

INSPECTION OF EMPLOYEES' CORPORATE E-MAIL CORRESPONDENCE

The employer's right to inspect employees' communication made through their corporate e-mail account is a much-debated issue. The Cassation Court has not defined this inspection's boundaries yet. The Constitutional Court, which had already examined this issue in two of its decisions,¹ reinforced its ever-evolving precedent, with its latest decision dated 12 January 2021.

The Constitutional Court's Decision dated 24 March 2016

In line with the principles laid down in the European Court of Human Rights' decision of *Bărbulescu v Romania*, the Constitutional Court specified four criteria for the circumstances under which employers may inspect their employees' communications: (i) presence of clear terms in the employment agreement regarding the right to inspect; (ii) whether the employees were informed about such terms; (iii) whether the employer provided legitimate reasons to justify monitoring communications and (iv) whether the interference is proportional to such legitimate aim.

In March 2016, the Constitutional Court decided that if an employee signs the company's internal regulations such as an "information security undertaking" or "workplace disciplinary code" making clear that the employer has the right to monitor personal correspondence made through the company's e-mail account, the employer's obligation to inform the employee in advance is deemed fulfilled.

¹ respectively dated 24 March 2016 and 17 September 2020

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The Constitutional Court's Decision dated 17 September 2020

Differing from its previous decision, in September 2020 the Constitutional Court concluded that inspection of the employee's corporate e-mail correspondence by the employer, without the employee's consent, violated his/her right to privacy and freedom of communication.

According to the Constitutional Court's decision, in principle an employer has the right to monitor the communication devices provided to its employees and to impose restrictions related to their use, within the scope of its management authority. However, the employer must support this interference with rightful and legitimate reasons such as ensuring the effective operation of the business, controlling the information flow and ensuring security at the workplace. The rationale behind this was that the employer's management authority could only be used within the boundaries of the employee's fundamental rights and freedom.

The Constitutional Court laid down the following general principles (the "**General Principles**") to be applied by courts while assessing whether the employer's interference violates the employee's rights:

- (i) The employer must have legitimate reasons to justify monitoring the communication devices provided to its employees. A distinction should be made between monitoring the communication flow and inspection of their content, because the latter requires weightier justifications.
- (ii) The employer must provide its employees in advance full information about the monitoring process.
- (iii) The interference must be related to and efficient for the purpose of the monitoring and the data obtained from this interference should be used only for the purposes for which they were originally collected.
- (iv) It should be assessed whether there is another method that is less intrusive to achieve the pursued aim, than directly accessing the communication content. Monitoring must be necessary to achieve the pursued aim.
- (v) The interference must be proportionate and the scope of the collected data must be limited to the pursued aim.
- (vi) A fair balance must be provided between the parties' competing interests.

Applying the General Principles to the case, the Constitutional Court first observed that the employee was not clearly informed about the employer's right to monitor and the inspection's scope. In this case, the employer failed to submit any evidence to prove that it had properly informed the employee. The Constitutional Court stated that the employer monitored the employee's corporate e-mail correspondence without the employee's consent and that the

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communications' content, which constituted the basis for the employer's termination, were inspected with an indefinite scope. The Constitutional Court concluded that the employee's rights to privacy and freedom of communication were violated.

The Constitutional Court's Decision dated 12 January 2021

In its most recent decision of last month, the Constitutional Court made an assessment that is very similar to its previous decision, repeating the General Principles. However, it reached a different conclusion.

In this case, under the employment agreement, the employer, a private bank, is authorized inspect the employee's corporate e-mail correspondence without prior notification. The employer inspected the employee's corporate e-mail correspondence on the ground that he/she was using its corporate e-mail account for his/her other commercial activities within working hours. As a result of this finding, the employer terminated the employment agreement. The employee filed a re-employment lawsuit, alleging that his/her right to protection of personal data and freedom of communication were violated.

The Constitutional Court applied the General Principles to this case too. It concluded that the employer had a legitimate interest and used an efficient method to achieve the pursued aim. Upon review of the employment agreement, it is understood that the employer has explicitly notified the employee in advance that corporate e-mail correspondence can be inspected and that such an inspection can take place without notice. By signing the employment agreement, the employee has already given a consent to this inspection method. In this respect, the Constitutional Court concluded that the employee's rights to protection of personal data and freedom of communication were not violated.

In the light of these decisions, it can be concluded that employers must comply with the General Principles, to be able to inspect employees' company e-mail accounts and to rely on the findings obtained this inspection for a possible termination.

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