to fulfil various purposes. In that relationship the employer has the role of a controller with all his powers and obligations, and the employee has the role of a subject of personal data with all their rights. The Law on Personal Data Protection contains provisions that are important for the installation of video surveillance and work at the workplace. The provisions of this law define rules for the processing of personal data, including cases where video surveillance is used for control and security. In the following, aspects regarding the establishment of video surveillance systems at the workplace will be considered in accordance with the legal regulations.

26 *Köpke v. Germany (dec.)* - 420/07. The applicant, a supermarket cashier, was dismissed without notice for theft, following a covert video surveillance operation carried out by her employer with the help of a private detective agency. She unsuccessfully challenged her dismissal before the labor courts.

5.1. Analysis or Periodic Evaluation of the Objective(s)

Before starting the process for establishing a video surveillance system, the controller – i.e. a natural or legal person, a state authority, a legal person established by the state for the exercise of public powers, an agency, or another body, which independently or jointly together with others determines the goals and the method of personal data processing – is obliged to perform an analysis of the goal – i.e. the goals for which the video surveillance is established.[27] The analysis contains the reasons for setting up video surveillance with an explanation of the need to fulfil the goal, as well as a description of movable and immovable objects, i.e. the space that will be protected by video surveillance.

The analysis must also contain the opinion of the personal data protection officer.[28] Based on the prepared analysis and the opinion received from the personal data protection officer, the responsible person decides upon the establishment of a video surveillance system in a separate document.

The controller is obliged to perform a periodic assessment of the results achieved by the video surveillance system every two years. These especially regard the further need to use a video surveillance system, the purpose or objectives of video surveillance, and possible technical solutions for replacing the video surveillance system. From the performed evaluation, the controller must make a report, which is an integral part of the documentation for the establishment of video surveillance.[29]

5.2. Defining the Objectives for the Establishment of Video Surveillance

According to the legal provisions, the controller can perform video surveillance on official or business premises if it is necessary to protect the life and health of people; to protect property; protect the life and health of employees due to the nature of the work; or to provide control over entry and exit from official or business premises, for security purposes.[30] The controller can perform video surveillance only on the premises that are necessary to achieve specific goals. For example, if the goal is to protect property or control access from official or business premises, video surveillance should be limited to the entrance of the building, and not to internal parts such as kitchens, offices, corridors, meeting rooms, etc. When setting up video surveillance at the entrance or exit from the facility (the company/state institution), the controller

27 Article 92, paragraph 1, LPDP.
28 Rulebook on the content and form of the act on the method of performing video surveillance (RSM Official Journal, no. 122 of 12.5.2020), article 7 paragraph 3.
29 Article 92, paragraph 3, LPDP.
30 Article 90, paragraph 1, LPDP.

should make sure that cameras are directed only to the property of the company/state institution – i.e., that they are not directed onto public areas, neighbouring facilities, etc. When setting up video surveillance, it is essential to protect the right to privacy of all persons, employees, customers, parties, and other subjects of personal data. Precisely for this reason, the controllers should be especially careful when directing the cameras and when choosing the locations for video surveillance, to avoid private rooms such as wardrobes, dressing rooms, sanitary units, and other similar rooms.[31] Employees should not be under constant video surveillance. The camera should be placed so that it does not cover the workspace where the employees work. Video surveillance must not be set up for the purpose of control – i.e. for the purpose of monitoring the efficiency of employees.

On the one hand, the establishment of video surveillance by the employer has a legitimate purpose, which is manifested in the need to ensure safety in the work process, but also in the protection of property. However, even in such situations video surveillance should be seen as an emergency measure, which should only be considered if there is no alternative method less invasive to the privacy of employees. Concrete measures that could be effective against break-ins and thefts, as well as video surveillance systems, are the installation of security alarm systems, good lighting, use of porters, many security guards, installation of security locks, protective windows, etc.

To protect the personal data that it collects, processes, and stores, the controller must take appropriate technical and organisational measures and regulate the way video surveillance is performed with a special act to prevent possible unauthorised access to the data.[32] This means that only the controller has the right to monitor in real-time, and in case of an incident review the material. Stored data must be kept locked, with access available only to the controller.

For performing video surveillance, the controller should prepare a special act (regulations, policy, procedure) which will regulate in detail the way of performing video surveillance. This act should describe the system for performing video surveillance, the purpose (i.e. the purposes of personal data processing), categories of personal sub-flows, technical and organisational measures to ensure the security of personal data processing, authorised persons for personal data processing, deadlines for keeping the recordings, the method of reporting and exercising the rights of the subjects of personal data, technical specification of the equipment, as well as a plan of where the video surveillance system is set up.[33]

31 Article 90, paragraph 3, LPDP.

32 Rulebook on the content and form of the act on the method of performing video surveillance (RSM Official Journal, no. 122 of 12.5.2020), Article 9, paragraph 1.

33 The content and form of this act are prescribed by the director of the Agency for the Protection of Personal Data by adopting a separate bylaw.

5.3. Obligation for Transparency and Reporting

The law on the protection of personal data introduces the principle of transparency in the establishment of video surveillance, which means that the subjects of personal data should be informed in detail about when and how their data is processed. This includes detailed information about the locations being filmed and the CCTV reporting – which should be clear, visible, and easily accessible to all stakeholders.[34] The notification should contain information about where the video surveillance is performed, the name/title of the controller who performs the video surveillance, the way in which information can be obtained, and about where and for how long the recordings from the video surveillance system are kept.[35]

The controller is obliged to inform the employees about performing video surveillance on official or business premises.

5.4. Storage Periods and Obligation to Delete

The recordings made during video surveillance are kept until the objectives for which it is carried out are met – not longer than 30 days, unless a longer period is provided by another law. This means that these recordings can be stored for longer than 30 days only if another law provides for a longer period, which includes measures to protect the rights and freedoms of subjects, but no longer than after the fulfilment of the goals.[36] Video recordings can be stored for a longer period than 30 days when it is necessary to realise the controller's legitimate interest in conducting appropriate procedures in accordance with the law – for which the controller establishes internal procedures for the method of storing and deleting the recordings.[37]

Video recordings may not be made available to other people, unless it is necessary in a possible evidentiary procedure. For example, the controller may not make the photos available or sell them to another person.

5.5. The Basic Rights of Employees, or the Subjects of Personal Data

In the act of performing video surveillance, the controller prescribes the method of exercising the rights of the subjects whose data is processed through the video

34 Article 89, paragraph 3, LPDP.
35 Article 89, paragraph 4, LPDP.
36 Article 89, paragraph 8, LPDP.
37 Rulebook on the content and form of the act on the method of performing video surveillance (RSM Official Journal, no. 122 of 12.5.2020), article 11 paragraph 3.

surveillance system, in order to familiarise them with the method of providing transparent information, communication, and the exercise of their rights, information and access to personal data, as well as the exercise of the right to correction and deletion, the right to object, and the automated adoption of individual decisions.[38]

5.5.1. Right of Access

Employees have the right to confirmation from the controller as to whether their personal data is being processed.[39] In the case of real-time monitoring without data storage, the controller may inform them that no personal data is processed after the monitoring is completed. If the data processing is still ongoing during the request – i.e. if the data is stored or continuously processed in any other way – the employee has first access to the recordings and corresponding information. However, there are several limitations to the right of access, such as when identification of the individual is impossible, or the request is unfounded. In such a case, the controller must inform the employee about the same. Also, an indefinite number of individuals may be recorded in the same video surveillance sequence, in which case the controller should take measures to obscure the faces of the individuals who are not the subject of the access request.

5.5.2. Right to Erasure

The employee has the right to ask the controller to delete his personal data, while the controller has the obligation to delete personal data within 30 days from the day of submitting the request for deletion if one of the following conditions is met: personal data is not required for the purposes for which they were collected or processed; whenever consent is withdrawn (and there is no other legal basis for processing); the employee files an objection to the processing; personal data was illegally processed; personal data should be deleted in order to comply with an obligation established by law that applies to the controller; personal data was collected in connection with the offer of information society services, in accordance with the legal provisions.[40]

38 Ibid, article 13, paragraph 1.
39 Article 19, LPDP.
40 Article 21, LPDP.

5.5.3. Right to Object

For video surveillance based on legitimate interest, or for the need to perform a task of public interest, the subject of personal data has the right to object at any time, based on a specific situation. Hence, the controller may not carry out further processing of personal data, unless it proves that there are relevant legitimate interests for processing which prevail over the interests, rights, and freedoms of the subject of personal data, or for the establishment, exercise, or defence of legal claims.[41]

6.
Conclusion

Video surveillance and workplace monitoring are on the rise in Macedonia, reflecting the employer's managerial authority and the employment relationship's subordination dynamics. The powers and rights of the employer, as the owner of the capital, determine the employment relationship as a relationship of subordination. In this regard, the right of the employer to organise and control the work of the workers is recognised, thus exercising legitimate managerial authority. While employers possess the legitimate authority to oversee their workforce, it is essential to define the limits of this supervision – especially concerning video surveillance – which can be the most intrusive form of monitoring and a potential threat to employees' privacy. Legal standards, as presented in this paper, establish the parameters within which this balance should be maintained.

In this regard, it is essential to highlight that the legislative framework in Macedonia, concerning the protection of privacy and personal data, aligns with European legal standards. It is in harmony with the principles established in European legislation. It outlines the necessary steps and legal requirements for the installation of video surveillance, with a strong focus on respecting the basic principles. The primary purpose of the provisions on privacy and protection of personal data, in this sense, is to regulate, limit, and condition the supervision to ensure that when surveillance is already carried out – which is *de facto* an invasion of privacy – that invasion is necessary, legal, fair, transparency and proportionate. The employer must respect the principle of proportionality in relation to the purpose for which the video surveillance is installed.

It is important to note that, in Macedonia, there is still no developed case law that sets the framework and interprets the legislation in this area. This creates a challenge and a longer process of development and establishment of standards for video surveillance and control of workplaces.

41 Article 25, paragraph 1, LPDP.

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Protecting Cross-Border Workers Within the EU: A Comparative Study Between Italy and the Netherlands

ABSTRACT: *This paper aims to identify the most insidious challenges and the most effective remedies to guarantee the principle of equal treatment and non-discrimination on grounds of nationality. It does so by analysing regulatory frameworks, case law and data on cross-border workers from a comparative perspective, with special focus on Italy and the Netherlands.*
KEYWORDS: *free movement of workers, cross-border workers, equal treatment, non-discrimination based on nationality, comparison.*

1.
Free Movement of Workers Within the European Union

Freedom of movement for workers was one of the founding principles of the European Union (EU).[1] In fact, the first article of the Community Charter of the fundamental social rights of workers[2] deals precisely with this freedom. The principles therein shaped the European social model in the following decades, and influenced the writing of the Charter of Fundamental Rights of the EU.[3]

Although free movement was already evident in Art. 3 of the consolidated version of the Treaty on EU (i.e. "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons

1 Regulation no. 1612/68 and Council Directive no. 68/360, which have been updated several times.
2 Adopted on 9.12.1989 by a declaration of all Member States.
3 It was laid down in Nice on 18.12.2000 and became legally binding with the ratification of the Treaty of Lisbon on 1 December 2009. In particular, see art. 15 (2), of the EU Charter of fundamental rights, which establishes for every EU citizen "the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State".

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is ensured"[4]), the Treaty on the Functioning of EU (TFEU) identified this right in a clearer and more detailed way. Indeed, it ensured free movement of goods, persons, services, and capital within the internal EU market,[5] and Art. 45 of the TFEU stated that "freedom of movement for workers shall be secured within the Union."[6] There are two important consequences of this declaration. Firstly, among workers of the member states it abolished discrimination based on nationality for employment, remuneration and other work conditions.[7] Secondly, it allowed workers the right to move freely within the member states for work purposes, limiting it only for justified reasons[8] such as public policy, public security or public health.[9]

Dir. 2004/38/CE of 29 April 2004[10] and the Regulation EU no. 492/2011 of the European Parliament and of the Council of 5 April 2011 confirm that freedom of movement constitutes a fundamental right of workers and their families, and provides for equal treatment of employment within the EU. Indeed, within the EU labour mobility is one of the most relevant ways to give workers the opportunity to improve their living and working conditions and to promote social advancement.

Free movement entails all aspects of the employment relationship,[11] from hiring to termination, with particular attention to the social security system. Regulations exist that provide all workers in the EU with social security benefits, regardless of the place where the activity is carried out,[12] as long as it does not prejudice the autonomy of each member state to determine the types of social benefits and services.[13] This kind of coordination of social security rules within the EU exemplifies how EU countries harmonise their social services. The EU did not create a single social security system – rather, it established links among the various and distinct social security systems present in each member state.

4 Art. 3 (2) TEU.
5 See art. 26 (2), TFEU.
6 Art. 45 (1) TFEU. Spaventa, 2007; Spaventa, 2015, p. 456; Shuibhne (ed.), 2023.
7 Art. 45 (2), TFEU.
8 Art. 45 (3), TFEU.
9 Just think about restrictions on freedom of movement during the Covid-19 pandemic in the years 2020-2021. According to measures introduced to contain the spread of the contagion, border controls were reintroduced: see Council Recommendation EU 2020/1475 on a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic.
10 It is a tool for harmonising entry and residence requirements (even permanent) of a Union citizen and their family members in a Member State other than that of origin or provenance.
11 As a general rule, applicable legislation is that of the Member State in which the person concerned pursues their activity as an employed or self-employed worker.
12 Paju, 2017.
13 Regulation no. 883/2004 on the coordination of social security systems. See also regulation no. 987/2009, laying down the procedure for implementing Regulation no. 883/2004. Obviously, the worker must be a citizen of an EU Member State.

The phenomenon of labour mobility within the EU is also significant in numerical terms. According to the Annual Report on Intra-EU Labour Mobility 2022,[14] the number of working age EU citizens[15] living in a different EU country – other than the one in which they have citizenship – remained stable in 2020, at 10.2 million, despite the slowdown caused by the COVID-19 pandemic.[16] The share of EU mobile citizens varies greatly between member states, ranging from 0.8% for Germany to 18.6% for Romania.

This data cannot be underestimated. In fact, it requires more attention to avoid the possible negative effects of discriminatory treatments. On 31 July 2019 the European Labour Authority (ELA) was established in order to guarantee that freedom of movement works in practice and brings a fair mobility to individuals and companies. In this perspective, the ELA has four principle aims. The first is to ensure better implementation of EU rules on labour mobility and social security coordination. The second is to provide support services for mobile workers and employers. Next is to sustain cooperation between member states in cross-border enforcement, including joint inspections[17] to tackle undeclared work.[18] Finally, it provides mediation to resolve possible disputes and to promote collaboration.

2.
Who are Cross-Border Workers?

In this framework, it is necessary to pay particular attention to cross-border workers. This term is used to define workers – both employees and self-employed workers – who exercise their right of free movement to work in one EU member state while

14 Published by the EU Commission on 05.04.2023.

15 Between 20 and 64 years.

16 According to the European Trade Union Confederation (ETUC), over 11.3 million people of working age live in another member State, available at: https://www.etuc.org/en/issue/labour-mobility#:~:text=Over%2011.3%20million%20people%20of,to%20their%20place%20of%20work

17 Joint inspections are inspections carried out in a Member State with the participation of the national authorities of one or more other Member States, and supported, where appropriate, by the staff of the Authority. They are different from concerted inspections, that are carried out in two or more Member States simultaneously regarding related cases, with each national authority operating in its own territory, and supported, where appropriate, by the staff of the Authority: art. 8 (2) of the EU Regulation 2019/1149, establishing the ELA.

18 See ELA Consolidated Annual Activity Report 2022.

remaining resident in another.[19] The concept of cross-border workers covers different circumstances, and the definition may vary from one field to another,[20] thus creating confusion and application uncertainties.

Often 'cross-border workers' and 'frontier workers' are considered synonymous; however, cross-border commuters are distinct from frontier workers to the extent that they do not necessarily work in the frontier zone of the host country. Indeed, frontier workers – as the word itself indicates – are workers who are employed in the frontier zone of an EU member state, but who return each day or at least once a week to the frontier zone of a neighbouring country in which they reside and of which they are citizens.

However, sometimes these terms overlap. The reason is that bilateral tax agreements – which determine the tax arrangements applicable to cross-borders workers[21] – use restrictive definitions and additionally impose a spatial criterion.[22]

Furthermore, other expressions are contiguous to the term 'cross-borders workers'. One example is the term 'posted workers',[23] employees who are sent by their employer to carry out a service in another EU member state on a temporary basis. This can be found in the context of a contract of services, an intra-group posting or a hiring through a temporary agency.[24] Another example is 'seasonal workers'. These include EU and third country nationals travelling to a member state to temporarily live and carry out an activity dependent on the passing of the seasons.[25]

According to set theory we could say that the expression 'cross-border work' has a larger circumference. It is the species which includes the smaller circumferences, represented by frontier work, posted work and seasonal work (i.e. the genera).[26]

19 It is essential that they retain their normal place of residence outside the State of employment. If the cross-border employees move to the State of employment, they become migrant workers. The term "normal" place of residence does not exclude the possibility that the cross-border employee, for practical reasons, also has temporary accommodation in the State of employment: Distler and Essers, 2011, p. 65.

20 For instance, tax law, right of residence, welfare entitlements.

21 In order to avoid double taxation.

22 I.e. living and working in a frontier zone: available at https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/cross-border-worker_en

23 *Ex multis*, Fuchs, 2018, p. 3; Rombouts and Houwerzijl, 2018, p. 127; Houwerzijl and Berntsen, 2020, p. 147.

24 The Directive 96/71/CE identifies the definition, the scope, the terms, and the conditions of posted work, but, nevertheless, it is not enough to prevent possible abuse and to distinguish it clearly from other types of labour mobility: Houwerzijl, van Hoek, 2012, p. 419.

25 See the final report written in March 2021 by the European Commission on "Intra-EU mobility of seasonal workers. Trends and challenges", available at https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&

26 It is worth specifying that, for the purpose of this research, the expression "cross-border workers" is used in its broadest sense, including its various facets.

It should be stressed that most cross-border workers carry out essential activities in key economic sectors such as agriculture and food production, transport and logistics, construction, social services including care, social work, tourism, food processing and packaging, healthcare and research, IT and pharmaceutical industries, critical infrastructure industries, etc. The health emergency caused by COVID-19 and its mobility restrictions shed light on the strategic role played by cross-border commuters, as the European Parliament pointed out.[27]

No EU-wide systematic data-gathering or digital tracking system exists to provide adequate data on the total numbers of cross-border workers, but their presence in EU and EFTA[28] countries is estimated at approximately 1.7 million. It is a remarkable number and deserves great attention, especially because European labour inspectorates repeatedly report violations of labour rights of cross-border workers.[29] For instance, in 2017 more than 700,000 people may have been engaged in some form of undeclared cross-border work. And this figure might increase with raising labour mobility and the growth of new forms of work.[30] Furthermore, the consequences of the pandemic crisis may exacerbate existing problems in their treatment,[31] increasing risks of social dumping and law shopping.[32]

Ensuring fairness for companies and workers to operate on a level-playing field across borders is critical to a well-functioning internal market and, therefore, is one of the fundamental issues for the EU.

27 European Parliament resolution of 19.06.2020 on European protection of cross-border and seasonal workers in the context of the Covid-19 crisis.

28 European Free Trade Association, which is an intergovernmental organisation set up for the promotion of free trade and cooperation between the Member States (Iceland, Liechtenstein, Norway, and Switzerland).

29 The last ELA Activity Report shows that, during the 37 concerted and joint inspections organised in 2022, more than 350 infringements were identified. Most irregularities concerned violations related to posted workers, undeclared work, driving and resting times, low wages and possible bogus self-employment: ELA, 2023, p. 11.

30 Stefanov, Mineva, Schönenberg and Vanden Broeck, 2020, p. 2.

31 "Rights for all seasons" was the slogan of the campaign promoted by ELA in the autumn 2021 to inform cross-border workers about their rights and duties, to raise awareness of the employers about the benefits connected to compliance with the rules, and to draw attention to specific safety-measures, available at: https://www.lavoro.gov.it/priorita/Documents/ELA-national-communication-plan-2021.pdf

32 For instance, the above-mentioned final EU report 2021 on intra-EU seasonal workers highlights that the most alarming critical issues are represented by lack of access to information about their rights, inadequate social protection, poor accommodation, low pay, and challenging working conditions. These challenges were aggravated during the COVID-19 pandemic, since many seasonal workers could not carry out their work, but, at the same time, they were trapped in countries of work and could not return home.

3.
A Comparative Analysis Between Italy and the Netherlands

Although the right of movement for workers is clearly established within the EU and is based on the principle of non-discrimination because of nationality,[33] it is not so obvious that cross-border workers are actually treated in the same way as nationals. The most significant examples may include access to work, conditions of employment, and social and tax benefits.[34] Because there are no standardised national legislations on the matter, the legal system framework is complex. This lack of coordination – even in the application of different definitions of the term 'frontier worker' depending on the country and the appropriate double-taxation agreement[35] – can lead to different treatments of workers from other member states compared to domestic workers. The European Court of Justice has intervened several times, particularly about taxation of cross-border workers,[36] since "the risk of penalties from a fiscal point of view could constitute a brake on these forms of mobility, effectively creating a form of discrimination."[37]

Considering the above, it may be interesting to verify how the EU regulatory framework on cross-border commuters works in individual countries and whether it is enough to avoid every kind of discrimination based on nationality. Therefore, preliminary clarifications are necessary to circumscribe the action range of the research to obtain the most reliable results. Firstly, this study aims to focus on three relevant issues: checking the correct transposition and effective compliance with the EU regulatory provisions; evaluating the real impact of cross-border workers (both incoming and outgoing ones); and identifying the most significant challenges. Secondly, this research is based both on an analytical methodology – i.e. examining the regulatory provisions and the data on the matter – and a comparative methodology, bringing into focus suggestive similarities and contrasts among two member states.

The countries selected for this comparative survey – Italy and the Netherlands – are very different not only from a geographical point of view, but also in a

33 According to art. 18 TFEU, "any discrimination on grounds of nationality shall be prohibited". Moreover, art. 45 (2) TFEU establishes that "such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment".

34 See Distler and Essers, *cit.* p. 8.

35 As seen in par. 2 of this essay.

36 E*x multis*, CJEU 14.02.1995, C-279/93 (Finanzamt Köln-Altstadt versus Roland Schumacker); CJEU 11.08.1995, C-80/94 (Wielockx / Inspecteur der directe belastingen); CJEU 12.06.2003, C- 234/01 (Gerritse); CJEU 9.11.2006, C- 520/04 (Turpeinen), in https://curia.europa.eu.

37 Nunin, 2016, p. 259.

socioeconomic context. Because most of Italy's national territory extends into the Mediterranean Sea,[38] only the northern Italian regions border other European countries.[39] This geographical conformation makes the presence of cross-border workers[40] particularly difficult, because they can only easily reach the limited territories on the border. Conversely, the Netherlands is more than half surrounded by Belgium and Germany and most of the country can be accessed effortlessly.[41] Furthermore, from a socioeconomic perspective, according to the data on the year 2022[42] the gross domestic product per capita in Italy is slightly below the European average, whereas the Netherlands is in fifth place on the list, with about 16,000 USD more than the European average. Moreover, the Eurostat data on the third quarter of 2022 shows that the unemployment rate in Italy[43] is among the highest in the EU,[44] while the Dutch unemployment rate is one of the lowest.[45]

These differences represent an interesting starting point for comparison while analysing the safeguards of cross-border workers, also considering that "the main purpose of comparative law is a better understanding of one's labour law system."[46]

4.
Harmonisation with the EU Legislation on Cross-Border Workers

Even though there are some differences in the formulation of the regulatory provisions, the constitutions[47] of Italy[48] and the Netherlands[49] both recognise protections for all workers, regardless of their nationality. Indeed, work is one of the pillars of the Italian Constitution since the first paragraph of the first article,[50] and in several

38 Bordering the Ligurian Sea, the Tyrrhenian Sea, the Ionian Sea and the Adriatic Sea.
39 Specifically, France, Switzerland, Austria, and Slovenia.
40 Especially the frontier ones.
41 While the remaining part borders the North Sea.
42 Available at: https://tradingeconomics.com/
43 8,3%.
44 About 2,2% more than the European average (6,1%).
45 3,7%.
46 Weiss, 2003, p. 169. See also Blanpain, 2010, p. 3.
47 Both in Italy and the Netherlands the Constitution is the highest law.
48 The Italian Constitution was approved by the Parliament in December 1947 and came into effect on 1st January 1948. The English version adopted in this contribution is published in https://www.prefettura.it/FILES/AllegatiPag/1187/Costituzione_ENG.pdf
49 The Dutch Constitution dates from 1814. The version of the Constitution currently in force dates from 1983. The English translation adopted in this essay is published in https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands
50 "Italy is a Democratic Republic, founded on work".

provisions workers[51] are guaranteed with relevant safeguards.[52] Furthermore, the second paragraph of Art. 35 "promotes and encourages international agreements and organisations which have the aim of establishing and regulating labour rights."

Although the Dutch Constitution devotes less space to specific provisions on work, leaving it to ordinary law,[53] it recognises the legal status and protection of 'working persons' without any distinctions. Moreover, the Dutch Constitution opens with a fundamental right, which can easily be defined in its working dimension: "all persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."

In the Italian Constitution there is a similar provision,[54] but it is aimed only at citizens.[55] This divergence likely depends on the different periods in which these two constitutional provisions were issued. The Italian has been the same since 1947, while the Dutch one was modified in 1983. Obviously, at that time anti-discrimination sensitivity was more mature and the European legislation in this regard was already extensive.

However, in other articles the constitutional text ensures that "the Italian legal system conforms to the generally recognised rules of international law. The legal status of foreigners is regulated by law in conformity with international provisions and treaties"[56] and "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations [and] promotes and encourages international organisations having such ends."[57]

Moreover, in both countries safeguards against discrimination have been ensured in more detail, at the ordinary level of legislation.

51 Without any kind of distinctions.

52 Regarding the fair pay (art. 36 (1)), the maximum working hours and the weekly and annual paid vacation (art. 36 (2, 3)), protection of women and of minors on the job (art. 37), social insurance for old age, illness, invalidity, industrial diseases, and accidents (art. 38), freedom of association (art. 39) and right to strike (art. 40).

53 See art. 19 (2).

54 See art. 3 of the Italian Constitution.

55 "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions".

56 Art. 10 (1, 2).

57 Art. 11 (2, 3). The European Union is one of the international organisations that ensure peace and justice among the Nations.

In Italy the Workers' Statute[58] (WS) invalidates any kind of discrimination[59] for the following reasons: sex, race, language, religion, political or trade union or personal opinion, age, handicap, sexual orientation, and nationality.[60]

The Equal Treatment Act (ETA), enacted on 1 September 1994 in the Netherlands, introduced the general principle of equality in ordinary legislation.[61] It protects all individuals from direct and indirect unequal treatment based on religion or belief, political orientation, race, gender, nationality, sexual orientation, and marital status.[62]

Indeed, the formulation of the Italian and Dutch regulatory provisions are very similar. Both incorporate inputs coming from the Constitutional Charter – which, as seen, presents strong similarities on this point – and from international and European anti-discrimination legislation.

Nevertheless, there are some interesting differences. Firstly, the Italian WS is expressly and exclusively devoted to workers, whereas the Dutch ETA is aimed at everyone and only in section five does it regulate the prohibition of discrimination in employment.[63] Secondly, the ETA does not use the term 'discrimination', but rather 'differentiation'. This is not merely a question of semantics because, under Dutch criminal law, the discrimination requires the intentionality of the conduct to be proven. Conversely, in labour law, even in the absence of an intention to discriminate, differential treatment can be unlawful. Therefore, using the term 'differentiation' avoids any possibility of confusion with criminal law. Thirdly, regarding employment the ETA provides for some specific exceptions to the rule of equal treatment. For instance, in cases where nationality is deemed a deciding factor, such as athletes who wish to play for the national team, or when casting an actor to play a specific

58 Law 20.05.1970, no. 300. It is one of the most relevant Italian regulatory provisions regarding labour and worker protection.

59 The sanction is the nullity of any agreement or action of the employer.

60 Art. 15 Law no. 300/1970. More recently, see the legislative decree 9.07.2003, issued in implementation of the European directive no. 2000/78/CE and updated in light of the directive no. 2014/54/EU. In doctrine, see, *ex multis*, Barbera, 1991; Barbera, 2003, p. 401; Barbera, 2007.

61 Before then, special civil law only protected discrimination on the grounds of sex. See Dierx and Rodrigues, 2003.

62 Ben-Israel and Foubert, 2004.

63 In Italy, general anti-discrimination provisions based on the race and ethnic background for all individuals are included the legislative decree 9.07.2003, no. 215, issued in implementation of the European directive no. 2000/43/CE.

character, corresponding citizenship may be required.[64] Finally, Art. 15 of the WS sanctions discriminatory acts and pacts with the nullity, while the ETA establishes the invalidity only in case of discriminatory dismissals.[65] In other situations, compensation is the only available remedy in cases of a breach of the equal treatment law.

Considering the above, free movement of workers and protection against discrimination based on nationality are guaranteed in both countries. This is true despite the inevitable practical difficulties in complying with the legislation,[66] especially regarding the state of play in implementing the EU regulatory provisions on cross-border workers.

Both member states try to implement the EU directives on the matter. However, occasionally there are critical issues and delays, *a fortiori* because this field is particularly complex and involves many aspects and interests.[67]

Regarding one of the latest directives on the matter, no. 2020/1057,[68] ruling on the posting of lorry drivers, Italy approved the implementing decree on 23 February 2023 – one year after the deadline expired.[69] However, on 19 April 2023 the European Commission decided to refer the Netherlands to the Court of Justice for failing to transpose that directive into their national legislation.[70] Even though this EU directive is essential – not only to ensure social protection for drivers and to improve their working conditions, but also to guarantee fair competition between operators by eradicating illicit employment and business practices – 22 out of 27 EU member states implemented it late or have not done so at all. Despite there being good will among the parties, it appears that the time is not yet ripe for consistent enforcement of non-discriminatory road transport social rules across the EU.

64 While art. 15 of the WS does not provide exceptions, art. 3 (2), of the legislative decrees no. 215/2003 and no. 216/2003 introduces a regime of exceptions to general discrimination rule, according to art. 4 (1), of the European directive no. 2000/78: "Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Art. 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate".

65 Actually, invalidity of discriminatory dismissal is rarely invoked: see Dierx, Rodrigues, *cit*.

66 For instance, Wells, 2015, no. 8: "Known for legalized marijuana and prostitution, acceptance of same-sex relationships, and tolerance of medical processes like euthanasia and abortion, at first glance the country appears to be an idyllic haven for open-mindedness. However, when analyzing the cultural traditions, politics, education, and other aspects of everyday life in the country, a long-lasting history of racism and prejudice is revealed. Those of minority religions or of certain origins different than that of the typical Dutch citizen (often stereotyped as tall, white, and blonde) face a challenging life in the country" (p. 1).

67 See Houwerzijl, 2019, p. 71.

68 This directive modifies the former no. 2006/22/CE.

69 The deadline was 2.02.2022.

70 See https://ec.europa.eu/commission/presscorner/.

5.
Incoming and Outgoing Labour Flows in Italy and the Netherlands

In 2022, foreigners residing in the 27 countries of the EU accounted for 37.8 million, or 8.5% of the total population. According to the Ministry of Labour and Social Policies' Annual Report of 2023 regarding foreigners in the Italian labour market,[71] over 70% of foreigners resided in four countries: Germany,[72] Spain,[73] France[74] and Italy. In the latter country there were 5 million resident foreigners, of which 2.3 million were employed.[75] Although the presence of foreign workers in Italy is varied and exceeds the borders of the European Union, the report shows that eastern countries' citizens - especially those from Romania,[76] Poland, and Bulgaria - form a significant bloc of them. A large number of cross-border workers come from Slovenia and Croatia, which is reasonable given the geographical proximity to Italy.[77]

Although occupations vary in terms of tasks performed and skills required, the sectors with the highest incidence of foreign workers are agriculture, construction, catering, tourism, road transport, and domestic work.[78]

However, besides the high number of incoming cross-border workers,[79] there are also outgoing frontier commuters from Italy, especially towards Switzerland.[80]

In contrast, the incoming and outgoing labour flows in the Netherlands are quite different than Italy's flows. According to data from the Dutch Statistics Office,[81] there are more incoming workers – especially from Belgium – than outgoing ones.

71 See https://www.lavoro.gov.it/temi-e-priorita-immigrazione/focus/xiii-rapporto-mdl-stranieri-2023.
72 10,9 million.
73 5.4 million.
74 5.3 million.
75 Which is 10% of the total number of employees in Italy.
76 With an increase of 0.7% compared to the previous year.
77 See par. 3 of this essay. For an analysis of the situation in the border region of Friuli-Venezia Giulia, see NUNIN, *cit.*, p. 259.
78 See also European Commission, *2017 Annual Report on Intra-EU Labour Mobility,* available at: https://ec.europa.eu/futurium/en/system/files/ged/2017_report_on_intra-eu_labour_mobility.pdf.
79 In the absence of a structured system for tracking cross-border workers, the estimated number, based on detection of passages at the Transalpina station and foreign mobile telephone users, varies between 15,000 and 18,000 cross-border workers per day: see Regione Friuli Venezia Giulia, 2020. See also the most recent data available at: https://www.rainews.it/tgr/fvg/video/2022/10/gorizia-transalpina-confronto-lavoro-transfrontaliero-dede4f1c-e1be-47a1-ba05-baa918a6f397.html
80 Data available at: https://www.bfs.admin.ch/news/it/2023-0507
81 https://www.cbs.nl/en-gb

In fact, frontier workers make up a significant part of workforce in the Netherlands – ranging from 15% to about 40% – especially for companies located near the border. In 2019 cross-border workers accounted for at least 1% in many regions, with significant peaks in Zuid-Limburg,[82] Zeeuws-Vlaanderen,[83] Noord-Limburg,[84] Midden-Limburg,[85] and Zuidoost-Noord-Brabant.[86] For certain sectors, border locations are often the best places to settle in Dutch regions. For multinational companies, that type of location is advantageous for recruiting international and multilingual staff, with the best skills.

In almost all sectors in the Dutch labour market qualified personnel are needed because of the insufficiency of the native Dutch workforce. Indeed, in the Netherlands there are 133 vacancies for every 100 unemployed people.[87] This factor is consequential to the low unemployment rate recorded there.[88]

6.
Challenges in Equal Treatment Between Cross-Border and National Workers

Despite the differences in geographical and socio-economic factors, the challenges for cross-border workers in Italy and the Netherlands are similar. For example, social dumping – where foreign workers receive lower pay or worse working conditions compared to domestic employees – is a risk in both countries.

Although this is a recurring term in debates related to workers' mobility and security, social dumping does not have a generally accepted definition. It is often considered a 'vague concept', and "legal experts, economists, social scientists all have their own conception."[89] Even though there are different perspectives on the term, there is a common agreement that it has a 'negative connotation'. The phenomenon signifies, at the same time, exploitation of workers and unfair competition between companies. It is a set of practices carried out on an international, national, or inter-corporate level. It is aimed at gaining an advantage over competitors due to application of different wages and social protection rules to different categories of workers.[90]

82 5.5%.
83 4.1%.
84 4.6%.
85 3.7%.
86 2.2%.
87 https://nltimes.nl/2022/05/17/dutch-labor-market-super-tight
88 As reported in par. 3 of this essay.
89 Jorens, 2022, p. 375.
90 Bernaciak (ed.), 2015; Buelens and Riguaux (ed.), 2016; Kiss, 2017.

In some cases it might consist of different treatments or discrimination based on the nationality. As such it contributes to the vulnerability of workers.[91]

For cross-border workers, social dumping may be the result of the following critical issues: higher taxation, greater difficulties in accessing social benefits and working arrangements, and the risk of undeclared work.

Due to the lack of a regulatory framework, cross-borders workers risk double taxation. In fact, their income from work could be taxed both in the country of residence and in the country where the work is carried out. Not only is it an economic burden on workers, but it also is an obstacle to free movement within the EU.

The only way to avoid double taxation and its consequences is signing bilateral taxation agreements. Italy has just revised the agreement with Switzerland,[92] which contains the definitions[93] of 'frontier area'[94] and 'frontier workers',[95] establishes the prohibition against double taxation,[96] and reaffirms the principle of non-discrimination.[97]

Even the Netherlands has just updated its double tax treaty with Belgium.[98] However, it still needs to be approved by both parliaments to become effective.[99] The revision of the existing treaty concerns a simplification of applicable rules and aims at combating abuse. In essence, the treaty prevents workers from paying tax in both countries. According to the new treaty, income from work must be taxed in the country where work was carried out.[100]

All agreements on the matter have similar purposes, i.e. avoiding double taxation and preventing exploitation. However, the sheer number of existing treaties and different modalities of their discipline may create great confusion and uncertainty. Therefore, a multiplicity of bilateral agreements can be a temporary solution.

91 A clear example may concern companies who engage cheaper and more vulnerable agency workers or relocate production to lower wage and less regulated locations. Social dumping may take different forms in different sectors.

92 Bilateral taxation agreement between Italy and Switzerland was ratified in Italy with law 13.06.2023, no. 83 and has been in force since the first July 2023. There is also a bilateral agreement with Slovenia, in force since 2002.

93 Art. 2 of the agreement.

94 Regarding Italy, frontier areas are considered the Regions of Lombardy, Piedmont, Valle d'Aosta and the Autonomous Province of Bolzano.

95 Frontier workers must be tax resident in a municipality whose territory is located, totally or partially, in the area 20 km from border with the other contracting State and should come back daily to its own principal domicile in the State of residence.

96 Art. 3.

97 Art. 4.

98 On 21.06.2023 the relevant ministers of the two Countries signed the new tax treaty. The previous treaty, still in force, was signed in 2001 and modified in 2009.

99 This is not expected to be until 2025.

100 Nevertheless, there are some exceptions in specific situation: for instance, working for government, working in education, working on board a ship or aircraft, etc...

However, the most effective remedy would be a homogeneous regulation on this relevant topic, valid throughout the EU member states.

Under no circumstances should access to social benefits be more difficult for cross-border workers than for domestic ones. If so, it would be an obstacle to equal treatment and a failure of the principle of free movement within the EU. Even though rules have been established, sometimes they do not work in practice, as attested by the interesting and lively case law in both countries.

A recent episode of the problem in accessing social benefits can be seen in foreign lecturers working in Italian universities. Although Italian law provides an acceptable framework for the so-called reconstruction of careers of foreign lecturers,[101] in practice most universities do not adequately respect the EU rules on free movement and non-discrimination based on nationality. They do not provide for a correct reconstruction of foreign lecturers' careers. This includes the adjustment of their salary, seniority and corresponding social security benefits to those of a researcher under a part-time contract. Therefore, most foreign lecturers have not received the money and benefits to which they are entitled. Consequently, the European Commission decided to refer Italy to the Court of Justice of the European Union,[102] claiming that Italy had violated the principle of non-discrimination due to nationality in another EU member state in regards to employment access and conditions of work.[103]

This is not an isolated case. In one of the Italian regions with the greatest presence of cross-border workers – i.e. Friuli Venezia Giulia – a regional law breached the principle of equal treatment.[104] It reserved sickness benefit to residents in Italy for at least ten years, of which five specifically in the region. Restricting access to social benefits favours those who are native and most deeply rooted in the region. This constitutes indirect discrimination based on nationality.[105]

Similarly, on this issue, the EU Court of Justice declared against the Netherlands for requiring foreign workers and dependent family members to comply with residence conditions. In particular, this pertains to the 'three out of six years' rule, which conflicts with obligations under Art. 45 TFEU and Art. 7(2) of Regulation no. 1612/68 on freedom of movement for workers within the EU.[106]

Because of the lack of a single social security system valid throughout the EU, case law plays a fundamental role in protecting cross-border rights and ensuring

101 As recognised by the Court of Justice of the European Union in case C-119/04, settled on 18.07.2006, available at: https://curia.europa.eu

102 Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3480

103 Art. 45 TFEU and art. 7 of Regulation EU no. 492/2011.

104 According to art. 117 of the Italian Constitution, regional normative provisions must respect not only the Constitution itself, but also the constraints of the EU regulatory system.

105 See Court of Udine 29.06.2010, in *D&L*, 2010, p. 874, which disapplied regional law 7.11.2006.

106 See CJEU 14.06.2012, C-542/09, European Commission v. Kingdom of the Netherlands, available at: https://eur-lex.europa.eu/

the principle of equal treatment in accessing social benefits, both at national and supranational level.[107] As noted, implementation of these rights "became a matter of jurisdiction rather than legislation."[108]

The number and variety of controversies on the matter are the clearest sign that freedom of movement and its effects,[109] although generally transposed into national legislation, are not yet sufficiently internalised.

Digital transformation of the labour market, especially due to the COVID-19 pandemic and its impact on the increase in remote working, may also affect working conditions of cross-border workers. Accessing remote work may be a bone of contention between cross-border and domestic workers. While national employees can easily take advantage of remote work,[110] frontier workers would be cut off from this possibility in order to comply with the strict provisions of bilateral agreements on the matter.

Furthermore, Art. 13 of Regulation no. 883/2004, which is applicable legislation for cross-border workers, establishes that an employee who normally pursues an activity in two or more member states shall be subject to the legislation of the member state of residence if they pursue a substantial part of work[111] in that member state.[112] During the COVID-19 pandemic, a Guidance Note[113] was issued to clarify that telework in a member state other than the usual country of employment, due to health emergency, should not change the applicable legislation, even when working from home exceeds 25% of activity.

Considering the changed post-pandemic social context – where telework has become a structural way of working for many employees – the greater difficulty in using remote work for cross-border employees would have represented an obstacle to free movement and equal treatment in employment. Therefore, a framework agreement for habitual cross-border telework has recently been promoted by the Administrative Commission for the coordination of social security systems.[114] It has been signed by 18 member states so far. This agreement[115] – which implements

107 It is appropriate to point out a recent CJEU ruling on the matter: 15.06.2023, C-411/2022, Thermalhotel Fontana Hotelbetriebsgesellschaft m.b.H. v. Bezirkshauptmannschaft Südoststeiermark, available at: *https*://eur-lex.europa.eu/

108 Grimm, 2015, p. 467.

109 I.e. equal treatment and non-discrimination on grounds of nationality.

110 This modality of carrying out working performance may allow reduction in commuting time, better work-life balance, more flexibility in working time organisation, and higher productivity.

111 According to art. 14 (8) of the Implementation Regulation no. 987/2009, substantial part is more than 25% of the activity.

112 So-called *lex loci domicilii*.

113 For the period between 1.02.2020 and 30.06.2022: see the revised version as of 25/11/2021 - AC 074/20REV3 available at: https://ec.europa.eu/social/main.jsp?catId=868&langId=en

114 For a comment on the agreement see Aceto, 25.09.2023.

115 Entered into force on 01.07.2023.

Art. 16 (1) of Regulation no. 883/2004[116] – only disciplines cross-border telework and constitutes an exception to Art. 13.

Although the purpose of the framework agreement is to identify applicable legislation and simplify procedures, some critical issues are recognisable. Firstly, both the member state of residence and employment must have signed it.[117] While the Netherlands has already approved it, in Italy it is still in discussion.

Secondly, according to Art. 3 of the agreement, cross-border telework should be carried out in the state of residence less than 50% of the total working time. Therefore, unlike for national workers, cross-border employees' flexibility is strongly constrained.

Although "considered a reasonable compromise",[118] this agreement is yet another demonstration of the urgency for true harmonisation between national regulations.[119]

Remote work presents opportunities as well as challenges for all employees, especially in the areas of occupational health and safety. This includes psychosocial issues related to hyper-connection, overworking, blurring boundaries between personal and professional life, etc. Challenges related to cybersecurity and data protection must also be addressed. In the case of cross-border workers these issues may be amplified, due to the possible differences in various national regulatory provisions.

Because the movement of cross-border workers is frequently not monitored, their risk of undeclared work is even more likely than for national ones.

Despite being a topic of great media interest, it is not easy to define irregular work according to traditional legal categories. It is an ancient and complex phenomenon. Not only is it widespread but it is varied because 'irregular work' as genus presents numerous species. It can be difficult to distinguish what constitutes undocumented work,[120] illegal work,[121] and informal employment.[122] Undeclared work is the definition adopted by the European Union for the first time in 1998.[123] It means "any paid

116 Art. 16 (1) establishes the possibility that two or more Member States, or the competent authorities of these Member States or the bodies designated by these authorities may, by common agreement, provide for exceptions to conditions in art.s 11-15 of Regulation no. 883/2004, in the interest of certain persons or categories of persons.

117 Art. 2 of Framework Agreement.

118 Aceto, *cit.*

119 From a tax perspective, circular no. 25/E of 18.08.2023 issued by the Italian Tax Agency provided clarifications on use of remote working and consequent tax regulation for cross-border workers, also to counter abuse of fictious residences abroad.

120 Calafà, 2017.

121 This expression generally refers to irregular work carried out by individuals illegally present on the national territory (European Commission, 2014, p. 8) or to illegal activity in itself.

122 Vermeylen, 2008.

123 European Commission,1998.

activities that are lawful as regards their nature, but not declared to public authorities, taking into account differences in the regulatory systems of the Member States."[124]

Not all EU member states have an express regulatory reference to undeclared work[125] or even use the same term. Depending on regulatory provisions, Italy uses the term 'irregular work'[126] – to mean the employment relationship for which the obligations in civil, administrative, fiscal, social security and insurance matters have not been fulfilled, in whole or in part – or 'black work',[127] when the violation is total. Conversely, the Netherlands prefers the term 'illegal employment' for every kind of exploitation of workers (i.e. dangerous and unhealthy working conditions, being underpaid, working without registration for income tax and social security, etc.).[128]

This phenomenon is a challenge that negatively affects workers, companies and governments across Europe in different ways.[129] It may have far-reaching consequences, including breaching of workers' rights, unfair competition, and reduced tax revenues.[130] At EU level the most effective measure was the creation of the European Platform. It made a permanent working group of the European Labour Authority to tackle undeclared work since 26 May 2021. At the national level the fight against undeclared work relies mostly on the actions of labour inspectorates. However, besides deterrent measures, preventive policies – such as tax incentives, amnesties, awareness raising – may be useful to decrease the incidences of undeclared work and facilitate compliance with existing rules.

Undeclared work is a serious issue both in Italy and in the Netherlands. Evidence of the problem can be seen in the annual reports on supervisory activity in labour and social security written by the Italian Labour Inspectorate[131] and the Dutch documents on the matter.[132] The data shows that cross-border workers are in one of the most vulnerable categories. Italy's latest reports highlight alarming incidences of illicit transnational posting in the northern Italian regions, especially in transport, construction, and health services.[133] Domestic work is another sector that is char-

124 See opinion of the European Economic and Social Committee no. 2014/C - 177/02 on *"A strategy to combat the black economy and undeclared work"*, available at: *eur-lex.europa.eu*

125 Robert, 2014.

126 Art. 1 of law 18.10.2001, no. 383.

127 Art. 36-*bis* of decree-law 4.07.2006, no. 223, converted by law 4.08.2006, no. 248.

128 See https://www.nllabourauthority.nl/topics/illegal-employment. See also factsheet on undeclared work in the Netherlands in *www.europa.eu*.

129 See characteristics of undeclared work across all 27 EU Countries, and the institutions and policy responses available at: https://ec.europa.eu/social/main.jsp?catId=1322&langId=en

130 On the topic, Russo, 2018, p. 876.

131 https://www.ispettorato.gov.it/attivita-studi-e-statistiche/monitoraggio-e-report/rapporti-annuali-sullattivita-di-vigilanza-in-materia-di-lavoro-e-previdenziale/

132 See https://www.cbs.nl/en-gb and https://www.nllabourauthority.nl/.

133 Ispettorato Nazionale del Lavoro, *2022,* p. 40.

acterised by a high rate of irregularities.[134] Since this area lacks good data, it is often overlooked by supervisory reports.

In the Netherlands, the Dutch Labour Inspectorate carefully monitors compliance with the Posted Workers in the European Union Act (*Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*). It provides better protection for these workers and combats unfair competition based on employment conditions,[135] especially in sectors of construction, maritime/shipbuilding and transport industries.[136]

In order to avoid dangerous consequences of undeclared work on cross-border employees, the only available remedies may be implementing labour inspections both at national and EU level, and promoting a culture of integration and legality for safer and more decent work, regardless of border and nationality.

7.
Brief Conclusions and Prospects for Strengthening Free Movement of Workers

It is clear that cross-border workers' protection is guaranteed – in theory – by general rules on the right to freedom of movement within the EU. This is constitutionalised in the treaties and progressively interpreted by the EU Court of Justice. Nevertheless, in practice many challenges need to be overcome.

The reasons for the gaps between theory and practice are numerous. Firstly, from a political viewpoint the last two decades have seen increased labour mobility become more heterogeneous.[137] Much of this is due to Eastern enlargements[138] that have led to migration flows from East to West.[139] Secondly, from a sociological perspective, an obstacle to full integration may be because of the public perception of cross-border workers. Studies on the issue show that less-educated persons consider free movement of workers as a threat to their jobs.[140] Moreover, from a legal viewpoint the complexity of harmonising national legislations cannot be underestimated, above all in the field of social security, which has remained a national competence. Thus,

134 Nunin, *cit.*, p. 263.
135 https://www.government.nl/topics/foreign-citizens-working-in-the-netherlands/employment-conditions-for-posted-workers-in-the-eu
136 Houwerzijl, 2018, p. 22.
137 For instance, regarding wage levels and working conditions.
138 Poland, Hungary, Slovenia, the Czech Republic, Slovakia, Latvia, Estonia, Lithuania, Cyprus, and Malta joined the EU in 2004. In 2007 Bulgaria and Romania were added. The last entry was Croatia in 2013.
139 Roos, 2019, p. 631.
140 Toshkov, Kortenska, 2015, p. 910; Vasilopoulou, Talving, 2019, p. 805.

coordination of national welfare systems may be essential to promote and facilitate free movement of workers within the EU.

Because of this contentious framework, it is no wonder that there were a significant number of infringement procedures initiated by the EU Commission against both the countries examined in this study.[141] Without going into details, they concern both the late communication to the EU Commission about the measures chosen to implement the directives, and the failure or the incorrect application of the EU regulatory provisions. Such procedures could involve the Court of Justice and lead to an economic penalty. Over time it could become a great cost to the state.

In conclusion, since free movement of workers cannot be taken for granted, what could be the most effective measures to strengthen it and protect cross-border workers?

At the EU level, the first point to address should just be creating a clear definition of cross-border workers. Indeed, these workers lack a uniform classification. Additionally, there is the issue of different disciplines, which depends on the criteria used for different groups of workers (i.e., frontier workers, seasonal workers, posted workers, etc.). These differing terms could increase confusion and thereby weaken worker safeguards even though these employees may have the same characteristics and vulnerabilities, i.e., they live in one member state and work in another.[142]

In regard to the principle of equal treatment, cross-border workers are pioneers of European integration and effective compliance. Therefore, the harmonisation of national regulatory frameworks should be a priority. This is especially true for the issues of granting social benefits and avoiding higher taxation. Furthermore, greater cooperation of European and national authorities to supply proper information and verify rule compliance should be included in the agenda.

Only with these essential tools will it be possible to reinforce free movement of workers, which is the cornerstone of European citizenship.

141 In the first half of 2020, 22 infringement procedures against Italy and 5 against the Netherlands were promoted. See *www.openpolis.it*.

142 Unlike EU migrant workers, who leave their country of origin completely, with or without their family, to live and work in another Member State.

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Workplace Surveillance of Employees from the Czech Perspective

ABSTRACT: *This contribution focuses on workplace surveillance from the Czech perspective. Its basis is to present the essence of surveillance by employers in the Czech Republic – a much-discussed topic influenced by a number of facts such as the development of modern technologies, also included in this paper. These issues are presented from several perspectives – specifically: employees under video surveillance; monitoring of employees' computers; and consumption of alcohol or other addictive substances under surveillance. In the case of video monitoring, the aspect of GDPR legislation and the Labour Code are discussed in detail. The national attitude towards hidden monitoring and dummy camera systems is also emphasised. For example, it is important that - according to some opinions - the employer is obliged to directly inform the employees about the scope and methods of the employee surveillance in advance. This would completely eliminate employee surveillance carried out with hidden cameras. However, this approach would basically be much harder on employers than the European Court of Human Rights' case-law. This paper, therefore, represents a different way of interpreting the relevant Czech Labour Code. The role of the Czech Personal Data Protection Office is also highlighted. The development of the opinion of this Office on employee email surveillance is also included. In relation to the topic of employee surveillance through a work computer, the paper also summarises the basic limits that the employer must take into account. Finally, monitoring work premises for the presence of alcohol is a highly important topic as well, with employees forbidden from working under the influence of alcohol. However, the employee surveillance faces some major restrictions in this respect, not only from Czech Labour Code legislation but also by the case-law of the Supreme Court of the Czech Republic.*

KEYWORDS: *labour law; employee surveillance; employer; workplace; Czech Republic*

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1.
Introductory notes

Surveillance of employees is certainly a much-discussed topic. Many employers are now thinking about how to approach the surveillance of their employees, or are introducing it to their workplaces as a new measure. This can be induced by many causes, the most common of which will likely be the effort to control efficiency and performance, while also including health and safety monitoring, natural monitoring of the working environment, or any other relevant cause. At the same time, employee surveillance is not only related to moments when the employee is performing distance work, such as on home office. Currently, these surveillance methods can be frequently encountered even during routine work in the employer's workplace and on its premises.

It is also necessary to emphasise that there are many new information technologies appearing – often directly associated with much easier and more intensive surveillance. And the more thorough these new surveillance possibilities are, the more essential it is to pay attention to the protection of employees, who can be excessively affected by such surveillance.

This is, at the same time, a very broad topic that can be viewed from different angles. This paper, therefore, includes employee surveillance from several different points of view. In this respect, employees under video surveillance and computer monitoring – and monitored for consumption of alcohol or other addictive substances – are discussed.

2.
Employees Under Video Surveillance

2.1. The GDPR legislation

Video surveillance is probably the most frequent method of employee surveillance in the Czech Republic, and the associated employee protection has two levels. By all means, recording of employees may be considered as processing of their personal data under the General Data Protection Regulation (hereafter GDPR).[1] This is especially the

1 Cf. 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.

case if the recording from the cameras can be kept for a longer period – in which case the employer will fulfil the requirements of Article 4 Points 2, 7 and 8 of the GDPR,[2] and will act as the controller and processor of the personal data of its employees.

In addition, the internal Act No. 110/2019 Coll., on the processing of personal data, as amended (hereafter the Act on Personal Data Processing), which closely follows this GDPR Regulation, was adopted in the Czech Republic. Therefore, the relevant legislation is included in both of these legal sources. On an application level, these jointly represent the general legislation in relation to camera systems and employee surveillance, which is to stipulate the basic[3] obligations placed on the employer — for example, the obligation to specify the purpose of processing personal data, records of processing activities, balance test, instruction of the data subject on the scope of their processing, on the proportionality test, or on the securing of protection of the personal data processed. The relevant supervisory body is then the Czech Personal Data Protection Office (as well as the European legal framework for personal data protection).

Although there are not many court decisions at this general level, a judgment by the Supreme Administrative Court of the Czech Republic can be referred to at this point. Specifically, it stipulates that the aim of the national legislation contained in the Act on Personal Data Processing (as well as in the previous legislation) is to fulfil the right of everyone, including the employees, to be protected against unauthorised interference with their privacy - and to get the rights and obligations regarding personal data processing in compliance with the European legislation.[4]

2 Article 4 Point 2 of the GDPR Regulation stipulates that processing means any operation or set of operations, '*such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.*'

3 Cf. Štefko, 2019, pp. 1246–1254.

4 Cf. Supreme Administrative Court, 2006, 3 As 21/2005-105.

2.2. The Role of the Czech Personal Data Protection Office and the Methodology

2.2.1. Division of Camera Systems into 4 Classes

In response to the European Data Protection Board Guidelines 3/2019,[5] the Personal Data Protection Office has prepared its national methodology.[6] This methodology is not a binding legal act, but a draft document to help with the GDPR application on video surveillance. In principle, it can be said that the office attempts to make the processing much easier for those processing personal data in a lower quality and smaller extent. Therefore, the office divides camera systems into 4 classes. The criteria of this division are - among other things - the quality of the recording, its sensitivity, or the degree of interference with the rights of the data subject (i.e. the employee).

The methodology also defines four types of threats to which the employer must react if using the camera systems for employee surveillance:

a) Unauthorised access to camera systems
b) Access by unauthorised persons to camera recordings
c) Unauthorised reading (even online), copying, transmission, modification, and erasing of camera recordings
d) Potential weather damage to surveillance cameras

For each of these 4 classes and types of threats, technical and organisational measures used for a specific camera system are subsequently determined by the methodology. These measures must be adopted by the employer to prevent the abuse of camera systems. The lower the recording quality of a specific camera included in the relevant class is, the fewer measures the employer is obliged to implement. In this case these measures are usually less demanding for the employer.

2.2.2. Camera Systems in Online Mode

In its methodology the office newly stipulates that – in order to save camera recordings – the processing of personal data can be carried out in 'online mode' – i.e. with a

5 Cf. European Data Protection Board (2020): Guidelines 3/2019 on processing of personal data through video devices [Online]. Available at: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32019-processing-personal-data-through-video_en (Accessed: 27 October 2023).

6 Cf. Czech Personal Data Protection Office (2023): Methodology for the design and operation of the camera systems in terms of the processing and protection of personal data [Online]. Available at: https://uoou.gov.cz/media/novinky/dokumenty/metodika-kamery0-983.pdf (Accessed: 27 October 2023).

camera system that does not store the recording. However, these videos can be monitored by the employer or by any other person online. The principle here is that any shot of an identifiable person represents personal data, and therefore enabling access to an unlimited circle of recipients also represents the processing of personal data.

Thus, the office extends the scope of GDPR legislation to all cameras, camera systems, photo traps and all similar devices capturing or transmitting shots of natural persons – whether they make a long-term recording or not.

2.2.3. Sample Documentation

The methodology also contains three sample documents. One is a sample document for fulfilling the information obligation; one is a sample record of the operation of the processing by the camera system; and one is a sample balance test within the processing of personal data on the basis of legitimate interests.[7] This is a step helping – in particular – smaller controllers to comply with the obligations of the GDPR in the using of camera systems.

2.3. Czech Labour Code

In addition to the GDPR legislation, some basic requirements are also stipulated in the Czech Act No. 262/2006 Coll., the Labour Code, as amended (hereafter the Labour Code). The legislation contained in the Labour Code is especially in relation to the general GDPR rules. The relevant supervisory bodies are then the Regional Labour Inspectorates and the State Labour Inspection Office.

In accordance with Section 316 of the Labour Code, without a serious reason the employer must not interfere with the employee's privacy in the workplace and in the joint premises of the employer. This means that the employer is forbidden from monitoring the employee openly or covertly, to intercept or record telephone calls, or to check email or other mail shipments addressed to employees. More importantly, if a reason is provided to justify such control mechanisms, the employer is obliged to directly inform the employees about the scope of the surveillance and the methods of its implementation.

7 *Ibid.*

2.3.1. Hidden Camera Systems

According to some opinions,[8] the provision of the above information should always precede the surveillance itself – and therefore secret employee surveillance was generally prohibited with regard to Section 316 of the Labour Code. However, this would also mean that the legislation of the Czech Labour Code would be much stricter on employers than foreign judicial decisions, such as those of the European Court of Human Rights (ECtHR). Out of these reasons, I cannot in principle identify with the opinion that provision of the information should always precede the surveillance itself.

An example of such ECtHR case-law is the judgment in Lopez Ribalda et al. versus Spain. This judgment dealt with a case in which a supermarket employer installed camera systems to prevent continuing theft at the workplace. Employees were informed about the installation of visible cameras, which were directed towards the entrances and exits of the supermarket. However, there were also several hidden cameras in the supermarket, of which the employees were not informed.

The court noted that Spanish law – as well as international standards – requires fulfilment of the employer's informational obligation previous to surveillance, but this is only one of the criteria taken into account in assessing the adequacy of employee surveillance. If the information has not been disclosed, other guarantees will be more important. It is essential to balance the employees' right to privacy with the protection of the employer's assets. The court observed that the interference with the employees' privacy was proportionate in the end, judging that there existed a reasonable suspicion of serious misconduct by the employees, and that the extent of the losses did constitute appropriate justification.

Therefore I strongly support the second interpretation, according to which it is sufficient to either inform the employees about the monitoring afterwards, or get the employees acquainted with the sole possibility of video monitoring without any other relevant details preceding the surveillance,[9] provided there is a significantly relevant reason for it (such as a risk of a severe property harm caused to the employer). Generally speaking, the possibility to use hidden cameras is still an open issue in the Czech Republic.

8 Cf. Jelínek, 2022, 1013.
9 Cf. Morávek, 2022, pp. 950–965.

2.4. Dummy Models of Cameras

The above-mentioned implies that legislation in the Czech Republic is partly duplicated and overlapping. The powers of the competent supervisory bodies are also doubled. This was relatively well reflected in a recent case dealt with by the Personal Data Protection Office,[10] dealing with the location of dummy cameras in the common premises of the workplace. The surveillance did not meet the definition of hidden monitoring, with the employees fully informed about the presence of these cameras. However, they were not informed that they were only dummy models – unable to make or store any record at all.

As part of its investigation, the office concluded that no breach of general GDPR legislation was caused. As a dummy camera is not capable of collecting any personal data at all, it cannot cause a GDPR breach. However, it pointed strongly to the fact that -in addition to the GDPR obligations - the employer is also obliged by the Labour Code to create favourable working conditions for the employees and ensure their health and safety.[11]

The dummy cameras were located in the common areas of the employer's workplace – specifically at the toilets. The office referred the whole matter to the relevant Regional Labour Inspectorate, which considered the location of the dummy cameras as a breach of the employer's obligation. Camera surveillance done in this form was assessed to be creating undue pressure on the affected employees, which while it represented no breach of the GDPR still violated the Czech Labour Code.

2.5. Partial Summary

In conclusion, it should be highlighted that there is duplicate legislation on camera surveillance in the Czech Republic – with not only the GDPR, but also the Labour Code. There is also an overlap between the competence of the Personal Data Protection Office and the Labour Inspectorates. In accordance with the Section 316 of the Czech Labour Code the employer must not interfere with the employee's privacy in the workplace or in the joint premises of the employer without a serious reason. However, it is not determined what this serious reason may be.

The employer is obliged to directly inform the employees about the scope of the employee surveillance and the methods of its implementation – however I am convinced that this does not prohibit employers from using hidden camera systems.

10 Cf. Czech Personal Data Protection Office (2022) Camera atrapa does not violate GDPR, but its installation can be sanctioned [Online]. Available at: https://uoou.gov.cz/vismo/dokumenty2.asp?id_org=200144&id=55810 (Accessed: 2 October 2023).

11 Cf. Section 302, para. c) of the Czech Labour Code.

This approach is entirely consistent with ECtHR case-law. However, for such monitoring the employers must have very serious reasons.

The general criterion is to proceed adequately towards the employees and always choose the more suitable and less invasive approach of surveillance carried out by the camera systems (this may be surveillance by a superior employee). At the same time, it is unacceptable to continuously monitor common relaxation spaces, especially toilets. On the other hand, the ruggedness of this legislation in some cases – such as the installation of dummy cameras – allows us to sanction a much wider range of inappropriate behaviour by employers than the GDPR would alone.

3.
Monitoring of Employees' Computers

3.1. Basic Definition

3.1.1. Several Comments on the Legislation

This section presents several notes on monitoring work computers. This can include not only installation of programs to allow the employer to remotely monitor activity, but also monitoring of emails and the employees' working environment. In principle, it is not decisive who the owner of these computers is, whether the employer or even a third party. The only important thing is how the employer performs surveillance in relation to a particular computer. In line with the development of modern technologies, there are a number of ways that employees can be monitored. Their range is extensive, and it is certainly not possible to deal with all of them. Some examples include monitoring of keystrokes, screens, mouse movements, observation of the environment around the computer, surveillance by webcam, and email monitoring. In addition there is the installation of data leak prevention systems and new generation firewalls. It should be said that with the current rapid development of technologies, this type of surveillance is becoming increasingly frequent.

Regarding computer surveillance, the above-mentioned legislation applies as well, especially when it comes to camera or video monitoring (in particular random activation of a webcam or microphone, and taking pictures of the environment around the computer). If the employee's personal data is processed through the selected means of surveillance, the GDPR legislation will apply again. In addition, the same Section 316 of the Czech Labour Code can always be related to the matter. Thus, for the employer to carry out surveillance their interest must outweigh the

interests (especially privacy) on the employee's side. And again, there is some overlap between the competence of the Personal Data Protection Office and the Labour Inspectorates.

Based on ECtHR case-law, the employees' privacy in the workplace is always to be protected by the employer. However, this does not grant employees permission to take paid leave and use the employers' devices to arrange their private affairs. According to the relevant interpretation, this is not contrary to the case-law of the ECtHR and the Court of Justice of the EU.[12] It is clear enough that no employer must be obliged to accept the use of professional equipment for employees' private purposes. Compliance with these rules is to be monitored by the employer.

The Czech Labour Code presents the very same opinion. In accordance with Section 316 the employee is prohibited from using work devices for their personal needs, and can do so only with previous consent from their employer. This can be implicit as well. If the employees violate this rule, they carry all the costs and it represents a breach of their duties, which can also lead to the termination of the employment relationship.[13]

However, it should be emphasised that for surveillance carried out by the employers, Section 316 stipulates conditions that must be observed by the employers in addition to the general conditions according to the GDPR.[14] The employer is entitled to monitor compliance solely in a proportionate manner. The Supreme Court of the Czech Republic extends this conclusion, as it stipulates that the surveillance "cannot be performed by the employer completely arbitrarily (in terms of scope, length, thoroughness, etc.), since the employer is entitled to perform this surveillance only in a proportionate manner."[15] The Labour Code leaves the court to define the circle of circumstances at its discretion. In particular, it should be relevant whether "it was a continuous or subsequent surveillance, its length, the scope of whether and to what extent it restricted employees in their activities, whether and to what extent it also interfered with the right to the employees' privacy, etc."[16] It is still necessary to say that the employer's right to monitor its property is not limited to working hours. However, in terms of determining the degree of proportionality of employee surveillance, employees in general are given a greater amount of privacy outside working hours.[17]

12 Cf. Morávek, 2017, pp. 573–577.
13 Cf. Supreme Court, 2014, 21 Cdo 747/2013.
14 Cf. Štefko, 2019, pp. 1246–1254.
15 Cf. Supreme Court, 2012, 21 Cdo 1771/2011.
16 *Ibid.*
17 Cf. Morávek, 2022, pp. 950–965.

3.1.2. Illustrative Examples of Appropriate Execution of the Employees' Surveillance

The method of proportional employee surveillance is essential. For example, if a physical inspection carried out by a superior is sufficient, it may always be more proportionate than surveillance through any kind of tracking software.

At the same time, technical tools preventing computer abuse (e.g. whitelists or blacklists) will always prevail over the subsequent surveillance – i.e. prevention always prevails over surveillance. Even in the case of subsequent monitoring, the employer should restrict the monitoring itself to the quantity and size of the mail correspondence or to the list of domains visited by the employee. It is generally decisive for the proportionality of employee surveillance whether it is a continuous or subsequent surveillance, its length, and whether and to what extent it restricted employees in their activities or interfered with their privacy.[18]

A completely different approach must be applied if the employer knows and accepts that employees use professional devices to arrange their private affairs. If the employer's approach represents a tolerated practice, it is not possible to penalise the employees in any way as they have not committed any breach of their obligations at all. This applies to all employees, including incoming employees, otherwise it would represent a discriminatory approach. Any possible change in the conditions would then have to be made in relation to all employees.

3.2. The Personal Data Protection Office – Surveillance of the Employees' Email Correspondence

3.2.1. The Previous Unsatisfactory Development

Although the rules presented so far may seem natural enough, the preceding development was rather confusing in the Czech Republic. The approach of the Personal Data Protection Office towards email surveillance was significant. The office had previously presented its Standpoint No. 2/2009,[19] focused exclusively on workplace surveillance with a special consideration to monitoring employees' email correspondence.

The office used to strictly divide employees' mail into private and work-related according to the email addresses used. For instance, in case the email was sent to the address *distribution@employers-domain.cz* it was always considered a work-related

18 Cf. Morávek, 2017, pp. 573–577.

19 Cf. Czech Personal Data Protection Office (2009): Stanovisko č. 2/2009, Ochrana soukromí zaměstnanců se zvláštním zřetelem k monitoringu pracoviště [Online]. Available at: https://uoou.gov.cz/files/stanovisko_2009_2.pdf (Accessed: 2 October 2023).

mail, and the employee was never granted any protection of privacy. Therefore, the employer could monitor the messages delivered to the employee using this address without any restrictions. This rule had to be followed even if this address was only used by one particular employee.

Conversely, the office claimed that in case of the email address starting with the name of the employee (e.g. *Svoboda@employers-domain.cz*), it is more reasonable to assume that the email may contain a message of a private nature, and is therefore subject to privacy protections. Emails sent to an address containing the name and surname of the employee were to be considered private, with no access allowed by the employer. Therefore, the employer was only allowed to monitor the number of received and sent emails, or (if the employer had a real suspicion of misuse of the work facilities for employees' private needs) to whom the employees write these emails, and from whom they receive them.[20] However, this division of email addresses was evidently very strict and in certain cases also outdated and inaccurate.

3.2.2. Remedy of the Harmful State of Things

The office finally realised that this approach had its limits, and the system was partially abandoned. The approach towards email addresses has since been modified, and now the employer shall determine themselves whether the email correspondence is private or work-related according to the topic, the sender, the recipient, or the salutations used, etc. "The employer may carry out the surveillance and check the contents of the employees' e-mail messages (open them and read them) only for a serious reason."[21] Emails qualified as private or containing any private information cannot then be read by the employer. If the employer realises that the email contains any private information only while reading it, they are strongly prohibited from reading on and must pass the email on to the appropriate employee.[22] If possible, the employee shall be informed in advance about the monitoring of their correspondence. Unfortunately, the previous Standpoint No. 2/2009 of the Personal Data Protection Office is still quite widely spread among the employers and the employees, which sometimes results in malpractice in email surveillance.

At the same time, the basic principle of minimising intervention into the protected values of the employees is still applied – proportionality is still the principle on which employee surveillance stands. For example, if an employee is not at the workplace (due to illness or holiday etc.) and does not respond to email correspondence, this

20 Cf. Morávek, 2010, pp. 3–7.
21 Cf. Morávek, 2017, pp. 573–577.
22 Cf. Štefko, 2019, pp. 1246–1254.

would seem to give the employer the right to view the emails instead of the employee – especially if the employer is threatened by serious property damage as a result of any kind of a delay. However, if we really follow the relevant proportionality principle, it is more appropriate to set an automatic response within the employees' e-mail address. This automatic response will then inform the sender that the employee is not present, and to what substitute address the message should be forwarded. In this way, the employer avoids any possible danger in delay and the sender receives all necessary information. However, it should also be emphasised that any automatic response that returns to the sender must not contain any other personal data of the employee in question. It is sufficient to report that the employee is absent until a certain date, but not the reason for their absence at work, etc.[23]

This approach is significantly more appropriate than going through all employees' emails immediately and without prior warning. Nevertheless, there will undoubtedly always be a certain number of cases where an automatic response would not be enough in order to prevent employer's property damage. In such a situation, the employer is justified to carry out surveillance and go through the employees' correspondence themselves.

4.
Consumption of Alcohol or Other Addictive Substances Under Surveillance

4.1. Initial Considerations

The final part of this article focuses on the monitoring of alcohol in the workplace, though everything listed in the following part can also be used regarding other addictive substances. Under Section 106 para. 4 of the Czech Labour Code, the employee is strictly prohibited from consuming alcohol at the employer's workplace;[24] consuming alcohol during working hours both inside and outside the employer's workplace; and entering the workplace under the influence of alcohol. Section 106 of the Labour Code, among other things, generally stipulates that each employee "is obliged to pay attention to his or her own safety, his or her health and the safety and health of natural persons who are directly affected by his or her actions or omissions at work." It is consequently obvious that 'alcohol surveillance' is part of the Health and Safety

23 Cf. Morávek, 2017, pp. 573–577.
24 This prohibits the employees from consuming alcohol in the workplace both during and after the end of their working hours.

requirements in the Czech Republic. Thus, although the main purpose of the previous types of employee surveillance was monitoring of the fulfilment of the employees' work tasks, protection of the employer's property, and prevention of data loss, in the case of alcohol surveillance it is less a case of protection of the employer's property than to prevention of injuries in the workplace and protection of employees' health.

However, the prohibition against alcohol does not apply to employees for which these beverages are part of the performance of their work tasks, or are usually associated with the performance of these tasks.[25] This is especially the case of tasters in the production or trade of alcohol. It can also be the case for employees working in unfavourable microclimatic conditions, who are allowed to drink beer with reduced alcohol content for these causes. Such employees will be, for example, staff of the metallurgical industry.[26]

The employees are also obliged to undergo monitoring as to whether they are under the influence of alcohol. This surveillance can be performed directly by the employer, or the employee can be sent to a suitable medical facility. The employee is only obliged to undergo surveillance based on the instruction of the authorised superior employee.[27] Such a superior must be determined in writing by the employer in advance. If the employee refuses to undergo surveillance, this may mean a breach of professional obligations.[28]An employer who does not ensure the prohibition of alcohol consumption in the workplace - in accordance with the Labour Code - may be fined up to a maximum of CZK 300,000.[29]

4.2. The Surprising Attitude of the Supreme Court of the Czech Republic

Following all of this, it would seem as if the legislation itself is unambiguous. Nevertheless, the Czech Supreme Court recently made the topic much more confusing. In principle, being under the influence of alcohol is not always enough for the employee to seriously breach their contractual obligations. Typically, being under the influence does not always grant the employer any permission to terminate the employment relationship.

In the assessed case,[30] the employee performed dangerous work within the operation of a steel plant. Before the shift started, the employee had a measured blood level of 0.32 ‰ of alcohol during the first breath test. In the second breath test

25 Cf. Section 106 para. 4 of the Czech Labour Code.
26 Cf. Pichrt and Stádník, 2019, pp. 590–599.
27 Cf. Section 106 para. 4 of the Czech Labour Code.
28 Cf. Pichrt and Stádník, 2019, pp. 590–599.
29 Cf. Section 30 para. 1 of the Act No. 251/2005 Coll., on the labour inspection, as amended.
30 Cf. Supreme Court, 2016, 21 Cdo 4733/2015.

(half an hour later) he had a blood alcohol level of 0.23 ‰. The court stressed that even if the employee had entered the employer's workplace under the influence of alcohol, "a state when he or she severely violates his or her duties, may not be given by mere ingestion of alcoholic beverages, but his or her ingestion must happen to such an extent that it affects the reduction of mental functions and overall employee's unreadiness." The assessment of intensity of the relevant breach always depends on specific circumstances. The court also noted that the blood level of 0.2 ‰ of alcohol is considered inconclusive with regard to the so-called physiological level, i.e. the natural level of alcohol.[31] In this case, the court took into account the personality of the employee and fulfilment of his existing tasks as well. The Supreme Court (after assessing all these facts) concluded that there was no fundamental breach of obligations.

The influence of alcohol is apparently only decisive if it directly leads to a certain decrease in the employees' mental or physical abilities. An explanation can be that the employees' abilities must be influenced to such an extent that cannot be ignored (for example the inability to speak, walk, etc.). This conclusion of the quoted judgment means that employers, as a rule, must tolerate a blood alcohol level of up to 0.20 ‰ of alcohol. However, the employers should be able to detect whether an employee who has exceeded this limit has or has not been sufficiently influenced. Nevertheless, there is no concrete guidance set for the employers as it may differ from employee to employee,[32] and Supreme Court case-law is extremely rare in this respect. Another negative aspect of this case-law lies in the fact that it forces any employer who wants to fight against alcohol abuse not only to carry out the appropriate alcohol surveillance, but also to seek witnesses or any other acceptable proof of the decrease in the employees' abilities.

This decision is groundbreaking in a manner. In principle it may now be possible to consume alcoholic beverages during working hours and enter the workplace under the influence of alcohol, unless the alcohol level exceeds a certain limit. However, it is still true that the circumstances of each individual case must always be thoroughly assessed.[33]

For the sake of completeness it should be noted that the Constitutional Court of the Czech Republic also rejects zero tolerance of alcohol in the case of the employees' alcohol surveillance.[34]The Constitutional Court relies its argumentation on the fact that, among other things, even the public law legislation does not provide for the zero

31 Therefore, it also evaluated, among other things, the fact that before the beginning of the shift the result of the finding was only 0.23 ‰ of alcohol, which is close to the given physiological level.

32 Cf. Supreme Court, 2016, 21 Cdo 4733/2015.

33 Cf. Jelínek and Odrobinová, 2022, pp. 418–423.

34 Cf. Constitutional Court, 2017, III. ÚS 912/17.

tolerance of alcohol, including in driving. "In practice, even the Road Traffic Act mentioned by the employer does not consider zero alcohol levels in the body but works with a so-called physiological level of 0.20 ‰, from which the eventually measured values exceeding it are deducted."[35]

5.
Conclusions

I strongly believe that, regardless of the aforementioned legislation and case-law, employee surveillance should be especially well balanced to prevent employees from feeling stressed or over-monitored. These employees habitually tend to work less hard, which results in precisely the opposite effect we want to achieve.

This contribution focused on the issue of employee surveillance from the Czech point of view. It discussed the basic legal framework of surveillance that employers in the Czech Republic carry out upon their employees. In particular, the aspect of relevant GDPR legal regulations and the Labour Code, were discussed in detail. Obviously, other topics such as the development of modern technologies were also mentioned, as they have an impact on monitoring as well.

The intention was to cover employee surveillance in the Czech Republic relatively widely and from different aspects, including video surveillance, monitoring of the employees' computers, and consumption of alcohol or other addictive substances under surveillance. There are many conclusions. For example, the employer is obliged to directly inform the employees of the scope of surveillance and the methods of its implementation in advance. According to some opinions, this condition stated in Section 316 of the Czech Labour Code completely excludes the possibility of carrying out covert employee surveillance. However, my opinion is that it is necessary to conclude the exact opposite. Only this conclusion can be consistent with the case-law of the European Court of Human Rights.

Naturally, the article also brought an overview of the basic limits that the employer must take into account when monitoring employee computers and monitoring alcohol in the workplace. In this respect, the surveillance faces some major restrictions, with which each employer should become acquainted. At the same time, the role of the Czech Personal Data Protection Office was emphasised in many places. The methodology, which contains the office's view on employee surveillance carried out through camera systems, was obviously mentioned and disassembled in detail. Its positive could probably be a degree of facilitating the position of certain personal data processors (i.e. employers) dealing with personal data obtained from the camera

35 *Ibid.*

systems. In direct contradiction then is the former unclear and confused opinion of the Personal Data Protection Office on surveillance and monitoring of the employees' emails. This original state was clearly unsatisfactory and was therefore subject to much criticism. Nevertheless, the new approach adopted by the office seems to be significantly more appropriate.

In summary, employee surveillance is certainly a highly relevant topic. Most employers have either tested it in the workplace in some form, or have already included it in their ordinary operations at their workplaces. As it often happens that some of these employers tend to modify and interpret the relevant legislation incorrectly – most often in a manner more favourable for them – it is necessary to pay particular attention to compliance with legal rules. The right to employees' privacy and the interest of the employer in protecting their assets often collide, and it is precisely for these reasons that flawless knowledge of legal regulations is so important.

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Marianna VASILEIOU

Surrogacy and Legal Parenthood in Greece – One Size Fits (Almost) All[1]

ABSTRACT: *The Greek legal framework governing the application of surrogacy is strictly defined and derives from four specific laws: Nos. 3289/2002, 3305/2005, 4272/2014 and 4958/2022. In order to safeguard the assisted parent(s) as well as the surrogate and establish legal family bonds between the child and the social mother, the legislation sets out specific prerequisites, such as the inability of the social mother to carry a child, the existence of a prior judicial authorisation, a written agreement between the parties and the prohibition of using the surrogate's eggs. However, the (excellent for the creation of legal family bonds) existing legal framework in Greece silently denies surrogacy to single men and gay or lesbian couples, reserving it only for straight couples and single women. This is a real-life issue largely ignored in everyday practice, which results in the birth of children without any legal family bond with their parent(s). The analysis of the legislation has identified three key issues on single men's and gay or lesbian couples' access to assisted reproduction: (1) Greek legislation remains silent on the issue; (2) Greek case-law is scant in the cases of single men and non-existent in the cases of gay or lesbian couples; (3) Greek legislation needs to be amended so that single men and gay or lesbian couples have unambiguous access to surrogacy, medical specialists can provide unhindered services to them and, most importantly, children born that way share a legal bond with their parent(s). The consensus for an overall reform of the legal framework governing single men and gay or lesbian couples to medically assisted reproduction in Greece, granting equal access to it for everybody – regardless of their sex or their sexual orientation – is absolutely imperative*

KEYWORDS: *medically assisted reproduction, right to procreation, Greek law, single men, gay and lesbian couples, surrogacy*

1 For the needs of this paper, there is no distinction between trans or cis-gender men and women; the terms 'man' and 'woman' refer equally to trans and cis-gender men and women.

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1.
Introduction: The Greek Legislation on Methods of Assisted Reproduction (MAR)

Despite the fact that the majority of European countries had enacted legislation regarding MAR in a relatively short period from the implementation of these methods,[2] it took Greece 24 years from the birth of Louise Brown to establish, in 2002 and 2005, two laws related to the implementation of MAR. Specifically, these are Law No. 3289/2002 entitled Medical Assistance in Human Reproduction[3] and Law No. 3305/2005 regarding the Implementation of Medically Assisted Reproduction.[4] The first law focused on civil law issues, creating and incorporating into the Greek Civil Code an entirely new chapter dealing with the conditions for the permissibility of MAR for married couples as well as for partners living in a civil union and for single women. It also legislatively recognised posthumous assisted reproduction methods and surrogacy, ensured the anonymity of sperm and egg donors, and established the principle of social and emotional kinship in MAR. The second law pertained to criminal law and made the violation of the terms of MAR application punishable, aiming for their as safe as possible implementation. Additionally, it provided a detailed description of MAR methods and techniques, specifying potential risks associated with their application.

The aforementioned laws remained unchanged until 2014 when Law No. 4272/2014 was subjected to vote, focusing on the Adaptation to national law of Commission Implementing Directive 2012/25/EU of October 9, 2012 laying down information procedures for the exchange, between Member States, of human organs intended for transplantation - Regulations on Mental Health and Medically Assisted Reproduction and other provisions.[5] This law has brought changes to Article 8 of Law No. 3089/2002 (regarding the residence of the intended mother or the surrogate in the surrogacy process), Articles 7 to 9 (about the duration of cryopreservation, disposal and restriction of the disposal of reproductive material), Articles 16 and 17 (concerning the operation of MAR clinics and MAR units), and Articles 25 and 26 (regarding the operation of the National Authority for Assisted Reproduction and the imposition of criminal sanctions on the trade of reproductive material, respectively) of Law No. 3305/2005. The most recent changes have taken place under Law No. 4958/2022 on Reforms in Medically Assisted

2 The Human Fertilization and Embryology Act, which came into effect in the United Kingdom (UK) in 1990, the Embryo Protection Act (Embryonenschutzgesetz) of Germany, also enacted in 1990, and the Insemination Act of Sweden, which was implemented in 1984, are indicative examples.

3 Government Gazette A' 327/23.12.2002.

4 Government Gazette A' 17/27.01.2005.

5 Government Gazette A' 145/11.07.2014.

Reproduction and other urgent regulations. This law has introduced significant changes, such as the modification of the upper time limits for cryopreservation and the age of the assisted woman, the relaxation of the principle of donor anonymity with the introduction of a complex system of selection between two categories of donors (anonymous or not), the provision for the donation of reproductive material among relatives and for the creation and cryopreservation/storage of sperm and eggs independently of the existence of recipients, and social freezing, even without the consent of the spouse or partner. Subsequently, a substantial increase in the compensation amounts for donors was envisaged, to the extent that the compensatory nature of the said remuneration for donors was called into question.

> *1 When Rachel saw that she was not bearing Jacob any children, she became jealous of her sister. So she said to Jacob, "Give me children, or I'll die"! 2 Jacob became angry with her and said, "Am I in the place of God, who has kept you from having children?" 3 Then she said, "Here is Bilhah, my servant. Sleep with her so that she can bear children for me and I too can build a family through her." 4 So she gave him her servant Bilhah as a wife. Jacob slept with her, 5 and she became pregnant and bore him a son.**

> *Transferring fertilised eggs into the body of a woman (the eggs not belonging to her) and carrying the child is permitted only after judicial permission is granted before the transfer, as long as there is a written and free agreement between the persons seeking to have a child and the woman who will carry the child, including her spouse, if she is married. The said judicial permission is granted upon the application of the woman who wishes to have a child, as long as it is proven that she is medically unable to carry a child and that the surrogate woman is able to carry a child, in view of her health state.***

2.
The History behind Surrogacy

For centuries, the saying *mater semper certa est* (the mother is always known) was taken for granted. Even today, in numerous pieces of legislation, the legal mother

* Genesis 30:1-5
** Article 1458 of the Greek Civil Code (GCC).

of a child is considered the woman who gave birth to them.[6] However, the fact that the female body has been used throughout the ages as a means of procreating other human beings and that surrogacy (or otherwise, the 'split of biological motherhood'[7]) is not something unheard of in human history. The biblical reference to Jacob and Rachel is well-known – Rachel could not bear children and for this reason she gave her handmaid Bilhah to Jacob as a 'wife' to bear them a child. This story is the inspiration behind Margaret Atwood's dystopian novel entitled "The Handmaid's Tale", in which women of childbearing age are used as surrogate mothers giving birth to the children of the elite in the fictional Republic of Gilead. The law attempted to regulate these practices in as early as 1780 BC, when the Code of Hammurabi stipulated that if a woman could not provide children to her husband, he retained the right to acquire them through a slave, whom he could not subsequently sell.[8] In ancient Egypt, it was a common practice for Pharaohs to have children with their concubines to avoid intermarriage with their wives, who were usually close relatives. In ancient Rome, the practice of uterine borrowing was also common for patrician families, allowing them to have a child through another woman to avoid the risks and hardships of pregnancy and childbirth.[9]Cases of artificial insemination with the husband's sperm, as well as that of a third-party donor, were recorded already in the late 18th century and throughout the 19th century.[10]

Nowadays, surrogacy raises concerns about the potential degradation and commodification of pregnancy, the exploitation of the female body and the commercialisation of the child to be born, as well as about the risk of creating unresolved legal issues and the fear of a burgeoning surrogacy market. As a result, this specific method is viewed sceptically by most European legislators. In France and Italy, the practice is explicitly prohibited. In Ireland and Sweden, while not explicitly prohibited, there is no regulatory framework for its implementation, leading to its practical non-application. Finally, in Greece and the United Kingdom, surrogacy is explicitly allowed and practiced.[11]

6 For example, Section 33.1 of the UK Human Fertilization & Embryology Act defines the mother of the child exclusively as 'the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman' and the Article 1571 of the German Civil Code states that 'the mother of a child is the woman who gave birth to them'.
7 Petousi-Douli, 2013, pp. 303 et seq.
8 Rodakis, 1982, p. 55.
9 Papachristou, 2003, p. 20.
10 Milapidou, 2011, pp. 10-11.
11 For a complete analysis, vide Gerber & O' Byrne, 2015.

3.
Liberation or Slavery of Women?

The fundamental philosophical issue regarding the permissibility of surrogacy – and what essentially has prevented many legal systems from adopting it – is the possibility of commodification of the female body,[12] either in the form of exploiting poor and marginalised women who will bear children due to economic hardship,[13] or by exploiting individuals who wish to have children through women who bear children as a "profession" and demand continuous payment to carry out the pregnancy.[14]

It is at least naive and hypocritical to pretend that women who have been granted legal permission to bear children as surrogate mothers are such good friends with the couple that desires to have a child, so that they agree to carry it for them without any compensation when, for the most part, they are foreigners, often from economically disadvantaged Eastern countries.[15] Furthermore, it has also been expressed that it is a per se unethical transaction that treats a child as an object of exchange.[16]

Essentially, the deeper issue raised here is to what extent our legal culture can accept the gestation and childbirth of a child on behalf of third parties as an expression of the autonomy of the surrogate woman. In other words, the issue at hand is nothing other than the "nature and extent of women's freedom: their freedom to control their bodies, their lives, their reproductive power, and to control the social use of their reproductive abilities".[17] From one perspective, this is impossible due to the broader exploitation that women undergo due to patriarchy,[18] and also due to the fact that surrogacy is such a heavy exploitation of women that none of them would choose it freely, in the same way that no one would choose freely to become a slave.[19] On the contrary, not allowing this choice to women "implies that women, due to their gender,

12 Kotzampassi, 2003, pp.48 et seq.
13 Kounougeri-Manoledaki, 2012, p. 48.
14 Grammatikaki-Alexiou, 2011, pp.56 et.seq and Kounougeri-Manoledaki, 2012, p.48.
15 Ravdas's research by Raptas P. (2012) on judicial decisions regarding surrogacy issued by the courts of Athens during the years 2010-2016 showed that in 217 out of 256 cases studied, foreign surrogate mothers (158) are almost twice as many as Greek ones (90), with the percentage being 61.2% and 35%, respectively. The countries of origin of the foreigners were mainly Bulgaria, Georgia, Poland, Albania, Romania, and Russia. The findings of a jurisprudential research conducted at the Thessaloniki Court of First Instance for the first quarter of 2017 are also categorical: in the twelve examined decisions (none of which were dismissive), only three pregnant women were of Greek origin, and of the rest, three were Albanian, two Russian, one Georgian, while there is no mention of the origin of the remaining two. For more, vide Vlachou-Vlachopoulou, 2017, pp. 1861-1870, but also Papadopoulou-Klamari, 2015, pp. 117-124.
16 Counter-argumentation in Kounougeri-Manoledaki, 2012, p. 48.
17 Shalev, 1989, p. 11.
18 Dodds & Jones, 1989, p. 13.
19 Hasan, 1999, pp. 101-121 and Overall, 1987.

are incapable of functioning as rational and ethical beings with regard to their own reproductive ability" – instead, women alone should decide[20] on issues concerning their reproductive capacity.[21]

4.
Full and Partial Surrogacy

Surrogacy is distinguished based on whether the surrogate's own egg is used, fertilised by the spouse/partner of the surrogate, the spouse/partner of the intended mother, or a third-party donor (full substitution), or whether the egg of the intended mother or of a third unknown donor is used, fertilised by the spouse/partner of the intended mother or by a third unknown donor (partial substitution).[22]

Full substitution has been criticised as a commodification of the child to be born and as an 'internal violation of the woman's personality',[23] undermining her right to self-determination. Additionally, concerns have been raised in the fear that it would be much more difficult for the surrogate to part with the child if they are biologically hers.[24] To avoid this possibility, Article 9 of the Greek Code of Ethics for Assisted Reproduction specifies that the surrogate mother must already have at least one child of her own, in accordance with the international data of the European Society of Human Reproduction and Embryology (ESHRE) and the American Society for Reproductive Medicine (ASRM).[25] Psychological support should also be provided to her during pregnancy and for a sufficient period after the child's birth.[26]

20 This decision is sealed by their consent, which takes place before the surrogacy. (Katz, 1986).
21 Shanley, 1995, pp. 164-179.
22 Kounougeri-Manoledaki, 2012, p. 47.
23 Kotzampassi, 2003, pp. 55-57.
24 It is worth mentioning, however, that there is no evidence to indicate such behaviors, even in countries that allow this practice, such as the United Kingdom. Research has shown that no couple refused to take the child from the surrogate (Van Den Akker, 1999, p. 264), and only 1% of surrogates ultimately changed their minds and decided to keep the child (Andrews, 1995, pp. 2343–2375).
25 http://eaiya.gov.gr/deltio-typou-19-04-2017/ (in Greek)
26 Papaligoura, 2011, p. 563.

5.
Greek Legal Requirements

Based on the above, the Greek legislator established partial substitution only, in a particularly liberal and innovative manner,[27] albeit under very strict conditions.[28] Specifically, in addition to the general conditions of Articles 1455 and 1456 of the Civil Code, it is required that:

5.1. The Woman Wishing to Have a Child must be Unable to Carry a Pregnancy and this must be Confirmed by Medical Opinions[29]

This should also include the case where the woman can conceive, but gestation poses the risk of transmitting a serious disease to the child.[30] Therefore, surrogacy is not considered for aesthetic and/or professional reasons (e.g. a woman working as a model or athlete).[31]

5.1.1. The Attempts of Jurisprudence to Circumvent the Upper Age Limit

Despite the requirement in Article 1455 of the GCC that a woman wishing to have a child must be of reproductive age (meaning she must not have exceeded 54 years of age at the time of the hearing of her case, as currently defined by law[32]), courts seem to be attempting to bypass the age limit using legal sophistry to grant permission for child acquisition through surrogacy. While exceeding the limit by only one and a half months may not seem to pose a significant problem,[33] considering that it could be due to the lack of hearings in a specific Court and it is unfair to punish the citizen for deficiencies in the Greek judicial system, the decision by the Court of Patras to

27 Skorini-Paparigopoulou, 2007, p. 141.
28 Grammatikaki-Alexiou, 2011, p. 62
29 The medical inability can be the result of either physical or psychological reasons – vide Papazissi, 2013, p. 78.
30 Panagos, 2023, p. 47. Counter-argumentation in Koutsouradis, 2006, p. 347, who considers this view to broaden the scope of surrogacy.
31 Kounougeri-Manoledaki, 2012, pp. 50-51, Skorini-Paparigopoulou, 2007, p. 144 Papaligoura, 2011, p. 561.
32 Thessaloniki Single-Member Court of First Instance 29288/2010 (NOMOS database).
33 Serres Multi-Member Court of First Instance 4/2018 (NOMOS database).

grant permission for child acquisition through surrogacy to a 54-year-old woman in its ruling No. 398/2018 is highly problematic.[34]

This decision is also extremely problematic because, in order to circumvent the provision of Article 4.1b of Law No. 3305/2005, which explicitly stated then that "*in the case that the assisted person is a woman, the age of natural reproductive ability is considered to be the fiftieth year*", it relies on the explanatory memorandum of Law No. 3305/2005, which states that the age of natural reproductive ability is defined as the fifty-fifth year. However, it is inconceivable for a Court to rely on an explanatory memorandum and not a legal provision to issue a decision.[35] It is also inconceivable for a law to be violated by invoking the Constitution, as the said judicial decision accepts that the constitutionally protected right to the free development of the personality of the applicant can only be satisfied if the upper age limit of 50 years provided by the absolutely clear Article 4.1b of Law No. 3305/2005 is raised to 54 years "*by teleological contraction of the aforementioned provision*".[36] Such decisions essentially mock the law and its conditions and should be strongly condemned by legal theory to prevent their repetition.

5.2. The Surrogate Mother must be in Good Health, Fit for Pregnancy, and this must be Confirmed by Medical Opinions[37]

This broad condition is specified in Article 13(2) and (3) of Law No. 3305/2005 and Article 9 of the Code of Ethics for Assisted Reproduction. The first one stipulates that the surrogate mother must undergo tests for HIV 1 and 2, hepatitis B and C and syphilis, as well as a thorough psychological evaluation.[38] The second one establishes that she must be between 25 and 45 years old, have already given birth to at least one child, and not have undergone more than two cesarean sections, presumably

34 (NOMOS database). Keep in mind that in 2018, the age limit of the intended mother was 50 years old.

35 A contrario the Heraclion Multi-Member Court of First Instance 14/2019 (NOMOS database), which rejected the application of a 58-year-old woman, ruling that Article 4.1b of Law 3305/2005 explicitly establishes an indisputable criterion regarding the maximum age limit for a woman's reproductive capability. Consequently, there is no legal vacuum justifying, through a teleological narrowing of the provision in paragraph b, the application of paragraph a of the same article, which would grant the right to resort to assisted reproductive methods, regardless of age.

36 Article 4.1 of Law 3305/2005

37 Vide the Thessaloniki single-Member Court of First Instance 838/2010 (NOMOS database), which postponed the issuance of a decision and ordered the resumption of the discussion to conduct the necessary medical examinations and obtain the relevant medical opinions so that the Court could form a 'definite legal conviction.'

38 For the need to monitor the surrogate mother by a psychologist, vide Papaligoura, 2011, pp. 562 et seq.

to ensure her maturity for making such a decision and her physical endurance for pregnancy and childbirth.

There is no specific age limit; instead, it is examined *in concreto* within the framework of the suitability of the surrogate for pregnancy.[39] This grants the Court the freedom to assess the age of the surrogate within the context of its capacity to judge her suitability for pregnancy within the legal framework. It should be noted that if the surrogate is a public servant, she is entitled to maternity leave, childbirth leave, and postpartum leave under Article 52.1 of the Code of Status of Public Civil Servants and Employees of Public Law Entities.[40]

5.3. The Applicant's or the Surrogate's residence/Temporary Stay in Greece

Law No. 3089/2002 initially required residence in Greece for both the intended mother and the surrogate. This was entirely justified, as it prevented Greece from becoming a destination for reproductive tourism[41] and reduced the likelihood of surrogates becoming victims of trafficking.[42] However, according to the amendment introduced by Article 17 of Law No. 4272/2014 to Article 8 of Law No. 3089/2002, temporary stay in Greece is currently sufficient, in order to avoid hindering "*the [freedom of movement of health services provided for by EU law*[43]*]*".

It would not be unreasonable to assume that this legislative choice – given its fragmentary nature – does not fit into a broader plan of exploiting medical tourism but simply eliminates an obstacle preventing the process and the consequent gain from the MAR Units.[44] This is also suggested by the publication of Law No. 4272/2014 on 11 July 2014, just a few days[45] after the publication of the *Mennesson*[46] and *Labas-*

39 Skorini-Paparigopoulou, 2007, p. 144.
40 'Female employees who are pregnant are granted maternity leave with full pay two (2) months before and three (3) months after childbirth. In the case of having more than one child beyond the third, maternity leave after childbirth is extended by two (2) months each time. Maternity leave due to pregnancy is granted upon certification from the attending physician regarding the anticipated childbirth date. In the case of a multiple pregnancy, maternity leave is increased by one (1) month for each child beyond the first one.'
41 Panagos, 2023, pp. 49 et seq. and Skorini-Paparigopoulou, 2007, p. 146.
42 Papazissi, 2013 pp. 81-82.
43 Koutsouradis, 2006, pp. 342 et seq.
44 Milapidou, 2014, 978 επ.
45 Kovacs, 2014.
46 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145179.

sée[47] *v. France* ECHR decisions on 26 June 2014.[48] Briefly, both decisions concern two French couples who resorted to the ECHR after lengthy legal battles for the registration in French registries of the birth certificates of their children, born to surrogates in the United States.[49] The ECHR ruled that the refusal to recognise the parent-child relationship between the intending parents and the children born to a surrogate abroad constitutes a violation of Article 8 of the ECHR, thus protecting the children's privacy.[50] By all means, the different legal provisions of each European country on surrogacy has led to efforts for regulating cross-border surrogacy cases, such as Petra De Sutter's Motion for a Resolution to the EU Parliamentary Assembly on Children's rights related to surrogacy,[51] the Comparative Study on the Regime of Surrogacy in EU Member States of the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs[52] or even the Aristotle University of Thessaloniki project entitled "Assisted Reproduction and Protection of the Embryo *in vitro*" as part of the ARISTEIA II project, co-financed by the Greek Secretariat of Research and Technology and the EU,[53] suggesting a proposal for a European legislation on assisted reproduction in general, including surrogacy of course.

47 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145180.

48 On July 21, 2016, the ECHR issued the judgments Foulon and Bouvet vs France (http://hudoc.echr.coe.int/eng?i=001-164968), with factual circumstances similar to those of Mennesson and Labassée. The court ruled that there was a violation of the right to respect for the private life of the children involved. For other ECHR judgements stating that the refusal to recognise legal bonds between the intended parent(s) and the child(ren) born via surrogacy violates the Article 8 of the ECHR, vide indicatively D.B. and Others vs Switzerland (https://hudoc.echr.coe.int/fre?i=002-13896), A.L. vs France (https://hudoc.echr.coe.int/fre-press?i=003-7305366-9961797), K.K. vs Denmark (https://hudoc.echr.coe.int/eng-press?i=003-7514285-10313040). For contra judgements, vide Paradiso & Campanelli vs. Italy case (https://hudoc.echr.coe.int/?i=001-170359) and the dissenting opinions, D. and Others vs Belgium (https://hudoc.echr.coe.int/eng-press?i=003-4865500-5943678) and C& E vs France (https://hudoc.echr.coe.int/eng?i=003-6589814-8731890), to name but a few.

49 In both cases, the appeals had been rejected by the French Court of Cassation in 2011, with the reasoning that a different judgment would legitimise a surrogacy agreement that is illegal under French law.

50 Commentary by Trokanas, 2015, pp. 207-216.

51 https://pace.coe.int/en/files/23015.

52 http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOLJURI_ET%282013%29474403_EN.pdf

53 http://repro.law.auth.gr/en.

In any case, if a European couple from a country where surrogacy is prohibited (such as France[54]) can now hope for the citizenship of their children born through surrogacy in a country where the practice is allowed, why not come to Greece to do so, where they can find high-quality medical services at a very low cost? The abolition of the residence requirement in Greece and its replacement with a temporary residence requirement seems very convenient in this direction. Decisions have already been issued *allowing foreigners temporarily residing in Greece* to have a child through surrogacy.[55]

Nevertheless, this choice indicates the tolerance – if not the intention – of the legislator to create a 'market' for surrogacy, where the incentive of solidarity is doubtful. "Because, if the legislator abolished the balance of Law No. 3089/2002 (which correctly introduced the term 'residence', strictly defining a very limited geographical scope for the application of the method precisely because it implied the motive of solidarity), it leaves the rest of the regulation of surrogacy entirely open to the development of a real 'market' at all levels."[56]

5.4. The Fertilised Eggs must Come Either from the Woman Desiring to Have a child or from an Egg Donor[57]

As a consequence of the issues raised in the Chapter on full and partial surrogacy, Article 1458 of the GCC explicitly states that the surrogate woman can never be the biological mother of the child to be born. This legal choice stems from the fact that the law cannot accept the case where a woman is deprived of a child who was conceived with her own eggs, as well as carried and laboured by herself, just for the sake of another woman. Such a scenario would be very constraining for her and would be

54 These ECHR judgements led to the French Court of Cessation requesting for an advisory opinion of the ECHR on the recognition in domestic law of a legal parent-child relationship between a child born abroad by a surrogate, using donor's eggs, and the intended mother, according to the provisions of the ECHR Protocol No 16 (also known as the "Protocole du dialogue"). The ECHR found (https://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782.) that the establishment of legal motherhood is imperative in such a case, in order to ensure the child's right to private life, as stated in Article 8 of the European Convention of Human Rights – however, such recognition is not obligatory to take place according to the surrogacy details legally established abroad and another means may be used if necessary, such as adoption.

55 Vide the Athens Multi-Member Court of First Instance 693/2018 (NOMOS Database), the Athens Multi-Member Court of First Instance 465/2018 (NOMOS Database) και την Athens Multi-Member Court of First Instance (ISOCRATES Database), which granted permission for child acquisition through the method of surrogacy to a 47-year-old French woman, a 40-year-old English woman, and a 45-year-old Dutch woman, respectively.

56 Vidalis, 2015, p. 183.

57 Counter-argumentation in Koutsouradis, 2006, pp. 349 et seq., who argues that the eggs must belong to the surrogate mother.

socially unacceptable, according to Article 179 of the GCC.[58] In addition, that would be an adoption and not a surrogacy case.

5.5. Applicants must be Married Couples, Civil Union Partners or Single Women

This requirement, which excludes same-sex couples or single men, will be discussed at length in the following sub-chapter.

5.5.1. The Myth of Motherhood

The conviction that the desire for a child concerns exclusively women, an idea based on the 'maternal instinct' construct[59] seems to be deeply rooted in the collective subconscious. The 'maternal instinct' is defined as "*an inherent emotional and tender tendency of all women without any exceptions towards children, stemming from their reproductive capacity*" and is supposed to create the desire in all women to carry a child and become mothers, be they trans or cis-gender.[60] On the contrary, the paternal instinct is not considered as strong as the maternal one – actually, even its very existence is often questioned.[61] This view stems from the undeniable fact that the perpetuation of the human species takes place through pregnancy, childbirth, nursing (and breastfeeding, if one selects it), experiences of an exclusive female (in the biological sense of the word) nature[62,] and has led to the formation of social perceptions and policies on the role of the two sexes. Maternity is considered as the basic mission, the 'profession' and the integral element of the female nature, to the point where the term 'woman' is equated with the term 'mother'.[63]

This social model has been endlessly perpetuated, unchanged from generation to generation, defining the role of cis-gender women as mothers and teaching at the same time young children what the roles of adults in childbearing should be.[64] Thus, a biological feature has acquired a central character and has become the basis of the

58 'Actions contrary to good morals include especially those legal practices where a person's freedom is excessively constrained, or where someone exploits another's need, deafness, or inexperience to secure for themselves or a third party material benefits that are manifestly disproportionate to the service provided.'
59 Borgeaud, 2004, Badinter, 1982.
60 Wade, 2002.
61 Shields, 1984.
62 West, 1988; Firestone, 1979.
63 Constantinou, Varela & Buckby, 2021.
64 de Marneffe, 2019.

identity of the female gender.[65,66] In that way, societies have established the norms of education and work for the two sexes, justified all kinds of discrimination between sexes and patriarchy. Therefore, they have fixed both sexes in traditionally defined roles in a perfect harmony with their 'natural calling'. In this scenario, women are meant to become mothers and men are meant to become workers, each of them acting in the private and public sphere of action[67] respectively.[68] In other words, "women's self-identity, social role and 'human needs' have all been defined historically by their procreative capacities. Rather than having physiological and other 'needs', women are seen principally as physical 'beings' and are socially confined to reproductive and domestic roles".[69,] Obviously, gender ideology has impacted not only the cultural notions of reproduction, parenthood and family, with all women (single or not) being treated as would-be mothers, but also the medical provision and legal access to assisted reproduction.[70] As a result, single women must always have legal access to MAR, since they will inevitably want to have a child, even without a spouse or partner. On the contrary, men will never want to have a child on their own; the opposite is viewed as something paradoxical or as the exception to the rule, at best.

5.5.2. Surrogacy (and other MAR) for Gay and Lesbian Couples

In Greece, same-sex couples achieved legal recognition only in 2015 under Law No. 4356/2015, which extended the civil union status (but did not allow civil marriage) to them. This development sparked a storm of reactions from conservative circles in society.[71] This expansion was expected, especially after Greece's condemnation by the ECHR in the *Vallianatos and Others v. Greece*[72] case in which the ECHR ruled that the exclusion of same-sex couples from Law No. 3719/2008 regulating civil unions constituted a violation of the right to private and family life, as well as of the provisions prohibiting discrimination. However, this law does not regulate the possibility of obtaining a child through MAR, as natural reproduction is *de facto* not possible.

65 Rubin, 1975.
66 Irigaray, 1974.
67 Baraitser, 2014.
68 Kravaritou, 1996; Arendt, 1958; Pateman, 1988.
69 Priaulx, 2008, p. 182; Friedan, 1963, pp. 273–274.
70 Almeling, 2007, pp. 319–340, Remennick, 2000, pp. 821–841 and Waggoner, 2017.
71 The public consultation on extending the civil union to same-sex couples received 3,324 comments, with the majority being homophobic and vulgar. Some indicative comments, with preserved spelling, include: "ALL THIS IS UNACCEPTABLE!!! WE ARE RETURNING TO THE TIMES OF SODOM AND GOMORRAH!!!", "No to the civil union for homosexuals!!! We won't level everything! It's time to learn to distinguish between the abnormal and the normal!", "Disgrace! The bill of abnormality should be abolished."
72 https://hudoc.echr.coe.int/?i=001-128294 – commentary by Pervou, 2014.

Additionally, the law excludes same-sex couples from MAR, as Article 9 clearly intends to permit child acquisition only to opposite-sex couples entering into a cohabitation agreement: "the child born during the civil union or within three hundred (300) days from the dissolution or annulment of the agreement is deemed to have the man with whom the mother drafted the agreement as their father".[73]

This situation changed in Greece in 2024, when Greece regulated civil marriage between same-sex individuals with Law No. 5089/2024 on Equality in Civil Marriage, Amendment of the Civil Code and Other Provisions again amid a storm of reactions from conservative circles in society.[74] This was mainly because this law addressed, at least partially, the significant problem faced by same-sex couples who had children through assisted reproduction abroad[75] – the child would share a legal bond with one parent, but the other parent would legally be considered a third party to the child, with all the problems that could entail.

According to the provisions of Law No. 5089/2024, marriage is concluded between "persons of different or of same sex" (Article 3). If no declaration is made, the child's surname will not be that of the father but a combination of both parents' surnames, with the first surname being the one that comes first alphabetically (Article 4). Social security benefits and parental or maternity leave entitlements are extended to same-sex couples (Articles 6 to 8). Pre-existing same-sex marriages concluded

73 The bold and underline fonts belong to the writer.

74 According to the writer's opinion, the establishment of civil wedding for same-sex couples is just a matter of time for all Western societies. Moreover, for every judgement like the Greek Supreme Court (Areios Pagos) 1428/2017 (NOMOS Database), which deemed the civil marriage of two men invalid and "reflects the ethical and social values and traditions of the Greek people, who do not accept the establishment of marriage for same-sex couples" there will be a judgement like the Supreme Court of the United States Obergefell vs. Hodges (https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf), stating that the prohibition of marriage for same-sex couples violates human rights, with the notable conclusion of Justice Kennedy: 'no union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.'

75 For example, the decision 623/2021 of the Athens Court of Appeals (NOMOS database) rejected the application of a male couple, who had entered into a civil union abroad, to recognise in Greece a voluntary jurisdiction decision from a foreign court (specifically of South Africa) that had granted them permission to jointly have a child using a surrogate woman. The rejection was based on the grounds that men are excluded from surrogacy in Greece, and any adoption of the child by one part of the couple would be 'contrary to dominant social and moral principles and beliefs, and the legal consequences arising from this could cause a profound disruption to the Greek legal order.'

abroad are considered valid (Article 10), and parent-child relationships registered in public documents or court decisions from third countries are recognised in Greece, whether established through adoption or ART (Article 11). However, it is noted that there is no provision allowing married same-sex couples to jointly pursue surrogacy to have a child, which constitutes a discriminatory treatment against them. In other words, couples who have children via this method outside of Greece will be able to establish a legal bond with their children in Greece, while those who might have children within Greece will not!

Although the Greek law is notably innovative, allowing even controversial and prohibited in other European) from reproductive technologies.[76] This decision is based on the delineation of the free development of personality through reproduction from the 'rights of others'.[77] Another argument is the fear of the potential impact on the emotional development of the children born to same-sex couples, something which may be against the welfare of the child to be born.[78] Finally, if one accepts that MAR are used by couples unable to conceive naturally, they cannot be used in cases where natural reproduction is de facto impossible.

However, these arguments are unfounded. Firstly, it is absurd to consider that the welfare of the child – which is the basis of this prohibition – dictates not bringing the child into existence.[79] Moreover, homosexual individuals in our country have, as a rule, been born and raised by heterosexual parents. If one accepts that the sexual orientation of parents affects that of their children, no child from a heterosexual family would ever become homosexual,[80] which is, of course, not true.[81] Research has also clearly demonstrated that the sexual orientation of parents does not affect the sexual orientation, sexual behaviour, and overall sexual identity of their children.[82] Even fears of potential inadequate psychosocial development of these children have been debunked by research,[83] with the American Academy of Child and Adolescent Psychiatry emphatically stating in 2013 that "current research shows that children with gay and lesbian parents do not differ from children with heterosexual parents in their emotional development or in their relationships with peers and adults. It is important for parents to understand that it is the the quality of the parent/child

76 Rethymiotaki, 2014, p. 171.
77 Papachristou, 2013, p. 278.
78 Papachristou, 2013, p. 279.
79 Papachristou, 2013, p. 279.
80 In passing, this argument is not only fallacious but also not just weak, but homophobic, as it implies that potential homosexuality is something bad and harmful to a person.
81 Papazissi, 2007, p. 765.
82 Green, 1978, pp. 692-697, Miller, 1979, pp. 544-552, Bailey et al., 1995, pp. 124-129, and Farr et al., 2010, pp. 164-178.
83 Golombok, Spencer & Rutter, 1983, pp. 551-572, Patterson 2009, pp. 727-736, Sasnett 2015, 2015, pp. 196-222 and Telingator & Patterson, 2008, pp. 1364-1368.

relationship and not the parent's sexual orientation that has an effect on a child's development. Research has shown that in contrast to common beliefs, children of lesbian, gay, or transgender parents: Are not more likely to be gay than children with heterosexual parent/ Are not more likely to be sexually abused./Do not show differences in whether they think of themselves as male or female (gender identity)./ Do not show differences in their male and female behaviours (gender role behaviour)".[84]

Finally, the argument regarding the impracticality of applying MAR when reproduction is practically impossible is utterly flawed, as to be consistent with this argument, the application of MAR should be prohibited to single women as well – something that nobody contemplates doing. Therefore, it is self-evident that the prohibition of same-sex couples' access to MAR constitutes discriminatory and adverse treatment based on their sexual orientation, violating the principle of the free development of their personality.

In any case, the wording of the law does not allow same-sex couples to resort to MAR methods, whether they are women or men.[85] However, practically, same-sex couples circumvent the legal prohibition in the following ways: in lesbian couples, one partner applies for MAR as a supposedly 'single woman' according to the letter of the law,[86] and in gay couples, one partner appears with a surrogate as a supposed couple in civil union and acquires a child with her, or attempts to do so as a 'single man' with a surrogate, as will be discussed in the next part of this paper. In these cases, the problem lies in the fact that only one partner has a legal bond with the child in lesbian couples, and that in gay couples a surrogate has a legal bond with a child she may never have even seen, while the other partner – who raises the child – has no legal relationship with them, with all the implications that such a situation may entail.

Theoretically, each partner could form a legal bond with the child by adopting them. However, it is unknown whether the social services, which will be called upon to judge whether the specific adoption is in the best interest of the adopted child,[87] will reach such a decision. Moreover, even if a court approves the adoption of the child by the partner of the mother or of the father, any legal bond between the minor and

84 https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFFGuide/Children%20with%20Lesbian,%20Gay-Bisexual-and-Transgender-Parents-92.aspx

85 Papazissi, 2007, p. 766 και Fountedaki, 2007, p. 178.

86 Kantsa & Chalkidou, 2014, pp. 180-205 and Rethymiotaki, 2014, pp. 173-174.

87 1557 GCC: 'Before the adoption takes place, a social service or another recognized organization specializing in adoptions conducts a social investigation. A relevant report is then submitted to the court within the specified deadline, based on the criteria defined in the law. This report assesses whether, according to the gathered information, the particular adoption is in the best interest of the adoptee.'

the biological mother must be severed,[88] making it impossible for both parents of the child (either through adoption or through assisted reproduction) to exist simultaneously.[89] It is obvious that legislative changes are thus imperative, not for rewarding the circumnavigation of laws, but for safekeeping the welfare of the child to be born.

However, it is only a matter of time before a Greek same-sex couple resort to the ECtHR in order to seek the conviction of Greece for this discrimination. The ECtHR has already relevant case law seeking the protection of same-sex couples and the prohibition of discrimination against them, based on their sexual orientation. More specifically, the case *X v. Austria* was issued in 2013, with the Grand Chamber of the ECtHR ruling that the prohibition for a woman to adopt the biological child of her partner constitutes a discriminatory treatment against them compared to a heterosexual couple and that it violates Article 14 of the ECHR on the prohibition of discrimination and Article 8 of the ECHR on the right to respect for private and family life.[90]

5.5.3. Surrogacy (and Other MAR) for Single Men

One could argue that allowing surrogacy only to single women and (straight) couples is due to the fact that these categories are able to conceive a child naturally. The ECtHR's established case law, however, has now included the right to assisted reproduction within the individual rights enshrined in the European Convention on Human Rights, specifically in the right to private and family life (Article 8[91]), as well as in Article 7 of the Charter of Fundamental Rights of the European Union.[92] This stance of the ECtHR, also adopted by the Supreme Courts of individual European countries,

88 1561 GCC: 'Through adoption, every bond of the minor with their natural family is severed, with the exception of the provisions regarding marriage impediments of Articles 1356 and 1357. The minor is fully integrated into the family of their adoptive parent. In relation to the adoptive parent and their relatives, the minor has all the rights and obligations of a child born in wedlock. The same applies to the descendants of the adoptive child. In the case of simultaneous or successive adoptions of more than one child, a relationship is created among them similar to that between siblings.'

89 The article 1562 GCC (In the case where one spouse adopts the child of the other, the ties of the adopted child with their natural parent and relatives are not severed. In all other respects, adoption produces all the effects of adoption that occurs by both spouses), cannot be applied to same-sex couples, as article 1561 GCC explicitly refers to a 'spouse' and not a 'partner.'

90 Kostopoulou, 2013, pp. 720-729.

91 Full analysis of the article can be found in van Dijk & van Hoof, 1998, pp. 504-514 and Schabas, 2015, pp. 358-411.

92 Respect for private and family life - Everyone has the right to respect for his or her private and family life, home and communications.

such as Germany[93] and Italy,[94] essentially reverses the question to be answered: the question is not when assisted reproduction should be allowed, but when and why somebody may be prohibited from resorting to assisted reproduction if they want to procreate. In other words, any restrictions must be justified and, as the ECtHR states, absolutely necessary in a democratic society.

There is no doubt that reproduction, which can be achieved naturally (through a sexual encounter resulting in pregnancy) or by artificial means (by resorting to methods of assisted reproduction), is an aspect of private and family life. The mere fact that single men are obliged to resort to surrogacy to procreate is not such a justified and absolutely necessary restriction, as invoking biological and moral reasons that could impose the exclusion of single men from surrogacy would primarily lead to the prohibition of the very forms of single parenting for me (e.g. adoption and sole custody after a divorce or widowhood), and not just the prohibition of access to surrogacy – denying surrogacy to single men is inconsistent with the fact that single parent families are legally established and single women are allowed to have a child via a surrogate, using not only donor's sperm but also donor's eggs (so that the child has no biological link to them).[95]

After all, individuals should be allowed to make decisions with respect to their life plans, according to their own values, beliefs and wishes, as long as others are not harmed by the exercise of this right.[96] Peoples' reproductive decisions are personal and encapsulate the meaning of being human – disregarding them deprives both men and women from their right to control their most intimate spheres of their life.[97]

This issue has engaged Greek jurisprudence with the ground-breaking decisions of the Athens Single-Member Court of First Instance (decision No. 2827/2008)[98] and the Thessaloniki Single-Member Court of First Instance (decision No. 13707/2009),[99] which used the same reasoning and analogically applied the provisions of Law No. 3089/2002, granting permission to a single man to have a child through egg donation and surrogacy. Specifically, the Court ruled that Article 1458 of the GCC violates the right to free development of personality under Article 5.1 of the Constitution, given the ethical preference it gives to the single-parent family created by a single woman. Furthermore, it constitutes 'an overt discriminatory treatment' against men, as their

93 BGH 10.12.2014- Az. XII ZB 463/13, OpenJur 2014, 27194.
94 Corte Suprema di Cassazione 162/9.4.2014, Gazzetta Ufficiale 1ª Serie Speciale, n.26/ 18.6.2014.
95 Kounougeri-Manoledaki 2003, pp.145-154.
96 O' Donovan, 2018, p. 490–491.
97 Robertson, 2004, pp. 7-40.
98 NOMOS Database.
99 NOMOS Database.

exclusion from recourse to surrogacy deprives them of the opportunity to form a family and infringes[100] Articles 4.2 and 4.3 of the Constitution.[101]

However, these exceptional decisions were not repeated, as the jurisprudence took a conservative turn on this issue: the Public Prosecutor of the Courts of First Instance in Athens appealed against decision No. 2827/2008 taken by the Athens Single-Member Court of First Instance, which was accepted by decision No. 3357/2010 of the Athens Court of Appeals.[102] The latter decision annulled decision No. 2827/2008 of the Athens Single-Member Court of First Instance and rejected the application.[103] Moreover, a recent decision of the Thessaloniki Multi-Member Court of First Instance (decision No. 8641/2017)[104] accepted that MAR are not allowed to single men, only for couples and single women.

These decisions concluded that the issue of unconstitutionality does not arise, as the legislative differentiation between the two genders is created by their different nature.[105] According to the judicial opinion, only a woman can conceive and give birth, and therefore, only she may have a relevant medical inability, allowing her to resort to surrogacy. In contrast, a man, whether fertile or not, needs a surrogate to have a child, thus compensating for a medical inability that is not his own. However, this argument is fundamentally flawed: *when a fertile woman without a medical inability has a child with donated sperm, she also compensates for a medical inability that is not hers*. Whether a woman simultaneously needs to have a medical inability related to her gender does not mean that a man cannot have a medical inability related to his gender, such as oligoasthenozoospermia. This is when it becomes even clearer that the need for a man to use donated sperm must be evaluated by the law in exactly the same way as for women.[106] Just as a woman needs sperm donation, a man needs egg

100 Papachristou, 2009, p. 818.

101 More precisely, it states that '...the provision of the right to MAR to single women while simultaneously denying it to single men constitutes a blatant discriminatory treatment of those interested in the solution of MAR, which is not justified according to Article 4, paragraphs 3 and 4, of the Civil Code. The gap that arises concerning the right to artificial reproduction for single men is addressed by an overall analogy of the article 1455, emphasizing, particularly in relation to paragraph 1, point a, that, just as for the assistance of the single woman beyond the limits of her gender (using sperm donation), the same applies to the assistance of the single man beyond the limits of his gender (using egg donation and surrogacy). It is also required that there be a medical need for assistance for the aspiring single parent, preventing natural reproduction either in the context of a couple with a person of the opposite sex. This limitation is imposed in both cases, for the woman and the man, according to good morals (Article 1456 and 1458 of the Civil Code).'

102 NOMOS Database.

103 Note that this decision was preceded by the birth of this child from the unmarried father, which was ultimately prohibited.

104 NOMOS Database,

105 Papachristou, 2003, pp. 55 et seq., and Vidalis, 2003, pp. 839-840.

106 Kounougeri-Manoledaki, 2010.

donation and a uterus. In both cases (single men or women), monoparental families are created.

In fact, decision No. 8641/2017 of the Thessaloniki Multi-Member Court of First Instance takes another logical leap, demonstrating the Court's intention to avoid taking responsibility for granting permission. The Court argues that, aside from the fact that the legal order is not yet ready for such decisions,[107] the lack of a legal mother violates the personality of the child. This perceived violation justifies a legitimate restriction on the free development of the man's personality through the acquisition of an offspring.[108] Disregarding the fact that no personality violation arises in the case of a being that may not even exist yet as a fertilised egg, with the same logic, the fact that a child born to a single woman does not have a legal father should equally violate their personality. Therefore, the acquisition of an offspring using donor sperm should not be allowed for single women either. However, no one would contemplate prohibiting such a thing, nor was that the intention of the law.

For a more in-depth analysis of the welfare of the child, it should be noted that the main argument for prohibiting single persons form access to MAR is the idea that a child should grow up in a two-parent environment. While it is certainly beneficial for the responsibilities of raising a child to be shared between two parents, this does not mean that it is forbidden, impossible, or problematic for a child to be raised by a single parent. The number of families established by single women has been increasing – as a matter of fact, these families enjoy special protection under the law and studies indicate that children from these families continue to function satisfactorily as they enter adulthood.[109]

Specifically, in the case of single men, the reservations are based on the fact that single women and couples can 'naturally' procreate, while a single man is obliged to resort to surrogacy. Apart from the gender equality issue, there does not seem to be any sufficient and necessary condition to limit single men's access to assisted reproduction, as there is no well-founded study stating that single men cannot be

107 Certainly, one might reasonably wonder how the legal system will be ready for such cases when the justice system itself refuses to integrate them into society.

108 "...the provision of legal protection for the right to the free development of personality, based on Article 5 of the Constitution, undoubtedly has as its limit the right to the free development of the personality of other members of society. In this case, beyond the aforementioned, the reasonable question arises whether the recognition of the right to medically assisted reproduction using a surrogate uterus for a single man infringes on basic expressions of the personality of the child to be born through this process. This is because it would involve a child with a legally nonexistent mother, given that, based on our current legal order, no bond of kinship is created between the woman who carries the pregnancy and the child. Therefore, adopting the view that this specific case could be regulated by analogy with the law is considered, at least, risky for the personal identity and characteristics of the future child. Moreover, our legal system is not prepared to handle such cases, even at the administrative level...".

109 Vide indicatively Golombok 2020 and the bibliography therein.

good parents. The only acceptable distinction should be based not on gender but on a general prohibition of surrogacy; however, such a prohibition could not be applied in Greece where surrogacy is a legally regulated everyday practice. If surrogacy was against the welfare of the child, it should be completely banned and not restricted to certain categories of persons; anything else would constitute an obvious sophistry.

In conclusion, it is entirely unjust – especially considering that the law on MAR is based on social and emotional kinship – for a woman to be legally allowed to have a child through a surrogate using not only donor sperm but also donor eggs, while a man cannot do the same. Such perspectives are contrary to any declaration of gender equality, insulting both the female gender by suggesting that motherhood is a biological destiny and not a choice, and the male gender by implying that fatherhood is an auxiliary task and coercion, not a choice.[110] When it comes to the welfare of the child, one should not forget that surrogacy is a choice with significant financial and emotional costs. Therefore, the choice made by these single men is a conscious one, contrary to many pregnancies which just 'occur.'

6.
Conclusion

The absence of an explicit provision of gay and lesbian couples' and single men's unhampered access to MAR methods in Greece does not only lead to unacceptable discrimination against them, as this could be as much construed as an infringement to their autonomy.[111] After all, individuals should be able to make decisions with respect to their life plans, according to their own beliefs and wishes, as long as others are not harmed by the exercise of their right to decide for themselves.[112] According to Robertson and Jackson, decisions related to reproduction are personal ones and encompasses the sense of being human and disregarding them essentially removes from persons the right to control one of the most intimate spheres of their lives. If the law prohibits surrogacy for gay and lesbian couples and single men, this should have severe and explicitly stated reasons. However, in the current legal framework, such reasons are inexistent.

The ideal legal solution is amending the existing legal framework, so that the Greek law unconditionally recognises the right of gay and lesbian couples' and single men to reproduction, allowing them unhindered access to MAR methods – this will

110 Krajewska & Cahill-O'Callaghan, 2020, pp. 85-106.
111 Quigley, 2010, pp. 408-409.
112 O' Donovan, 2018, pp. 490–491.

also safeguard the best interests of any children born, the core of the legislation governing access to MAR.

Furthermore, if it has to be accepted and respected that straight couples and single women may not wish to become parents and neither pregnancy nor childbirth is imposed on them, it has to be equally accepted and respected that gay and lesbian couples and single men may wish to become parents and thus provide them with equal access to MAR and surrogacy.

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Agata WRÓBEL*

The intersection of national and European law - Assessing the conflict of laws, rules and the primacy of EU law in Poland

ABSTRACT *The article explores the principle of the primacy of European Union law in the context of Polish law, analyzing its evolution, legal foundations, and its impact on the sovereignty of member states. It discusses the origins of the primacy principle, emphasizing the role of the case law of the Court of Justice of the European Union and the significance of the Treaty of Lisbon. The conflicts between EU law and the Polish Constitution are examined, with particular focus on rulings of the Polish Constitutional Tribunal, such as K 3/21 and P 7/20. The article highlights the challenges of implementing EU law within the Polish legal framework and the mechanisms for resolving disputes between the legal systems. In conclusion, it underscores that despite controversies over sovereignty limitations, the principle of EU law primacy is crucial for ensuring coherence, protecting citizens' rights, and maintaining the effective functioning of the EU.*
KEYWORDS: *EU law primacy, CJEU, Sovereignty of member states, Lisbon Treaty, Conflict of Polish and EU law.*

1.
Background of the Principle

The primacy of EU law, sometimes called the principle of supremacy[1], derives from the case law of the Court of Justice of the European Union (CJEU). The CJEU is of great importance in shaping and changing the dynamics of EU law – but the acceptance of such a high degree of authority of the court has often been problematic for member states, with many doubts raised about the impact on state sovereignty and

1 Biernat, 2011, p. 47.

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decision-making.[2] Indeed, when considering the primacy of EU over national law, we are talking about both primary sources of law – i.e. the treaties establishing the legal framework of the EU legal order – and secondary sources of law - comprising legal instruments adopted on the basis of these treaties (regulations, directives, decisions, agreements, as well as general principles of EU law, CJEU case law and international law). For the development of the principle, the key document is the Treaty of Lisbon, regulating and detailing the scope of EU competence. The Lisbon Treaty, unlike the Constitutional Treaty, does not contain a formal article granting the primacy of EU law over national legislation.

However, the Lisbon Treaty was accompanied by Declaration No. 17, which refers to the opinion of the Council's Legal Service – and again refers to the consistent case law of the CJEU on this issue.[3] In that annex, "the Conference recalls that, in accordance with the consistent case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties take precedence over the law of the Member States under the conditions established by the said case law." The adoption of the primacy of the European legal system entails several important consequences. Firstly, it ensures uniformity in the application of law throughout the EU – which is relevant to the functioning of the common market and ensuring its efficiency. Second, it ensures the protection of the rights of citizens and businesses throughout the EU, guaranteeing a unified level of legal protection. Third, it gives the CJEU the ability to interpret EU law and apply it throughout the union, which is crucial to maintaining a unified position on legal issues. In principle, therefore, EU law takes precedence over national law. This does not mean, however, that national law no longer has any relevance.

As we explore the implications of the primacy principle, it becomes evident that the CJEU's role extends beyond a mere legal arbiter. The court's ability to interpret and enforce EU law fosters a cohesive legal framework, reinforcing the integration of member states. This integration, however, is not without challenges, as the principle's influence on member states' sovereignty continues to be a subject of ongoing debate and negotiation within the EU framework. Moreover, the dynamic nature of EU law – shaped by ongoing developments and legal interpretations – underscores the need for a comprehensive understanding of the primacy principle. The continuous evolution of the EU legal landscape prompts scholars, policymakers and legal practitioners to stay abreast of CJEU decisions and legislative developments that impact the

2 For more on the process of forming the principle see in: Kozłowski, 2018, pp. 29-33; Cesarz, 2014, pp. 179-182.

3 Consolidated version of the Treaty on the Functioning of the European Union - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on December 13, 2007 - A. Declarations relating to the provisions of the Treaties - 17. Declaration relating to primacy (Official Journal 115 , 09/05/2008 P. 0344 - 0344).

delicate balance between union and national law. The primacy of EU law represents a cornerstone in a unified European legal framework. Its origins in CJEU case law – reaffirmed by the Treaty of Lisbon and accompanying declarations – highlight its enduring importance. As the EU navigates the complexities of legal harmonisation, the primacy principle remains a linchpin – ensuring coherence, uniformity, and the effective functioning of the European Union.

2.
Allegations of unconstitutionality and judgments

In the case Van Gend en Loos v. Nederlandse Administratie der Belastingen,[4] the CJEU ruled that community law adopted by the institutions of the European Union can be a source of powers enforced by natural and legal persons before the courts of individual member states. This means that EU law can be applied directly. In Costa v. ENEL[5] the court relied on the principle of direct application, and held that recognising the subordination of community law to the laws of individual member states would jeopardise the objectives of the treaties. Because the member states had delegated certain powers to the EU, they had thereby limited their sovereignty. Consequently, in order for community law to operate effectively, the principle of its primacy over all national laws – including the constitutions of individual member states - must apply.[6]

In Poland this hierarchy of sources of law has been met with a number of allegations, amounting to a conflict between the founding treaties and the Polish

4 Court ruling of February 5, 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen. Reference for a preliminary ruling Tariefcommissie - Netherlands. Case 26/62.

5 Judgment of the Court of July 15, 1964. Flaminio Costa v. E.N.E.L. Reference for a preliminary ruling Giudice conciliatore di Milano - Italy. Case 6/64.

6 See also other examples of cases in which the Court has emphasised the principle of the primacy of European Union law include: Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel (Judgment of the Court of December 17, 1970. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling Verwaltungsgericht Frankfurt am Main - Germany. Case 11/70); Marleasing SA v. La Comercial Internacional de Alimentacion SA (Judgment of the Court (Sixth Chamber) of November 13, 1990. Marleasing SA v. La Comercial Internacional de Alimentacion SA. Reference for a preliminary ruling: Juzgado de Primera Instancia e Instruccion no 1 de Oviedo - Spain. Directive 68/151/EEC - Article 11. Case C-106/89); Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Judgment of the Court of March 9, 1978. Amministrazione delle Finanze dello Stato v. Simmenthal SpA. Reference for a preliminary ruling: Pretura di Susa - Italy. Case 106/77).

Constitution.[7] On November 27 2009 a group of MPs submitted a motion to examine the compatibility of a number of provisions of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. The motion concerned the extent that these provisions allow the Council of the European Union to legislate by a qualified majority – either alone or jointly with the European Parliament - contrary to the sovereign interests of Poland. The application also sought to examine the compatibility of Declaration No. 17 with Article 8 in conjunction with Article 91(2) and (3) and Article 195(1) of the Constitution of the Republic of Poland. In addition, the applicant alternatively requested an examination of the compatibility with Articles 2, 4, 8, 10, and Article 95(1) of the Constitution of Article 1 of the Act of April 1 2008 on the ratification of the Treaty of Lisbon – to the extent that the legislature's consent to the binding of the Republic of Poland to the indicated treaty provisions is not accompanied by a statutory norm providing for the participation of the Sejm and the Senate in the process of shaping the position of the Republic of Poland in any matter of possible adoption by the European Council or the Council of the European Union of a legal act on the basis of any of these provisions. The applicant's fundamental constitutional doubts concerned the mechanism for creating EU law and making other relevant decisions. The case was resolved by the Constitutional Court in its decision of November 10 2010 (ref. K 32/09).[8]

The allegations concerned the incompatibility of Poland being bound by the provisions of the Founding Treaties and acts adopted by the institutions of the communities and the European Central Bank – and therefore by the rulings of the CJEU – leaving doubt as to the compatibility of this regulation with Article 8 of the Constitution, which guarantees the supremacy of the Constitution and its direct application. Recognition of the supremacy of the external legal system over the Constitution was met with the charge of limiting the sovereignty of the nation from Article 4 of the Constitution. In addition, the principle of permissibility to interpret the primacy of community law over the Constitution was accused of limiting the sovereignty of the republic itself, due to the fact that the scope of the state's competencies

7 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997 No. 78, item 483). Text adopted on April 2, 1997 by the National Assembly.

8 In this particular case, the Court decided to discontinue the proceedings with regard to the examination of the application of a group of deputies due to the absence of the applicant at the hearing. The presence of the representative of the group of deputies was limited to participation in the first phase of the hearing, because at the beginning of the second phase, after responding to the Constitutional Court's decision not to grant the request for adjournment of the hearing and to the positions of the participants in the proceedings on this issue, the deputy left the courtroom. The representative of the group of deputies asked the Court to allow him to resign from further participation in the hearing. The Court did not issue any decision in this regard. In this state of affairs, the Constitutional Court, in the absence of the representative of the group of deputies, did not have the opportunity to continue the proceedings on the motion of the group of deputies.

ceded to the European Union exceeded the permissible scope of the vague concept of 'certain matters'[9] in which the republic may – on the basis of an international agreement – delegate to an international organisation or international body the powers of state authorities, in accordance with Article 90(1) of the Constitution. Beyond this, the allegations also included the risk of danger associated with "opening before the Community adjudicating institutions the issue of the legal status of real estate in the northern and western lands of the Republic" (which refers to the transfer to certain legal entities of the Catholic Church free of charge ownership of land located in the resources of the State Land Fund or in the Agricultural Property Stock of the State Treasury). It was also alleged that Article 55(1) of the Constitution (which prohibits, in principle, the extradition of a Polish citizen) was incompatible with the possibility of extraditing a citizen under EU law.

In light of the legal analysis of the Constitutional Court's ruling K 18/04,[10] it can be concluded that the accession of the Republic of Poland to the European Union and the adoption of its laws as a result of the Accession Treaty does not violate the sovereignty of the Polish state. The Constitutional Court pointed out that the EU and the European Communities are not considered supranational organisations that stand above sovereign states. They are considered international organisations to which sovereign member states are parties. Joining the EU means joining an international organisation, which is in accordance with the Constitution. The legal acts adopted clearly define the scope of the competencies that have been transferred to the EU. The Republic of Poland retains its sovereignty and the ability to withdraw from international agreements, including the EU, remains preserved. Therefore, accession to the EU does not violate state sovereignty – and in accordance with international law and constitutional provisions, the Nation has authorised state organs to conclude international agreements and join international organisations, such as the European Union.

9 The article reads: "The Republic of Poland may, on the basis of an international agreement, delegate to an international organization or international body the competencies of the organs of state power in certain matters". Although the Constitution of the Republic of Poland lacks a direct reference to the EU, the general feeling, as well as in the doctrine, is that the quoted provision was included with Poland's membership in the EU in mind and can be considered the equivalent of the European clause. It should be emphasised that the Constitution of the Republic of Poland allows for the delegation of powers to an international organisation, but does not specify the limits of such delegation.

10 Judgment of the Constitutional Tribunal of May 11, 2005, ref. K 18/04, para. 11.2, OJ. 2005.86.744, 17.05.2005.

3.
Crucial Judgments for Poland

The rulings K 3/21 and P 7/20 of the Constitutional Court in Poland are milestones in the debate on the primacy of EU law over national law. In its judgment K 3/21 of 7 October 2021, the Constitutional Court ruled that certain provisions of the Treaty on the European Union (TEU) are incompatible with the Polish Constitution.[11] In particular, the court held that Articles 1 and 19 of the TEU – which provide the basis for the primacy of EU law and the principle of effective legal protection – cannot be applied in the Polish legal order to the extent that they empower EU bodies to act beyond the scope of their powers and interfere with Polish sovereignty. Similarly, in its judgment P 7/20 of 14 July 2021, the Constitutional Court questioned the competence of the CJEU to issue interim measures that affect the organisation of the judiciary in Poland. The court found that the provisions of the TEU, to the extent that they allow for such measures, are contrary to the Polish Constitution.

Both judgments are an expression of the position of the Polish Constitutional Tribunal, according to which the Constitution of the Republic of Poland takes precedence over EU law in situations where this law violates fundamental principles of the Polish system – such as the sovereignty of the state or the rule of law.[12] They are also a reflection of the broader political context in Poland, where the ruling political majority seeks to limit the interference of EU institutions in domestic affairs.[13]

The rulings K 3/21 and P 7/20 have a significant impact on the primacy of EU law in Poland, challenging its absoluteness in the Polish legal order. These decisions undermine the fundamental principle of the community legal system that EU law takes precedence over national law, including the constitutions of the member states.[14] The K 3/21 judgment is particularly problematic as it relates directly to the principle of effective judicial protection, which is a key element of the *acquis communautaire* and the EU rule of law system. In practice, this means that Polish courts may be obliged to ignore CJEU rulings that are not in line with Constitutional Court rulings,[15] leading

11 See: Jaraczewski, J. (2021).
12 See more: Pastuszko, G. (2023).
13 After all, there remain different interpretations of the primacy of EU law by the Polish Constitutional Court. See: Zoll F., Południak-Gierz K., Bańczyk W. (2022).
14 Biernat S., Łętowska, E. (2021).
15 This in practice, by all means, raises a number of interpretative problems in in concreto situations. See Wojcik, 2023: The EC argues that the Polish Constitutional Court violates EU law by challenging its primacy over national law. This Court has issued rulings that question the supremacy of EU law, which, in the EC's view, threatens the fundamental principles of the European Union.

to a potential fragmentation of the application of EU law in Poland and undermining the principle of uniform application of law throughout the Union.[16]

4.
Competences Ceded to the EU

The basis for Poland's membership in the EU is Article 90 of the Constitution, which we call the pillar of European integration. It does not expressly mention the EU, but rather "an international organization or international body",[17] reflecting concerns about the union infringing on the republic's independence. The article contains a basis for transferring to such entities the competencies of state authorities in certain matters, such as when the Sejm abandons the issuance of regulations in a matter already regulated by international law. However, the transfer of competencies does not mean that state sovereignty is divested. The transfer of competencies is carried out on the basis of a treaty, and the treaty must be ratified with the prior consent of either the people in a referendum or the Sejm in a law – and the choice of the path of consent to ratification is made by the Sejm with an absolute majority of votes.

The opening of the Polish domestic order to international law also has a basis in Article 9 of the Constitution, obliging Poland to comply with international law binding on it. The two legal orders are reconciled by conflict of laws rules. Primary law is part of a member state's domestic legal order and should be applied directly, unless application requires the issuance of a law. If this law is adopted through the so-called 'major ratification'[18] procedure it takes precedence over the law in the event of a contradiction. Secondary law is applied directly, taking precedence in case of conflict with laws. Regulations are applied directly, while directives require implementation and are implemented through an implementing law. In general, EU law has the force of a law and takes precedence over a law in case of conflict. EU law enables

16 See more: Kwiecień, R. (2019).

17 Jerzy Ciapała distinguishes two potential interpretations of the term in this regard. The first implies referring the term exclusively to state bodies with authority, i.e., those with imperium, to the exclusion of local and professional self-government bodies. The second interpretation suggests treating the term in a functional sense, referring to anybody with public authority, regardless of its position in the public power structure. Given the unique nature of Article 90(1), the need for a restrictive interpretation of the term, and the relevance of Articles 15, 16 and 163 of the Constitution, the first interpretation is preferred, although this does not imply a concomitant approval of the form of expression of the term in Article 90(1). See: Ciapała, 2014, pp. 77-90.

18 Also referred to as "superratification", see: Jaskiernia, 2009, pp. 461-470. The legislative regime for enacting an ordinary law expressing approval for the ratification of an international agreement applies exclusively to agreements whose effects do not result in the transfer of competences as defined in Article 90 of the Constitution of the Republic of Poland.

the realisation of its common goals and values, such as freedom, security and justice. It constitutes the legal foundation of the union's operation. EU law and the national laws of the member states have common roots, as noted by Article 2 of the TEU, saying that these legal orders are based on common values.

As already mentioned in the introduction, the Lisbon Treaty distinguishes three main types of competence, which is important for the principle of primacy of EU law. Thus, we distinguish firstly between 'exclusive competences',[19] which empower the EU to exclusively enact its laws (leaving member states with the duty to implement them); second, 'shared competencies',[20] which allow member states to adopt legal acts of a binding nature when the EU has not addressed a particular area; and third, complementary competencies,[21] which allow the EU to adopt measures to support or complement the policies of member states. The transfer of powers from the union to the member states is only possible through the Treaty amendment procedure. The division of powers is linked to the issue of exceeding powers. Any action outside the granted scope of authority is referred to as *ultra vires*. The consequence of such an action is that it is null and void by operation of law, and thus lacks the attribute of validity. As an example of *ultra vires* action one can point to rulings of the CJEU, concerning areas reserved for member states such as the organisation of the judiciary. The exercise of EU competence is subject to two basic principles set forth in Article 5 of the TEU. The first of these is the principle of proportionality, which imposes limits on the content and scope of EU activities so that they do not go beyond what is necessary to achieve the objectives set forth in the Treaties. The second principle is that of subsidiarity, which specifies that in areas that do not fall under its exclusive competence, the EU shall take action only if the objectives of the intended action cannot be sufficiently achieved by the member states and can be better achieved at EU level.

There should also be a dive into the historical context of Poland's accession to the EU. The journey towards EU membership began in the early 1990s, following the collapse of the Soviet bloc and the establishment of a democratic government in Poland. The desire to integrate into Western political, economic and security structures became a central tenet of Poland's foreign policy. The Association Agreement signed in 1994 paved the way for closer ties, setting out the framework for cooperation and establishing the path towards EU accession. The actual accession process was marked by rigorous negotiations and a comprehensive alignment of Polish legislation with EU norms and standards. This process required significant domestic reforms to meet the accession criteria outlined in the Copenhagen criteria, which focused on democracy, rule of law and market economy principles. The completion of this

19 Article 3 of the Treaty on the Functioning of the European Union (TFEU).
20 Article 4 TFEU.
21 Article 6 TFEU.

process culminated in Poland officially becoming a member of the European Union on May 1 2004, along with nine other countries. Poland's membership in the EU brought about a multifaceted transformation. On the economic front, access to the EU's single market opened up new opportunities for Polish businesses. Structural funds and cohesion policy provided crucial financial support for the modernisation of infrastructure and the convergence of living standards.[22] However this period also posed challenges, particularly in sectors where Polish industries had to adapt to increased competition within the common market.

From a political perspective, EU membership solidified Poland's commitment to democratic values and the rule of law. It became an active participant in EU decision-making processes, contributing to the shaping of policies that spanned various domains, from agriculture to foreign affairs. Additionally, the free movement of people facilitated cultural exchanges and increased societal interactions, fostering a sense of European identity among Poles. However, Poland's relationship with the EU has not been without its complexities. Tensions have arisen on several fronts, including issues related to the rule of law, judicial independence, and migration policies. These challenges underscore the delicate balance between national sovereignty and the obligations that come with EU membership.

The ongoing discourse surrounding the rule of law has been a prominent feature of Poland's relationship with the EU. The European Commission, invoking Article 7 of the TEU, initiated proceedings against Poland – expressing concerns about the independence of the judiciary and the rule of law. This development triggered debates about the limits of EU intervention in the internal affairs of member states, and raised questions about the effectiveness of the mechanisms in place to safeguard fundamental values. Another area of contention has been migration policies, with Poland taking a firm stance against mandatory quotas for the relocation of refugees. This stance reflects broader debates within the EU about solidarity, burden-sharing, and the preservation of national identity in the face of complex migration challenges. As the dynamics of the EU continue to evolve, Poland finds itself at a crossroads, navigating the tensions between national sovereignty and integration. The emergence of new geopolitical challenges, such as the conflict in Ukraine and the redefinition of the EU's relationship with Russia, adds additional layers of complexity to Poland's role within the union.

22 After Poland's accession to the European Union, aid programs became much more influential for the economy, mainly due to an increase in the amount of structural funds. With EU accession, there have been significant changes in the directions of support, with a particularly noticeable increase in the role of programs focused on improving human capital. See statistics from the collective work edited by Filip Tereszkiewicz in: Glusman, 2013, pp. 154-191.

5.
Resolving Conflicts of National and EU Law

The implementation of EU law in the Polish Sejm mainly consists of the creation of laws that incorporate EU provisions into the national legal order. This process is not regulated in detail by law, and is mainly carried out under the standard legislative procedure. However, there are some exceptions that regulate a number of procedural issues aimed at aligning the legislative process with implementation requirements. These include provisions contained in the Rules of Procedure of the Sejm[23] and the cooperative law.[24] Unlike the process of EU lawmaking, implementation activity in the Sejm is carried out by various parliamentary committees associated with specific areas of law. These committees undertake ordinary legislative activities as part of the legislative procedure, adapting Polish legislation to the norms and requirements of EU law. Their activities vary, as each committee has a specific subject area.

It is worth emphasising that the process of implementing EU law in the Polish legal order does not involve passing laws that are contrary to European norms. The Sejm strives to create regulations that are compatible with European law, which is one of the key principles of the Polish parliament in the context of European integration.[25] The implementation procedure requires cooperation between various state bodies, as well as dialogue with EU institutions. The parliamentary committees, acting in their specialised areas, strive to adapt Polish legislation to European standards effectively and in accordance with the law. In this context, consultations with the public and experts in the field also play an important role.

However, even within the framework of the implementation procedure there is a certain freedom of action for the Sejm. This allows national specifications and needs to be taken into account, while maintaining compliance with the principles of EU law. The implementation process is thus a balance between meeting European requirements and preserving the state's autonomy in shaping its laws. It is worth noting that Poland, like other EU member states, actively participates in shaping European policy through its participation in EU institutions. The European Parliament, the Council of

23 Resolution of the Sejm of the Republic of Poland dated July 30, 1992 Rules of Procedure of the Sejm of the Republic of Poland.

24 Law of October 8, 2010 on cooperation of the Council of Ministers with the President of the Republic of Poland and the Sejm and Senate in matters related to the membership of the Republic of Poland in the European Union.

25 That is why, among other things, one of the mandatory elements of the justification of a bill, as stipulated in Article 32(2) of the Rules of Procedure of the Sejm, is the prophylactic obligation to require a statement on the compatibility of the bill with EU law or a statement that the subject of the proposed regulation is not covered by EU law. See more on this topic: Kuczma, 2015, pp. 136-138.

the European Union and the European Commission are places where Polish representatives co-determine the direction and content of EU policy.

It should be emphasised that the European Union is not a state, but a special legal entity. It does not have the right to *kompetenz-kompetenz* (the right of an entity or state to assign itself the competencies of another entity or state),[26] which only EU member states have. In addition, the transfer of competencies to union bodies is subject to the jurisprudential control of the Constitutional Court and the constitutional courts of other states. The fact that EU law does not always have primacy over national law is evidenced by the Constitutional Court's interpretation in its judgment K 18/04, according to which Poland could withdraw from the EU if an irremovable contradiction between the Constitution and EU law were to arise.[27] The decision is made by Poland – not the European Union. On the basis of Article 90 of the Constitution, an entire legal construction has been created covering accession and the possibility of withdrawal from the EU. Three steps are taken in the following order: mandatory renegotiation of the European Treaty, amendment of the Polish Constitution, and, as a last resort, withdrawal from the EU. The position of the Constitutional Court is that neither Article 90(1) nor Article 91(3) can provide a basis for delegating to an international organisation the authority to enact legal acts or make decisions that would be contrary to the Constitution of the Republic of Poland. In particular, the norms indicated here cannot be used to delegate authority to the extent that would make the Republic of Poland unable to function as a sovereign and democratic state.[28]

Moreover, the CJEU in its rulings K 18/05 and K 32/09 distinguished the primacy of application from the primacy of validity. He stated that the principle of supremacy of the nation in Article 4 allows for the primacy of application of EU law over national law, including the Constitution, but this does not imply the supremacy of EU law over the Constitution of the Republic of Poland, because the Constitution still retains primacy of validity. He further formulated the concept of constitutional identity as a set of inalienable values and principles of law that are fundamental to the country, and these provisions can never be transferred to international bodies.

26 An interesting approach defining the *Kompetenz-Kompetenz* doctrine as a "necessary evil that aids in the administration of justice" see: Bawah, 2019, pp. 168-179.

27 A similar approach to the primacy of EU law and national sovereignty can be seen in the jurisprudence of the Hungarian Constitutional Court, e.g. in the already mentioned decision 32/2021 (XII. 20.) AB, where it was emphasised that the protection of constitutional identity is a key element of Hungarian sovereignty. The Court stated that Hungary may refuse to apply EU law if it considers that it violates its constitutional order. See more about that: Varga Zs., András és Berkes, Lilla (2023).

28 I am encouraged to read a similar case in the Decision 32/2021. (XII. 20.) AB judgment. This judgment concerned the question of whether Hungarian state authorities are obliged to implement the provisions of European Union law in such a way as to lead to a violation of the Hungarian Constitution, in particular with regard to national sovereignty and the integrity of constitutional identity.

The principle of primacy, or priority, signifies the precedence of the applicability of EU law over the national legal systems of its member states. From the perspective of the EU, this principle holds sway over all national legal norms within the member states, irrespective of their position within the hierarchy of legal sources, including constitutional provisions. Nevertheless this perspective – which inherently entails the absolute supremacy of EU law over national law – has not found unanimous validation in the rulings of the majority of constitutional courts within the member states. Consequently the CJEU – while acknowledging the necessity for a 'constructive dialogue' with the national courts of the member states – has introduced certain techniques designed to facilitate the coexistence of EU and national legal frameworks.

Specifically, in its recent jurisprudence[29] the court has recognised the safeguarding of the national identities of the member states as a justification for limiting the scope of the primacy principle.[30] In this manner, the court has permitted the potential invocation of constitutional values by member states under certain circumstances, thereby enabling them to deviate from the absolute supremacy of EU law in the interest of protecting their national identities. In the legal context, it should be emphasised that the EU has neither a state nor a federal character. Nevertheless, the degree of cooperation and economic interdependence achieved – as well as the gradual implementation of elements typical of sovereign states, such as citizenship, the establishment of a common euro currency in some member states and the abolition of internal border controls within the Schengen area – contribute to a growing sense of European identity.[31]

6.
Conclusions

In conclusion, the primacy of EU law – rooted in the case law of the CJEU and bolstered by the Treaty of Lisbon – plays a crucial role in the legal dynamics of the European Union. Despite concerns raised by member states about the potential impact on sovereignty, the principle serves to maintain uniformity in the application of law, protect the rights of citizens and businesses, and empower the European Court of Justice in

29 See for example: Judgment of the Court of Justice of October 14, 2004. C-36/02.

30 Całka, 2016, pp. 47-58.

31 The significance of positive self-images in shaping European identity goes beyond internal discussions, as the EU actively projects its vision of European identity beyond its own borders. This is particularly evident in the European neighborhood, encompassing both the Southern and Eastern dimensions. The focus lies on the external democratisation efforts of the EU, involving the promotion of democracy in third countries through support for human rights, the establishment of good governance standards, and participation in modernisation projects. See more: Kaina and Karolewski, 2013), pp. 35-40; Martinelli, 2017, pp. 7-12.

interpreting and applying EU law across the Union. Allegations of unconstitutionality and conflicts between EU law and national constitutions, exemplified by the case in Poland, underscore the ongoing tension between supranational legal systems and national sovereignty. The Constitutional Court's decision in the K 32/09 case emphasised that the accession to the EU does not violate state sovereignty, provided the transfer of powers is clearly defined, and the state retains the ability to withdraw from international agreements, including the EU.

Examining the competences ceded to the EU, Article 90 of the Polish Constitution serves as the foundation for European integration, allowing the transfer of specific competencies while preserving state sovereignty. The Lisbon Treaty's delineation of exclusive, shared, and complementary competencies further shapes the principle of primacy, emphasising the importance of proportionality and subsidiarity in EU actions. Resolving conflicts between national and EU law involves the implementation of EU law in the Polish Sejm, where laws are created to align with European norms. While there is a degree of freedom for the national legislature, efforts are made to ensure compatibility with EU law, reflecting the delicate balance between meeting European requirements and preserving state autonomy.

The classical concept of sovereignty, as defined in Article 4 of the Constitution of the Republic of Poland, is inadequate today to reflect with full clarity the essence of Poland's functioning in EU structures. The concept has evolved in such a way that the Constitution always retains the supreme power and priority of validity but allows, in certain cases, the priority of applying international law directly. Thus, the culmination of the argument will be the recognition that EU law does not have absolute precedence over national law, due to the strongest position of the fundamental legal act of the state. Thus, the purpose of the primacy of community law is to ensure that all residents enjoy equal protection under EU law throughout its territory. However, it should be borne in mind that the primacy of community law applies only in areas in which individual member states have transferred their sovereign powers to the EU – such as the single market, environmental protection, transportation, and others. However, it does not apply to areas such as education, culture, or tourism. This nuanced approach aims to facilitate the coexistence of EU and national legal frameworks, while respecting the diversity and values of member states.

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